REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

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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. JOHN APPLETON,
HON. JONAS CUTTING, LL. D., } ASSOCIATE
HON. SETH MAY,
HON. DANIEL GOODENOW, } JUSTICES.
HON. WOODBURY DAVIS,
HON. EDWARD KENT, LL. D.,

ATTORNEY GENERAL.

HON. JOSIAH H. DRUMMOND.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT.

1858.

COUNTY OF CUMBERLAND.

MARY ANN BARBOUR *versus* CHARLES J. BARBOUR.

The wife has no vested right, of any kind, to dower in the estate of her husband, before his decease; and, until then, her right may be modified, changed, or abolished by the Legislature.

The statute of 1841, (R. S., c. 95, § 15,) restricting the widow's right of dower in lands mortgaged by her husband before marriage, applies to all cases where the death of the husband has occurred *since* that Act was passed, though the mortgage may have been redeemed *before* that time.

EXCEPTIONS from the ruling of RICE, J.

This was an action of dower, and was submitted to the Court, each party reserving the right to except to any ruling upon matters of law.

The premises, in which dower was claimed, were formerly owned in fee by William Barbour, and were mortgaged by him to Timothy Little, October 28, 1824. May 7, 1826, William Barbour married the demandant. Dec. 1, 1829, he conveyed the premises, subject to the mortgage, to Robert Barbour. In this deed the demandant did not release her right of dower. The mortgage was paid by Robert Barbour, and was discharged by Little, May 6, 1831.

The husband of the demandant died October 26, 1854, and demand of dower was duly made June 21, 1855. The writ was dated Dec. 31, 1855. Upon these facts the presiding Judge ruled that the action was maintainable, to which exceptions were filed by the tenant.

T. H. Talbot, argued in support of the exceptions.

The authorities cannot be found to justify, much less to compel, the Court to sustain an action so inequitable in its results as this, while they can be found amply sufficient for the purpose of this defence.

I. In Massachusetts, where the law is most favorable for the plaintiff, the decisions are contradictory, the older authority and the more consistent statement of principle being with the defendant. There is the early case of *Popkin* v. *Bumstead*, decisive for the defendant, and it is approved in *Gibson* v. *Crehore*, 3 Pick. 475, (480); *Van Dyne* v. *Thayer*, 19 Wend. 162, and *Wilkins* v. *French*, 20 Maine, 111, 115, 4 Kent's Com. 46.

It is contradicted in the plaintiff's strong case, *Eaton* v. *Symonds*, 14 Pick. 98. But internal evidence in the latter shows that it must give way to the former. See page 107, where WILDE, J., says the decision in *Popkin* v. *Bumstead* rests upon the circumstance that the payment was made after the death of the husband, a remark entirely incorrect, as appears from the case itself and from the cases where it is cited and approved. The same of his construction of *Swaine* v. *Perine*, on page 108.

Indeed, this distinction between a payment made by the same person, with the same form of transaction, before, and another after, the death of the husband, which may be found in another case, cited by the defendant in the court below, *Massiter* v. *Wright*, 16 Pick. 151, (see page 153,) is an ear mark of unsoundness in these later decisions, even for the State of Massachusetts, as it is unknown to the earlier cases; and it prevents these later cases from being quoted as authorities in New York, New Hampshire and Maine; for in these

States it is not recognized. See, in addition to cases before and after cited, especially *Rossiter* v. *Cossit*, 15 N. H. 38.

That the decisions in Massachusetts, upon this subject, are running counter to those of these three States, see the statement of PARKER, J., in *Robinson & als.* v. *Leavitt*, pp. 103 and 104, 7 N. H. 73, and that the case cited, as illustrative of the law in Maine, is *Carl* v. *Butman*, 7 Greenl. 102.

II. The general principle, within which the plaintiff must bring herself in order to maintain this action, is not, as laid down by WILDE, J., that the payment must be made during the life of the husband; but, briefly, that it must be made by or for the husband, or some one else like him, paying for the wife's benefit. *Young* v. *Tarbell*, 37 Maine, 509, (page 515); *Bullard* v. *Bowers*, 10 N. H. 500, (page 502); *Van Dyne* v. *Thayer*, 19 Wend. 162, (page 174); *Brown* v. *Lapham*, 3 Cush. 551, (pp. 554, 555). This last case is noticeable as going very far towards contradicting the doctrine of *Eaton* v. *Symonds*.

III. Not even a discharge upon the record, or its equivalent, will supply the place of such payment.

1. Not in New York. *Swaine* v. *Perine*, 5 Johns. Ch. R. 482; *Bruyn* v. *Dewitt*, 6 Cowen, 316; *Van Dyne* v. *Thayer*, 19 Wend. 162, (extensively examined); and 4 Kent's Com. 46.

2. Not in New Hampshire. *Cass* v. *Martin*, 6 N. H. 25; *Robinson & als.* v. *Leavitt*, (a leading case,) 7 N. H. 73, both opinions; *Towle* v. *Hoit*, 14 N. H. 61; *Rossiter* v. *Cossit*, 15 N. H. 38; *Heath* v. *West*, 6 Foster, 191; *Wilson* v. *Kimball*, 7 Foster, 300.

3. Not in Maine. The case of *Kinnear* v. *Lowell*, 34 Maine, 299, is in point for the defendant. For, not actual coercion, but merely a liability to such coercion by suit or foreclosure, is necessary to give the party paying the benefit of his payment. A liability to suit, and to lose an estate, are similar in result, even now that imprisonment for debt is abolished. For the distinction between a volunteer and a rightful payment, see 7 N. H. 73, and *Jenness & ux.* v. *Robinson & ux.*, 10 N. H. 215.

The case of *Carl* v. *Butman*, 7 Greenl. 102, is similar to the one at bar; for a careful reading of the opinion of the Court takes away the first appearance of a perfected foreclosure; and the statute of 1821, c. 39, § 1, shows the deed of release and quitclaim to have been of precisely the same legal effect as the discharge upon the record, at bar.

This case has never been overruled; on the contrary, it has, as appears by their reference to it in the Report of the Commissioners on the Revision of the Statutes, received a legislative confirmation, in R. S., c. 95, § 15, which is to be taken as declaratory of the common law upon this subject.

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

The mortgager, at the time of his marriage with the demandant, was seized in fee of the premises against all the world but the mortgagee and his assigns, and the demandant had an inchoate right of dower, against all the world but the mortgagee and his assigns. When that mortgage was paid and discharged on the record by the mortgagee, the demandant had an inchoate right of dower against all the world. She was placed in the same legal position as she would have been, had there never been a mortgage given. The right to the possession and enjoyment of her dower became perfect at the death of her husband, and the judgment of the Court is therefore correct.

In support of these principles, we cite *Eaton* v. *Simonds*, 14 Pick. 98; *Walker* v. *Griswold*, 6 Pick. 416; *Wedge* v. *Moore*, 6 Cush. 8; *Wilkins* v. *French*, 20 Maine, 111; *Campbell* v. *Knight*, 24 Maine, 332; *Wade* v. *Howard*, 6 Pick. 492; *Massiter* v. *Wright*, 16 Pick. 151; *Smith* v. *Eustis & al.*, 7 Greenl. 41; *Tompson* v. *Chandler*, 7 Greenl. 377.

If R. S., c. 95, § 15, is relied upon by the defendant, we say it has no application to the case at bar, the demandant's rights as a doweress having become perfect before the statute was made.

A statute is not to have a retroactive effect unless it clearly express that intention. *Torry* v. *Corliss*, 33 Maine, 333.

The defendant, claiming title by descent from Robert Barbour, is estopped from denying the seizin of William, under whom Robert claimed by deed of warranty. *Kimball* v. *Kimball*, 2 Greenl. 226; *Hains* v. *Gardner & al.*, 10 Maine, 383; *Smith* v. *Ingalls*, 13 Maine, 284.

The opinion of the Court was delivered by

CUTTING, J. — Previous to the coverture, the premises, in which dower is demanded, were conveyed to Timothy Little, in mortgage, to secure the sum of six hundred dollars. Subsequent to the marriage, and on Dec. 31, 1829, the husband quitclaimed, with covenant of warranty against the claims of all persons by, through or under him, the same premises to Robert Barbour, under whom the tenant claims, subject however to the mortgage, which was discharged, on payment of the sum secured, by Robert Barbour.

In *Wedge* v. *Moore*, 6 Cush. 8, under a very similar statement of facts, SHAW, C. J., remarks, "He (the tenant,) took his conveyance subject to that incumbrance, and it may be presumed that the consideration paid was less, by the amount of that incumbrance, than he would otherwise have paid. He paid off the incumbrance to clear his own estate, and took a discharge. The tenant must have either agreed to pay off and discharge this mortgage, as a part of the purchase, or, otherwise, he would, if evicted, have a remedy, under his general or special warranty, against the grantor, the demandant's husband. The fact that the tenant obtained a discharge of the mortgage, and did not take an assignment, leads to the conclusion that he was to pay the mortgage himself, as in effect, part of the purchase money. The tenant thus obtained all which his grantor's deed could give him, namely, the estate described, subject to his wife's inchoate right of dower."

We fully concur in the doctrine, as embraced in the foregoing citation, and find no authorities conflicting with it, in this or any other State; certainly none such have been cited in the very learned and elaborate argument of the tenant's counsel.

At the time then, when the mortgage was discharged, the

demandant had an inchoate right of dower in the premises in which dower is demanded. But it was only an inchoate right, subject, before it was matured, to be modified, changed, or even abolished by legislative enactment. It could not have matured until the decease of the husband, which was on Oct. 26, 1854, prior to which time, namely, on August 1, 1841, our Revised Statutes went into operation. By c. 95, § 15, it is enacted, that "If, upon any mortgage made by a husband before 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."

In this case the tenant claims title under the husband, whose mortgage, made prior to the marriage, he has discharged, and by force of the statute he should be allowed the sum so paid to be marshalled in one of the modes pointed out in the enactment. Had the demandant brought her bill in equity and therein offered to repay such part of the money so paid as would be equal to the proportion, which her interest in the mortgaged premises bears to the whole value thereof, she would have been entitled to a conditional decree to that effect.

But instead of equity, she has resorted to her common law remedy; by which she is entitled to dower only, "according to the value of the estate, after deducting the money so paid for the redemption thereof." Consequently, as the Judge ruled, this action is maintainable and the demandant is entitled to her *legal* dower in the premises.

Exceptions overruled.

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

WHITE MOUNTAIN BANK *versus* PRESBURY WEST, AND PATTEN & HAMLIN, *Trustees.*

SAME *versus* WEST & MORSE, & same *Trustees.*

JOHN M. WHIPPLE *versus* WEST, MORSE & CO., and same *Trustees.*

EBENEZER CARLETON, *pet'r.*, *versus* WHITE MOUNTAIN BANK.

SAME *versus* JOHN M. WHIPPLE.

If one member of a firm, in purchasing property, so conducts himself as to lead the vendor to suppose that he is acting for the firm, he is thereby estopped, as against such vendor, from claiming that the sale was made to him alone.

And if the firm take the property so purchased and intermingle it with their own property of the same kind, and sell the whole together, giving no notice that one member of the firm owns any part thereof in severalty, the purchaser is liable to the firm only for the price. The member of the firm claiming exclusive title could not maintain an action in his own name alone for any part of the price; nor can his private creditors maintain a trustee process against such purchaser.

The laws of New Hampshire prohibit a mortgager of personal property, under certain penalties, from selling the same without the consent in writing of the mortgagee, indorsed upon the mortgage, and entered in the margin of the record. A mortgagee gave such consent in writing, but it was not indorsed nor entered upon the record as the statute directs; and the mortgager thereupon sold the property in this State. *It was held*, that whether such consent was sufficient to protect the mortgager from his liabilities under the statute or not, the mortgagee was thereby estopped, as against the purchaser, from setting up any claim of title.

If a factor receives goods, and makes advances upon them, to be reimbursed from the proceeds, when sold, and is then summoned as the trustee of the owner, he is not thereby divested of his right to sell the goods. The creditor, by the trustee process, is only subrogated to the rights of the debtor.

When, in a trustee process, an assignee is admitted as a party to contest the right of the plaintiff to the fund, and the alleged trustee is afterwards discharged, neither the plaintiff nor the assignee is entitled to recover costs against each other.

REPORTED by DAVIS, J., April Term, 1858.

THE trustees in this case, Messrs. Patten & Hamlin, received a quantity of lumber of West, Morse & Co., a firm doing business in the State of New Hampshire, upon which they made certain advances. For these advances they were

to be reimbursed out of the proceeds of the lumber, when it should be sold. They afterwards sold the lumber, and received therefor, over and above all expenses, about seven hundred dollars more than enough to reimburse them for their advances. This sum they held, and were ready to pay to whatever party was legally entitled to receive it.

The White Mountain Bank had certain demands against West, and certain other demands against West & Morse, a firm composed in part of the same persons as the firm of West, Morse & Co. The firm of West & Morse had existed before the firm of West, Morse & Co. was established. Suits were therefore commenced by the bank against West, and Morse & West; and Patten & Hamlin were summoned as trustees in both cases.

The partnership of West, Morse & Co., was formed in July, 1856. In the following December, West purchased a large quantity of lumber of John M. Whipple. Whipple claimed that this sale was made to the firm; and he brought an action against the firm for the price, and summoned the same persons as trustees.

Carleton had two mortgages of a part of the lumber that was sold to Patten & Hamlin. These mortgages were given long prior to the purchase of lumber by West of Whipple, and before the partnership of West, Morse & Co., was formed. The mortgages were from West alone. As the lumber, so mortgaged to Carleton, was intermixed by West, Morse & Co., with their lumber, and the whole sold together, Carleton claimed the proceeds of the whole in the hands of the trustees. He was admitted as a party in all the cases, to contest the right of the several plaintiffs to receive the fund.

Edward Fox and *Henry Willis*, argued for Carleton:—

1. A part of the lumber sold by the trustees was originally the property of West, and was by him mortgaged to Carleton by two mortgages of different dates, executed to secure distinct debts.

By the laws of New Hampshire, R. S., c. 132, § 8, it is

provided, that "no mortgager of personal property shall sell or pledge any such mortgaged property without the consent in writing of the mortgagee upon the back of the mortgage, and on the margin of the record thereof in the office." And section 10 imposes a penalty, for such sale, of double the value of the property so sold.

Carleton made no written consent upon the second mortgage. Nor was the consent upon the first mortgage entered in the margin of the record. West, therefore, had no authority to sell, and the title remained in Carleton.

2. West, Morse & Co., wrongfully intermixed the lumber mortgaged to Carleton with their own lumber, without the knowledge or consent of the mortgagee, so that the property could not be distinguished or separated. Carleton is, therefore, entitled to the entire proceeds of the sale of property, now in the hands of the trustees. 3 Kent's Com. 364; *Hazeltine* v. *Stockwell*, 30 Maine, 237; *Willard* v. *Rice & al.*, 11 Met. 493; *Bryant* v. *Ware*, 30 Maine, 295.

Shepley & Dana, argued for the White Mountain Bank, contending that the avails of the lumber sold by the trustees belonged to West alone, and that they were entitled thereto in their suit against West.

Whipple is not a party to this report, and his suit against West, Morse & Co., is not before the Court upon this hearing for adjudication. It is, therefore, entitled to no consideration.

The lumber was the property of West, and not of the firm. So all the partners testify. The fact that they had declared otherwise, and that the trustees supposed they were dealing with the firm, can make no difference.

Nor can Carleton's claim be supported. His mortgages embraced only about 160,000 feet, a small part of which was mixed with the other lumber of West. The entire quantity of lumber in the hands of West was about 500,000 feet. There was no such confusion as to change the title to any of the property. *Ryder* v. *Hathaway*, 21 Pick. 298.

And if there had been, Carleton lost his lien upon the property by consenting that the mortgager should sell it. It matters not that such consent was not in strict conformity with the statutes of New Hampshire. If the mortgager, by making the sale, subjected himself to any penalty, that did not prevent the title from passing to the purchasers. They lived in this State, and are not presumed to know the provisions of the statute in New Hampshire relating to sales of mortgaged property. They might well rely upon the written consent of Carleton which is proved in this case.

Howard & Strout, for Whipple.

The opinion of the Court was delivered by

DAVIS, J.—Messrs. Hamlin and Patten have been summoned as trustees, and have disclosed, in each of the above cases. Carleton claims the funds in their hands as belonging to him, and has been admitted by the Court as a party, for that purpose. The several plaintiffs have filed allegations, according to the statute; and they, and Carleton, have taken testimony to support their respective claims. The principal defendants have been defaulted.

It is said in argument that Whipple's case is not before us. And it is true that each of the three cases is distinct from the others; and Whipple is no party to either of the other actions. But the disclosure in his case is before us, with his allegations and proofs; and we are to determine the liability of the trustees in his case, as well as in the others.

It seems to be conceded, that the funds in the hands of the trustees belong either to West, individually, or to West, Morse & Co. As the second action is not against West alone, nor against the firm, the trustees, in that suit, must be discharged.

Carleton claims to hold the funds in the hands of the trustees by virtue of two mortgages held by him upon the lumber which they sold. If his claim is sustained the trustees must be discharged in both the other suits.

If Carleton's claim is not sustained, we must determine

whether the lumber was the individual property of West, or the property of West, Morse & Co. If the property of the former, the trustees are liable to the White Mountain Bank; if the property of the latter, they are liable to Whipple, and therefore not liable to the bank.

Carleton had two mortgages of the same lumber, one dated Feb. 25th, and the other April 3d, 1856. On the back of the first mortgage was the following indorsement: —

"It is agreed by the parties to this mortgage, that the said West is to manufacture and sell the lumber mortgaged, at his own expense, subject only to his paying over the avails of the same to said Carleton, when sold, if done seasonably to pay the notes secured by this mortgage agreeably to their terms.

"Ebenezer Carleton,
"Presbury West."

The notes secured by this mortgage became due, one of them in Oct. 1856, and the other, for $1700,00 in Oct. 1857.

The second mortgage was given to secure another note of $405,00, payable in Feb'y, 1857. And it is contended by Carleton's counsel, that as the agreement for West to sell the lumber was indorsed upon the first mortgage, it was restricted to that; and that he had no right to sell after the second mortgage was given. But we do not so understand the intention of the parties. There is no date to the agreement written on the back of the first mortgage. Nor have we any right to assume that it was of the same date as the mortgage, as it was entirely distinct from it, as much as if it had been written on a separate paper. The second mortgage does not annul it, either expressly, or by implication. It was still a valid, subsisting agreement. It referred to the same lumber described in both of the mortgages, and was a consent in writing by the mortgagee that the mortgager might sell the property. And, whether the consent was sufficient to protect the mortgager, or not, the mortgagee is thereby estopped from setting up any claim of title against the purchasers. And, having lost his title, the *mortgage* gives him no right to the proceeds.

When the lumber was delivered to Patten & Hamlin, and they had made advances upon it, with the agreement that they should sell it to reimburse themselves, they had a right so to sell it, even after trustee process was served upon them.

Neither Carleton, nor other creditors, can claim any more than to be subrogated to the rights of West.

If West had the right to sell the lumber, then he could give a good title. His stipulation, that the avails should be paid over to Carleton, was personal only; and any default on his part in this respect, could not affect the title of his vendee.

Nor did this consent for him to sell make him an agent of Carleton for that purpose. It was a release of the mortgage claim, in case of a sale. The effect of a mortgage with such consent for the mortgager to sell, was to hold the property for the mortgagee against attaching creditors; but, from the time of sale, the lien of the mortgagee was extinguished, and the mortgagee was left with no security but the personal promise of the mortgager to pay the proceeds to him. And if he wished to reach the proceeds in the hands of the purchasers, he, like other creditors, should have resorted to a trustee process under the statute.

Carleton states in his allegations, that the property in the hands of the trustees, at the time of service upon them, belonged to him, and was the proceeds and avails of lumber belonging to him. But his claim upon the specific property cannot be sustained; for West had authority to dispose of it, as he had done. And his claim for the proceeds cannot be sustained; for a claim to "credits" can be sustained only by proof of "an assignment" from the principal debtor. Such an assignment of the sum due West from the trustees, could not be made until the contract between West and the trustees was made. That West made any such assignment to Carleton, is not pretended. His claim must therefore be dismissed.

We have alluded to the fact, stated in argument, that some of the lumber was in the hands of the trustees, unsold, at the

time of the service of the process upon them. They state in their disclosure that it had been sold, and that a specific sum was due therefor, at the time they were summoned as trustees. The parties are estopped by the statute from contradicting them. Nor is there any evidence to contradict this statement, except the deposition of one of the trustees, in Whipple's case. It there appears by the account rendered, that, if sold before they were summoned, they did not receive pay for a large part of it until afterwards. We do not think it material; though we think the case shows, on the whole, that the trustees had sold all the lumber before they were summoned, but that a part of the proceeds did not come into their hands until afterwards.

It remains for us to decide whether the trustees are liable to pay the amount in their hands to West, Morse & Co., or to West alone.

The partnership of West, Morse & Co. was formed July 27, 1856. It is evident that, at that time, the larger part of the lumber was the property of West. Nor is there any evidence that he then or afterwards sold it to the firm. Still, though the title to the property was in him, he and the other members of the firm may have so conducted towards the trustees, that, as to them, they are estopped from denying that the lumber belonged to the firm.

In December, after the partnership was formed, West bought about 75,000 feet of lumber of Whipple. And though he testifies that he bought it upon his own individual account, we are satisfied that Whipple supposed, and had good reason to suppose, that he was selling it to the firm. Their mode of doing business was such that a sale of lumber to West must have been believed to be made to the firm, unless he gave notice to the contrary. Instead of doing so, he seems to have used the terms "we" and "our" as if doing business for the firm. We have no doubt that the lumber sold by Whipple became the property of the firm. They have been defaulted in his action against them for the price. This lumber was sent to market with that which had been owned by

West alone. If not actually mingled together, no separate account was kept of it. What proportion of each was sent to the trustees it is impossible to determine. The trustees had no reason to suppose that any part of it was the individual property of West; but all their intercourse and correspondence was such as to lead them to believe that they were dealing with the firm. Especially was the conduct of West calculated to give them this impression. He gave them no notice that the lumber belonged to him. He disclosed the names of his partners, and gave the note of the firm for the money advanced in anticipation of the consignment. The lumber actually belonging to the firm was so mingled with his, that the trustees, if they had had notice, could not have distinguished the one from the other. It is very clear, that West himself is estopped from claiming that the trustees should account to him, individually; and his creditors, by a trustee process, can stand in no better position. The trustees are under no obligation to account to any one except West, Morse & Co., and to those to whom the rights of that firm have been transferred.

In both of the cases in favor of the White Mountain Bank, the trustees are discharged. And though in these cases, Carleton was admitted as a party, yet as neither party prevails in holding the funds, so neither party can recover costs against the other.

In the case of Whipple *v.* West & als., the trustees are charged for the sum of $696,19, deducting therefrom their costs in that suit. In the other suits the trustees are entitled to recover their costs. In this case the plaintiff is entitled to costs against Carleton.

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

SAMUEL A. HOLBROOK *versus* GEORGE LORD.

H. & L. made an assignment, *as partners*, of all their property, for the benefit of their creditors. Among the *private* assets of one of the partners, which went into the hands of the assignee, was a note held by him against his co-partner for a private debt. This was sold by the assignee to the plaintiff. And, notwithstanding there was a clause in the assignment, by which the *creditors* of H. & L. released them from all their liabilities, *it was held*, that this did not release the partners from their liabilities to each other, and that the plaintiff was entitled to recover.

FACTS AGREED. April Term, 1858.

The facts sufficiently appear in the arguments of counsel, and in the opinion of the Court.

Deblois and *Jackson*, argued for the defendant.

The case finds, that on the 6th day of August, 1845, the defendant, George Lord, together with one Hyde and one Duren, formed a co-partnership under the firm name of Hyde, Lord & Duren. That afterwards, on the 27th day of September, 1848, said Duren left the firm, which from that time became the firm of Hyde & Lord. That on the 26th day of February, 1850, said Hyde & Lord made an assignment of all their partnership property for the benefit of their creditors. In and by the same assignment, the defendant contends that they both, individually, assigned also all their individual property for the benefit of their creditors, partnership as well as individual.

This assignment was executed, not only by the firm under their partnership name of Hyde & Lord, but also by William Hyde and George Lord, in their individual capacities. Said Hyde was at the time of the execution of this assignment a creditor of the defendant Lord, to the amount then due upon said note, as the holder thereof.

We contend that, by the terms of the deed of assignment, all persons becoming parties thereto, were bound by all the provisions of the instrument; that said Hyde & Lord, as a firm, and said George Lord and William Hyde, as individuals,

became parties to said assignment in two capacities, the one as assignors of all their partnership and individual property, for the benefit of their partnership and individual creditors, who should become parties to the assignment; the other as creditors of the partnership estate as well as of the individual estates. Thus, William Hyde, by signing said deed, not only assigned all his property for the benefit of the creditors of the firm and of himself individually, but also, by his signature thereto, became a party to the assignment, as a creditor of the estate of George Lord and of Hyde & Lord, and entitled to his proportional share in the division of said estates according to his claims.

William Hyde thus becoming a creditor of the estate of George Lord, by his signature to said deed of assignment, absolutely and entirely, by the terms of the deed, released and forever discharged said Lord from all debts due him and from all claims for or on account of the same, in consideration of his proportional share in said estate.

The purpose and object of the assignment was to make an equal distribution of the partnership and individual property for the benefit of all the creditors of Hyde & Lord and of William Hyde and George Lord, who should become parties thereto. William Hyde, a creditor of George Lord, having signed said deed of assignment, became thereby a creditor, entitled, with the rest, to the distributive share in the estate. As soon as the signatures were affixed to this instrument, Hyde and Lord were both barred from ever enforcing outside of the assignment claims held by either against the other or against the firm of Hyde & Lord. A different construction defeats the purposes and objects of the instrument. All parts of the instrument are to be taken together, and the obvious intent and meaning of the parties is to govern. The note in question, is a dishonored note, and the present plaintiff purchased the same at a sale of the effects of the bankrupt estate, subject to all the equities.

Upon a fair assignment of all his property, the defendant was entitled to, and received a full and complete discharge

from all the creditors who became parties to the deed, and a construction which would permit one creditor afterwards to sue a note thus discharged and forever released by his own act, would defeat the obvious intent and meaning of the instrument. The assignee was a trustee under the law, for the purpose of carrying out the full intent and object of the instrument. As such, he had no right to consider this note as an asset of the estate of William Hyde. He should have filed it as a claim against the estate of George Lord, and, as such, paid the dividend thereon over to the creditors of Hyde & Lord and William Hyde. He had no right, therefore, to dispose of the same in any event, and a sale thereof, by him, was invalid and passed no title to the plaintiff.

Barnes, argued for the plaintiff.

The argument of the defendant's counsel results simply in this, that Hyde, by the form and terms and legal intent of the instrument of assignment, released Lord from the debt, which was evidenced by the note in question.

The question whether he did so release Lord, and discharge the note, is a mixed question of fact and law.

The solution of the case is not to be obtained from the discussion of rules pertaining to bankruptcy or insolvency, because our statutes of assignment are not a bankrupt law, nor a code of insolvent laws.

The case depends upon the mere statutory provisions of our own assignment law, upon the general law of partnership, in some respect, and upon the general law regulating the title to promissory notes.

In bankruptcy, or under insolvent laws, the discharge of the debtor results, as a legal consequence of the proceedings instituted.

But, under our assignment laws, there is no discharge of the debtor, from any given debt, unless the holder of that debt *agrees* to discharge, and expresses that agreement by the definite, voluntary act of signing the deed *for that purpose.*

Any intention or willingness of the creditor to release,

amounts to nothing, unless that intention is expressed in proper form.

First.—As to the form and terms of the deed in this case: From beginning to end, the assignment is by Hyde and Lord, as partners and joint debtors, all in the plural number, all in their collective, joint capacity, assigning in terms their common property, and providing for the assent of their joint creditors.

There are three parties to the deed. The *creditors* are the *third* party. The *assignors* are the *first* party. There is no provision in this deed, to permit or enable one, who is a party of the *first* part, to be also a party to the *third* part.

The instrument is subscribed, it is true, by Hyde and by Lord separately, as well as by their firm name. This was done, doubtless, to satisfy the technical necessity, that such an act of assignment could not be validly executed by a mere partnership signature, made by one of the partners, but must be evidenced by the separate signature and seal (if any seal be necessary,) of each partner.

Immediately after these signatures, and the signature of the assignee, party of the second part, comes the jurat, certifying the oath of each partner to the *foregoing assignment by him subscribed*, and to the schedules annexed, showing that those signatures were understood and intended by them to be made as *assignors*, parties of the first part and exhibiters of schedules, not, in any sense, as creditors or releasors, or as parties of the third part.

The note in controversy has a general blank indorsement by Hyde, the payee, making it, in form, payable to holder. In the absence of evidence as to the time when this indorsement was made, it must be presumed to have been at the time when the title and possession of it passed out of the hands of Hyde into the hands of the assignee, showing that, after the execution of the deed, Hyde treated the note as a subsisting, unreleased security, and that he had not intended to release the maker.

Second.—As to the legal intent and effect of the deed in its existing, actual form:—

It passed the property in the note to the assignee, as it had been held by Hyde. The indorsement completed the assignee's title. For, although there are no expressions in the deed denoting, in terms, an assignment of the separate property of the individual partners, yet such separate property, whatever it was, did, in fact, pass by the deed. This results from the requisitions of the statute, and from the general law of partnership, by which partnership creditors have, in a certain event, a resort to the separate assets, so that Hyde, in order to have the benefit of the assignment law as to his partnership debts, must surrender to the assignee his separate estate.

Still, notwithstanding the note, as a separate asset, was thus brought into the assignment, there was nothing in the nature of the case, or in the relations of the parties, which changed its legal character, or qualified its legal validity in the hands of the assignee. The note was not a partnership matter in any way, and did not become such by being drawn into a joint assignment made by the promissor and the payee in their capacity as partners. Before the making of the assignment, it was the property of Hyde, payable absolutely by Lord. After the assignment, it was still as absolutely payable by Lord, although it had become the property of the assignee.

These considerations test the unsoundness of the defendant's argument that Hyde did in fact release this debt; as though, when he made an assignment for the benefit of his creditors, he could, by the very act, impair or destroy or in any manner qualify the value of the assets passed over to his creditors, which is manifestly unreasonable. He could no more release this note than he could a note against a stranger. So far as concerned this note, Lord was, in fact, a stranger.

For whose benefit now does such an asset pass to the assignee, in a case like this?

Obviously, the theory of the law is, that it passes, primarily, for the benefit of the separate creditors of the person who assigned it. The partnership creditors would have no benefit from it, until after the separate creditors of Hyde were satisfied in full. And whether these separate creditors would have to follow this asset into the partnership assignment, by becoming parties to it, or could obtain the benefit of it otherwise, it is not material now to determine. To them, and them only, it belonged, beneficially, in contemplation of law, until they were satisfied in full, and it was the duty of the assignee to deal with it, and dispose of it in such a manner as to make it most productive for their use.

It turns out, in point of fact, that the proceeds of this note were paid by the assignee to *partnership* creditors. So the case finds. Hence, for *some* purposes, and between *some* parties, it might be inferred that Hyde had no separate creditors.

But this distribution of proceeds was an affair wholly subsequent to the sale of the note, an affair with which the plaintiff had nothing to do, and over which he had no control.

The application of the proceeds of the sale of the note to the partnership debts, now shows that Lord had a direct and material benefit from the sale. His partnership debts have been paid, *pro tanto* with the money paid by the plaintiff for the note. Obvious equity, therefore, forbids that Lord should now repudiate the note, from the sale of which he has derived an immediate personal benefit.

It is not necessary to inquire whether, under our statutes, partners, owing partnership debts, and being also indebted to each other, or one to the other, might or might not be able, by one instrument of assignment, aptly and legally to provide both for releases of their joint debts, and releases from their debts to one another. It is enough that, in the present case, the things requisite to release Lord from this debt have not in fact been done.

Neither has any thing ever been done by Lord, or any one else, to secure to him the benefit of any equity, which, under

any available hypothesis, might be raised in his favor in regard to this note.

If any equities existed, by which he could have protected himself against the sale of this note, they were not such as were manifest to an innocent purchaser, nor was there any thing in the transaction and its antecedent relations to put a stranger on his guard, or on inquiry.

It is true the note was overdue when it was sold. But it was also overdue when it was assigned. The fact of its being overdue was sufficient to put a stranger on his guard against equities existing between the parties to the note when it was made, or arising before its maturity. But there is no pretence that any such equities existed between Lord & Hyde before the assignment. All the equities that could be set up, if any, must have arisen from the act of assignment itself; and of these, the mere non-payment of the note at maturity gave no notice, because it was long overdue at the date of the assignment.

It cannot be maintained that the purchaser of dishonored paper is affected by equities between the original parties, which arose after its dishonor.

No pretence of bad faith on the part of the assignee is urged, or of any intentional misconduct by him, and it appears affirmatively that he dealt with the note according to his legal title. The assignee is to be protected, not less than Lord.

As Lord took no steps to secure his alleged immunity against this note at the time, when, if done at all, it could be done without injustice to any person; as he has permitted the sale to be made without objection or warning; as he has received the entire proceeds of the sale, less the expenses, in the payment of his own debts; as he has not offered, and cannot offer to restore the plaintiff to his former position, he should be held to the just and necessary consequences of his own acts in the making of the note, or his own omissions in not securing his immunity from it, before it became the property of the plaintiff.

The opinion of the Court was delivered by

GOODENOW, J.—This action is founded on a promissory note dated August 1, 1845, made payable to William Hyde, or his order, for the sum of $2622,50, in three years from date, with interest, and signed by defendant. On the back of said note are several indorsements of sums of money received. It is also indorsed by "William Hyde, without recourse."

The consideration for this note was the private debt due from the defendant to William Hyde.

On the 6th of August, 1845, the said Lord and Hyde, with one Duren, formed a co-partnership, under the firm name of Hyde, Lord & Duren. On the 27th of September, 1848, said Duren left said firm, and thenceforward the business was conducted by said Lord and Hyde, under the firm name of Hyde & Lord. Said Hyde and Lord so continued partners, until the 26th of February, 1850, when becoming embarrassed in their business, and unable to pay all their creditors, they, in consequence thereof, made an assignment, under the statute.

John W. Munger, the assignee named in the instrument of assignment, duly accepted the trust.

On the 17th day of February, 1854, said assignee, among other things, sold at public auction the note set forth in the writ, the private property of said Hyde, and the plaintiff then and there purchased the same, he being the highest bidder therefor, for the sum of $485.

In looking at the instrument of assignment, we are not able to come to the conclusion that the said William Hyde executed it in any other capacity than as an assignor. We have no doubt he, as well as Lord, intended to assign not only all their partnership property, but all their private property, to which their creditors were justly entitled. They acted as parties of the *first part*, and not as creditors or parties of the *third part*, named in said instrument. The note in suit was not thereby discharged, but the property in it passed to the assignee, and, by the sale at public auction, from the assignee to the plaintiff.

Upon this view of the case, according to the terms of the agreement of the parties, a default must be entered, and judgment rendered for the plaintiff for the amount due on the note, and for his costs. *Defendant defaulted.*

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

ELECTUS B. LITCHFIELD *versus* LEMUEL DYER.

If an officer of an insurance company transfers a promissory note in violation of law, whether the maker, (the company or its creditors interposing no claim to the note,) can plead such illegal transfer in defence, unless he is a creditor of the company, — *quære.*

But if the payor of such a note is himself a creditor of the company, he may contest the legality of such transfer, in order to avail himself, by way of set-off, of the existing equities between himself and the company.

REPORTED by APPLETON, J., October Term, 1857.

THIS was an action of *Assumpsit*, upon a promissory note, by an indorsee, against the maker. The defence was, that it was indorsed and transferred by the Secretary of the Atlas Insurance Company, (a corporation formerly doing business in the State of New York,) in violation of the laws of that State.

It was denied by the defendant that Tracy, who indorsed the note, was secretary of the company; or, if he was, that he had any authority to make the indorsement. But it is unnecessary to report the testimony or the arguments upon the points, as the case turned upon the *legality* of the transfer under the statutes of New York.

Upon this point the facts sufficiently appear in the opinion of the Court, which was drawn up by

HATHAWAY, J. — The plaintiff was a director in the Atlas Mutual Insurance Company, in New York, a corporation created by the laws of that State, to which company, the de-

fendant, in New York, October 3, 1855, gave a premium note payable to the order of the company, in twelve months after date, upon which this action was brought by the plaintiff, as indorsee.

The company being "somewhat embarrassed," October 19, 1855, obtained a loan of eighteen thousand dollars, and assigned to the plaintiff, as collateral security for that loan, and for previous indebtedness, the note in suit, and other securities, the whole amount of which was twenty-one thousand nine hundred and eighty-eight dollars and twenty-four cents.

The company failed March 5, 1856, and was indebted to the defendant, for a sum larger than the amount of the note sued. The note was transferred to the plaintiff by the indorsement of the Secretary of the company, which, as he testified, was the usual way of transferring such paper.

A question arises, whether or not, by the laws of New York, where the contract was made, the note was legally assigned and transferred to the plaintiff, so as to enable him to maintain an action upon it.

The case finds that by the Revised Statutes of New York, 4th ed., vol. 1, page 1115, part 1, chap. 18, title 2, art. 1, it is provided in § 8, that "no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation of any of its real estate, or of any of its effects exceeding the value of one thousand dollars, but this section shall not apply to the issuing of any promissory notes, or other evidences of debt, by the officers of the company, in the transaction of its ordinary business," and in § 9, — "No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given, by any such corporation, when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company shall be valid in law." And any person receiving such assignment is held accountable therefor to the creditors of the company. And by § 11, the offence is made a misdemeanor, punishable by fine or impris-

onment. And in § 12, — "Every director shall be deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the foregoing provisions of this article."

It is obvious that the assignment and transfer of the notes and securities due to the company was not within the meaning of the statute, "the *issuing* of promissory notes, or other evidences of debt, by the officers of the company in the transaction of its ordinary business." The word "*issuing*," as used in the statute, has no such meaning; a bank *issues* its own notes, not the bills or notes of other banks, which it may own and transfer or pass as currency. By the grant of power to a corporation to issue bills or notes, the power first to make them would be implied. The notes securities and debts, due to an insurance company, constitute its "effects," and the transfer to the plaintiff, of October 19, 1855, was a transfer of the effects of the company, exceeding in amount the value of one thousand dollars. It was, therefore, illegal, unless "authorized by a previous resolution of its board of directors."

It was proved, in the case, by the testimony of the secretary of the company, *that* there was no such vote of the directors; *that*, at the time of the loan and transfer, the company was embarrassed; *that* the intention was to secure the payment of the indebtedness of the plaintiff, independently of their indebtedness or payment to any one else, and *that* the company failed, and were stopped in their business operations by an injunction March 5, 1856, in four and a half months after the assignment and transfer to the plaintiff.

It is plain that the transfer of the notes and securities was made in violation of the eighth section of the statute, and the conclusion cannot well be avoided that, in violation of the ninth section, the transfer was made to the plaintiff, one of the directors, in contemplation of the insolvency of the company, with the intent of giving them a preference over its other creditors.

Whether the defendant, if he had not been a creditor of the company, could have contested the legality of the indorsement, as the company has interposed no claim to the note, is not the question before us. The defendant is a creditor, having a demand which he has a right to set off against his note, if the transfer was illegal and void. The plaintiff, if he could recover, would be liable to the creditors of the company for the amount. The defendant, being one of the creditors, may contest the legality of the transfer, and thus throw the note back into the hands of the company, in order to avail himself of the existing equities between them.

Plaintiff nonsuit.

TENNEY, C. J., and CUTTING, GOODENOW, DAVIS, and MAY, J. J., concurred.

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

Fessenden & Butler, for defendants.

ROBERT HULL, *in Equity, versus* ISAAC STURDIVANT.

A Court of Equity will not decline to enforce the specific performance of a written contract for the conveyance of real estate, because the parties have therein agreed upon a penal sum "as liquidated damages" in case of non-performance.

Nor is the *form* of the contract of any importance, if it appears by it that the parties intended it to be an agreement for the sale of lands.

Time is not the essence of such a contract; and, if there has been an express or implied waiver of it by the parties, the Court will decree a performance.

THIS was a BILL IN EQUITY, by which the plaintiff sought to enforce the conveyance of certain real estate to himself, by the defendant, under a contract of which the following is a copy:—

"Articles of agreement made and concluded at the city of Portland, County of Cumberland, State of Maine, this twenty-fifth day of February, in the year of our Lord one thousand

eight hundred and fifty-three, by and between Isaac Sturdivant of Exeter, N. H., on the one part, and Robert Hull, tallow chandler, of the said city of Portland, on the other part:—

"Witnesseth,—That the said Isaac Sturdivant, on his part, for the consideration hereinafter mentioned, has agreed, and does by these presents agree to and with the said Hull, of the other part, that if the said Hull, on his part, pays or causes to be paid to the said Sturdivant, one hundred dollars, in cash, this day, and one hundred dollars, in ninety days, with interest; eleven hundred and fifty dollars, in one year, with interest semi-annually; eleven hundred and fifty dollars, in two years, with interest semi-annually, together with a receipt in full for any and all dues, debts and demands of whatever name or nature, now existing against said Sturdivant. That, on the receipt of the ninety day payment, with the interest, that I, the said Sturdivant, hereby agree to give the said Hull a good and sufficient obligation, to convey, by a good and sufficient deed, all that property lying between Green and Mechanic streets in said Portland, and now occupied by the said Hull as a tallow chandlery, and to reconvey the two lots of land on R street, in said city of Portland, being the same lots which I purchased of said Hull in October, 1838. Also, to give up and return to said Hull all notes signed by him and payable to said Isaac Sturdivant, dated previous to this agreement, together with a receipt in full, for all dues, debts and demands of whatever name or nature, (provided the ninety day payment, with the interest on same, is punctually paid at maturity.) Said obligation to have full effect at the expiration of the above named two years, provided all the payments are punctually paid.

"And the said Hull, on his part, in consideration of the above named premises, has agreed, and does by these presents agree, to pay to the said Sturdivant all the above named one hundred dollars, in cash, together with the above named amounts, in ninety days, one and two years, with the interest accruing on same at maturity, together with all the taxes,

insurance, repairs, &c., &c., which may arise on the above named property from this date.

"To the true and faithful performance of the several covenants and agreements aforesaid, the parties aforesaid do hereby respectively bind themselves and their respective heirs, executors, administrators and assigns, each to the other, his executors, administrators and assigns, in the penal sum of two hundred dollars, as liquidated damages.

"In testimony whereof, they have hereunto set their hands and seals, the day and year above written.

"It is further agreed and understood by the parties, that no receipts in full are to be passed between the parties, or any notes, previous to this date, be given up by either party, until or unless the full amount of twenty-five hundred dollars, and the interest, is fully paid and accomplished, corresponding with this agreement. "Isaac Sturdivant,

"Robert Hull."

The case was heard upon the bill, answer and proof.

It appeared in evidence that plaintiff paid the defendant one hundred dollars in advance, and one hundred dollars, with interest, within ninety days from the date of the contract, and thereupon demanded the obligation for a conveyance of the premises. The defendant promised to give him such an obligation; but he delayed and neglected to do it, and the parties appear to have treated the original contract as sufficient. The plaintiff continued to make payments, and the defendant to receive them, until the whole amount paid was $2196,00.

The payments were not all made within the *times* stipulated in the contract. But the defendant, at first, by a memorandum in writing on the back of the contract, extended the time of the several payments one year. He also continued to receive payments after the extended time had expired, giving receipts therefor, "in part payment of the bond." On the 23d day of Feb. 1856, the plaintiff paid him two hundred and fifty dollars, for which he gave a receipt, of which the following is a copy:—

"Portland, Feb'y 23, 1856.

"Received of Robert Hull, for Isaac Sturdivant, two hundred and fifty dollars, to be indorsed on his bond, dated Feb. 25, 1853, and two hundred dollars to be paid at the Bank of Cumberland in sixty days from this date or forfeit the first payment of two hundred and fifty paid this day, the said Hull to have an extension of six months from this date to pay five hundred dollars more to be indorsed on said bond, the balance of said bond to be paid in one year from this date, without infringing to either party on the privileges mentioned in said bond."

The plaintiff paid the defendant five hundred and forty dollars, Aug. 20, 1856. And, on the 14th day of February, 1857, he tendered to him eight hundred and sixty-five dollars, being the balance remaining unpaid, and demanded a conveyance of the property according to the terms of the contract. The plaintiff also, at the same time, tendered to the defendant a receipt, as specified in said contract. But the defendant declined to receive the money, and refused to make the conveyance.

The following is the only portion of the answer necessary to an understanding of the case.—

"And this defendant further saith, that the complainant is not entitled to the relief sought by him in his said bill — but if entitled to any thing, he is only entitled to recover at law the sum of two hundred dollars, in said indenture mentioned, as liquidated damages, for any breach of its terms, by this defendant, which this defendant hereby offers to pay, if the Court shall so adjudge."

Shepley & Dana, argued for the plaintiff.

The defendant made a breach of the conditions of his agreement. The plaintiff made the first two payments within the time stipulated, and was entitled to "a good and sufficient obligation to convey by a good and sufficient deed." The defendant, though requested, did not give him such an

obligation; but he assured the plaintiff that his rights were sufficiently protected under the original contract. We see that both of the parties so understood it, and payments were made and received the same as if the obligation had been given. The defendant will not be permitted, in a Court of Equity, to take advantage of his own wrong in not giving such an obligation as he agreed to give.

The agreement, of itself, is a contract for the conveyance of the premises described. Such clearly appears, by its terms, to have been the intention of the parties; and they have so treated it ever since.

Time is not the essence of such a contract. 2 White & Tudor's Leading Cases in Equity, 18, 26; *Jones, in Equity*, v. *Robbins*, 29 Maine, 351. And, if it were otherwise, the time of making the payments has been extended from time to time, and the plaintiff has strictly complied therewith.

It is clear that defendant, as he announces in his answer, has deluded himself with the opinion that, because the sum of $200 is named as the liquidated damages which the party failing to perform shall pay the other, he could take complainant's money to the extent of about $2000; and, then, when it was apparent that complainant was about to comply with all the terms of the agreement, he could refuse to comply on his part, and leave the complainant to recover the $200! This is the only explanation of his course that can be offered.

But the words "liquidated damages" do not possess the sovereign character which was ascribed to them after the passage of 8 & 9 William 3.

The law is well settled differently from what defendant supposed. The calling a sum "liquidated damages" does not make it so. 2 Parsons on Con. 434.

The Court must be satisfied it was not the legal intendment of the agreement of Feb. 25, 1853, that, after the complainant had paid the amount he has, he was to be remitted to the penal sum of $200 as (his) "liquidated damages." The opinion of Lord Chancellor SUGDEN, in *French* v. *Macall*, 2

D. & War., 274, well states the principle which regulates Courts of Equity in cases of this kind. "The general rule of equity," says his Lordship, "is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate, and execute his bond for £600, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate, in specific performance of his agreement." See, also, *Howard* v. *Hopkyns*, 2 Atk. 371; *Chilliner* v. *Chilliner*, 2 Ves. 528; *Hardy* v. *Martin*, 1 Cox, 26; *Roper* v. *Bartholomew*, 12 Price, 796; *Logan* v. *Weinholt*, 1 C. & F. 611; 2 White & Tudor's Leading Cases in Equity, part 2, pp. 465, 466, 474, 475; *Gordon* v. *Brown*, 4 Iredell's Eq., 399; *Canal Co.* v. *Sanson*, 1 Binney, 70; *Brown* v. *Bellows*, 4 Pick. 158.

The penalty is construed as intended to secure the fulfillment of the contract and not to defeat it.

Howard & Strout, argued for the defendant.

The contract of the defendant was to give the plaintiff a *bond* to convey the real estate mentioned, upon the receipt of two hundred dollars, within ninety days from the date of the contract, or forfeit $200, "as liquidated damages;" if the $200, were paid within ninety days from the date of the contract.

The plaintiff paid the sum of $200, within the ninety days, and demanded the *bond*, but the defendant neglected and refused to give it; choosing to forfeit the $200, rather than to execute a bond, as he contends. And this, he claims that he had a right to do, by the terms of the contract, under the penalty of $200, "as liquidated damages."

The receipt of sums of money by the defendant, from the plaintiff, at subsequent dates, does not so far extend the *contract*, as the defendant alleges, as to authorize the plaintiff to claim a *bond* from him.

In the receipt of Feb. 23, 1856, the supposed extension

therein referred to, has reference to defendant's "*bond dated Feb.* 25, 1853," and speaks of "*the balance of said bond*" to be paid in one year from Feb. 25, 1856, "without infringing to either party on the privileges mentioned in said bond."

Whereas, in fact, no *bond* was ever given by the defendant to the plaintiff. The articles of agreement contemplated that a *bond* should be given upon certain conditions named in the agreement. But, in truth, no such *bond* was ever executed.

If the plaintiff is entitled to reclaim his money paid to the defendant, that would not enable him to maintain his bill;—for the law, in such case, would afford him ample remedy.

The defendant denies that he was ever bound to convey to the plaintiff; not by a *bond*, for none was ever given; nor by contract, for such was not the agreement.

The opinion of the Court was delivered by

GOODENOW, J.—The bill seeks to enforce a specific performance of a contract, made and executed by the parties on the 25th day of February, 1853. It alleges full performance on the part of the complainant, and a neglect and refusal to perform on the part of the defendant. The answer admits the making and executing the agreement or indenture, under seal, as recited in the complainant's bill; but alleges that the complainant never paid the sums of money mentioned in said indenture to be by him paid, to the defendant, in accordance with the terms of said indenture, or any of them, and has never performed the terms of said indenture, by him to be performed. And the defendant further says, that the complainant is not entitled to the relief by him sought in his said bill; but, if entitled to any thing, he is only entitled to recover at law the sum of two hundred dollars in said indenture mentioned, as liquidated damages, for any breach of its terms, by the defendant.

The complainant in his replication to the answer of the said defendant, says that he will aver and prove his said bill to be true, certain and sufficient in law to be answered unto;

and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by the repliant.

We are satisfied that the material facts, alleged in the bill, and denied in the answer, are true, and are proved to be true, by the evidence exhibited by the complainant in the case.

Where a contract, respecting real property, is in its nature and circumstances unobjectionable, it is as much a matter of course for a Court of Equity to decree a specific performance, as it is for a Court of Law to give damages; and, generally, a Court of Equity will decree a specific performance, when the contract is in writing, is certain, and fair in all its parts, and is for an adequate consideration, and is capable of being performed. The form of the instrument, by which the contract appears, is wholly unimportant. Thus, if the contract appears only in the condition of a bond, secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty. 2 Story's Eq., § 751.

Time is not generally deemed in Equity to be the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract. 2 Story's Eq., § 776. The parties have not so treated it in this case, as it clearly appears from the proof. Complainant has fully performed and offered to perform every thing on his part to be performed, and within the time, as extended by the defendant's consent. He is, therefore, entitled to a decree for specific performance as prayed for, upon bringing into Court and depositing with the clerk thereof the sum of eight hundred and sixty-five dollars, for the use of said Sturdivant or his legal representatives, and also depositing with said clerk such a receipt in full to said Sturdivant or his legal representatives as is provided for in and by said agreement.

TENNEY, C. J., and HATHAWAY, CUTTING, MAY, and DAVIS, J. J., concurred.

FRANKLIN WHARF CO., *Appellants, versus* CITY OF PORTLAND.

The owner of land, who claims under a deed by which the premises are bounded on the line of a street, which was never made or used as a street, but of which there was on record a description and plan made under a void location, to which the deed refers, cannot recover pay for the land to the middle of the street, upon a subsequent location thereof, his title extending only to the line of the street.

EXCEPTIONS from the ruling of DAVIS, J.

This was an appeal from the adjudication of the city council of Portland, in locating Thames street, Aug. 2, 1854, over certain flats, lying below high water mark. The premises in controversy had been used as a dock by the appellants and others doing business at their wharf, which was adjacent thereto. The city council awarded that *no damages* were sustained by the appellants in consequence of the location.

It appeared in evidence that, in 1760, the town of Falmouth, which then embraced the territory of the present city of Portland, located Thames street, a description and plan of which were put into the case. The street so located was never made or used as such below high water mark. And it was contended that the location was void for want of authority in the town to make it; or if not originally void, that the easement was lost by non-user. The new location made in 1854, at the point adjacent to the premises of the appellants, was the same as that originally made in 1760.

The appellants claimed, through Abel Chase and others, under a deed from the Portland Marine Railway Company, dated July 1, 1850, by which the premises are bounded easterly "by the south-westerly line of Thames street." At the time the deed was given, the street had no existence in fact, and could have been known only by the record of the ancient location made in 1760. The appellants claimed the right to hold, by their deed, to the middle of the street; and they claimed damages for one half of the land covered by their location.

It was claimed in behalf of the city that the appellants, by

their deed, acquired title to the land only *to the side line* of the street, and therefore that no part of their land was covered by the location; and that, even if it were otherwise, they had sustained no damage by the location, their property being worth more, rather than less, in consequence thereof.

In order to settle the question of damages, the presiding Judge ruled that their title, under their deed, extended to the middle of the street, and to this ruling the respondents excepted.

The case was argued by

Rand, for the appellants, and by

Fox, for the respondents.

The opinion of the Court was delivered by

HATHAWAY, J.—Under the pleadings, the burden of proof is upon the appellants, to establish their title to the land, upon which the street was located, by the defendants. Their title appears to have been derived, through mesne conveyance, from the Portland Marine Railway, as by their deeds to Abel Chase & als., of July 1, 1850.

One of the boundaries of the land conveyed, as described in the deeds, was the south-westerly side line of Thames street.

Thames street, the line of which was named as the boundary, was in tide waters, was never made, and has never had existence, as a street, at the place where it was named as a boundary, except on the records of the town of Falmouth; and the Judge properly instructed the jury, that its location, by the town of Falmouth, in 1760, was void.

Although the side line of the street, as located, might be a sufficient designation of the boundary of the land conveyed; yet, the location being void—there being, in fact, no street there—and, as it does not appear that the complainants, or those under whom they claim, *ever* owned any portion of the land upon which such void location was made—the deeds, under which the appellants derive their title, did not include

any part of the land covered by such void location. *Bangor House* v. *Brown*, 33 Maine, 314.

The instruction of the Judge, therefore, that "the jury might consider the title of the petitioners *proved*, to the centre of the street, as originally located in 1760," was erroneous. It is unnecessary to consider the other questions presented in the case. *Exceptions sustained.*

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

SAMUEL CHADWICK, *Adm'r, versus* INHABITANTS OF PORTLAND.

The promissory note of a town given for money borrowed, with interest payable semi-annually, the principal "to be redeemable at the pleasure of the town after ten years from date," should not be so construed as to give to the town the right to retain the money perpetually; the design and intention of the restriction being to limit the right to pay the note until the ten years had expired. And, after the expiration of the ten years, the payee may legally enforce payment. — HATHAWAY, APPLETON, and CUTTING, J. J., dissenting.

REPORTED by DAVIS, J., April Term, 1855.

ASSUMPSIT upon a writing, of which the following is a copy: —

"Town Treasurer's Office. — Portland, Dec. 14, 1830.

"For $3000. — Value received, I, Charles B. Smith, Treasurer of the town of Portland, by virtue of a vote passed by said town on the 12th day of October, 1829, authorizing the town treasurer to hire a sum not exceeding three thousand dollars for the purpose of erecting an addition to the Alms House, promise to pay William Chadwick, or his order, the sum of three thousand dollars, with interest thereon till paid, at four and one-half per cent. per annum, payable semi-annually, and the said three thousand dollars to be redeemable at the pleasure of the town after ten years from the date hereof.

(Signed) "Charles B. Smith, *Town Treasurer of said Portland.*"

The writ is dated Dec. 17, 1856. Payment of the note was demanded Oct. 31, 1856.

When the action was instituted, the interest for six months was unpaid; but the question controverted was whether, by the terms of the note, the plaintiff was entitled to recover the principal.

Rand, for the plaintiff, argued that the paper declared upon, not being made payable at a time certain, cannot be regarded in law as a promissory note, but rather as a contract between the parties for the payment of money.

And the simple question is when is this money to be paid? Is it ever to be paid? What contract did the parties make in the eye of the law?

That the defendants borrowed, and now owe the money; and that it was the understanding and intention of both parties that it should be paid *at some time*, we think cannot be doubted.

The present plaintiff is an administrator, and is desirous of ascertaining from the Court, whether this money due his intestate is ever to be paid, and the estate settled.

And it is submitted, that the true and proper legal construction of the contract is, that the money is payable *in a reasonable time after the expiration of ten years from date.* It will be said on behalf of the defendants, that the parties made their own contract, and agreed that the money should only be paid "at the pleasure of the town after ten years from date." Such were the words used; but, surely, it cannot be claimed, that it was the intention and understanding of the parties that the payment should depend upon *the mere "pleasure* of the town;" and never be paid if it was the pleasure of the town *not to pay;* or never be paid *unless* it was the "pleasure of the town" *to pay.* Surely, even such contracts as this are to receive a reasonable, and not a suicidal construction,—"*ut res magis valeat quam pereat.*"

The defendants have kept this money for twenty-eight years at four and one-half per cent. interest; a reasonable time

after the expiration of ten years from date has long since elapsed; payment has been requested, and refused; and it is submitted, that upon a reasonable construction of the written contract, the plaintiff, as administrator, is entitled to recover.

Fox, for the defendants, argued, that no legal obligation was created by this contract which can be enforced as to the principal; only as to the interest.

It is payable at the pleasure of the town. *Nelson* v. *Von Bonhorst & al.*, Penn. American Law Register, December, 1857, January, 1858; *Barnard & al.* v. *Cushing & al.*, 4 Met. 230.

The opinion of the Court was delivered by

MAY, J.—The whole difficulty, in the construction of the note in suit, arises from its last clause, which is in these words, "and the said three thousand dollars," (this being the amount of money loaned,) "to be redeemable at the pleasure of the town, after ten years from the date hereof." Without these words, the note, in its legal effect, would have been payable on demand. The payee could have enforced its payment when he pleased, or the defendants could have made a legal tender at pleasure which the payee could not rightfully have refused. We are therefore of opinion that the design and object of the clause under consideration, was not to enable the defendants to retain the money borrowed perpetually, *ad libitum;* but it was inserted in the note for the purpose of restricting the defendants from making payment *until after ten years.* The language is adapted to show that *after* ten years the right to pay the principal should exist, and by a strong and binding implication, that it should not exist before. Such being the purpose of the clause, it is found to contain nothing to prevent the plaintiff from instituting this suit when he did. After the restriction upon the defendants had ceased to operate, then the note was in the same condition as if such restriction had never been inserted. It had performed its office,

and both parties were then left to enforce their rights in the same manner as if the note were payable on demand. If the restriction had not been inserted such would have been their condition from the date of the note.

This case is wholly unlike the cases cited in defence. In that cited from the American Law Register, vol. 6, p. 151, *Nelson, in Error*, v. *Von Bonhorst & al.*, the instrument declared on, in the original action, contained no promise, on the part of the defendant, other than to pay *whenever, in his opinion, his circumstances should be such as to enable him so to do;* and, in that cited from 4 Met. 230, *Barnard & al.* v. *Cushing & al.*, the payees of the note at the time it was made, and as a part of the transaction, indorsed a promise thereon *not to compel payment thereof, but to receive the amount when convenient for the maker to pay it.* In both these cases it was held that no action could be maintained. Neither contract contained any legal obligation at all, because the debtor in each case, in effect, reserved to himself the entire control of all remedies against him. To be sure there was, in form, an agreement to pay, but the right to enforce payment was, by mutual consent expressly withheld; and thus the obligation was merely a moral one. The language in both cases was too unequivocal to admit of any other construction. In the present case, we find no such difficulty. The note is susceptible of a reasonable construction, and such as will give legal efficacy to the promise contained in it, which is expressly *to pay the principal, or money borrowed,* as well as the interest at the rate agreed. According to the agreement of the parties, judgment is to be entered for the plaintiff, for the sum of three thousand dollars and the interest due thereon.

Defendants defaulted.

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

CUTTING, J., dissenting. — This case involves the construction of the final clause in the instrument declared on, viz. —

"and the said three thousand dollars to be redeemable at the pleasure of the town after ten years from the date hereof."

After the ten years have elapsed, it seems to have been the pleasure of the legal representative of the promisee, that the principal should be paid. Otherwise, as to the promisor. Hence, the institution of the present suit, in order to ascertain *judicially*, whose pleasure is to control; whether that of the promisee or promisor. And while the parties, by written, unequivocal language, say the latter, the opinion of a majority of this Court says the former. Such a construction, if it is to be regarded in Westminster Hall as law, might shake the British throne; for, as remarks an elementary writer,—"the national debt of England consists chiefly in stocks *redeemable at the pleasure* of the government."

I shall commiserate the responsibility of the too credulous barrister, whenever his citation of an American common law decision is held treasonable in England.

HATHAWAY and APPLETON, J. J., concurred.

FRANCES A. DRESSER *& als., in Eq. versus* JOHN DRESSER *& al.*

It seems that a gift *causa mortis* may be made *in trust*, for the benefit of third persons.

But where the donor, in anticipation of death, gave certain personal property to the defendants, to be managed by them as their own, and, with the proceeds of it, to be paid to his children at a specified time, *it was held* to be a gift *inter vivos*; and the donees were permitted to retain the property upon giving bond to execute the trust.

SUIT IN EQUITY.

The bill is inserted in a writ of attachment, dated Sept. 20, 1858. It alleges that Frances A. Dresser, Julius A. Dresser and Horatio S. Dresser, three of the complainants, are children of Asa Dresser, late of Saco, deceased; the

two latter being minors, and suing by their guardian; that Allen Haines, the other complainant, is administrator *de bonis non*, with the will annexed of the said Asa Dresser, and also a testamentary trustee under his will; that the testator, by his will dated January 14, 1854, after providing for debts and expenses of administration, and for an annuity in favor of his widow, directed that the residue of his property should be held in trust for his children; that he died in February following; that his will was duly proved; that his widow and the original executor have since both deceased, and that his only surviving children, the three complainants first named, now have the sole beneficial interest in his estate; that, after the decease of the executor and trustee named in the will, the complainant Haines was appointed, by the Court of Probate for York County, testamentary trustee under the will, and [subsequently] administrator with the will annexed, and was duly qualified under both appointments.

The bill further alleges, upon information and belief, that Asa Dresser, a short time before his decease, made a writing, not of a testamentary nature, and not executed conformably to the law for the testamentary disposition of estates, by which he undertook to provide for placing in the hands of the respondents certain valuable securities, amounting, at par value, to the sum of ten thousand dollars, to be held by them in trust for his children, together with the interest accruing thereon, upon certain conditions named in the writing. The complainants say they do not know whether that writing was, in fact, a valid creation and effectual declaration of trust, or whether it is capable of taking effect, nor, of their personal knowledge, that such a writing was, in fact, made; because they have never seen it, and do not know its contents otherwise than from the representations of the respondents. Nor do they know at what time, or under what circumstances the respondents came into possession of the securities referred to.

But they aver that the respondents do, in fact, hold such securities of the value stated, which were the property of Asa Dresser, and claim to hold them as trustees under the writing

in question, and represent themselves as having that writing in their hands.

Complainants further allege, that the respondents have for a long time—but how long is unknown to the complainants—collected and received the income of said securities to the amount of six hundred dollars annually, which, unless expended by them, is now in their hands, and held by them subject to whatever trusts were created by the writing aforesaid.

That the respondents, for a long time, designedly and wrongfully concealed, from all of the complainants, all knowledge of the fact that they held those securities, or claimed to hold them as trustees, or that any such writing was in their hands.

That, before the bringing of this bill, the complainant Haines, in his capacity of administrator and trustee, demanded of the respondents whether they held such securities, and upon what grounds they held them, and what was their form and tenor,—to which demands, the respondents, with hesitation and reluctance, at length admitted that they did so hold securities to the amount of ten thousand dollars, and claimed to hold them by virtue of a written paper signed by Asa Dresser, and stated that the securities were the bonds of the city of Portland in the sum of five thousand dollars, and a like sum in bonds of the Androscoggin and Kennebec Railroad Company. The said Haines then demanded of them that they should deliver these securities to himself as testamentary trustee. With this demand they refused to comply, and have ever since neglected and refused.

Complainants further allege, that the respondents have never given any security, in any manner, for the proper discharge of their alleged trust, or of any trust respecting those funds; that they have never rendered any account thereof to any person or tribunal; that they have not invested or secured the accruing income of the funds, nor applied it, in any manner in furtherance of the alleged trust, but have caused and suffered it to be applied to their own use.

The bill avers that these acts, omissions, concealments and neglects of the respondents, are against equity and good con-

science; and in violation of the law respecting trusts and the duty of trustees, and that these funds are greatly in danger of waste, misapplication and loss.

The complainants say that they have no adequate remedy at law in the premises, and pray the Court to take cognizance of the same in equity; to the end, that after due proof, suitable order and direction may be given, by authority of law, for the proper management of said trust, if any trust was effectually declared by said writing, and is capable of being executed; if not, or if the respondents shall be found to have violated any trust reposed in them, or forfeited any privilege claimed by them, that the funds and securities may be decreed to be placed and disposed of, so that the intentions of the donor, whether as evidenced by his last will and testament, or by any other lawful writing, may be carried into effect, according to law.

The bill prays that the respondents may be held to make a full disclosure of all the grounds of their claim to hold said securities and funds, and of all the writing under which they pretend to hold the same, and of all the circumstances under which the securities and the writing came into their hands; that they be required to render a full and specific account of the bonds and securities and of the income thereof and application of the same, and for all such other and further relief as complainants may be entitled to. And prays for process, &c.

In their joint and several answer, the respondents say, that Asa Dresser was brother of John Dresser, one of the respondents, and uncle of John W. Dresser, the other; that he regarded respondents with great friendship, and had confidence in their integrity and business capacity; that, for a long period before his decease, he was weak in body, though of sound mind; that during this period, while confident that he must finally yield to the disease with which he was troubled, he was in the habit of consulting these respondents in regard to his property, and confided to them his views with regard to the intended disposition thereof. That on the 5th day of

November, 1852, he wrote from Philadelphia to the respondent, John Dresser, a letter duly received by the latter.

(This letter, disclosing the manner he intended to dispose of his estate, was copied and made part of the answer.)

The answer further alleges, that the said Asa did substantially make the arrangements contemplated in this letter, and subsequently, in January, 1854, he, then living in Saco, requested respondents, one or both, to come to Saco and see him; that the respondent, John Dresser, was not able to go, but the respondent, John W. Dresser, did go, and arrived there on or about the twenty-first day of that month.

The respondent, John W. Dresser, severally answering, says, and the other respondent believes it to be true, that the deceased then and there called John W. Dresser and one Daniel Dresser, who is since deceased, into his private room, and there, without the presence of any other person, addressed John W. Dresser, in substance, as follows:—

"I wish to commit to you and your father (these respondents) a trust. I wish the fact of this trust to be kept from the knowledge of any one but my brother Daniel and yourselves. Brother Daniel will go to the bank with you and deliver to you certain bonds and scrip, which I place in your hands to do with as you would with your own. This paper, which I give you, will tell you what is to be the final disposition of the fund. I am anxious that my children shall not feel that they can live without effort on their part. I wish them to know nothing of this fund, so that they may acquire habits of economy and self-reliance, which they might not do after my death, if they had control of present means or even knew of the existence of this fund. I have fixed the age at which they will be entitled to receive the fund, as I have, in order that after their experience in an economical mode of life, they would be the better prepared to make a proper use of the means which will then be ready for division."

That the said Asa Dresser then delivered to John W. Dresser, the respondent, a writing of which the following is a copy:—

"$10,000. "Saco, January 21, 1854.

"Having confidence in my brother John and his son, J. W. Dresser, as friends, that they will take charge of a certain amount of property for safe keeping, consisting of city bonds or scrips, for the benefit of my children, when the youngest child is thirty years old, the amount may, with all the interest, be paid over to them in equal amounts. Said sum is now ten thousand. My brother John and his son, J. W. Dresser, shall be the trustees for the present. Daniel Dresser, of Saco, to be added when he thinks it consistent with his other responsibilities. "Asa Dresser.

"John Dresser, Castine,—John W. Dresser, Castine."

The answer further alleges that, at the time Asa Dresser delivered this written paper, he delivered to John W. the key of a trunk, in which he stated the bonds or scrip to be, in the vault of the Manufacturers' Bank, in Saco; that Daniel Dresser then accompanied John W. to the bank, at the request of Asa, and that John W. received the trunk alluded to, which was opened by him and found to contain five thousand dollars (at par) of the city of Portland scrip, and a like sum (at par) in bonds of the A. & K. R. R. Co. The former matures Nov. 30, 1865; the latter April 1, 1862, both payable to bearer, as will appear upon exhibit.

That after erasing the name of Asa Dresser from the trunk and placing thereon, "to the order of John and John W. Dresser," the trunk with its contents were again placed in the vault of the same bank, where they remained until January, 1858, when they were removed to Castine to save the trouble of having the securities so far from the residence of respondents.

The answer further alleges that, in compliance with the injunction of Asa Dresser, they did not inform the complainants, his children, of the fact of the trust, but that they have never used any improper means to conceal the knowledge of it from any person.

That as soon as respondents were aware that the complainants had obtained some knowledge of the trust, and that

their inquiries were not caused by a suspicion which might be quieted without divulging what the father had desired to be concealed, the respondents freely imparted to the complainants all the facts in regard to the trust.

That they accepted the trust, and have held the funds solely at the request and to carry out the wishes of the father, having simply a desire to discharge the duties imposed on them, when they received the trust; that they have not felt authorized to deliver up the funds, upon the request of the complainants or either of them, because Asa Dresser did not contemplate such an act, and the funds were not delivered to them for such a purpose.

That Horatio, the youngest child, will not arrive at the age of thirty years, as they believe, prior to the year 1870.

That they have never been requested by the complainants, or any one in their behalf, to furnish any bond to secure the performance of this trust, nor has the want of a bond, or fear that respondents might become irresponsible, ever been suggested as a reason why the fund should not remain in their hands.

That if any bond or security for the due performance of the trust had been desired from them, they would have furnished it, and they now offer to furnish the same, if, in the opinion of the Court, it is necessary or desirable.

This case was argued at July Term, 1859, by *Barnes & A. Haines*, for complainants.

The contest in this cause, arises upon the matters disclosed in the answer.

Whether upon the case stated in the bill, or in the answer, it is necessarily within the cognizance of the Court, as a Court of Equity and trusts. *Morrice* v. *Bishop of Durham*, 10 Vesey, 537; *Raynham* v. *Trustees, &c.*, 23 Pick. 148.

The title of the respondents must be made out either on the ground of *donatio inter vivos*, including declaration of trust *inter vivos* — or of *donatio mortis causa*.

I. Not a *donatio inter vivos*, because the whole case shows

that the transaction was not to take effect immediately and absolutely, without reference to death.

Plainly a *post mortem* disposition, the answer so admits and avers; so avowed in the Philadelphia letter, and the answer says that the design thus avowed, was substantially carried out in the actual transaction.

The arrangement was revocable, "ambulatory." *Dole* v. *Lincoln*, 31 Maine, 422.

II. Not a *donatio mortis causa*, because, though resembling this in some respects, such as expectation of death, and reference to contingency of death; yet there was no such gift to any one, as the law requires.

The gift was not so made as to be absolute to any one upon the death of the donor.

The donor intended to retain the *dominion* of the thing after his decease.

No gift to the trustees, because the terms are merely, "take charge," "for safe keeping."

No gift to the children, because the fund was not to belong to them, "*presently, as their own property*," upon the death of donor, but was still to be controlled by authority of the donor.

Precisely and peremptorily so determined in the case of *Dole* v. *Lincoln*.

There is no definition of *donatio mortis causa*, and no adjudged case in the books, which permits the subject to be placed in the charge of one person, to be held and managed by him, for another, according to rules and conditions laid down by the alleged donor.

III. Cases of mere agency, the gift placed in the hands of a third person, for mere delivery to the donee, are familiar, and consistent with the definition, and easily distinguishable from this case.

IV. Cases are found, where a person, into whose hands the gift comes, is said to be "trustee" for another; such as *Borneman* v. *Seidlinger*, 21 Maine, 189; *Howard* v. *Menifee*, 5 Pike, 668, and other like cases, where the trust relation

arises by implication of law, from the position of other parties, not from any purpose or declaration of the donor.

V. A proposition is found stated, Hill on Trustees, p. 66, to this effect;—"it has been decided, that a *donatio mortis causa* may be made to the trustee for a particular purpose."

The case cited is *Blunt* v. *Barrow*, 4 Brown's Chancery Cases, 75; and a later edition of Hill cites *Moore* v. *Darton*, 7 Eng. Law and Eq., 134.

See also the case of *Blunt* v. *Barrow*, as reported in 1 Ves. jr., 546, and *Hills* v. *Hills*, 8 Mees. & Wels. 401.

The cases cited in Hill, do not support his text.

The case in Mees. & Wels. upon its own facts, is no authority, those facts not requiring any such doctrine; and its reference to the case of *Blunt* v. *Barrow* is undiscriminating.

In the two cases above cited, where the Courts speak of a "condition" or "trust" coupled with the gift, the facts do not show any thing, as a *condition* imposed by the donor, but only the statement of a *motive*, inducing the gift.

No other cases are found, where any such doctrine is even mentioned.

VI. A correct proposition under this head appears to be this:—if one wishes to continue his own dominion over his own property after his decease, he must do it either by an act in proper testamentary form, or by an act of disposal which is irrevocably completed while he is alive. There is no intermediate third mode of doing this, by *donatio mortis causa.*

VII. The transaction in question cannot be upheld as a declaration of trust *inter vivos*, because, manifestly, upon the evidence the case was not so. As before stated, the whole thing was contingent upon death by that sickness. This evident contingency of the gift repels that hypothesis of the case.

VIII. To uphold this transaction, would violate the rule of "the utmost caution." *Dole* v. *Lincoln.*

The suspicious circumstances of the case require this rule to be rigorously observed.

These circumstances are, not merely the sickness, for coun-

sellors and friends might be present, as, one week before, when the will was made, but the absence of all disinterested witnesses; the large amount of property thus alleged to be disposed of; the alleged injunction of secrecy to be maintained for so long a time; the actual injustice to the wife; the practical disinheritance of the children, and the omission of all securities and safeguards.

The rule of "the utmost caution" also exacts the most ample proof, not merely uncontradicted testimony, but evidence, consistent with all probabilities, and sufficient to overcome, clearly and satisfactorily, all contrary presumptions.

Here, the whole case depends upon the testimony of one witness, deeply interested as a party.

IX. Important incidents of the transaction are unjustifiable, and unlawful, in the sense that the courts of law will lend no aid, in upholding an act so characterized.

Instead of *secrecy*, the policy of the law demands publicity in death bed dispositions of property.

The alleged *motive* towards the children cannot be defended, and the Court will not execute such a purpose. The Court will pronounce it the duty of the parent, not to play tricks upon his children, but so to educate them, while he lives, that they can bear whatever fortune, much or little, his death may cast upon them.

X. If the transaction was invalid, the present trustees hold, only "for those who take under the disposition of the law," (Lord Eldon, in *Morrice* v. *Bishop of Durham, ubi supra,*) and must be decreed to place the fund in the hands of the legal representative.

XI. The situation and conduct of the respondents require a decree against them.

1. A principal part of the alleged design of the deceased has failed by the death of Daniel Dresser. The deceased evidently sought to place the whole affair under the watch and control of Daniel, though affecting (and for an evident improper purpose) to postpone his nominal function as trustee.

Whether he failed through ignorance, or the infirmity of

disease, to provide a substitute, is immaterial. It results, that the fund is not now where the deceased intended to place it, and the alleged trust is incapable of being executed, as designed. The respondents hold the fund, therefore, only "under the law," not under the writing, which has become ineffectual.

2. The mere willingness of the respondents to accept such a trust, under such circumstances, should be rebuked, so that the voice of the law may hereafter deter the perpetration of such improvidence and injustice, in the secrecy of a death chamber.

3. The actual falsehood, voluntarily practiced by the respondents in reference to this fund, shows them unworthy of any trust. Nor can the allegation that secrecy and deception were enjoined upon them, as a duty of the trust, relieve their position. The Court cannot decree that falsehood may be lawfully enjoined, or knowingly committed.

4. When the secret was detected, it was the duty of the respondents, at the least, to submit their case voluntarily to the Court in equity, for its direction. Their refusal to do so, or to surrender the fund except upon compulsion, shows the inequitable design, with which they hold their position and purpose.

5. Their long omission to invest or secure the accruing income is a direct violation of the first duty of a trustee. It is nothing to say that they are pecuniarily responsible, for, under such circumstances as this case discloses, liability of a fund to misapplication and loss is a conclusion of law, however rich the trustee may be. They are not merely without bond and without security, but, in their hypothesis of the case, they are not accountable to any tribunal, nor removable by any power. At least, nothing but the chance detection of their secret has brought them within the reach of this Court. In the next case of like impression, it will only need the good fortune of escaping detection, to give to the pretended trustees an utter immunity.

By statute, a testator may exonerate his testamentary trus-

tee from giving bond, subject however, to the better judgment of the Probate Court. But he cannot exempt him from the liability to account, nor from the liability to be removed.

XII. The whole policy of our law is contravened, and the constitution and function of the Courts, for the administration of estates, are neutralized and abrogated, if *post mortem* trusts are withdrawn from the convenient and prompt jurisdiction of the Court of Probate, and forced to be transferred to the cumbersome and dilatory procedure of a court of general equity.

And if such *post mortem* trusts as this can be fabricated in secrecy, and carried along at the pleasure of the trustees, unknown to all but the trustees themselves, for a series of years, distinctions of jurisdiction are not worth mentioning, for the whole body of the law for administrations and testamentary trusts is practically repealed.

Shepley & Dana, for the respondents.

Asa Dresser, a man of independent fortune, delivered certain securities to the respondents, to be held by them in trust for a particular purpose, and finally distributed under certain conditions.

The distributees claim the securities before the conditions are fulfilled; they claim as heirs, on the ground that the trust is void.

If the donor could make the above disposition in favor of a stranger, he could make it in favor of his own heirs. He had the absolute property in the fund, and could annex to its disposition such conditions (under limitations to be hereafter noticed) as he saw fit to impose.

I. He made a good gift *inter vivos* to his children, and delivered it to the respondents to hold in trust for the donees. The delivery was complete, and sufficient of itself to pass the property. The direction as to the mode of distribution does not deprive the gift of its legal character. Immediately upon delivery the donor's dominion over the fund ceased.

A gift of this nature is often made under circumstances

similar to those made on the expected approach of death; and, in *Marston* v. *Marston*, 1 Foster, 491, such a gift is expressly upheld.

II. If not a valid gift *inter vivos*, it is still a good *donatio mortis causa.*

Every thing which must concur in order to render such a gift valid existed in fact at the time of the transaction.

The donor might have legally bestowed these securities absolutely upon these respondents, if he had seen fit; and there is no rule or principle of law to prevent his accompanying the gift with directions as to the final disposition of the fund.

No case can be found where the principle contended for by the complainants has been established.

On the contrary, in many cases where gifts coupled with conditions have been called in question, the courts have sustained them.

It is well known, that for a long time gifts *mortis causa* were looked upon with suspicion, and those were formerly held invalid which are now sustained. It was only after repeated decisions to the contrary, that the House of Lords, on appeal, decided that choses in action, bonds, &c., are proper subjects of such gifts.

While such was the tendency of the courts, however, the case of *Blount* v. *Barrow* was decided in 1792. This case has been relied on ever since, by Judges not apt to overlook the point adjudged, as *establishing* the doctrine that a gift *mortis causa* may be coupled with a condition.

The case is not very fully reported, either by Brown or Vesey; but the language of the Court was, that the gift being for a particular purpose did not prevent its being a good *donatio mortis causa.*

In that case, the evidence as to the terms of the donation, was derived from the answer of the donee. This answer divulged the fact that the gift was made for a particular purpose; and, if that had been fatal, then the Court would hardly

have directed an issue of law to find whether it was made in expectation of the approach of death.

The actual state of the law in regard to donations like the one at bar is stated by Story (1 Eq. Jur. § 607, &c.) as follows:—"According to the civil law, a donation *mortis causa* may be made subject to a trust or condition. *Eorum quibus mortis causa donatum est, fidei committi quoque tempore potest....* The point does not seem to have been directly established in modern equity jurisprudence; *but the manifest inclination of the Courts is to sustain such a donation although it is coupled with a trust or condition.*" [See 1 William's Executors, &c. 655,* ed. of 1849.]

In *Hambroke* v. *Simmons*, 4 Russ. Ch. R. 25, there was a gift of a mortgage debt, which the donee was to hold and not collect principal or interest till the death of the donor, and, at the decease of the donee the security was to go to her children. Counsel argued in regard to the effect of the condition, which, if illegal, would of itself have been fatal to the gift; but Sir John Leach, Master of the Rolls, after commenting on the evidence, and stating that there was great doubt as to the *facts*, directed an issue in the following words—"whether the testator made any gift by way of *donatio mortis causa* of the mortgage debt due to him from James Pollard."

As in *Blount* v. *Barrow*, this issue would have been unnecessary, had the admitted *trust* rendered the donation void.

The case of *Marston* v. *Marston*, (*ub. sup.*) was a case where certain notes were placed in the hands of the *executor* of the donor, the proceeds of which were to be applied to the support of the donor's child. The Court held that, after the delivery, the executor was trustee for the special purpose designated, and sustained the gift.

Subject to the rights of creditors, a person is allowed to dispose of his property by will, to whom he pleases; or he may bestow the whole upon any one by a gift to take effect presently, or at his decease. The books are full of cases where donations of the latter description are delivered to persons other than the donee. The donor directs the gift to

be delivered at his death. Why should he be deprived of the right to say that the gift shall not be delivered within a period fixed by himself.

There is no limit fixed by law upon the right of a testator to postpone the time when his legatees shall enter on the enjoyment of his bounty. Public policy, which is opposed to accumulation of enormous fortunes by accretion of interest, demanded some limit to *that* postponement, and the want was met by Statute 39 and 40 Geo. III, c. 98. The disposition by gift does not differ, save in its mode of proof, from a testamentary disposition; and no reason can be adduced why, the proof being satisfactory, a gift should not be enjoyed upon terms as well as a testamentary bequest. In the opinions of the Judges of the Exchequer in *Hills* v. *Hills*, 8 M. and W. 401, (since Story wrote Eq. Jur.) the question is very aptly put.

The ingenuity of counsel is exercised in an attempt to show that the Judges of that Court, which stands as high as any in the world, not only mistook the nature of the case before them, but failed to discover the simple point decided in the case relied on by them as authority in determining that cause.

We have already alluded to the reasons why the decision of the Court in *Blount* v. *Barrow* is an actual acknowledgment that a donation *mortis causa* can be made for a particular purpose.

It remains to say that *Hills* v. *Hills* was a case in the determination of which *Blount* v. *Barrow* was directly in point. In that case, the testator, being involved in a suit, gave certain India bonds to the respondent for the *purpose of prosecuting that suit.* The fund was placed in the hands of the donee for a particular purpose. It is no answer to the facts, to say that the prosecution of the law-suit was simply the motive of the gift. The question is not one of motive, for to all gifts there must be some motive, but whether a thing given for a particular purpose or on certain conditions, can be held on those conditions or for that purpose.

Counsel says the Court of Exchequer overlooked the fact, that the donee of these bonds was the residuary legatee of the donor and would have thus received the bonds. But that does not meet the case. If the donee, as legatee, would have received the bonds under the will, this would not have rendered it obligatory on him to expend the amount in the prosecution of a suit in which, up to the exhibition of the will, he had no interest. The very fact that, while such legatee, the Court considered him entitled, and so held him obliged to use the fund for the purpose expressed by the donor in his gift *mortis causa* and did *not* allow him to hold it as a residuary legatee under the will, is conclusive on the point, that a donation may be made for a particular purpose, or in other words upon condition.

Courts may be said to have gone to this extent, that in gifts *mortis causa* the donor may designate the purpose for which, and the time when, his bounty is to be expended. In addition to the cases cited, see *Drury* v. *Smith*, 1 P. Wms. 404; *Tate* v. *Hibbert*, 4 Br. Ch. Rep. 286*; *Wells* v. *Tucker*, 3 Binn. 366.

Dole v. *Lincoln*, cited by complainants, did not turn upon any such question as is presented here. The counsel and Court both took it as past dispute that a *donatio mortis causa* could be made in trust, and the whole question in that case, was, whether the trust were or not void for *uncertainty*. The opinion of the Court, in declaring the affirmative, *assumed* that such a donation could be coupled with a proper trust. The Court do not there lay down the rule of "utmost caution" as quoted by counsel. The language made use of referred to gifts to charitable uses merely, and in the cases there cited all the donations were sustained.

Counsel attempts to raise a distinction between the effect of a gift *inter vivos* and *mortis causa*. It is virtually admitted, and indeed is indisputable, that an absolute gift of the first description may be made upon such terms or conditions as the donor sees fit to impose. Those of the second description *are also gifts inter vivos, subject to be defeated only by the*

donor's recovery. Gifts of the first description are perfected by tradition; of the second by tradition followed by the decease of the donor; when both these things concur, the dominion of the donor is divested. If the gift be upon trust, the property in the thing rests between the trustee and the beneficiary, as in other cases of trust. That the trust was declared on the donor's death bed, or in expectation of the approach of death, does not alter the case.

This is in the nature of a bill of discovery and relief.

The answer sets out fully the nature of the gift, and the grounds on which respondents claim to hold the fund. That answer is not contradicted, and conclusively establishes the existence of the facts as stated. Adams' Equity, 363*; 3 Greenl. Ev. § § 284, 288.

If Asa Dresser had the legal right to make the gift disclosed, neither his *motives* nor the circumstances under which the gift was made or the trust carried out justifies the interference of the Court.

The answer shows that Dresser had confidence in the respondents; that, for some years prior to his death, he had contemplated placing certain funds in the hands of respondents in trust; that, on the 21st of January, 1854, shortly after his will was made, the testator delivered to them securities to the amount of $10,000, at par value, to be managed by them as they would do with their own, and finally divided among his children; that the testator enjoined secrecy on them, that his children might be kept in ignorance of the amount, lest the expectation of this fund, to be added to what they came into possession of under his will, might not induce those habits of economy he desired to inculcate.

The case shows that he left property beside this, which in his opinion was sufficient for their support, though one of the plaintiffs preferred to have their "property all together," and thought this fund needed for their comfortable maintenance.

It will be seen that all the securities become payable before they are to be distributed under the terms of the instrument

declaring the trust; the respondents were directed to do with the fund as their own until the time for distribution came, and then deliver principal and interest to the heirs.

There is nothing in the disposition of this property which would have authorized the Court to interfere, had the declaration of trust been more formally drawn. The testator had the right to say what portion of his estate his children should enjoy immediately upon his decease, and as to what portion their enjoyment should be postponed. A more formal declaration would have availed simply because it would have been satisfactory evidence to the Court of his intention.

The uncontradicted evidence of intention here is also sufficient.

The Court is not to look behind an instrument, making an otherwise legal and proper disposition of property, to ascertain what causes or motives induced that disposition; and, here, when the Court finds that Asa Dresser placed property in the hands of these respondents, to be held by them for a certain time and then distributed, it makes no difference what motive caused this act, if *that act was one he had a legal right to do.*

If he was mistaken in thinking it would be for the benefit of his children to be kept in ignorance of his act, that mistake can have no reflex power sufficient to defeat the act itself.

The respondents did not seek this trust. It was imposed on them by a relative, who had sufficient confidence in their integrity to place it in their hands to do with as their own until the fulfillment of the time fixed by himself. They were not required by him to invest the interest from year to year, but they are ready to account for it, and profess themselves ready to give what security the Court may require for the due performance of the trust.

The intention of the donor is clear. The respondents desire to carry it out. It is for the Court to say whether that intention shall yield before the impatience of the donees.

Barnes replied.

The opinion of the Court was delivered by

DAVIS, J. — Asa Dresser, the father of the complainants, a few weeks before his death, delivered to the respondents a writing of which the following is a copy: —

"$10,000. "Saco, January 21, 1854.

"Having confidence in my brother John and his son J. W. Dresser, that they will take charge of a certain amount of property for safe keeping, consisting of city bonds or scrips, for the benefit of my children, when my youngest child is thirty years old, the amount may, with all the interest, be paid over to them in equal amounts. Said sum is now ten thousand. My brother John and his son J. W. Dresser, shall be the trustees for the present. Daniel Dresser, of Saco, to be added when he thinks it consistent with his other responsibilities. "Asa Dresser."

At the time this writing was delivered to the respondents, Asa Dresser said to them, that he wished them to do with the property as they would with their own; and he thereupon delivered it to them. They were enjoined from divulging the fact to his children, until the time when the whole amount should be paid over to them according to his written declaration aforesaid.

The complainants, having discovered the transaction, though the time for the distribution has not yet arrived, now seek to recover the property, on the ground that such disposition of it was illegal and invalid. And it is argued that it was not a gift *inter vivos*, to the trustees; nor valid as a gift *causa mortis*, because made *in trust*.

This last proposition has been ably discussed; and the counsel for the complainants has commented at some length upon the case of *Blount* v. *Barrow*, 4 Brown, C. C., 75, and subsequent cases in which it has been cited. The argument is, that in none of these cases has a gift *causa mortis, in trust*, been held to be valid. But if this is so, it does not sustain the proposition of the complainants. It simply results that the question is still unsettled. For we do not know of any case where such a gift has been held to be *invalid*.

The law has never been so strict in regard to the disposition of personal property as of real estate, in expectation of death. Infants could make testaments of chattels, though not of lands. 2 Blacks. Com., 497. And, at common law, it was not necessary for such testaments to be in writing. 4 Kent's Com. 516. Gifts *causa mortis* are a sort of off-shoot of this principle, surviving the statute prohibition of verbal wills. And though once looked upon with disfavor, and still carefully scrutinized by the Courts, when they are found to have been made in good faith, they should be upheld.

Gifts *inter vivos*, and gifts *causa mortis*, differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise the same principles apply to each. And as the former may be made *in trust*, we can see no reason why the latter may not. The learned counsel has not shown us where such a gift infringes on any decided case, or on any established principle of law. Nor is it objectionable from considerations of public policy. The danger of fraud and deception is certainly less than in the case of a gift to the donee in his own right. If the gift is *in trust*, the donee has little, if any, personal interest in sustaining it. And when such a gift is proved to have been made in good faith, and the trust is definite, so as to be enforced in a Court of Equity, we are unable to perceive why it may not be upheld.

In the case of *Dole* v. *Lincoln*, 31 Maine, 422, the gift was held invalid, not on the ground that it was *in trust*, but because, if it was a gift, which was doubtful from the testimony, it was for a trust so indefinite and uncertain that it could not be executed.

But we do not think it is necessary to a determination of this case that we should come to the conclusion that a gift *causa mortis*, in trust, may be valid. For, if the transfer in this case was a gift, it was a gift *inter vivos*. The donor was sick, probably with no hope of recovery. This clearly was the reason why he made this disposition of a part of his property, after having made his will a week previous. Assum-

ing it to have been a gift, it was made in anticipation of death,—*but it was not conditioned upon that event.* There is no intimation, either in the writing, or in the oral testimony, in regard to the transfer, of any expectation or right on his part to reclaim the property, under any contingency. Nor is such a gift, to children, accompanied by delivery, revocable. *Smith* v. *Smith,* 7 C. & P. 401.

And, though no words of gift are in the writing, it is to be construed according to the intention of the donor. And, giving to the language its natural meaning, under all the surrounding circumstances of the case, we cannot doubt that it was a gift, *in trust,* for the benefit of his children. The *res gestæ* corroborate this construction. The donees are called "trustees." The property was delivered to them, so that they had entire dominion over it. They were instructed to do with it as they would with their own, until the time of final distribution. The trustees, and the *cestuis que trust,* are all named in the writing, which is signed by the donor; the objects are definite; and the time and manner of the final disposition of the fund is fixed with certainty. We therefore think the trust should be upheld according to its terms. It violates no rule of law or of public policy; and the final distribution will be made at the same time, and on the same principles, as it would be by the administrator, under the will, if we should grant the prayer of the complainants.

But we think that the safety of the complainants requires that the trustees should furnish a bond to the *cestuis que trust,* for the performance of the trust, as they offer to do. We also think that it was the duty of the trustees, using the property as their own, to invest the accruing interest from year to year; and, so far as they have neglected to do it, after a reasonable time, they should be held personally responsible. A decree may therefore be made, that the funds may remain in the hands of the respondents until further order of Court, upon their filing a bond as trustees, with sureties to be approved by some one of the Justices of the Court, with the condition that they shall faithfully execute the trust, invest

the interest annually as it shall be paid, and account for the use of any that they have neglected to invest, and finally pay over the whole, principal and interest, according to the terms of the trust, subject to such compensation as may be allowed them by this Court for their services. And, under the peculiar circumstances of this case, we order that neither party shall recover costs.

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

PORTLAND & OXFORD CENTRAL R. R. CO., *Petr's, versus* THE GRAND TRUNK RAILWAY CO. AND ATLANTIC & SAINT LAWRENCE RAILROAD COMPANY.

In a proceeding under the statute of 1854, c. 93, relating to connecting railroads, the actual possession of the railroad by the petitioners, under claim of title, with no evidence of adverse claim, is sufficient evidence of their title and of the organization of the company, to entitle them to the relief which the statute was designed to afford.

Such a proceeding is not analogous to a suit at common law; and, where a railroad company had leased its road to another company, the lessors and lessees may be joined as respondents; and, if the petitioners are entitled to relief against either, commissioners may be appointed, and the Court will afterwards determine against which the award should be finally made; or, whether against both.

The sale of the Buckfield Branch Railroad to the Cumberland & Oxford Central Railroad Co., which was authorized by a special statute of 1857, invested the latter company with all the rights and immunities of the former, including the right of connection with the Atlantic and Saint Lawrence railroad. And the right to *connect* is not lost to the company purchasing, in consequence of its being empowered by its charter to make a road *across* the A. & S. road. But when the road shall be actually made across and operated, the right of connection will no longer exist.

A statute authorizing the Court, by commissioners appointed therefor, to determine judicially what are the mutual rights and obligations of any two railroad companies, authorized by their charters to connect their roads, is clearly within the just limits of legislative power. And as the statute of 1854 was not intended to go beyond this, it is remedial only, and binding upon existing corporations.

Portland and Oxford Central R. R. Co. *v.* Grand Trunk Railway Co.

EXCEPTIONS from the ruling of DAVIS, J.

The Portland and Oxford Central Railroad Company in their PETITION represent, that said corporation is the grantee of the Buckfield Branch Railroad, with all the privileges pertaining to said road under its charter, and that the said Buckfield Branch road has become a portion of said Portland and Oxford Central Railroad, and connects with the Atlantic and St. Lawrence Railroad, (whereof the Grand Trunk Railway of Canada has become the lessee,) in the town of Minot. That said companies have failed to agree upon terms of connection, or the rates, at which passengers or merchandize, coming from the one, shall be transported over the other, and that the place of connection, prescribed by said lessees of the Atlantic and St. Lawrence road, is distant from the place of actual junction of the two roads, and inconvenient and burdensome to the petitioners.

They pray for the appointment of commissioners to determine and award upon the matters of disagreement, &c.

This petition, (which is based on the statute of 1854, c. 93,) was returnable at October Term, 1857, when the Grand Trunk Railway appeared and filed an answer. Whereupon the petitioners moved for leave to amend, by making the Atlantic and St. Lawrence Railroad Company a party respondent, which motion was allowed; and, on a subsequent day of the term, the last named company filed its answer.

The case was heard at the same term. The nature of the respondent's answers, and of the evidence produced by the parties, may be gathered from the bill of exceptions and the opinion of the Court.

Upon the point of organization of the Portland and Oxford Central Railroad Company, the petitioners adduced in evidence the charter of the company; also charter of the Buckfield Branch Railroad Company; book of records of organization and proceedings of company and of directors, which book was admitted, though objected to, on proof that it was the book of records of the corporation, and of the president and directors. Also, notices in two public newspapers.

Upon the point of conveyance or transfer of the Buckfield Branch Railroad to the petitioners, they exhibit in evidence, records of Portland & Oxford Central Railroad, doings of corporation and of directors; deed from Smith to said corporation dated, August 10th, 1857; also deed from Parris to Smith, Oct. 29th, 1849.

Smith testified, that he was in possession of Buckfield Branch Railroad, under his deed from Parris, and that he transferred possession of said road, with all its property and franchises to the Portland & Oxford Central Railroad Co., on the delivery of his deed to them.

The respondents objected to the legal sufficiency of the evidence offered on these two points.

The presiding Judge ruled, that the organization of the petitioners was sufficiently made out for the purposes of this case, by the evidence adduced.

He also ruled that a sufficient legal conveyance was shown, for the purposes of the present proceeding, to sustain the allegation of the petition, that the petitioners were grantees of the Buckfield Branch Railroad line, with its privileges, &c.; that the conveyance, having been made by Smith, the mortgagee, and he being shown to have been in possession as such, that possession and conveyance were sufficient for the present proceedings, as against parties not claiming any title.

He also ruled that the institution of this proceeding was a sufficient evidence of failure to agree upon terms of connection, as alleged in the petition, taken in connection with other evidence in the case, [contained in sundry letters and telegraphic communications.]

He further ruled that, by the terms of the Act of March 29, 1853, relied upon by the Atlantic and St. Lawrence Railroad Company, in its answer, this proceeding could be sustained against them as lessors; that the lessees are to be regarded as the servants of the lessors, and that terms of connection could be legally enforced against the lessees only through the means of process against the lessors.

He further ruled that the Atlantic company is subject, notwithstanding the provisions of its charter, to the provisions of the Act of 1854, c. 93, though not liable to have terms imposed inconsistent with said provisions of its charter.

And upon the point taken in the answer of the Atlantic company, that the Portland and Oxford Central Railroad, whenever built according to its charter, would be an independent crossing road, and not a connecting road with the Atlantic line, and therefore, not entitled now, or at any time, to maintain any such petition for terms of connection with the latter, the presiding Judge ruled and held that if the Portland and Oxford Central Railroad Co., should build and use conjunctively with the road on the east side of the Atlantic and St. Lawrence Railroad any portion of its line, on the west side of the Atlantic road, it would then cease to be entitled to any connection with the Atlantic line; but that until any part of it should be built on the west side of the Atlantic line, it is entitled, by its possession of the immunities of the Buckfield Branch Road Co., to a connection with the Atlantic Road, on its east side.

The respondents contended, that if a legal conveyance and transfer of the Buckfield Branch line to the petitioners were made out, such a conveyance, extinguished all the immunities pertaining to the Buckfield Branch line, and vacated the charter of that company, and that the Portland and Oxford Central Railroad Company, having no right of connection by any terms of its own charter, could not maintain this process against either of the respondents. But the presiding Judge held and ruled that the conveyance in question, did not extinguish the alleged immunity of the Buckfield Branch line but conveyed it unimpaired to the petitioners.

The presiding Judge, upon the whole case, ordered an entry to be made upon the docket:—"Prayer of the petitioners granted. Commissioners to be appointed."

To which order, and to the several rulings of the presiding Judge, the respondent corporations excepted.

The questions presented by the bill of exceptions were elaborately argued by

F. O. J. Smith, for the petitioners, and by

Barnes, for the respondents.

The opinion of the Court was delivered by

DAVIS, J.—This is a proceeding under the statute of 1854, c. 93, relating to connecting railroads. The petitioners allege that they own a railroad in operation between Buckfield and Minot, there connecting with the railroad of the respondents, and that said companies have failed to agree upon terms of connection; wherefore they pray that commissioners may be appointed by this Court to determine and award upon the matters of disagreement. The parties were heard at *Nisi Prius*, and commissioners were ordered to be appointed. In arriving at that result, there were several rulings to which exceptions were taken, which we will notice in their order.

The first objection is, that the organization of the petitioners, and their title to the railroad in their possession, are not sufficiently proved. These are mainly questions of fact; and a part only of the evidence is reported. The first meeting of the corporators appears to have been regularly called, at which the charter was accepted, and the company organized. And they subsequently went into actual possession of the Buckfield Branch Railroad, under a deed from F. O. J. Smith, a mortgagee then in actual possession; and the company have ever since operated the road as their own. What other evidence of title there was does not appear; but the respondents claim no title, and the case does not show any error in the ruling that the organization and the title of the petitioners were sufficient. Actual possession under claim of title, with no evidence of any adverse claim, would seem to be all that should be required to entitle a company to the relief which the statute was designed to afford.

The ruling, that the parties had failed to agree upon terms of connection, was a matter of fact exclusively; and if sub-

ject to revision, we think it was warranted by the evidence in the case.

Both of the companies that have been notified have appeared and answered to the petition. They have both an interest in the railroad, one having a leasehold estate, and the other the reversion. This proceeding is not analogous to a suit at common law; but it may be sustained if either of the companies is liable. The lessees have actual possession of the railroad; and, as they have property within this State, and agents who reside here, there are many reasons why they should be held responsible. And the statute authorizing the lease provides that the liabilities of the lessors shall remain the same as before. But it is not necessary for us to determine, at this stage of the proceedings, against which of the companies, if either, an award shall finally be made; or whether against both. In either case, it was proper for commissioners to be appointed.

The petitioners are authorized by section ten of their charter, "to purchase the franchise and all the property of the Buckfield Branch Railroad, with all the privileges, rights of way, and other immunities whatsoever pertaining to said road." *Special Laws of* 1857, *c.* 122. And it is further provided in the same section, that, from and after such purchase, "the Buckfield Branch Railroad shall merge in and become a part of the Portland and Oxford Central Railroad; and the charter hereby granted shall, in such case, be and operate in all the powers, rights and privileges herein described, co-extensively with the line of road herein first described and the line heretofore embraced by the Act incorporating the Buckfield Branch Railroad Company; and the last named company shall thereupon cease."

The privileges, rights and immunities of the Buckfield Branch Railroad Company having passed by the sale, so authorized, to the petitioners, their rights are co-extensive with those granted by the charters of both companies. And though the former company has ceased to exist, except for certain specified purposes, yet their charter must still be

resorted to, to ascertain and determine the rights of their vendees. These rights, including that of connection with the Atlantic & St. Lawrence Railroad, were not extinguished by the transfer, but they passed unimpaired to the purchasers.

It is argued, however, that if the petitioners did acquire all the rights and immunities of the Buckfield Branch Railroad Company, still the right of connection with the A. & St. L. Railroad must have been lost, because the petitioners are empowered by their charter to make a road *across* the latter road. And, it is said, that a "crossing" road cannot be a "connecting" road. Upon this point the presiding Judge ruled, that if the railroad of the petitioners should be hereafter *actually made across* the railroad of the respondents, and be in operation on both sides of it, it would then be no longer a connecting railroad; that the right of *connection* would *then* be lost— but not until then.

Railroad corporations, whose roads cross each other, have no mutual rights, and are under no mutual obligations, except such as are granted or imposed by the general laws, or by their respective charters. Nor can the Legislature add or impose any thing, unless the power to do so was reserved when the charter was granted.

It is true the Legislature may, by general laws, applicable to all railroad corporations alike, restrict the rate of speed in traveling, or require trains to be stopped before crossing bridges, or other railroads. This is remedial legislation, designed for the public safety, of the same nature as that legislation which imposes certain restrictions upon persons traveling in streets, or other public ways. And, for all violations of such laws, railroad corporations may be held to answer before the judicial tribunals. But the petitioners, in the case before us, ask the interposition of the Court, not for any public right or security, but for certain private and special rights which they claim against the respondents. Did the Legislature confer any such rights as are claimed? If they did grant such rights to the petitioners, did they reserve the right to do it in the charter of the respondents?

It has always been the practice in this State for the Legislature, in granting charters for railroad corporations, to reserve the right to authorize other companies to connect their railroads with those of such corporations, upon one side, or both. And the mutual rights and obligations resulting from such "authorized connection" are defined in chapter nine of the laws of 1842. By section first, it is made the duty of each company to draw the trains of the other over their road, "at reasonable times, and for a toll not exceeding the ordinary rate." And, in case of refusal, the second section provides that each "shall have the right to draw their said cars, with their own locomotives," over the road of the other.

This statute was in force when the charter of the A. & St. L. Railroad Company was granted. And, by section seven of the charter, the Legislature reserved the right "to authorize any other company to connect any other railroad with the railroad of said corporation, *but only on the easterly side thereof.*" And, in such case, they made it the duty of said corporation "to receive and transport all persons, goods, and property brought upon such other railroad, at the same rates prescribed by said corporation for like service upon their own road, at any of their deposits."

The Buckfield Branch Railroad was wholly *upon the easterly side* of the A. & St. L. Railroad, and was expressly authorized by the charter of the company to be connected therewith. This right has passed, by sale, to the petitioners. And, though they are authorized by their charter to extend their road to Portland, at any time before the year 1869, yet, if they do not avail themselves of this before that time, their charter will *then* attach to, and be limited by, whatever portion of the road is then completed. *Sec.* 13, *ch.* 122, *Special Laws of* 1857. If they extend it *across* the railroad of the respondents, it will then cease to be "on the easterly side thereof;" and the right of connection will be lost. But if it should not be extended, but remain, as now, a road entirely on the easterly side of the railroad of the respondents, the

right of connection will be preserved. We perceive no error in the ruling of the presiding Judge upon this point.

The statute of 1854 was not designed to confer any additional rights, nor to impose any new liabilities, upon railroad corporations. The object of it was to provide a more specific remedy for the violation of rights already granted. How far it may be found practicable it is unnecessary for us to inquire. Nor is it necessary in this case for us to enter upon any discussion in regard to the limits of legislative control over corporations. There are cases before us in which this question is raised; and we therefore reserve any extended consideration of it for the present.

The respondents, by their charter, are subjected to the liability of having other roads connected with theirs, "on the easterly side." The petitioners, by their charter and by purchase, have the right of connection. This right carries with it its necessary incidents. The rules by which these are to be determined are prescribed in the charters, and in the statute of 1842, re-enacted in the R. S., c. 51, § 26. The determination of the mutual rights and obligations of connecting roads is an exercise of judicial power. Under the statute of 1854, it may rightfully be done by this Court, by commissioners duly appointed for that purpose, on application to us, by any party aggrieved. Commissioners so appointed have no authority to impose any new duties or obligations upon the railroad companies. All they can do is to ascertain and determine, in any given case, what duties are already imposed by statute, and by the charters.

The ruling upon this point at *Nisi Prius* was, that the respondents were subject to the provisions of c. 93 of the laws of 1854; but were not liable to have terms imposed inconsistent with the provisions of their charter. This is in accordance with the principles above stated, and is not erroneous. The words of the statute may not have been chosen with a strict regard to the power of the Legislature, or of this Court, over corporations. Thus, the commissioners are required, upon a hearing of the parties, "to prescribe the

things to be done and performed." This might seem to imply that they could prescribe things to be done which the company are not required by their charter to do. That would be an exercise, not of *judicial*, but of *legislative* power. And even the Legislature could not do it without violating that provision of the charter exempting the company from "the imposition of any further duties, liabilities, or obligations." The Act of 1854 is to be construed in the light of this principle; and it should be so interpreted, if possible, as to be in harmony with the constitution.

A statute authorizing this Court, by Commissioners appointed therefor, to determine judicially what are the mutual rights and obligations of any two railroad companies, authorized by their charters to connect their roads, is certainly within the just limits of legislative power. Presuming that the statute of 1854 was not intended to go beyond this, we think it was remedial only, and was binding upon existing corporations. In the case at bar, it was proper that commissioners should be so appointed. There are some matters alleged in the petition upon which they have no legal authority to act; but it is not necessary, as the case is now presented on the exceptions, for us to express any opinion in regard to them at this time. We cannot presume that the commissioners will transcend the legitimate scope of their authority. Should either party, after the hearing, believe that they have done so, that question will be considered when their report shall be presented for acceptance.

The exceptions are overruled.

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

URIAH FURLONG, *in Equity, versus* HOLLIS RANDALL *& als.*

Where judgment had been rendered against a mortgager, and a writ of possession issued, under which the mortgagee had been put in possession of the premises, and, fifteen years afterwards, the mortgager brings a bill in chancery, alleging that the amount, adjudged to be due at the time of judgment, was paid before possession was taken, and claiming to redeem, the burden of proof of payment will be upon him; and, if he fails clearly to prove the alleged payment, the bill will be dismissed with costs.

BILL IN EQUITY to redeem a parcel of land in Portland. The case was heard on bill, answers and proof. The allegations and nature of the proof appear in the opinion of the Court.

Howard & Strout, for the plaintiff.

Anderson & Webb, for the defendants.

The opinion of the Court was delivered by

DAVIS, J. — The premises in controversy were mortgaged to Nathaniel Crockett, August 25th, 1834. This mortgage was assigned by Crockett to Job Randall, under whom the respondents claim, October 16th, 1838. Randall commenced a suit to recover possession of the premises, and obtained a conditional judgment therefor, June 27th, 1839. The amount adjudged to be due upon the mortgage was $60,85. This amount not having been paid within two months from the date of the judgment, a writ of possession was issued, and Randall took actual possession of the premises, Nov. 8th, 1839. He died soon afterwards; and his heirs and their grantees have been in possession ever since that time.

The petitioner alleges that the amount adjudged to be due upon the mortgage, though not paid within two months, was afterwards paid by him and received by Randall in full discharge of the judgment and mortgage; and he testifies that this payment was just before Randall took possession of the premises. To prove this alleged payment and discharge, he

relies upon his own testimony, and that of Isaac Fuller, who testifies that he was present when the amount was paid.

To rebut this testimony, the respondents have introduced the depositions of Margaret and Sarah Randall, the wife and daughter of Job Randall. They both testify that they lived with said Randall prior to and until his decease; and that they had no knowledge of any payment such as the petitioner asserts; and that if any such payment had been made at the time alleged, they would have known it. Fuller testifies that one of these witnesses was present at the time of payment. The testimony of these witnesses is of a negative character; but it is strengthened by the circumstances of the case. If payment was made after judgment, and a writ of possession had been issued, and the claim was thus discharged, it is difficult to understand why no written discharge or receipt was given. It is still more difficult to understand, if such was the fact, as understood by the parties, why Randall immediately afterwards took possession of the premises by force of his writ; or why the petitioner under such circumstances acquiesced therein, without any attempt to regain possession for nearly sixteen years. Such conduct on the part of both parties is inconsistent with the allegation that the mortgage had been previously paid and discharged. The burden of proof to establish the fact of such payment is upon the petitioner; and the testimony adduced by him is so weakened and impaired, by other facts and circumstances proved, that we are not satisfied that he is entitled to recover. The bill must be dismissed with costs for the respondents.

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

JOHN B. CARROLL *versus* STEPHEN HINKLEY.

The statute of April 9, 1856, discharged stockholders in corporations, from all personal liability for corporate debts contracted before that Act took effect.

REPORTED by APPLETON, J., October Term, 1857.

This was an action on the case against the defendant, as a stockholder in the York & Cumberland Railroad Company. The debt due the plaintiff was contracted by the corporation during the years 1853 and 1855. He commenced his action therefor, and recovered judgment against the company, Feb. 19, 1856. Execution was issued upon this judgment, and payment was demanded of the Treasurer of the company, May 24, 1856, and the officer certified upon the execution that he could find no corporate property wherewith to satisfy it. The plaintiff then proceeded, under the statute of 1856, to fix the personal liability of the defendant as a stockholder in the company, and he commenced this action against him, July 26, 1856.

The case was argued by *Rand*, for the plaintiff, and by

Fox, for the defendant.

Various questions were discussed relating to the regularity of the proceedings; but the Court expressed no opinion upon them.

This was one of the cases before the Court when the case of *Coffin* v. *Rich* was under consideration.

The counsel for the defendant made the following points:—

1. The liability of stockholders for corporate debts was *created* by statute. R. S., 1841, c. 79, § 18. This section was expressly *repealed* by the statute of 1856, which took effect on May 9 of that year. That repeal abrogated all liabilities of stockholders under all prior statutes, except so far as they were expressly saved from its operation.

2. Nothing was saved under the Act of 1856 but "suits and processes pending." This case was not then pending.

No demand was made upon the defendant until May 24th, after the Act took effect; and this action was not commenced until July 26th. It cannot be sustained under the prior statutes, because they were repealed. And it cannot be sustained under the statute of 1856, because the debt was contracted before that Act was passed, and the suit was not then pending.

3. The statute of 1856 was *prospective* in its operation. It did not provide for the *continuance* of *old liabilities*, unless suits therefor were pending,—but it *created new liabilities*. *Gray* v. *Coffin*, 9 Cush. 192.

4. Nor did the repeal of the former statutes impair any vested rights. *Oriental Bank* v. *Freese*, 18 Maine, 112; *Longley* v. *Little*, 26 Maine, 162.

The opinion of the Court was delivered orally by

HATHAWAY, J.—This case was before the Court and was considered with the case of *Coffin* v. *Rich*, [45 Maine, 507,] and that case is decisive of this.

Plaintiff nonsuit.

FREDERICK NUTTING *versus* BENJAMIN GOODRIDGE.

By the Revised Statutes of 1857, c. 87, § 8, an action on the case for slander survives, and, after the death of the plaintiff, may be prosecuted by his executor, or the administrator of his estate.

FACTS AGREED. April Term, 1858.

This was an action on the case for slander, commenced May 29th, 1857. By the statutes then in force, among actions that survived were "actions of trespass for goods taken and carried away, and actions of trespass and trespass on the case for damage done to real and personal property."

By the Revised Statutes of 1857, which took effect Jan. 1,

1858, among the actions that survive are "actions of trespass and trespass on the case." The qualifying words in the former statutes are omitted.

The plaintiff died in April, 1858. The only question submitted was whether the action survived. And *it was held* by the Court, (GOODENOW, J., dissenting,) that the action did survive; and it was ordered to stand for trial.

Littlefield, for plaintiff.

Fessenden & Butler, for defendant.

COUNTY OF YORK.

OTIS R. HUNTRESS, *Petitioner for Partition, versus* JOHN C. TINEY *& al.*

In a case of petition for partition, where, after the entry of *judgment for partition*, against the co-tenants named in the petition, other persons, claiming to be interested in the estate, were allowed to appear and defend, under c. 121, § 9, of R. S. of 1841, they, by thus appearing, became parties, and are bound by any subsequent judgment in the case.

Any person who is interested in the premises to be parted, comes within the terms of the statute, notwithstanding such person might not be bound by the final judgment in the case, if he had not appeared.

In a case within the purview of the statute, whether the person moving for leave to appear and defend should be admitted, is a question of discretion; — and its exercise at *Nisi Prius* will not be revised on exceptions by the full Court.

Where, on case stated, an interlocutory judgment had been entered by order of the full Court, against the co-tenants named in the petition, — and afterwards others, claiming to be tenants in common, were admitted to defend, — the petitioner's motion, for costs against the original respondents, and for the appointment of commissioners to make partition, was properly denied, no final judgment in the case having been entered up.

PETITION FOR PARTITION. The case comes before the full Court on EXCEPTIONS, taken by the petitioner, to the refusal

of RICE, J. to allow costs and appoint commissioners to make partition.

N. D. Appleton, for the petitioner.

In this case the petitioner claimed to be seized of one-third part of the premises described, in common with John E. Tiney and Ivory Hall, the respondents, who were duly notified as required by law, and appeared, and pleaded that they were each seized as tenants in common of one half of the premises, and traversed the right of the petitioner, as he had alleged.

The case was opened to the jury, January term, 1854, before WELLS, J., upon whose ruling a report was made, and the case submitted to the full Court for decision. The conclusion of the report was as follows:—"If said return is sufficient, and the evidence offered by the respondents is inadmissible, the petitioner is to have judgment for partition; or if said return is insufficient, and the officer has the right to amend it in such a manner as to affect the title of said Hall to the premises, then judgment is to be entered for the petitioner. If the return is deemed by the Court insufficient, and it is considered that the officer has no right to amend his return, then judgment is to be rendered for the respondents. If the evidence offered by the respondents is admissible, the case is to stand for trial, notwithstanding the amendment may be allowed by the Court."

The Court decided the case in favor of the petitioner, and directed the clerk to enter judgment, "*partition ordered;*" which was done November 1, 1855. At the September term, 1855, held by adjournment November 5th, the petitioner moved for costs; and Samuel Ham & als. applied and were admitted as parties, in defence, against the objections of the petitioner. At April term, 1856, the petitioner had leave to withdraw his motion for costs and to file the same at a subsequent time.

At the September term, 1856, the petitioner renewed his motion for costs, and also moved for commissioners to be ap-

pointed to make partition as ordered,—which motions were overruled and the petitioner excepted.

I. The petitioner was entitled to his costs and his motion should have been granted. He was the prevailing party. His rights had been contested by the respondents and decided in his favor by the Court.

By R. S., c. 121, § 14, "if it appear that the petitioner is entitled to have partition, and an assignment of the part described in his petition, he shall recover costs of the respondent." It did appear to the Court that the petitioner was entitled to have partition, and, by the express provisions of the statutes, in that case, costs were to be allowed to him.

The judgment in this case, though called interlocutory, was in *fact* a final determination of the suit and controversy between these parties. It was a judgment upon the merits of the case as regarded them. The right of the petitioner was established by the decision, and the respondents had no further day in Court. They could interpose no further opposition to the completion of the partition prayed for. And the subsequent proceedings are to be conducted by the petitioner at his own expense.

On the other hand, if judgment had been rendered for the respondents, upon one view of the case, as stated in the report, there would then have been a termination of the controversy between these parties, and, in that case, the respondents would have recovered their costs.

In *Hanson* v. *Willard & al.*, 12 Maine, 142, after the question on demurrer was settled, the respondents, who were interested as co-tenants with the petitioner in part of the premises, pleaded *sole seizin* in a part of the same, which, upon trial, was decided in their favor, and the interlocutory judgment was rendered for the residue. And, at the same term, costs were awarded to the respondents and execution issued, as it appears by the record in that case. *Swett* v. *Bussey*, 7 Mass. 504; *Symonds* v. *Kimball*, 3 Mass. 299; *Reed* v. *Reed*, 9 Mass. 372; *Paine* v. *Ward*, 4 Pick. 248; *Lord* v. *Penniman*, 19 Pick. 539.

II. The motion of the petitioner for the appointment of commissioners should have been allowed. R. S., c. 121, § 19.

The statute is peremptory, that, after the Court has entered the interlocutory judgment, it shall appoint three or five disinterested persons as commissioners to make the partition, &c.

The petitioner, having an honest debt against J. D. Pillsbury, attached the right of the latter to the land in question, being one moiety, and, after having obtained his judgment, seasonably levies his execution upon the land in question. Subsequently to the attachment, Pillsbury conveys his interest in the land to Ivory Hall, one of the respondents. Huntress then petitions for partition against said Hall and Tiney, who appear and defend, on being summoned, and succeeds in establishing the regularity of his proceedings, in making the levy, and got his judgment *quod partitio, &c.* See *Huntress* v. *Tiney,* 39 Maine, 237.

The litigation between these parties was finished and concluded by the judgment aforesaid, and the petitioner was entitled to have the benefit of that judgment, as in other cases, by having commissioners appointed to set out and assign to him his part of the premises described, as prayed for.

III. But it is said our motion for costs and for the appointment of commissioners ought not to be granted, because other parties have been admitted to come in and defend, since the judgment for partition was entered.

The question then arises as to the legality and effect of the order admitting the other parties.

We contend that this order was a proceeding unauthorized by law, and should be treated as a nullity, and without any legal force and effect.

The statute on this subject, (R. S., c. 121,) gives no authority for such a proceeding. By that statute, two modes are provided for effecting a division of real estate held in common. First, by a writ of partition at common law; and second, by a petition for partition. And, in the latter case, there are two modes of proceeding provided. First, when

the co-tenants alleged are all named in the petition; in which case the petition is to be filed in the clerk's office, and a copy served upon each of the co-tenants. Second, when the co-tenants are unknown and not named in the petition; in which case, the Court orders a general notice to be given to all persons interested.

In the first case, the petitioner embraces in his petition, as in the present instance, those who are his co-tenants, and deny his rights, and the process at its commencement assumes the aspect of an adversary suit. In this particular it resembles the writ of partition at common law, although the forms of proceeding and the pleadings may be dissimilar, but the result would be substantially the same.

The petitioner commences his process, with the specific object of settling a controversy and deciding matters in dispute between himself and his alleged co-tenants, and other parties have no right officiously to intermeddle and thrust themselves into a suit, in which they have no interest, and where their rights, if they have any in the land, cannot be affected. *Cook* v. *Allen*, 2 Mass, 463.

To allow this to be done would be unjust and contrary to all the analogies of the law.

The 9th section of the statute, which is relied upon as authorizing the order for the admission of the other parties, is not applicable to cases like the present, but to those where the co-tenants are unknown, and when a general notice is given. Here a judgment has been duly rendered, by which the rights of the petitioner have been established against the original parties, the respondents, on whom the process was served. Persons, not parties to this judgment, nor interested in the questions which have been settled by a protracted litigation, now claim to come in, and are admitted, to set aside a solemn judgment of the full Court, in this summary manner, and compel the petitioners to make new issues with them, which were not anticipated or invited. If this can properly be done, it is certainly a novel procedure in judicial proceedings. It is confidently believed that no precedent or

decision can be found to authorize or justify it. On the other hand, the principles settled in the cases, where a construction of the statute in question has arisen, all lead to an opposite conclusion.

It is well settled that no person is concluded by a partition when he could not be admitted by law to defend his rights,— in conformity to a maxim of the common law, that judgments do not bind the rights of any but parties or privies. In this case, there was no necessity for the admission of the other parties, as they would not be concluded by the judgment which had been rendered.

In the case of *Cook* v. *Allen*, PARSONS, C. J. says, "when, in the petition, *certain persons are named* as the *co-tenants*, if partition be made, none are concluded by it, but the persons named, their heirs and assigns. If, in the petition, the co-tenants are *not named*, and notice is given to all persons interested, to appear and show cause against the petition, and partition be made, this partition shall conclude all persons whatever as to their right of possession."

These remarks of the Court clearly recognize the distinction we have endeavored to maintain, between those cases of partition where the co-tenants are named in the petition, and the class of cases where they are not named.

See also *Colton & al.* v. *Smith & al.*, 11 Pick. 311. In this case a former partition was held not to be a bar or estoppel to a subsequent petition for partition, the parties and the title put in issue not being the same. An examination of this case will also show, that the petitioners Colton & al. *appeared* and *endeavored* to *be heard* on the *former petition*, but were refused a hearing, "as not being parties, not having been named in the petition." And WILDE, J., in giving the opinion of the Court, deciding that the former judgment would not be conclusive, assigns the reason, that, in the former suit, the petitioners were not made a party, and, for that reason, were denied a hearing by the Court. Thus, evidently, recognizing the reason given, as satisfactory and sufficient.

The case referred to is directly in point, and sustains our position.

In the case of petitions for partition, where the co-tenants are not named and against persons unknown, the right of parties to come in and contest the rights of the petitioners under the statute in question, after the rendition of the interlocutory judgment, is not absolute, but subject to the discretion of the Court.

In *Field & ux. & als., Petitioners,* v. *persons unknown,* 34 Maine, 35, the Court refused to allow it to be done after the interlocutory judgment and the commissioners had made their report. The Chief Justice says, in that case, if the right to defend at such a late period be absolute, the previous judgment and proceedings, even after verdict, might be set aside, in order to permit a plea of sole seizin; and inquires, how the Court could set such verdict aside, unless upon citing the prior parties to re-appear.

This was a case where the co-tenants were not named in the petition, and a general notice had been given to all persons interested to appear and show cause; and yet, even there, the difficulties, as suggested, were such as to induce the Court to disallow the application and not disturb the judgment.

In the present case, the parties applying to be admitted to appear and defend had no right, as we insist, absolute or qualified, to be admitted. The Court had no power or authority to do it, and the order to that effect was null and void. The interlocutory judgment stands in full force and unreversed or abrogated in any manner whatever. Why then should not our motion for costs and for the appointment of commissioners be allowed, as the statute expressly requires?

Why should the petitioner be denied the costs to which he is justly entitled by law, against those whose objections to his suit were groundless, and who have subjected him to the great expense consequent upon litigation?

I. S. Kimball argued for the respondents, sustaining the rulings excepted to.

The opinion of the Court was delivered by

MAY, J.—It is provided by the R. S. of 1841, c. 121, § 9, that "when a person interested is not named in the petition, or is out of the State, and has not had notice and an opportunity to appear and answer to the suit, he may, on motion to the Court, at any time before final judgment, be allowed to appear and defend." In this case, before final judgment, certain individuals, on motion to the Court, were allowed to appear and defend, and no exception was taken to the action of the Court in that particular,—consequently, such individuals became parties to the record and will be bound by any subsequent judgment.

It is contended, for the petitioner, that the presiding Judge had no authority to admit new parties, unless the rights of such parties would necessarily be affected and definitively determined by the final judgment in the suit. The language of the statute is very broad, embracing all persons interested, and, in the judgment of the Court, *any person who is interested in the premises to be parted* comes within the terms of the statute, notwithstanding such person might not have been bound by the final judgment in the case, if he had not appeared.

This case, falling within the purview of the statute, the question, whether the persons moving to be admitted to appear and defend should be admitted, was one of discretion; and, as has already been decided, in the case of *Field* v. *persons unknown*, 34 Maine, 35, the exercise of this discretion is not subject to revision upon exceptions in this Court.

By the admission of new parties, the case now stands open for further proceedings. It is apparent, therefore, that under such circumstances no costs can be allowed to the petitioner in this stage of the case. The motion of the petitioner was properly denied. *Exceptions overruled.*

JOHN MCMILLAN *& al., in Scire Facias, versus* JOSEPH HOBSON *& al.*

Where a trustee, before the enactment of the provision in § 69, c. 86 of R. S. of 1857, had been charged on his disclosure in the original suit, the Court may permit or require him to disclose further, in a suit of *scire facias* against him.

And, if the trustee be discharged on *scire facias*, he will not be liable to pay costs, but will be entitled to costs, if he seasonably disclosed in the original suit.

WRIT OF SCIRE FACIAS. The case, as made by the parties, shows that the original action of the plaintiffs against Andrew Hobson & als., as principals, and the present defendants, as trustees, was entered at the May term of Supreme Judicial Court in the year 1853; that, after the trustees had filed their disclosures, the plaintiffs presented allegations of facts which were not disclosed nor denied, and filed their proof in support of their allegations; that, upon a hearing before HOWARD, J., without the intervention of a jury, the trustees were charged. Judgment was rendered, a writ of execution was duly issued, and seasonable demand made upon the trustees.

The plaintiffs then sued out their writ of *scire facias*, and, at the return term of the Court, the defendants obtained leave to disclose further. To this ruling of GOODENOW, J., at *Nisi Prius*, the plaintiffs excepted. On a hearing, before the full Court, the ruling was sustained. The defendants afterwards filed additional disclosures. And the parties agreed to refer the case to the full Court.

The case was argued by

Hammons, for the plaintiffs, and by

Eastman, for the defendants.

GOODENOW, J. — In the original action by the plaintiffs against Andrew Hobson and these defendants, as trustees, they were adjudged to be chargeable. This is a *scire facias*,

in common form, requiring them "to show cause why judgment and execution should not be awarded against them and their own goods and estate, for the sum remaining due on the judgment against the principal defendant."

It is contended that the decision of the Judge at *Nisi Prius* is conclusive upon the parties, upon the question presented to him; and the case of *Fletcher & al.* v. *Clarke & trustee*, 29 Maine, 485, is relied upon as a conclusive authority to sustain the plaintiffs' position. That case determined that the adjudication of the District Court, *as to the facts*, in a trustee process, was conclusive. It was decided May term, 1849. In August, 1849, (c. 117,) the Legislature enacted that "in all cases under the trustee process, in the Supreme Judicial Court, where exceptions are taken to the ruling and decision of a single Judge, as to the liability of a party summoned as such, to be charged or not, as trustee of the principal defendant, the whole case, both as to fact and law, may be re-examined and determined by the full Court, when, in the opinion of the Court, justice shall require it."

And the same power was given when a disclosure of a trustee was made in the District Court, and the case transferred to the Supreme Judicial Court by exceptions. This Act does not appear to have been repealed, except by the repealing Act of 1857, when the new Revised Statutes were enacted. By § 72, c. 86, if the trustee had been examined in the original suit, the Court may permit or require him to be examined anew in the suit of *scire facias;* and he may thus prove any matter proper for his defence; and the Court may enter such judgment as law and justice require, upon the whole matter appearing on such examination and trial. This is identical with § 79, c. 119, R. S., 1840.

In *Bickford* v. *Boston & Lowell Railroad Corporation*, 21 Pick. 111, Mr. Justice WILDE says, "It is true that, when a trustee comes in on the original process, and submits to an examination, and prays to be discharged on his answers, the Court is bound to decide the question whether he is entitled to a discharge, or whether he appears to be trustee or not;

but the decision of the Court is an interlocutory decision, not definitively binding on the trustee, and consequently it may be omitted to be set forth in the *scire facias.*" It may be otherwise under our new R. S., § 69, c. 86, which requires the Court to fix the amount for which the trustee is chargeable on the original disclosure. § 79 provides that "in all cases, under the trustee process, in the Supreme Judicial Court, where exceptions are taken to the ruling and decision of a single Judge, as to the liability of the trustee to be charged, the whole case may be re-examined and determined by the law court, and remanded for further disclosures or other proceedings, as the Court thinks justice requires." This is more extensive, even, than the provision in the Act of 1849, before referred to. This action was commenced, as appears by the writ, February 26, 1852. It may not be material to determine whether the provisions of the Act of 1849, or those of the R. S. of 1857, should control the decision; as they are substantially the same, so far as they relate to this case. But in the case of *Bickford* v. *Boston & Lowell Railroad Corporation,* 19 Pick. 109, *it was held,* "in *scire facias,* pending at the time when the R. S. of Massachusetts took effect, that the proceedings might be conformed to and regulated by the provisions of those statutes, without affecting any vested right or invalidating any act done in the original suit, and therefore it was competent to the Court to allow the testator to answer anew.

We are of opinion that the whole matter, as to law and fact, as far as the papers disclose, is properly before us, for re-examination and determination; and that the defendants are not liable as trustees of the original defendants, but are entitled to be discharged; with costs, if they came in at the first term, or subsequently, as of the first term, by consent of plaintiffs.

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

ALONZO P. HOUSE *versus* SIMEON P. MCKENNEY.

One who had lost by betting, and had demanded his money of the stakeholder, who still held it and refused to restore it to him, may recover the same with interest from the date of the demand.

FACTS AGREED.

The plaintiff and one Hamilton placed in the hands of the defendant, each one hundred dollars, to abide the result of a horse race; the defendant to pay the two hundred dollars to the party who should win the bet. Hamilton, having won, demanded of the defendant the two hundred dollars, who declined to pay him more than one hundred dollars, the plaintiff having notified him not to pay to Hamilton the sum he deposited, and having demanded the same of him. The defendant refusing to restore the one hundred dollars to the plaintiff, he brought this action to recover it.

Goodwin & Fales, for the defendant, contended that if the facts set forth show a wager, which by the law then in force was illegal, yet the act intended by the statute to be prohibited, to wit, the racing of horses for money or on a bet, having been accomplished, it would not be within the spirit and intent of the statute to maintain this action.

The better law, applicable to such a case, is that of *Yates* v. *Foot*, 12 Johns. 1; *McKeon* v. *Caherty*, 3 Wend. 494.

The plaintiff can only recover by aid of chapter 35, of the Revised Statutes of 1841.

If the case is not upheld by that statute, the plaintiff cannot prevail, and must abide by the terms of his contract. *Marean* v. *Longley*, 21 Maine, 28.

But if the action, in its commencement, could have been maintained under chapter 35, yet that statute is now repealed and no similar statute has taken its place, and, in the absence of statutory enactment to uphold the suit, the plaintiff cannot recover. *Bangor* v. *Goding & al.*, 35 Maine, 73.

Luques, for plaintiff.

By the Court. — Defendant to be defaulted. Judgment to be for one hundred dollars, and interest from the date of the writ, — it not appearing how long before that date the demand was made.

COUNTY OF OXFORD.

Alfred W. Stearns *& al. versus* The Atlantic and St. Lawrence Railroad Co.

The statute of 1842, c. 9, § 5, providing that a railroad corporation shall be held responsible to the owner of property that has been injured by fir communicated by a locomotive engine of the corporation, will not be held to be unavailing to the person whose property has been thus injured because neither that, nor any other statute, provides a remedy, or prescribes a form of action; for then, he may declare specially on his own case.

To hold that there is no *remedy* would be, in effect, a denial of the *right* to recover; whether the right exist by statute or at common law.

Neither notice nor demand is necessary before bringing suit, under this statute.

If there be, in the writ, no allegation of wrong or fault of the defendants, the writ may be amended. But, after verdict, the amendment will be unnecessary. Whether such an allegation is material — *quære*.

It was not an unauthorized exercise of Legislative power to render a railroad corporation liable for damages, as was provided by § 5, of c. 9, of the laws of 1842, and to require that degree of care that will prevent any such injury as the statute was designed to provide against. And, if any such injury occur, the corporation cannot be regarded as without *legal* fault.

The defendant corporation will not be relieved from the liability imposed by this statute, by reason of having leased their road to the Grand Trunk Railroad, who were in possession, controlling and managing the leased road, at the time of the injury; — and notwithstanding the fire was communicated by a locomotive engine, which the lessees had themselves furnished.

Exceptions from the ruling of Hathaway, J.

This was an action to recover for the destruction of plaintiffs' building and other property, by fire alleged to have been caused by a locomotive engine of defendants.

The declaration in plaintiffs' writ, which is dated October 10, 1856, is "in a plea of the case; for that the plaintiffs, at Paris, in said county of Oxford, on the 24th day of November, A. D. 1855, were seized of a large chair factory, with all machinery, tools, and other apparatus necessary for the manufacture of chairs, of great value, to wit, of the value of four thousand dollars; and also were the owners of and had in said factory, on said 24th day of November, A. D. 1855, large quantities of lumber, and other materials used in the manufacture of chairs; and also large quantities of chairs, some of which were wholly and others only in part completed, of the value of two thousand dollars; all of which property, real and personal, was situated along its route, and was near to the track of the Atlantic and Saint Lawrence Railroad Company, a corporation duly established by a law of this State. And, on said 24th day of November, A. D., 1855, said chair factory and all the machinery thereof, and all the tools, lumber, chairs, and other property above named, were injured and wholly destroyed by fire communicated by a locomotive engine of the said railroad corporation; to the damage of the said plaintiffs, as they say, the sum of six thousand dollars, by reason of which, and by force of the statute in such case made and provided, the Atlantic and Saint Lawrence Railroad Company are responsible for, and ought to pay to the plaintiffs, the damages so by them suffered and sustained, and an action hath accrued to the plaintiffs to sue for and recover the same of said corporation."

This action was brought under the 5th section of c. 9 of the public laws of 1842, which provides that, "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be held responsible in damages, along its route, and may procure insurance in its own behalf."

The defendants tendered the issue to the country, authorized by c. 115, § 42, Revised Statutes, in these words, that "they do not owe the sum demanded by plaintiffs," which was joined.

The destruction of the property at the time alleged, was not called in question.

After the opening of the plaintiffs' case, the defendants objected to the maintenance of the action, and stated the following points of objection:—

1. That no remedy is given by the statute of 1842, and that the statute does not prescribe or authorize any action, or form of action, or mode of trial, by which the alleged rights and liabilites of the parties can be determined and no such remedy is given by the general statutes, or by the common law.

2. That the statute of 1842, is, in itself, incomplete, repugnant, and wholly ineffectual to create any such right as is claimed to be in the plaintiffs, or any such liability as is claimed to rest upon the defendants.

3. That the statute is unconstitutional in this;—that the Legislature cannot impose a penalty where there is no fault, and no violation of law; and cannot create a liability, compelling one subject to suffer a loss in favor of another, without any protection to the sufferer against such loss, or any equivalent for it.

4. That no action can be maintained under this statute, until notice of the property alleged to have been injured, given to the railroad corporation by the owners, and demand of the sum for which the corporation is alleged to be responsible.

Which several objections were overruled by the presiding Judge for the purposes of this trial.

Parol evidence was offered by the plaintiffs, to the effect, that Thomas Stearns, one of the plaintiffs, in 1849, was in possession and claimed to be the owner of the land on which the factory stood, and continued to hold and occupy it until the time of the fire; that by a verbal partnership agree-

ment, in 1849, the two plaintiffs agreed to construct the building, supply it with machinery and stock, and carry on the business as partners; Alfred Stearns paying one quarter of the expenditure, and being the owner of one quarter of the building, machinery and stock, and Thomas the other three quarters; that the building was erected in the fall of 1849, and that they continued so to hold and occupy until the time of the fire.

Defendants objected to this evidence of title, as legally incompetent, but it was admitted by the Court.

It was in evidence, and not controverted, that the defendant corporation, under authority of an Act of the Legislature, passed March 29, 1853, had leased its railroad to lessees, and that, on the 5th day of August, 1853, the lessees entered with possession, and had ever since had the exclusive possession, management and control of the road and property leased, and had operated the line exclusively by their own officers and agents; that the defendant corporation, since the date of the lease, had had no direction or concern whatever in working the road; that the locomotive engine, by which the fire was alleged to have been caused, was a new engine, purchased after the lease, and first placed on the line in July, 1854.

The plaintiffs contended, that by the terms of the Act, authorizing the lease, this action could be maintained against the defendants, the lessors; which the defendants denied, and prayed instructions thereon, which are hereafter recited.

The lease was made a part of the case.

Plaintiffs offered in evidence an indenture made between Thomas Stearns and the defendants in 1854, showing a settlement of damages and adjustment of lines between them.

Defendants offered evidence tending to show, that before the time of the fire, the plaintiffs, in carrying on their business and disposing of their lumber, had been in the habit of depositing, and at the time of the fire had deposited, combustible material within the limits of the located way of the railroad adjacent to the factory of the plaintiffs; that the line of the defendants' located way, towards the building, being six-

teen feet distant from the rails, as established by the indenture before mentioned, with Thomas Stearns, there remained a space, between that line and the building, of eleven or twelve feet in width, at one corner of the building, and nineteen or twenty feet at the other; that the plaintiffs, before and at the time of the fire, had caused to be deposited and accumulated upon the sixteen feet breadth of way, belonging to the defendants, quantities of lumber, wood, chips and rubbish, tending to increase the risk of fire from locomotives.

This was denied by the plaintiffs, except as to two piles of wood, one of which was burnt and the other scorched, both, as they contended, by the fire of the building, after the building was in flames, and they offered evidence in support of their position.

Defendants offered in evidence the record of the location of the railroad, at the place in question; a first location recorded June 23, 1849, and a second one recorded Dec. 17, 1850.

It appeared in evidence, that the building was erected in the fall of 1849, and partly stocked with machinery and materials in that fall and the winter following; that a considerable part of the machinery, which was in the building at the time of the fire, was not put in until 1851, and that the stock of materials and fabrics was disposed of and replaced from time to time in the usual course of business.

It appeared, by evidence not controverted, that, at the time of the fire, the plaintiffs had a subsisting policy of insurance for $1000, in their own favor, upon the building, machinery and stock. It did not appear whether or not the plaintiffs had recovered any thing upon this policy.

The charter of the railroad company to make a part of the case.

The defendants prayed the Court to instruct the jury as follows:—

1. That by the charter of the Atlantic & St. Lawrence Railroad Company, that company is not subject to the provisions of the Act of 1842.

2. That, upon the evidence in regard to the lease of the railroad, and the management and control of the same, and the purchase of the engine by the lessees, this action cannot be maintained against the lessors.

3. That the indenture and settlement with Thomas Stearns, in 1854, was an extinguishment of all such claim as is now set up and is a bar to the present action.

4. That if, at the time of the fire, the plaintiffs had a subsisting policy of insurance upon the property, for which compensation is now claimed, they are not entitled to recover in this action, for any part of the property embraced in such policy.

5. That if the jury find that the property, or any part of it, for which compensation is now claimed, was erected or placed on the premises, after defendant corporation had made and filed its location, the plaintiffs cannot recover for any such property.

6. That the defendants are not responsible for any stock of lumber, or other stock, or any fabrics manufactured, or partly manufactured, which were destroyed or injured by the fire in question, nor for any machinery or apparatus so destroyed, which were not, in the strictest sense, fixtures to the building or land.

7. That it was the duty of the plaintiffs not to place any combustible material within the located way of the railroad adjacent to the plaintiffs' premises, in such manner as to increase the risk of fire from locomotive engines, nor to give their consent that any other person should so place any such material; and to use all reasonable diligence, and make all reasonable efforts, in managing their own property and carrying on their own works, so as not to cause, or knowingly to suffer such increase of risk; and, that if the jury find that the plaintiffs did so increase the risk, and did not use such diligence and make such efforts, the verdict should be for the defendants.

This *seventh* instruction was given by the presiding Judge,

with the qualification,—"provided the loss was occasioned in any manner by such increased risk."

8. That upon the evidence offered by the plaintiffs, of their title to the property in question, taken in connection with the allegations in the writ, the plaintiffs are not entitled to recover.

Which several instructions the presiding Judge declined to give, with the exception of the seventh, which was given with the qualification above stated.

The verdict was for the plaintiffs.

Barnes, in support of defendants' exceptions:—

Since the exceptions were taken in this case, the decision of the Court in *Pratt* v. *the same defendants,* 42 Maine, 579, has rendered a part of the exceptions unavailable for further discussion.

That case, like the two cases in the Massachusetts Reports, under a similar statute, appeared to present one or two prominent and special grounds of defence, supposed to be so well maintainable, as not to call for examination of certain elemental objections to proceedings under this very peculiar statute. The case of *Pratt,* if it does not actually overrule much of what is said in the previous case of *Chapman,* 37 Maine, 32, certainly takes away from railroad defendants, the confident reliance, which they had placed upon the several statements and *dicta,* contained in the latter case, respecting the liability to fire risk for mere personal and moveable property, a reliance the more reasonably entertained, because the two Massachusetts cases, show explicitly, that they were prosecuted only for injury to real, fixed property, and no trace appears in the cases, or in the discussions by the Court, of any claim for loss of personalty, though such loss must necessarily have occurred.

We are compelled also to regard the decision in *Pratt's case,* as rendering it unavailing to discuss any further, the relations supposed to be created by the legislative equivalent, of protection by insurance, against the liability declared in

the statute. For nearly all cases that can arise, the statute must now be treated as if no such provision were made for the protection of the companies, as if there were only the naked declaration of their responsibility, without corresponding safeguard or equivalent of any kind.

Under these circumstances, the discussion of the present case will be confined to a point, which goes to the elemental meaning and effect of the statute, and to one or two others, which are special issues raised by the particular facts of the case.

1st. The defendants except and object that this action cannot be maintained because no remedy is given by the statute of 1842—the statute does not prescribe or authorize any action or form of action, or mode of trial, for recovery of the damages alleged, and no such remedy is given by the general statutes or by the common law.

It is plain upon the face of the statute, that it does not, of itself, give any action or prescribe any form of remedy. It is equally plain that the deficiency is not supplied by the general statutes. The familiar provision in R. S., 1841, p. 500, that all penalties may be recovered by action of debt, where no other form of action is prescribed by the statute imposing such penalties, has no application here, because this is not a case of penalty, nor have the plaintiffs brought an action of debt. This provision, however, does indirectly declare, that if *penalties*—a subject so familiar to the analogies of the common law—require specific statutory declaration of a remedy and form, by which they may be recoverable, much more is a statutory provision of remedy indispensable for recovery against a party who has done no wrong, broken no contract, violated no rights, neglected no caution, omitted no diligence, but has merely prosecuted a lawful business, and discharged a duty required by statute, in the only mode in which it could possibly be accomplished.

But the absence of all statutory remedy compels the plaintiff to rely upon common law authority for bringing an "action on the case," as this is said, in the writ, to be.

We instantly encounter the anomaly, not to say the absurdity, of an action on the case, where the writ contains no allegation of any wrong, or fault of any kind, and where, of course, no proof of any wrong could be offered, and none was offered, in fact, or pretended to exist.

It is an incontrovertible first principle of the common law that *damnum absque injuriam*, is not the subject of any action. The true translation of that phrase is, simply, "*loss without wrong*" — suffering sustained by one party, without *fault* by the party causing it. The present writ alleges a loss sustained by the plaintiff, but alleges no fault or neglect committed or suffered by the defendant. The common law does not know how to deal with such a case.

The familiar maxim of the common law that "wherever a statute gives a right, the party shall, by consequence, have an action to recover it," has its proper application and its necessary limits.

It is found stated in the foregoing words in 2 Dane's Abr. 486, and is, in its terms, a very broad and general declaration. But upon page 481, the same author lays down that "no man can be liable to an action, but in one of three ways"; 1, upon his promise; 2, upon some wrong; 3, because some law specially gives the action. And see sect. 4, on p. 482.

It requires but a moment's reference to the cases cited by Dane, at the place first quoted, to see that it is not merely the statutory *declaration of a right*, which gives a party an action, but there must be some *violation* or withholding of that right, and then we have the "*damnum cum injuria*," which authorizes the action on the case, as stated in 2 Dane, p. 486, § 24.

The case in 2 Salk. 415, is the same with that in 6 Mod. 26. It is held, that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land, "for, where a statute, as the statute of Wills gives a right, the party by consequence, shall have an action at law to recover it."

Now the statute of Wills, (32 Hen. 8, c. 1,) was merely a statute, by which the king, waiving his own prerogative dominion over the property of his subjects, authorized them to

make testamentary dispositions of their estates. Under wills so made, undoubtedly devisees would acquire rights; but it would be absurd to hold, under that, or any other statute of wills, that a devisee, by the mere terms of the statute, could sue for the benefit given him. There must first be, a withholding, or denial of the right, and then we have the common and indispensable element of a *wrong done* against such right —in one word, a *delictum*,—which is the essential and central idea of every form of an action on the case.

Dane refers also to 1 Com. Dig. 223, folio ed. [The place referred to is at the beginning of the sub-title "Action upon statute," under the general head of "Action upon the case,"] which lays down, that "upon every statute, made for the remedy of any *injury, mischief* or *grievance*, an action lies by the party *grieved*," where the terms all import a *wrong* done, or a right violated, in accordance with the doctrine of the same author, who states, [Action on the case, "*When it lies*,"] "An action upon the case is founded upon a *wrong*," and, "In all cases, where a man has a temporal loss or damage, by the *wrong* of another, he may have an action upon the case to be repaired in damages."

Comyn refers to 2 Inst. 55, 118, and this carries us back to rights and remedies under Magna Charta itself. Coke says, in interpreting the clause, "*Nulli rendemus*," *&c.*, "And, therefore, every subject of this realm, for *injury* [that is, in Saxon, *wrong*] done to him in goods, lands, or person, by any other subject, may take his remedy by the course of the law, and have justice and right for the injury done to him."

And, more specifically, (2 Inst. p. 118,) discussing the statute of *Marlebridge*, the same authority declares, "When any act doth prohibit any *wrong or vexation*, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute.

The whole thing is comprehensively and explicitly stated by the Court in 11 Johns. 140, "It is the pride of the common law, that wherever it recognizes or creates a private right it also gives a remedy for the *wilful violation* of it." In like

manner, where a *statute* creates a private right, it is the pride of the common law to supply a remedy for the "*willful violation* of it," but not otherwise. The common law supplies no remedy, where there is no *wrong*.

A familiar maxim upon this subject is very tersely expressed in four words—"*ubi jus, ibi remedium.*" Equally succinct, and more precisely accurate, however, is the formula—"*ubi injuria, ibi remedium.*" It is plainly not the mere existence of the *jus* which gives a right of action, but the violation of it,—in other words, the *injuria*. And our best elementary authority on these subjects, (1 Chitty's Pleadings, 85,) quotes from the leading case of *Pasley* v. *Freeman*, that, "where cases are new in their *principle*, it is necessary to have recourse to legislative interposition in order to remedy the grievance." Certainly, claims made under the statute of 1842, are novel in *principle*, and not merely in the *instance*, and the common law, with all its fertility of remedy, where the *instances* are alike, supplies nothing in aid of a statute, which has undertaken to create relations, upon a principle unknown to the general ideas of right and wrong.

It is confidently believed, that no form can be found, in any of the books of entries or precedents, for an action on the case, whether under statutes or otherwise, without an allegation of some wrong, violation or breach.

Familiarly, also, in all our other statutes, which create liabilities, where none would exist at common law, or are sought to be imposed upon a particular party, who would not be liable otherwise, the Legislature carefully provides for the *action* as well as for the *rights*. As, under the usury laws, laws for recovery against stockholders, pauper laws, fence laws, highway laws, and others, indefinitely.

In accordance with the views taken by the defendants, they have declined to plead the proper general issue to an action on the case. They have not pleaded that they are not guilty, because the plaintiffs have tendered no such issue. The defendants are more successful in finding a statutory plea to suit this anomalous declaration, than the plaintiffs are in finding a

valid form of remedy or declaration, either by statute or common law.

The decision in *Pratt's case* does not cover the present exception, not only because no such point was made, but because the declaration in that case was in the usual form of a common law action on the case, and specifically alleged negligence; though, as the case went forward upon an agreed statement, every question of pleading was waived. Thus, there is nothing in the present argument, which is inconsistent with the record or the trial of the decided case.

2d. The defendants object, that this action cannot be maintained against them, for want of previous notice to them of the alleged loss, and because no demand was made upon them for any sum for which they are claimed to be responsible, and they insist that this point is justly and necessarily applicable to all claims and proceedings under such a statute.

This point rests upon reason and sense, upon every idea of natural justice, and upon all the analogies of the law.

Because—a party so made responsible by mere statute, but being in no fault, shall not be sued, until he has had an opportunity to pay without suit, including the opportunity to learn the fact of liability and amount of damage.

Universally, policies of insurance provide that the insurer shall not be subject to suit, until after notice of loss, and time to make payment. This is matter of contract, and common reason requires the contract to be so made. *A fortiori*, a party compelled by statute to become an insurer, and incurring liability without fault or neglect, shall have reasonable notice before suit. To hold that the statute subjects him to costs, before he has knowledge that the liability has accrued, or what damage is incurred, is to hold the statute manifestly unjust and oppressive.

All claims resting upon contingencies, where the knowledge that the contingency has become fact, is in possession of the claiming party, require notice of the event, before suit. Even if a railroad company be supposed to know, in all cases, that its engine has caused a fire, with damage to other parties—

which is not a supposable case—yet it is plain that it cannot know, until notice from the suffering party, what kind or amount of damage has been sustained. Nor can it possibly be supposed that it should be ready to pay, instanter, a claim of which it had never before heard.

The ancient English law furnishes a convenient analogy. The Hundred was liable to make compensation for robberies. But the Hundred was in no fault. Yet public policy required that it should make good the loss of the suffering party. Not, however, until after hue and cry, nor until after most explicit and formal notice. See the abstract of the statutes in 2 Sell. 79, and the form of declaring in 2 Saund. 375. [One of the *notes* in 2 Saund. is wrong, as appears by reference to the case cited, 2 Salk. 614, where the point decided was upon the *oath*, not upon the *notice.*]

The statutes of Hue and Cry go back to the period, where are found also the fountains of the common law. They are arbitrary in the liabilities they create, but they adopt the principles of the common law in their process, and it is worthy of remark, in support of our first exception, that they do not stop with merely declaring that the Hundred "shall be held responsible," after the manner of our statute of 1842, but they specially provide a form of remedy, and a means of recovery.

More familiar analogies are abundant, as in the case of indorsers, guarantors, actions upon bank deposits, town orders, and contingent claims of that kind where, though in some of the instances, it would now be held, that the *contract* was to pay only after notice and demand, yet it is the common law which has made that to be the contract, for the obvious reason that otherwise the party against whom the claim is made, can have no previous knowledge, what will be claimed, or when it will be made. So, in the large class of cases, where trover is not maintainable until after demand; the chief distinction between this and the other class of cases in trover, being that in the one there is no legal fault until after demand. And generally, where there has been a breach of contract, or any

tort feasance or neglect, with injury, action lies at once. But not, where the party claimed against has neither done any wrong, nor has any knowledge of the existence of a claim.

The two cases in Massachusetts, 4 Cush. 288, and 13 Met. 99, both show expressly that demand was made before suit brought.

3d. Upon the point made in regard to the lease, the defendants do not now controvert the actual decision in the case of *Whitney* v. *Atlantic & St. Law. Railroad,* 44 Maine, 362. The liabilities rising under the duty of building and maintaining fences, a matter appertaining to the *structure* of the road, may be left as they are left under that decision. Notwithstanding, however, the more comprehensive *dicta* contained in the opinion, the defendants, having regard to the importance of an explicit definition of their position, under other classes of duties, feel at liberty to ask the attention of the Court to some further considerations touching the liabilities that may arise from the actual business of "maintaining and operating" the line, especially since the liability discussed in the present argument is one of so very peculiar nature, and there is much reason to hold that the general statute comes in aid of the view, which the defendants take of the Act authorizing the lease.

The attention of the Court has already been called to another peculiar duty, supposed to arise in the maintenance and operation of the line; that is, the duty of connecting with other roads, whether under the charter, or under the Act of 1854, on this subject. Whether the discharge of this duty is to be worked out by process against the lessors or the lessees, (if the Act of 1854 applies to either,) has been discussed in the case of the *Portland and Oxford Central Railroad Co.*, petitioners, against the *Grand Trunk Railway Co. & al.*, now before the Court.

Yielding then, that where a duty and liability goes to the structure of the work, the lessors may not be exonerated in any event, yet, when the lease Act, with equal explicitness declares that the lessees shall be enabled to "maintain and

operate" the line, it means that they may, of themselves, according to their own discretion, for their own interest, at their own risk, subject to the law, do all those things which pertain to the current business of the road as railroad proprietors, and that the benefits and the hazards belong to them and not to the lessors. If the lessees contract to carry goods or persons, and do not perform their contracts, the breach is upon them, and not upon the lessors. If, in maintaining and operating the line, they act negligently or tortiously in any manner, the tort is plainly theirs, and cannot be regarded as the act of the lessors, who are not in possession and not in control, but, in fact, ousted, by the law as well as by the lease, from all authority and all power of control. And, *a fortiori*, in a case like this, where there is no tort, but only an arbitrary responsibility, created by statute, against those who own and work the locomotive, which causes the fire.

The defendants contend, as was contended in the case last referred to, that an interpretation of the lease Act, which makes the lessors universal and perpetual guarantors for all acts of the lessees, is so extremely onerous, that it ought not to be made out, in the slightest degree, by inference or implication. If the Legislature had meant that, it would have said so. Instead of merely declaring that the Atlantic Company should be held responsible for all its own duties and liabilities, it would have provided, that notwithstanding any change of title or possession by the lease, the lessors should be answerable for every thing done or omitted by the lessees. Instead of providing only for the existing actual duties and liabilities of the defendants, "*now imposed* upon them," it would have made them explicitly chargeable for all the *potential* and future liabilities, which might accrue in the subsequent use and working of the property.

It is noticed, that in the case of *Whitney*, as reported, the argument of plaintiff and the opinion of the Court, in reciting the non-exoneration clause of the lease Act, both omit the word "*now*," contained in that clause; an omission doubtless inadvertent, perhaps unimportant. Yet, the defendants, as

matter of recollection, know, and as matter of construction, insist, that that word was designed to indicate such a distinction between the actual and the potential as is contended for in this case.

Certainly, the lease Act does absolve the Atlantic Company from some of the duties required by its charter,—from this very duty of working the line. The 12th section of the charter requires that the company shall supply carriages, and shall be obliged to receive and carry passengers and goods. But the lease Act says, that the lessees may do this, and that the lease may be so made as that they shall be enabled to do it—clearly discharging the lessors from all this duty—not providing that they may do it, by the lessees, as their servants or agents, but that the lessees may do it themselves, by an actual, independent, legislative authority. Therefore, whatever liability to other parties arises in the doing of this, is the liability of those who do it, not of those who are discharged from doing any thing at all.

If the duty should be wholly omitted, then a question would arise with the State, which would act, not upon any matter of fault of this or that party, not upon any question of principal or agent, lessor or lessee, but upon fundamental questions of franchise, over which the State retains full control, and full power of correction.

It is of importance to observe, that the Act of 1842, expressly contemplates that the fire damage in question, may be caused by a locomotive belonging to a party, which does not own the franchise of the road on which it is running. The second section of that Act, which is still in force as a general law, directly authorizes a connecting road company, under certain conditions, to run its own locomotive over the road of another company. It then justly provides, that when injury is done by fire from the engine of *any* railroad corporation, *the said* corporation shall be held responsible in damages. The liability is cast upon the party which does the damage, not upon the party holding the franchise of the road on which it is running.

So that there is just reason to hold that the Act of 1842, regarded by itself alone, provides that the remedy, in a case like this, (if there is any remedy,) shall be sought against the party which does the act, and not against any other.

The present case finds that long before, and at the time of the alleged injury, the Atlantic Company was out of possession, had no control over the running, did not work the locomotive, and never owned it, and was not acting by any servant or agent in the matter in question. Another party was in possession under statute law, was the owner of the locomotive, and was running it, by its own servants, for its own benefit.

Howard & Strout, for plaintiffs, to the objection that the statute of 1842 gives no remedy and prescribes no form of action, replied, that the statute creates the liability of the party causing the injury, and recognizes the right of the party injured to redress. Wherever the common law recognizes or creates a legal right, it will confer a remedy by action. *Birkley* v. *Presgrave,* 1 East, 226; *Yates* v. *Joyce,* 11 Johns. 140.

So, if the right be created by statute, and be invaded or impaired, with or without violence, the common law will confer a remedy when none is provided by statute. *Ubi jus, ibi remedium.* 2 Inst. 118.

At common law, if no form of action could be found in the register, adapted to the nature of his case, yet the plaintiff was at liberty to bring a special action on his own case. 1 Chitty's R. 95, 96; 2 Black. R. 1113. This Court has power to issue all writs and processes, which may be necessary for the furtherance of justice, and the due execution of the laws, R. S., 1841, c. 96, § 5, and may mould the process and the form of action to an efficient remedy.

In their argument, that the statute was binding on the defendants, and was not unconstitutional, the counsel cited *Hart* v. *the Western Railroad Co.,* 13 Met. 99; *Lyman* v. *the Boston & Worcester Railroad Co.,* 4 Cush. 290; *Chapman* v. *the*

Atlantic & St. Lawrence Railroad Co., 37 Maine, 92; *Pratt* v. *same*, 42 Maine, 579.

As this is a claim founded in wrong, an action *ex delicto* lies without demand or notice. For, so is the law, whether the tort arise from non-feasance, malfeasance or misfeasance. 1 Chitty's Pl. 133, 134.

The statute of 1842, c. 9, § 5, is general in its terms, and applies to railroad corporations subsequently chartered, as well as those then existing, and *a fortiori* to the former. There is no exemption from such liability in the charter of the defendants, granted February 10, 1845. The Act, under which the defendants executed a lease of their railroad, provides expressly that "nothing contained in this Act, or in any lease or contract that may be entered into, under the authority of the same, shall exonerate the said company or the stockholders thereof, from any duties or liabilities now imposed on them by the charter of said company, or by the general laws of the State." Special Laws of 1853, March 29, § 1.

By effecting the lease, therefore, the defendants could not avoid their responsibility in this and similar cases. Their lessees were authorized to "maintain and operate the railroad and connecting lines," and were, *quasi*, the agents and employees of the lessors. The lease was intended to be, and was in fact, made to the Grand Trunk Railway Co. of Canada, a foreign corporation, not amenable to this State, or to the jurisdiction of this Court, and hence the responsibility of the defendants was coupled with the authority to lease; in order to secure to all, rightfully commencing suits in this State, a just and legal indemnity in damage, for wrongs and injuries inflicted by the defendants, their agents and lessees, in accomplishing the objects for which they were created and allowed to maintain and manage their railroad.

The locomotive engine, by which the fire was communicated, though purchased by the lessees, was used and intended, as appears by the evidence in the case, to enable them to "maintain and operate" the railroad of the defendants, under the lease, as contemplated by the Act of 1853. And, to that

end, may well be regarded as the engine of the defendants, *quoad hoc*, it was their engine, upon their railroad, operated by their agents, to perform their duties, and accomplish their business and purposes, as between them and the public. *Whitney* v. *the Atlantic & St. Lawrence Railroad Company*, 44 Maine, 362.

It is not perceived that the settlement with Thomas Stearns, in 1854, of "damages, and the adjustment of lines between them," can have any material bearing upon the matter in controversy in this suit. *Lyman* v. *the Boston & Worcester Railroad*, 4 Cush. 290. The subject of this controversy did not exist at that time, and was not embraced in that settlement.

The plaintiffs having procured insurance upon their property destroyed, and for which they now claim compensation, is of no importance to the defendants. Even if the plaintiffs had received compensation from the insurance company, it would not exonerate the defendants from their liability under the statute, and would furnish no bar to this suit. How the equities between the insurance company and the plaintiffs might be affected, under such circumstances, is not a matter to be agitated by the defendants. *Hart* v. *Western Railroad Co.*, 13 Met. 99.

The fifth request for instruction was properly refused, if, as we have attempted to show, the defendants are subject to the provisions of the Act of 1842. Whether the property destroyed was placed upon the plaintiffs' land before or after the location of the railroad, does not justify the burning in the manner alleged.

The defendants are responsible for the property destroyed by fire communicated by their engine, on which it would have been practicable to effect insurance, by use of reasonable diligence, as held by this Court in *Chapman* v. *the Atlantic & St. Lawrence Railroad Co.*, 37 Maine, 92. The sixth request was therefore properly refused.

The seventh request was given with suitable qualifications. The jury must have found, under the instructions from the Court, that the plaintiffs did not contribute to the injury of

their property, or increase the risk, so as in any manner to occasion the loss.

It is not perceived how the eighth requested instruction could have been given by the presiding Justice, without invading the province of the jury, and assuming to settle facts which they only were competent to determine.

The opinion of the Court was delivered by

MAY, J.—At the trial of this action several grounds of defence were urged, which, in consequence of subsequent decisions, are now abandoned. Such as remain, and have been presented to our consideration in argument, we will consider, and such only; regarding all other grounds, as waived by the learned counsel who has so ably conducted the defence.

The first objection now raised, is, that this action cannot be maintained because no remedy is given by the statute creating the liability; nor by any other statute; nor by the common law. That the statute, upon which the plaintiffs base their right to recover, gives to them a right to compensation for the injury they have sustained, is not denied, stat. of 1842, c. 9, § 5; but, it is insisted, that the creation of such a right is wholly unavailing to the party injured, unless the same statute, or some other, also provide some form of remedy. But such is not the law. Some form of action may always be maintained for a violation of a common law right; and, it is often said to be the pride of the common law, that it furnishes a remedy for every wrong. In the absence of any authority to the contrary, it is not perceived why a legal right to compensation for actual damages sustained, even though such right depend wholly upon a statute, is not as worthy of protection in a court of law, as any common law right. The common law is said to be, in fact, nothing but the expression of ancient statutes; but, whether this be so or not, the injury for a violation of a statute right, is as real as are injuries which exist only by the common law.

If a man has a right, he must, as has been observed in a celebrated case, have a means to vindicate and maintain it,

and a remedy, if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. *Ashby* v. *White*, 2 Lord Raym. 953; *Westmore* v. *Greenbank*, Willes, 577, cited in Broom's Maxims, 147. To deny the remedy is therefore, in substance, to deny the right. And it makes no difference, whether the right exists at common law or by statute. Hence the familiar maxim quoted by the counsel in defence, that "wherever the statute gives a right the party shall, by consequence, have an action to recover it." The authorities cited in defence will be found to be in harmony with this maxim. The rule is now understood to be well settled, that when a statute gives a right, or forbids the doing of an injury to another, and no action be given therefor in express terms, still the party shall have an action therefor. Broom's Maxims, 149, 150, and cases there cited. The cases cited for the plaintiffs not only sustain the same position but also show, that where no other remedy is provided, the proper remedy is a special action on the case.

It is said, however, that in all these cases the fact that a wrong had been done, is recognized by the Court, while, in the case at bar, the defendants are without fault. This may be true; if the defendants, or their lessees, are required in the running of their engines, to exercise only that degree of care which is required by the common law. But something more than ordinary care, at least by a strong implication, is made necessary by the statute on which this action is founded. In the rightful exercise of its powers, the Legislature has determined, that if the locomotive engines of any railroad corporation are driven by them, or their agents, in such a manner, or under such circumstances, that fire shall be communicated thereby to the property of any person or corporation along its route, such railroad corporation shall be held responsible in damages to the person or corporation injured. The degree of care, therefore, which is required to protect such railroad corporation against liability for damages, occa-

sioned by fire so communicated, is such as will prevent all such injury. If they exercise such care they are safe, otherwise they are not. We cannot say, considering the dangerous nature of this element, and the vast amount of property along our railroad routes which is exposed to its devouring flames, that such a rule is not required for the public good, or that when a less degree is exercised, even though it be all which ordinary prudence might require, the corporation is without legal fault. There is at least a statute wrong. The foundation, therefore, for the alleged distinction between this case, and those referred to in the cases cited, does not exist; and the exception to the ruling of the presiding Judge on this point, is not sustained.

It is further said that the declaration in the plaintiff's writ alleges no wrong. If it be defective in this particular, the omission is of such a character that it can be set right upon a motion to amend. We do not decide, however, that it is insufficient as it is, especially after verdict.

It is next contended that this action cannot be maintained, for want of notice and demand previous to the suit. No such preliminary acts are required by the terms of the statute. The liability in this case is likened to that on contracts of insurance, and it is insisted that the same rules as to notice and demand, should apply. But in cases of insurance, these preliminaries to a suit are provided for by the express terms of the contract. In the absence of such a provision, we are aware of no case in which it has been held that an action might not be instituted at the moment the loss occurred and the liability attached. This case falls within the rule stated by the counsel in defence, that "generally, where there has been a breach of contract, or any tort-feasance or *neglect with injury*, an action lies at once." As we have already seen, the defendants are not to be regarded as wholly without fault. The ruling, therefore, which was requested upon this point, was properly withheld.

The third, and only other point argued in defence, is, that

upon the facts in this case, these defendants are not liable, and that, if any liability exists, it is against their lessees. The correctness of the decision in the case of *Whitney* v. *these defendants*, 44 Maine, 362, is not controverted; but it is urged that there is such a marked distinction between the facts in that case, and the facts in this, that it does not necessarily follow, that the question determined in that case is decisive of this. The principal difference between the cases consists in this, that in the former, the liability arose from a neglect to perform a duty enjoined upon the defendants by their charter, relating to the structure and fencing of their road; while, in this case, it is imposed by a subsequent statute, upon any railroad corporation, by whose engine the fire causing the injury was communicated. It appears, also, that the engine, by which the fire now complained of, was set, was not among the property contained upon the schedule annexed to the lease, and so was not then and thereby transferred by the defendants to the use and possession of their lessees. It appears to have been purchased by said lessees long after the making of said lease.

The liability of the defendants, if liable at all, was created by the statute of 1842, c. 9, § 5, before cited, which provides that "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured." It also contains other provisions not now necessary to mention.

The statute imposing this liability upon the defendants was passed long before the transfer of the use and possession of their road to their lessees; and, by the express provisions of the statute of 1853, c. 150, § 1, authorizing the defendants to lease their road, it was enacted, that nothing contained in said Act, or in any lease or contract entered into under the authority of the same, should exonorate the said company, or the stockholders thereof from any duties or liabilities then

imposed upon them *by the charter of said company* or *by the general laws of the State;* nor does it appear from the lease, in fact, executed, that any such exonoration was attempted.

Whatever duties or liabilities, therefore, were assumed by the defendants, by the acceptance of their charter, or afterwards rightfully imposed upon them by the laws of the State, were, at least for the purposes of a remedy, to remain and continue to be obligatory upon them in the same manner, and to the same extent, as if the lease had not been executed, and the use, possession, and management of their property had not been transferred to their lessees. To meet such liabilities, and to indemnify themselves against loss, from any neglect on the part of their lessees to perform all such duties, and to pay all such indebtedness as had arisen, or might subsequently arise, out of such liabilities, the defendants were careful to secure themselves, by appropriate covenants in the indenture or lease between them and their lessees. Such, therefore, must have been their understanding of the statute, and of the extent of their liability. It cannot be material whether the duty or liability to be enforced arises out of the provisions of the charter, or, as in this case, out of a subsequent general law.

Nor do we see any ground upon which to restrict the liability of the defendants, contemplated by the statute authorizing the lease, to such claims as arise from the duties in relation to the structure of the road, or from any neglect properly to construct and fence it. The statute clearly extends, not only to such liabilities, but to all others arising from the violation of any corporate duty which was imposed upon the defendants, either by their charter or by some general law. "The comprehensive *dicta*," therefore, of Justice CUTTING, as contained in the opinion drawn by him, in the case of *Whitney* v. *these defendants*, before cited, is fully warranted by the language of the statute. To limit the liability of the defendants, in the manner which is contended for in defence, would be doing violence to the manifest intention of the Legislature,

and would, in effect, be to turn all parties having valid claims, arising from the mismanagement of the road, or from the omission or commission of acts by their lessees, which are required or prohibited by the charter of the defendants or the statutes of the State, over to a foreign corporation and a foreign jurisdiction, for the adjustment of their rights and satisfaction of their claims. It would be doing the very thing which the statute was designed to prevent. The lessees may "maintain and operate" the line of the road. They may have the whole control and management of it, but the lessors cannot thereby be exonorated from answering for any neglect of duty or liability imposed upon them by law.

Nor does the fact, that the locomotive engine, from which the fire was communicated to the property of the plaintiffs, was not among the specific property originally leased, relieve the defendants from liability. It is apparent from the terms of the lease, that the defendants, not only still retain a reversionary interest in all the property, the use and management of which was transferred to their lessees, but in all such property as should subsequently be substituted therefor, or added thereunto by the lessees during the continuance of the lease; and, by the covenants in the lease, the lessees are expressly bound, not only to keep the said railroad in repair, but constantly equipped with all necessary apparatus, and other moveable property of every kind, and from time to time to make such additions thereto and renewals thereof, as shall be necessary for the transportation of the largest practicable number of passengers, and amount of freight. All such property, whether purchased or renewed in pursuance of the lease, immediately becomes subject to, and is held for the lessors, subject to its provisions; and, according to the contract, is as much a part of the leased estate as that which was referred to in the schedule annexed to the lease. The engine therefore, by which the fire complained of was set, was the engine of the defendants, within the meaning of the statute upon which the liability of the defendants depends. It was

not the engine of any connecting road. Had it been such, whether the defendants would, or would not have been liable, we are not now called upon to decide. Nothing, therefore, is found in the facts of this case to take it out of the rule which was established in the case of *Whitney* v. *these defendants*, before referred to. *Exceptions overruled, and Judgment on the verdict.*

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW, and KENT, J. J., concurred. DAVIS, J., concurred in the result.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT.

1858.

COUNTY OF KENNEBEC.

RUBY H. BARTON, *Appellant, versus* JOAN C. HINDS.

By c. 95, § 3, of the Revised Statutes of 1841, (R. S., 1857, c. 103, § 3,) the Judge of Probate may assign the widow her dower in all the lands of which her husband died seized, unless her right thereto is disputed by heirs or devisees, or by persons claiming under them. As no other persons are bound by the decree, so they have no right to appeal from it. (MAY, J., dissenting.)

FACTS AGREED, March Term, 1857.

This was an appeal from a decree of the Probate Court, assigning dower to Joan C. Hinds, in the real estate of her late husband, Benjamin Hinds. The dower was assigned as of lands of which the said Hinds died seized. That he was in possession, claiming title therein, was not questioned.

The appellants and said Benjamin Hinds, and others, were heirs at law of Ashur Hinds, whose estate was divided among them in 1815. This partition was made by the Probate Court; and the part assigned to Benjamin Hinds, was the same land in which dower was assigned to the respondent. But the appellants denied the validity of the partition made

in 1815, and claimed to have been tenants in common of the premises with Benjamin Hinds. They, therefore, resisted the assignment of dower by the Probate Court, and claimed an appeal from the decree. The only question was their right to interpose for the purpose of ousting the Probate Court of its jurisdiction, as they were not heirs or devisees of Benjamin Hinds, nor did they claim under any heir or devisee.

It appeared, however, that when the estate of Ashur Hinds was divided among his heirs, in 1815, the commissioners, in making partition thereof, not being able to divide it equally "without great inconvenience," assigned a larger share to Benjamin Hinds than to some of the other heirs, and awarded that he should pay them certain sums of money therefor. This was done under the statute of March 9, 1784. In accepting the report of the commissioners, the Judge of Probate, in his decree, ordered that the share so assigned, "should be held charged for the payment of the sums of money so awarded." It appeared in evidence that, at the time of Benjamin's decease, all the other heirs had not been fully paid the sums awarded them. This was one ground on which they claimed to have an interest in the land.

The case was argued by *Bradbury, Morrill & Meserve,* for the appellants.

Benjamin Hinds did not die seized of the lands, and therefore the widow was not dowable therein.

1. The decree of the Judge of Probate, accepting the report of the commissioners who made partition of the estate of Ashur Hinds, was not in conformity with the statute of 1784, and was therefore void. Such a decree did not pass the title to Benjamin Hinds. *Goodtitle* v. *Maddern,* 4 East, 501. Nor was it necessary for any of the heirs to appeal from it. It was *ipso facto* void. 16 Mass. 122. The land, therefore, remained the property of the heirs as tenants in common. 7 Pick. 209.

2. But if the commissioners proceeded according to the statute, their report was never accepted by the Judge of Pro-

bate, except upon the express condition that the sums awarded to the other heirs should be a charge upon the land. If the Judge of Probate had no authority to annex such a condition, then there was no acceptance. If he had such authority, the condition has never been performed by payment, and therefore no title ever passed to Benjamin Hinds. *Gaddler* v. *Newhall*, 16 Mass. 122; *Thayer* v. *Thayer*, 7 Pick. 209.

It is immaterial whether the decree was void *ab initio*, or became void for want of performance of the condition. In either case Benjamin Hinds acquired no title by lapse of time. 7 Mass. 79. His possession, as one of the heirs, was not adverse to the others, and he acquired no title by disseizin. 3 Gr. Cruise, 436.

North argued for the respondent.

1. The Judge of Probate exceeded his authority in annexing the condition to his decree. The condition being void, the acceptance of the report was perfected, and the title to the land passed to Benjamin Hinds free from any charge, and subject to no contingency.

2. But, if he had authority to annex any such condition to his acceptance, the appellants waived the condition by permitting Benjamin Hinds to occupy the premises for a period of forty years. They never entered for condition broken; and they are now precluded, by lapse of time, either from denying the legality of the proceedings, or claiming a forfeiture, merely because a small sum remained due to two of the heirs.

The opinion of the Court was delivered by

GOODENOW, J. — By the R. S., c. 95, § 3, the Judge of Probate may assign dower to the widow, in lands of which her husband died *seized*, when her right of dower is not disputed by the *heirs* or *devisees*.

In *Sheafe* v. *O'Neil*, 9 Mass. 9, the husband did not die seized, and upon this ground the case was decided.

In the case *French* v. *Crosby*, 23 Maine, 276, it was held

that a person, claiming title under an heir or devisee, might dispute the right of a widow to dower, and thereby oust the Probate Court of jurisdiction in the assignment of dower.

In this case, the husband died seized of the premises in which dower has been assigned by the Judge of Probate, and the claim of dower was not disputed by an heir or devisee of the husband, or by a person claiming under an heir or devisee.

When the assignment is made, the widow acquires no new freehold, but her seizin is a continuation of her husband's seizin. 4 Mass. 384, 388; 1 Pick. 314, 317, 189, 191.

The presumption is, that the husband owned the land, having died in the exclusive possession of it. It makes out a *prima facie* case for dower. The widow should be provided for without unnecessary expense or delay. She should not be held out, or turned out, by a claim from any one, except the heir or devisee, or person claiming under the heir or devisee, before there shall have been a decision upon the merits of such claim. The assignment of dower by the Judge of Probate is not conclusive. It does not settle the title as to strangers, or undertake to do so.

If the Judge of Probate had power to insert in his decree, "and the share or part so assigned shall be held charged for the payment thereof," it was not a *condition precedent*. Benjamin became seized, it may be, of a defeasible estate. The case shows no entry for condition broken, in his life time. The payment was to be made to the other heirs, by Benjamin, within one year after it should be demanded.

Whether the appellants have lost all remedy by lapse of time, we need not now decide. They may, or may not, have a charge upon the land for the amount which remains due them from Benjamin Hinds. Upon that question, however, we express no opinion. However that may be, they do not sustain such relation to the estate of Benjamin Hinds, as to authorize them, under the statute, to interfere with the proceedings before the Judge of Probate, or to claim an appeal from a decree of the Probate Court, assigning dower to the

widow. The appeal is therefore dismissed and the decree of the Probate Court affirmed.

Appeal dismissed. — Decree of Probate Court affirmed.

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

MAY, J., dissenting. — This is an appeal from a decree of the Court of Probate for this county, assigning dower to the appellee in the real estate of her late husband, Benjamin Hinds, as if he were sole seized thereof at the time of his death. The appellants appeared in that Court, and denied that her said husband was so seized; and alleged that they were seized as tenants in common with him and others, as coheirs and children of Ashur Hinds, who died as early as the year 1815, and from whom the said estate descended to them as his heirs at law. The appellee claims that her said husband became sole seized by virtue of a partition of the real estate of said Ashur Hinds among his children, by the Court of Probate, in October, 1815, and by which that portion of his estate, in which dower is now claimed, was set off to him. The validity of the proceedings in said Court are denied by the appellants.

Upon the foregoing facts, the first question presented to our consideration, is, whether the Court of Probate had any jurisdiction, so as to authorize an assignment of dower, by any proceedings in said Court. By the R. S., c. 108, § 14, it is provided, that "any widow entitled to dower in any estate of which her husband died seized, settled, or in a course for settlement in any Court of Probate, may apply to the Judge and have her dower assigned to her, on the principles stated in chapter ninety-five, unless her claim is disputed by some adverse party;" and, by the said c. 95, § 3, it is further provided, that "the Judge of Probate for the county in which the estate of the husband is settled, may assign dower to the widow, in the lands of which the husband died seized, in whatever counties they may be, where her right of dower is not disputed by the heirs or devisees." Under this statute

it has been directly settled by this Court, that it was not the intention of the Legislature to submit any question of title to the decision of the Judge of Probate. *French* v. *Crosby*, 23 Maine, 276. In this case SHEPLEY, J., remarks, that "the intention of the statute was not to refuse the jurisdiction because a *particular person* disputed the right, but because the *right was disputed by the owner of the land*, out of which the dower was claimed." This was said in reference to the apparent limitation contained in § 3, c. 95, by the words "heirs and devisees." The construction, adopted by that learned Judge, was in conformity to that adopted by the Court, of a similar statute, in the case of *Sheafe* v. *O'Neil*, 9 Mass. 9; and is greatly strengthened by the use of the words "unless her claim is disputed by some adverse party," in the 14th section of chapter 108, as before cited. It appearing, therefore, from the facts in the case, that the right to dower, as claimed by the appellee, was disputed, the Judge of Probate should have dismissed her petition for want of jurisdiction, and the parties should have been left to settle their conflicting claims in a court having jurisdiction, and where a trial by jury can be had, if need be, to settle any facts in dispute between them.

MILTON M. STONE *versus* CITY OF AUGUSTA.

Where one of the boundaries of land conveyed by a deed was, "thence to mill brook; thence by the *bank* of said brook to," &c., it was held, that the grantee's land is bounded by ordinary high water mark; and this principle is not changed by the fact, that the land continues to rise more or less precipitously above that point. His land is not limited to the top of the hill or bank beside the stream, but extends to the margin of the stream.

The Commissioners of the county of Kennebec so located a road as to cross a stream in the city of Augusta. The city made the road as laid out, and erected a bridge across the stream. An owner of land bounded by the stream, brought an action against the city for injury to his premises caused by the bridge, alleging that it was so constructed as to change the current of the stream whereby the damage occurred; — and *it was held*, that to establish the liability of the city, in this action, it was not necessary that the plaintiff should prove that the bridge was *wantonly* built so as to injure him; it was sufficient to show a want of ordinary care in the erection of the bridge, on the part of the officers of the city, and that thereby the injury happened, without any fault of plaintiff, arising from acts or negligence on his part, which contributed to produce the damage.

The laying out the way by the Commissioners was a judicial act; but the construction of it, and the erection of the bridge, were acts purely ministerial, and the same rules of law are to be applied to the city, as would be to individuals in the performance of acts of a like ministerial character.

And such a case is distinguishable from one of ordinary repair of a highway, falling within the jurisdiction of a highway surveyor.

EXCEPTIONS from the ruling of RICE, J.; and on MOTION of defendants to *to set aside the verdict*, as being against law and evidence.

This is an ACTION ON THE CASE, for diverting the water of Bond's brook, by the erection of a bridge, whereby damage was caused to the premises of the plaintiff.

The plaintiff read in evidence a deed of the premises from Thomas Fuller to himself, dated September 10, 1844, which are bounded thus: — "Beginning at the north line of lot No. 10, on the south side of the road leading to the grist-mill formerly owned by James Bridge, Esq.; thence southerly and easterly by said road, four rods; thence southerly and westerly, parallel with the north line of said lot No. 10, to the mill brook; thence by the bank of said brook to the north

line of said lot No. 10; thence east south-east to the bounds first mentioned, meaning hereby to convey to said Stone four rods off of the north-westerly end of the premises conveyed to me by Church Williams, by deed dated July 27, 1844." The description of the deed, Williams to Fuller, is thus:— "Beginning at the north line of No. 10, on the south of a road leading to the grist-mill formerly owned by James Bridge, Esq.; thence southerly and easterly by said road twelve rods and four links; thence southerly and westerly seven rods and eleven links to the bank of the mill brook, one rod below a great hemlock marked on the bank of said brook; thence by the bank of the brook to the north line of lot No. 10; thence E. S. E. to the bounds first mentioned, containing half acre, more or less."

It was admitted that the County Commissioners duly located the county road across Bond's brook, where the bridge was built, and that the defendants, in pursuance thereof, caused the bridge to be erected.

The testimony given at the trial was fully reported, (and is voluminous,) the nature and effect of the most material parts of it, are indicated in the arguments of the counsel.

The defendants' counsel requested the Court to instruct the jury as follows:—

1. That the plaintiff's deed bounds him by the bank of the stream, and that it does not give him the rights of a riparian proprietor, so as to maintain this action for damages growing out of the change of the current of the water.

2. If they find that the defendants made this bridge in the exercise of ordinary care, they are not liable to the plaintiff, although he may have suffered damages in consequence of its erection.

3. If they find that this road and bridge were legally laid out by the County Commissioners, and the defendants caused the bridge to be erected in pursuance of that laying out, they are not liable in this action, unless it was *wantonly* built, so as to injure the plaintiff.

4. If they find that the plaintiff was not in the exercise of

ordinary care in placing his buildings and wharfing on the bank as he did, and that his want of ordinary care contributed to produce the injury complained of, he cannot recover in this action.

5. If they find that there was a want of ordinary care on the part of defendants in the construction of the bridge, and that that contributed to the injury of plaintiff, but that at the same time other causes, also contributed to that injury, without which it would have happened, then this action cannot be maintained.

The first and third of said requests were refused. The second, fourth and fifth were given.

The verdict was for the plaintiff, for $500 damages.

J. Baker, for defendants, in support of the exceptions: —

I. The first requested instruction should have been given.

It is manifest by the descriptions in the two deeds, that, in law, the plaintiff is limited to the bank. 8 Maine, 85; 6 Mass. 435; 1 Pick. 180; 36 Maine, 309, and cases; 7 Mass. 496; Angell on Watercourses, pp. 3 and note, and 25, 26; 17 Mass. 289; 4 Hill, 369; 4 Mason, 365; 13 Maine, 198–201; 2 Bouvier's Law Dict. 485–7 and 646; 2 Bouvier's Inst. 176; 4 Mason, 400–3; 4 Kent's Com., 353–5. Then where, in fact, is the bank? By the testimony, it appears that there is a clearly marked bank on the surface of the earth, and at some distance from the shore and current of the stream which is alleged to be changed. According to the testimony, in going from the road to the stream, we first have about fifteen feet of level ground; then we come to the brink of the steep bank, some judge it a descent of 45 degrees, but one witness took it exactly, and found it 39; and this bank must be about fifty feet in width horizontally; then we come to the shore nearly level, some eight feet wide, and finally to the water. By his deed, the plaintiff only owns *to* the bank, which is a term of exclusion; so that he does not own the fifty feet of bank; he does not own the eight feet of shore; he does not own the land under the water to the thread of the stream.

He owns only the upland, some sixty feet from the stream, and has no more right to maintain an action for the diversion of the water, than if it was sixty rods from it. Not a particle of his land has been reached or disturbed by the action of the water.

This instruction was not only important, as it affected the very foundation of the action; but also:—

1. Because it affected the question how far the plaintiff's own negligence contributed to the injury. It would be stronger evidence of negligence to place his buildings on the bank of another, by trespass, than on his own.

2. Because it vitally affected the amount of damages. Only some ten feet of the main house stood on his own land, and the remainder of that, and all the other structures, were beyond his line, and all the damage was caused by the washing away what was beyond his line. These structures, placed on the land of another, not by consent, but by trespass, and fixed in the soil, became the property of the land owner, and the plaintiff had no right to recover for damage to them, and, much less, for damage to the soil, which the jury included in their verdict.

II. The third instruction requested should have been given. This is the only legal principle applicable to this class of cases; is distinctly recognized in *Hovey* v. *Mayo*, 43 Maine, 322; 23 Pick. 36 and 53.

III. The verdict is against law and evidence and ought to be set aside, because the bridge was built with ordinary care.

The Commissioners laid out the road in this precise location, and the case finds that the bridge was built in pursuance of it. The defendants had no discretion as to whether they would build it, or where they would build. They were compelled to build it just where it was built. The fact of building, and place of building, are not, therefore, involved in this inquiry. It is simply the manner of building, as affecting the current of the stream, and nothing else that is involved. Now, how was this done? It is proved, that the vent for the water is amply sufficient, 20 by 33½ feet. The arch bridge

below, where there is more water and more exposed to influx from the river, is only 36 feet in span. The piers are laid parallel with the current, and so disturb it the least, and they do not project into the water more than usual. The natural bed of the stream is only about 40 feet wide, and only 6½ is occupied by the piers. Thus, we see, that the most deliberate consultation of scientific and practical men was held on the best mode of building this bridge, before it was built, and we have the judgments of all these judicious men since it was built, that it is built in the *most* prudent and skilful manner; in the manner that would least affect the current of the stream. There is no contradiction of this evidence. Yet, in defiance of it all, the jury have found that it was not built with even *ordinary* care. We complain that this finding is against the weight, the overwhelming weight of the evidence before them.

But, it will be said, that placing horizontal timbers at the bottom is evidence of want of care. There are two ways of laying the foundation of such a bridge. One is by driving piles into the ground, and the other is the one adopted in this case, by consultation. These timbers are 16 inches thick and 40 feet long. The earth was dug out at the edges of the channel for the ends of the timbers, and they were let into the ground, so that when the bridge came to be built, and ever since, their tops were below the natural bed of the stream, above and below them. Now, as a matter of philosophy, it is impossible that these timbers, placed horizontally across the bed of the stream, at the bottom, could change the direction of the current to the right or left. And, as a matter of fact, the witnesses testify that they actually do not change the direction of the current at all, or even obstruct the free passage of the water.

IV. The verdict is also against law and evidence, because it was clearly proved that other causes contributed to produce the plaintiff's injury. 43 Maine, 492.

1. His own negligence in building in such a place in the manner he did, and loading down thus a sandy soil on a clay bottom.

2. The back flowing from the river and from Gage's dam, built a short distance below this lot.

3. The breaking away of Bridge's dam in spring of 1854.

4. The extraordinary and unparalleled freshet of October, 1855.

We contend that there was proof that some or all of these not only contributed, but were the efficient causes of plaintiff's injury, and the jury should so have found, according to the instructions of the Court.

V. The verdict is against law for another reason, deserving of a distinct point. The writ sets forth no cause of action "*in hac vice.*" It is true the writ does not allege, but the case finds, that the defendants built the bridge in pursuance of a legal location by the County Commissioners. Now on what principle of law can such an action be maintained? It is an action of *tort*, or *wrong*, and can only be grounded on some *unlawful acts*. *Spring* v. *Russell*, 7 Maine, 273–294 and 5. Oliver's Precedents, forms in case, 284 to 290.

The writ alleges no unlawful acts. The one act alleged is the erection of the bridge. It does not allege this to be unlawful, and the case finds that it was lawful. It does not allege that it was done in an *unlawful manner*, or that all the consequences, the diversion of the water and changing its current to the injury of the plaintiff, were not such as lawfully and necessarily flowed from the lawful act. Now the verdict only verifies the allegations in the writ. Therefore the jury have not found any *unlawful* act done by defendants, or any lawful act done in an *unlawful manner*.

Nor does the proof, independent of the writ, show any unlawful conduct on the part of the defendants.

The verdict is therefore against law and without proof, and ought to be set aside.

VI. The verdict is against law for another reason. The case finds that the defendants themselves did no acts. What was done, was done by Barrows, under the superintendence only, at the most, of certain city officers. Neither Barrows nor the city officers could be deemed, in law, the agents of

the city in doing any *unlawful* acts, nor could the city, in any way, be bound thereby. Angell on Highways, 196, cases in note.

VII. The damages are excessive.

R. H. Vose, contra.

The instructions of the Court were very favorable to the defendants. They assumed, that the defendants were duly authorized and obliged to erect the bridge in question; that if it was made in the exercise of ordinary care, they were not liable, and further, if they were not in the use of ordinary care, if the plaintiff was in the same position, or if there were other causes, in addition to the want of ordinary care on the part of the defendants, which contributed to the injury, then the defendants were not liable.

The subject of complaint is, first, that the Judge refused to instruct the jury, that, in order to entitle the plaintiff to recover, he must have the right of a riparian proprietor, which he had not, by a fair construction of his deed; and, secondly, that the plaintiff, in order to entitle himself to recover, must show that the bridge was wantonly erected.

Whether or not the plantiff was a riparian proprietor, it is not necessary to determine; his rights do not depend upon that question. Neither is it necessary to prove that the bridge was *wantonly* built so as to injure the plaintiff. The defendants are charged with no such thing; but simply in the common form, of negligence, are they charged; not wilfully nor wantonly, but of intending to do what they have done.

The right of the plaintiff to recover, in exact accordance with the instructions given, depends upon no new doctrine, but upon legal principles well established, both in this country and in England.

The first authority we cite, is from Angell on Highways, published in 1857, p. 196, § 221,—"When damages occur in the prosecution of a work, by order of a municipal corporation, the corporation is liable for the acts of its servants and agents, in the same manner as an individual. Municipal cor-

porations are charged with a twofold duty in regard to highways; first, they are to decide when, where, and what repairs and improvements are to be made in them, secondly, they are to procure them to be made. The former is a judicial, or legislative duty, in the discharge of which they are exempt from civil responsibility, so long as they do not exceed their jurisdiction. The *latter* is a purely ministerial duty, in the performance of which they derive no immunity from their character as a municipality, for any want of due care or diligence on the part of their agents. And, *where the injury was occasioned by an erection unskilfully constructed* upon the land of a city, and for its benefit, the city was held to be liable for the damages, although the persons who constructed the same were not its agents nor under its control." In accordance with this principle, was the decision, *the Mayor, &c., of New York, in error*, v. *Bailey*, 2 Denio's R. 433,—"A municipal corporation is responsible for the negligence or unskilfulness of its agents and servants, when employed in the construction of a work, for the benefit of the city or town subject to the government of such corporation." Again, "the degree of care, which a party who constructs a dam across a stream, is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it shall prove insufficient. It is not enough, that the dam is sufficient to resist ordinary floods. *If the stream* is occasionally subject to great freshets, those must likewise be guarded against."

The defendants' counsel moved for a nonsuit, and one of the grounds was, that this action could not be sustained against the defendants, the work in question having been constructed by the water commissioners, appointed by the Governor and Senate, and not by or under the control of the defendants; and, again, that the defendants acted as public agents, in all that they had done in respect to the work in question, and, for that reason, were not responsible; and, moreover, that they were not a private corporation entrusted with the performance of the work in question." But all these

objections were overruled. See, also, *Bush* v. *Steinman*, 1 Bos. & Pul. 404.

These decisions are in accordance with the instructions given. But the courts have gone much further, and have decided that, although the work is legally authorized and carefully constructed, that still the defendants are liable for consequential damages. *Barron & Craig* v. *The Mayor and City Council of Baltimore*, reported in the American Jurist, No. 4, Oct., 1829. This was an action on the case, brought against the corporation of Baltimore for an injury done to the wharf interest of the plaintiffs. The wrong complained of was the diversion of certain streams from their natural channel to a point near the wharf in question, to which point a large deposit of sand and earth was carried down by the streams, and thus lessened the depth of water at the wharf, and materially impaired its revenue and permanent value. That the work was legally authorized and carefully constructed was admitted.

The defendants asked the Court to instruct the jury that, if acting within the scope of their lawful authority, the jury should find that they acted *bona fide*, and to the best of their judgment, the action could not be maintained. But the Court refused, and instructed them, in substance, that the plaintiffs were entitled to damages, if they should find that by the diversion of the water, (though made with due circumspection and the best advice, and in consequence of cutting down and paving streets, for securing the health of the city and to preserve the navigation,) greater quantities of earth and sediment were carried down by the diverted streams to the property of the plaintiffs, than were carried thither before the cutting down and paving. The verdict was for the plaintiffs. The case was argued by some of the most distinguished attorneys in the country, and these principles were sustained, and the whole subject exhausted.

In the case of *Stevens* v. *Middlesex Canal*, 12 Mass. 466, the Court say, "if a work of public convenience and advantage should be constructed, the execution of which would

require or produce the destruction or diminution of private property, without at the same time affording the means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law against those who should cause the injury, for his damages." Now, in the case at bar, the instructions of the Court proceed upon the ground that the defendants were in the exercise of a lawful right; — certainly the most favorable view for the defendants. But even this may well be doubted.

As to defendants' motion to set aside the verdict as against evidence.

Under the instructions of the presiding Judge, two facts were necessary to be established to the satisfaction of the jury: —

1st. That the plaintiff was damaged by the erection of the defendants' bridge.

2d. That it was owing to the fault of the defendants.

The point, that the damages assessed are excessive, and for that cause, the verdict should be set aside, was considered and controverted by counsel, citing *Jacobs* v. *Bangor*, 16 Maine, 187; *Brown* v. *Tyningham*, 12 Pick. 547.

The opinion of the Court was delivered by

RICE, J. — The case is presented on exceptions and report. Two grounds for exception were presented. First, that the Court erred in declining to instruct the jury, that the plaintiff's deed bounds him by the bank of the stream, and that it does not give him the rights of a riparian proprietor, so as to maintain this action for damages growing out of the change of the current of the water.

There will be found, on examination of the books, many technical rules by which to determine the effect of the descriptive terms of deeds, grants, &c., bounding lands upon rivers and other bodies of water. When, however, that sound and sensible principle of construction, that the intention of the parties must govern, is not overlooked in search of some more technical and recondite rule, there will, ordina-

rily be found little difficulty in arriving at satisfactory results. It is competent for a proprietor to convey such portion of his estate as he may desire, and affix such boundaries to the estate alienated as he may deem expedient, by the use of apt words for that purpose.

Thus the owner of upland and flats connected, may sell his upland without the flats, or the flats without the upland, or both together. It has, however, been held, under a technical rule of construction, originating in the Colonial Ordinance of 1641, that where land was bounded "on a stream, on the bank thereof, and on the bank of the Penobscot river," being tide water, the upland included in the description in the deed, not only passed, but the flats also, below high water mark, as appurtenant to the upland. *Lapish* v. *Bangor*, 8 Maine, 85. The same rule has prevailed in many other cases, both in this State and in Massachusetts.

The land, which is the subject of controversy in this case, lies upon the margin of a stream, in which, according to the testimony, the tide ebbs and flows, though the water is fresh. But this fact, according to the doctrine of the case above cited, is immaterial, the rule having reference rather to the question, whether the tide flows at the point in controversy, than to the fact that the water is salt or fresh.

If, then, the technical rule of the class of cases referred to were to be applied, the plaintiff's lot would not only extend to the bank of the brook, and include the upland, but would also include the flats, if any, below high water mark. This construction, however, is not applicable to the case and would not comport with the obvious intention of the parties. The plaintiff is bounded by the *bank* of the brook. By this term is understood what contains the river in its natural channel when there is the greatest flow of water. 1 Bouvier's Law Dict. The obvious intention was to include in the plaintiff's deed the land to the margin of the stream, but not to include the stream itself or the bed thereof. The owner may sell the land without the privilege of the stream; as he will, if he

bounds his grant by the bank. *Hatch* v. *Dwight*, 17 Mass. 289.

The plaintiff's land is, therefore, bounded by ordinary high water mark, and this principle will not be changed by the fact that the land or bank continues to rise more or less precipitously above that point. His land is not limited to the top of the hill or bank beside the stream, but extends to the margin of the stream, to that point where the bank comes in contact with the stream.

Such being the case, it is immaterial whether the plaintiff has the rights in the stream of an ordinary riparian proprietor or not. He has the right to the quiet enjoyment of his land, to its full extent, and, if by any unauthorized diversion of the stream from its natural channel, he has been injured, he is entitled to a legal remedy for such injury.

The next alleged error, on the part of the presiding Judge, was, that he declined to instruct the jury that, if they find that this road and bridge were legally laid out by the County Commissioners, and the defendants caused the bridge to be erected in pursuance of that laying out, they are not liable in this action, unless it was wantonly built so as to injure the plaintiff.

There seems to have been no question raised at the trial, controverting the legal establishment of the way upon which the bridge was built, which is the alleged cause of the plaintiff's injury; nor that the bridge was constructed by the constituted authorities of the city, acting in their official capacity. The only question raised on this part of the case, has reference to the degree of care which the defendants were bound to use in the erection of the bridge. The Court instructed the jury, that the defendants would be liable in damages for injuries sustained from want of ordinary care. The defendants contended, that they would be liable only in case the bridge was wantonly built, so as to injure the plaintiff.

The laying out and establishing the way by the County Commissioners, was a judicial act, and was performed under

the same responsibilities as other acts of that character, which are judicial in their nature. But the construction of the way and the bridge thereon, by the city, through the intervention of its agents, were purely ministerial acts, and fall within an entirely different principle as to the degree of diligence required in the execution. In the latter case they, like private individuals, must proceed with ordinary care and diligence, and, if by the want of such care, private persons are injured, a remedy may be had for such injury by action at common law. Angell on Highways, § 221.

Under our statute, the duty is devolved upon highway surveyors, or road commissioners, to remove any obstacle, natural or artificial, which shall in anywise obstruct, or be likely to obstruct, or render dangerous the passage of any highway or town way. These officers are thus required to act, not only in a ministerial capacity, but also, to some extent, in a judicial capacity. They must not only remove obstructions, and make such repairs as are required to keep the ways under their jurisdiction, in such condition as to be safe and convenient, which is a merely ministerial duty, but they must determine, within certain limits, what repairs are necessary for the purpose, which determination partakes of a judicial character. And therefore, it has been decided, that if a highway surveyor dig down a street, or road, with discretion and not wantonly, no action at common law, under the general statute of the State, can be maintained against him. *Hovey* v. *Mayo*, 43 Maine, 322.

If the public safety, and convenience require a levelling of the road, the surveyor must do it with as much care in relation to property bordering on the road, as it is possible for him to use; and, if he should abuse his authority by digging down or raising up, when it might not be necessary for the reasonable repair and amendment of the road, he would be amenable to the suffering party for his damages. *Callender* v. *Marsh*, 1. Pick. 418.

Public officers, of every grade and description, may be impeached and indicted for official misconduct and corruption.

To this there is no exception, from the highest to the lowest. But the civil remedy, for misconduct in office, is more restricted, and depends exclusively upon the nature of the duty which has been violated. When that is absolute, certain and imperative, and every merely ministerial duty is so, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency. Duties which are purely ministerial in their nature are sometimes cast upon officers whose chief functions are judicial. When this occurs and the ministerial duty is violated, the officer, although for most purposes a judge, is civilly responsible for his misconduct. *Wilson* v. *Mayor, &c., of New York*, 1 Denio, 595.

The rights of the public in property are to be governed by the same rules of law as the rights of individuals, and the maxim *sic utere tuo ut alienum non laedas*, applies with equal force in the one case as in the other.

In the case under consideration, the laying out and establishing the way, was a judicial act, and was performed by the County Commissioners. The construction of that way, and the bridge thereon, was a purely ministerial act, and was devolved upon and performed by the city. It was not a case of ordinary repairs of a highway, falling within the jurisdiction of the road commissioners or highway surveyors, and for which they would be personally liable, but was performed by the agent of the city, acting under the supervision of the regularly constituted authorities of the city. For such acts the defendants are to be governed by the same rules of law as would private individuals, in the performance of acts of like ministerial character. The rule of law laid down by the presiding Judge, was applicable and appropriate for this class of cases, and not open to objection.

As to the motion. We have carefully examined the evidence reported, and though, if the case had been submitted to us for determination, upon the facts as therein presented, we might have come to a different conclusion, both upon the question of ordinary care and as to the amount of damages, yet we cannot say that the result is so manifestly incorrect as

to authorize us to interpose and set aside the judgment of the men to whom these questions were submitted, and whose duty it was to decide them.

No evidence has been adduced to show that the jury were influenced by prejudice and improper motives, and we do not think that there is such a preponderance of evidence as would authorize us to draw such an inference from the testimony in the case.

Exceptions and motion overruled, and
Judgment on the verdict.

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

ALTON B. GOODSPEED *versus* DAVID B. FULLER.

If the defendant in a suit at law, at the request of a third person, permits him to assume the defence, upon a promise of such third person to indemnify him and pay all costs recovered against him, such a promise is not void for want of consideration.

Nor is such a promise within the statute of frauds, as being a promise to pay the debt of another person.

Nor can it be avoided on the ground of maintenance.

The only effect of the usual clause in a deed acknowledging the payment of the consideration, is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it may be explained, varied or contradicted by parol proof. If the consideration actually agreed upon has not been paid, of which the acknowledgement is only *prima facie* evidence, the grantor may recover it. If it has been overpaid by any mistake of the parties, or through any fraud of the grantor, the grantee may recover back the excess.

Upon the money counts, parol evidence was held to be admissible to prove that the defendant, for the amount expressed as the consideration in a deed, agreed to sell and convey to the plaintiff two lots of land, each for a specified price; that the plaintiff paid the defendant the full sum for both lots; and that, by mistake or fraud of the grantor, only one of the lots was conveyed by the deed. And the defendant having, upon request, refused to convey the other lot, the plaintiff recovered back the consideration paid for it with interest.

REPORTED by RICE, J., November Term, 1857.

This was an action of ASSUMPSIT. The writ contained the money counts, and also a special count upon an alleged agreement of the defendant, in consideration that the plaintiff would permit him to assume the defence of a suit pending against him, the plaintiff, in which the defendant was collaterally interested, he would indemnify the plaintiff, and pay all the costs recovered against him.

The plaintiff proved the facts alleged in this count. It appeared that the suit referred to was finally decided against the plaintiff, and that he paid the amount of the judgment for costs, being $67,71, June 28th, 1856.

Under the money counts, the plaintiff was permitted to prove that the defendant made a parol agreement to sell him two lots of land, each for a specified sum, for both of which the plaintiff paid him; but that when the defendant gave him the deed, a nine acre lot was not embraced in it. Whether it was omitted by accident or design does not appear. But the defendant afterwards, upon request, refused to convey it, and the plaintiff claimed to recover back the sum paid for it, with interest. The evidence admitted was seasonably objected to by defendant.

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

Libbey, for the plaintiff, argued, that the defendant was clearly liable for the money paid for the land that was not embraced in the deed. He had agreed to give the plaintiff a deed of it, and, when he delivered the deed to plaintiff, he assured the plaintiff that both parcels of the land were embraced in the deed. And, when the plaintiff afterwards discovered that the nine acre lot had not been conveyed to him, he requested the defendant to give him a deed of it, which he neglects to do, and refuses to return to plaintiff the money paid for it. The plaintiff is entitled to recover back the money with interest.

The plaintiff is also entitled to recover the amount he has been compelled to pay to discharge the judgment against him

for costs in the Spaulding suit. The defendant was the party interested in defending that suit, and assumed the defence of it. It has been repeatedly held, that when the party in interest commences and prosecutes a suit in the name of a third party, for his own benefit, such party is liable to the plaintiff of record for all costs that may be recovered against him. And there is no difference in principle, whether it be the prosecution, or the defence of the suit, that is assumed by the party in interest.

Bradbury, Morrill & Meserve, for the defendant, made the following points: —

1. The plaintiff seeks to recover for the breach of contract for the sale of lands. That contract not having been in writing, the action cannot be maintained. R. S., c. 111, § 1.

2. That the whole consideration was for the parcel of land actually conveyed, conclusively appears by the deed, which the defendant himself put into the case. He cannot contradict it by parol testimony.

3. The plaintiff's remedy for the costs paid by him in the suit of Spaulding against himself, was against Elliot, upon his covenants of warranty in the deed of the land in controversy.

The promise of the defendant to pay said costs was without consideration. And, if not, it was within the statute of frauds, being a promise to answer for the debt or default of another. Not having been in writing, no action can be maintained upon it.

The opinion of the Court was delivered by

APPLETON, J. — It appears from the evidence, that the defendant verbally contracted with the plaintiff, to sell and convey to him several tracts of land, among which was the west half of the Plummer lot, so called; — that subsequently, at the instance of the defendant, he assigning as a reason, that he might be a witness in case any controversy should arise as to the title, it was agreed between the parties, that the conveyance of the west half of the Plummer lot should be

made by one Robert Elliot;—that, accordingly, the defendant procured the deed of Elliot and delivered the same to the plaintiff, who paid him the consideration expressed therein for the land conveyed. It appeared in proof that the plaintiff had nothing to do with Elliot in the negotiation, but that his contract was with the defendant alone.

After the plaintiff received his deed and entered into possession, one Union Spaulding brought an action of ejectment against him, to recover possession of the premises conveyed by Elliot. The plaintiff having received his summons, being doubtful of the title and to avoid cost, was about to settle with Spaulding, when the defendant, who was legally or equitably interested in the title, learning from him what he proposed doing, in consideration that he would permit him to assume the defence of the suit commenced by Spaulding, promised to save him harmless from, and to pay all the costs arising, or which might arise in the prosecution of the defence. The plaintiff thereupon gave the defendant the summons he had received, who immediately retained counsel and assumed the entire management and control of the defence, without any interference whatever on the part of the plaintiff, who, relying on the agreement made with the defendant, neglected to notify Elliot of the suit brought against him. The defence proved unsuccessful. *Spaulding* v. *Goodspeed*, 39 Maine, 564. Judgment was rendered for possession of the premises demanded and for costs against the plaintiff, which he has paid, and this action is brought to recover the amount thus paid, and interest thereon.

Any consideration, however small, in the absence of fraud, is sufficient to support a promise. It may arise from a benefit to the promisor, or a loss or injury to the promisee. Mere inadequacy of consideration, when there is no fraud nor circumvention, affords no ground for vacating a contract. "It is not essential," remarks PUTNAM, J., in *Hubbard* v. *Coolidge*, 1 Met. 93, "that the consideration should be adequate in point of actual value." The question, whether the consideration should be equal in value to that which the party gives

up, or loses by the restraint under which he places himself, arose in *Hitchcock* v. *Coker*, 6 Add. & Ell. 438. On this subject, TINDALL, C. J., remarks, "it is enough, as it appears to us, that there actually is *a* consideration for the bargain, and that such consideration is legal and is of some value." In *Bambridge* v. *Firmston*, 1 P. & Dav. 2, the declaration stated, that, in consideration plaintiff would, at the defendant's request, permit the latter to weigh certain boilers of the plaintiff, the defendant promised to give them up to the plaintiff in the same condition as they were in at the time of such consent; it was held, on motion in arrest of judgment, that there was a sufficient consideration stated; and Lord DENMAN, C. J., observed, "we must not inquire into the nature of the benefit derived to the defendant. The plaintiff may have sustained some injury by complying with the defendant's request, and that is enough after verdict."

The permission for the defendant to assume and manage the defence in the suit, *Spaulding* v. *Goodspeed*, and his assumption and management of the same, (if there is no rule of law forbidding it,) is a sufficient consideration for his promise to save the plaintiff harmless from, and to pay all costs which he therein incurred. It was held, in *Knight* v. *Sawin*, 6 Greenl. 361, when one requested permission to bring an action for his own benefit, in the name of another, against a third person, to recover a debt supposed to be due, promising to indemnify the nominal plaintiff against all damages, that such promise was valid and binding, being neither against good morals nor public policy, nor within the statute of frauds. "Considering the motives of the plaintiff in the transaction," says MELLEN, C. J., in delivering the opinion of the Court, "the defence is made with an ill grace by the very man, who has been the cause of all the unpleasant consequences which have followed." But it is immaterial whether the permission be to commence a suit or to defend one already commenced. In *Adams* v. *Dansey*, 6 Bing. 506, the plaintiff, an occupier of land, at the request of defendant and upon a promise of indemnity, resisted a suit of the vicar for tithes. There was

held to be a sufficient consideration for the promise, "for the vicar's claim had been resisted at the instance of the defendant, and the plaintiff was at that time liable if the plaintiff should succeed." "The plaintiff," remarks BOSANQUET, J., "on allowing his name to be used for the purposes of the defendant, was at liberty to impose such terms as he pleased, either as to the past or the future cost, and the debt for which he stipulated was his own debt and not that of a third person."

The contract, in such case, is not within the statute of frauds, as being a promise to pay "for the debt, default, or miscarriage of another person;" for, as TINDALL, C. J., remarks, in the case last cited, "what promise is there as to the debt, default, or miscarriage of another? It is a direct promise to repay Adams any money which he might pay for costs in the suit between the vicar and Adams." So, in the present case, the promise of the defendant is an original and not a collateral undertaking. *Knight* v. *Sawin*, 6 Greenl. 361.

Neither can the defendant avoid the contract on the ground of maintenance. *Knight* v. *Sawin*, 6 Greenl. 361. "Surely," remarks Lord ABINGER, C. B., in *Fendon* v. *Parker*, 11 Mees. & Wels. 675, "the old cases are now exploded. The sole question is, have the parties an interest, or do they believe they have an interest in the action." The rule seems to be, that if a party has the most remote interest he may lawfully interfere. The defence, in the case of *Fendon* v. *Parker*, rested upon grounds somewhat similar, in point of integrity, with those upon which the defendant relies to avoid the performance of his contract. The language of the Chief Baron, in delivering the opinion, is not without its application. "If," says he, "any ground can be fairly suggested for making this contract legal, we ought to adopt it in favor of the party who makes the defence, in order to acquit him of the imputation he casts upon himself." And ROLFE, B., remarks, "the only hesitation I have had in the case, has arisen from the fear, that the indignation one feels at so unrighteous a defence as the present, might lead me into bending the law

more than ought to be done. But I think the law appears to concur with the honesty of the case. * * Any lawful construction must be placed upon the agreement, rather than one that renders it criminal."

The defendant is legally as well as morally liable upon his contract, to indemnify the plaintiff against costs caused by his unsuccessful prosecution of a defence, which he assumed for his own benefit, and which, at his urgent solicitation, the plaintiff permitted him to undertake.

The plaintiff further shows that the defendant verbally agreed to sell him two lots of land, each at a specified price; and that he paid for both, but that the defendant omitted one, the nine acre lot, in his deed. He seeks, therefore, to recover so much of the consideration in the deed as is equal to the agreed price of the lot omitted.

The proof shows that the plaintiff is very illiterate, that the deed was not read to him, and that he cannot read writing much; that, after the delivery of the deed, the defendant informed plaintiff that his deed did not cover the nine acre lot; that he promised to convey the same the first opportunity, and that subsequently he offered to compromise the matter by a repayment of part of the money thus received.

It is obvious that the plaintiff cannot recover upon the original contract to convey both lots, because, not being in writing, it is within the statute of frauds.

Neither can he recover upon the covenants in his deed, for they apply only to the premises specifically described in his deed.

If the evidence offered was properly received, it most conclusively shows that the defendant has in his hands the money of the plaintiff, which he is unjustly retaining, without a pretence of any right.

It is material, then, to be considered, whether evidence is admissible to show what was the true consideration for the land conveyed by the defendant to the plaintiff.

The only effect of the consideration clause in a deed, is to estop the grantor from alleging that it was executed without

consideration, and to prevent a resulting trust in the grantor. For every other purpose, it may be varied or explained by parol proof. The grantor may show, notwithstanding the acknowledgement of payment, that no money was paid, and recover the price in whole or in part against the grantee. *Wilkinson* v. *Scott*, 17 Mass. 249. This clause is *prima facie* evidence only of payment, and may be controlled or rebutted by other proof. *Clapp* v. *Tirrell*, 20 Pick. 247. The recitals in the deed, of the amount and payment of consideration, do not estop the grantee from sustaining an action for the price. *Thayer* v. *Viles*, 23 Verm. 494; *White* v. *Miller*, 22 Verm. 380. "This clause is either formal or nominal," says DAGGET, J., in *Belden* v. *Seymour*, 8 Conn. 304, "and not designed to fix conclusively the amount either paid or to be paid." The amount of consideration, and its receipt, is open to explanation by parol proof in every direction. It may be shown that the price of the land was less than the consideration expressed in the deed, as in *Bowen* v. *Bell*, 20 Johns. 338, or that it was more, as in *Belden* v. *Seymour*, 8 Conn. 304, or that it was contingent, dependent upon the price the grantee may obtain upon a resale of the land, as in *Hall* v. *Hall*, 8 N. H., 129, or that it was in iron, when the deed expressed a money consideration, as in *McCrea* v. *Purmatt*, 16 Wend. 460, or that no money was paid, but that it was an advancement, as in *Meeker* v. *Meeker*, 16 Conn. 387, or that a portion of the price was to be paid by the grantee, and the balance was an advancement, as in *Hayden* v. *Mentzler*, 10 S. & R., 329, or that it was paid by some one other than the grantee, and thus raise a resulting trust, as in *Scoby* v. *Blanchard*, 3 N. H. 170. *Pritchard* v. *Brown*, 4 N. H. 397; *Dudley* v. *Bosworth*, 10 Humph. 9. The damages for the breach of the covenants in a deed may be increased or diminished, as between the parties, by proof of a greater or less price paid for the land, than is expressed in the deed. *Belden* v. *Seymour*, 8 Conn. 304; *Morse* v. *Shattuck*, 4 N. H. 229. The entire weight of authority tends to show that the acknowledgement of payment in a deed is open to unlimited explanation in every direction.

When the price of the land has not been paid, the grantee may recover it in whole or in part, as the case may be, in assumpsit, notwithstanding the acknowledgement of payment in the deed.

In this State, in the case of *Dearborn* v. *Parks*, 5 Greenl. 81, evidence was received to show that the grantee retained in his hands a portion of the consideration, sufficient to meet certain outstanding notes of his grantor; and, upon this proof, the payee was held entitled to recover such amount from his, the grantee's, hands. In *Schillinger* v. *M'Cann*, 6 Greenl. 364, it was decided, that the acknowledgement of payment of the consideration money in a deed, did not estop the grantor from showing that a part of the money was left in the hands of the grantee, to be applied to the grantor's use. In *Burbank* v. *Gould*, 15 Maine, 118, it was held, that the acknowledgement in a deed did not preclude the grantor from showing, by parol testimony, that a part of the money was left in the grantee's hands, to be by him paid to a third person, for the benefit of the grantor. So, other consideration than that expressed in the deed may be shown. *Emmons* v. *Littlefield*, 13 Maine, 233. An agreement, made by the grantee, at the time of the sale and conveyance of land, to pay a sum additional to that expressed in the deed is valid, and the sum thus agreed to be paid may be recovered in an action of assumpsit. *Nickerson* v. *Saunders*, 36 Maine, 413.

But, if parol evidence be receivable, it is equally so at the instance of the grantee as the grantor. If the character or amount of the consideration may be shown by proofs without the deed, those proofs are equally open to both parties.

The evidence, therefore, offered was properly received, and, being in the case, it establishes, most conclusively, that the defendant holds in his hands the price of the nine acre lot, without any consideration therefor. If he were willing to convey the land, for which he received it, the plaintiff would not be entitled to recover. *Coughlin* v. *Knowles*, 7 Met. 57. But such is not the case. The defendant, though requested,

has refused to deed the lot omitted, and for which he has received the price. If, then, he retains the money, it will be the successful consummation of a fraud which he deliberately committed, or the consequence of a mistake which he is unwilling to rectify. But on neither of these grounds can he retain it. The law cannot be so distorted as to become the participant of such dishonesty. The defence is as devoid of law as it is destitute of common honesty.

Defendant defaulted.

TENNEY, C. J., and RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

STATE *versus* DAVID L. ESTES.

An indictment under the statute for cheating by false pretences, in which one is charged with having pawned a watch as a pledge that he would perform a certain act, falsely representing it to be worth a sum much exceeding its real value, and, at the time, representing that the watch was the property of a third person, there being no allegation that he represented he was authorized by the owner to part with it, was held to be bad on demurrer, the property taken in pledge being *confessedly* the property of another person.

INDICTMENT under the statute for cheating by false pretences, to which the respondent filed a demurrer.

Bradbury, Morrill & Meserve, argued for the defendant, and cited *State* v. *Godfrey,* 24 Maine, 232; *State* v. *McKenzie,* 42 Maine, 392; *Vernon* v. *Keys,* 12 East, 631.

Appleton, Attorney General, *contra,* cited *People* v. *Gates,* 13 Wend. 311; *Commonwealth* v. *Strein,* 10 Met. 521; *State* v. *Philbrick,* 31 Maine, 401; *State* v. *Mills,* 17 Maine, 211; Davis' Preced. 91; Train & Head's Preced. 85; *Rex* v. *Hamilton,* 9 Ad. & El., N. S. 274; Wharton's C. L., § § 2161 and 2150; *Commonwealth* v. *Merrill & al.* 8 Cush. 571; *Commonwealth* v. *Hubbart,* 12 Met. 446.

But one of the several causes of demurrer relied on by the defendant's counsel was considered in the opinion of the Court, which was drawn up by

CUTTING, J. — The demurrer admits the truth of the averments, which in substance are, that the respondent received from one Moses Rollins a certain note which Rollins held against him, in consideration of his promise, within a certain time to procure another note for the same amount, signed by himself and his father, and deliver as a substitute for the one taken up. And, to induce Rollins thus to part with his note upon the promise to produce the substitute, *it is alleged* that the respondent pawned a watch, falsely representing it to be worth a sum much exceeding its real value. But it is *further* alleged that the respondent, at the same time, represented that the watch was the property of his wife, and it is not alleged that he represented he was authorized by her to part with it. The facts, then, presented, are simply these; a watch, *confessedly* the property of another, is taken as a pledge. The true title to the thing was disclosed, which rendered its glittering characteristics of no consequence to the over credulous recipient. The wife, at any time, could have reclaimed her watch, without jeopardy to her husband. Under these circumstances, if the pawner is chargeable with turpitude, the pawnee is equally so with stupidity. The Government cannot punish the one or protect the other.

Demurrer sustained,
Indictment quashed.

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

EPHRAIM BALLARD *versus* JAMES R. CHILD, *Ex'r.*

The covenants in a deed are restricted to the grant. And, if the grantor conveys only his right, title and interest in the premises, he is not liable upon his covenants of warranty, against persons claiming title under him, though he had previously conveyed the land to another.

REPORTED by RICE, J., November Term, 1857.

This was an action of COVENANT BROKEN. The question involved, was the liability of the defendant's testator upon his covenants in a deed, conveying only his right, title and interest in the premises. The facts sufficiently appear in the opinion of the Court.

Lancaster argued for the plaintiff.

Vose, for the defendant, made the following points:—

1. The plaintiff had actual notice of the prior deed of a portion of the premises. This portion was inserted in the deed by mistake. But, if evidence of this fact was not admissible, the plaintiff, having actual notice of the former deed, can recover nominal damages only. *Leland* v. *Stone*, 10 Mass. 459; *Baxter* v. *Bradbury*, 20 Maine, 262.

2. But the defendant's testator conveyed only his right, title and interest in the premises. The covenants are not to be made broader than the grant. The plaintiff, therefore, can recover nothing, though the title fails.

The opinion of the Court was delivered by

TENNEY, C. J.—Under the agreement of the parties, from the evidence which is competent, the Court are to find the facts, and apply thereto the law.

On Oct. 27, 1842, the defendant's testator gave to Thomas Sawyer, jr., his heirs and assigns, a deed of a parcel of land, in Augusta, called, in the case, the school house lot. On Oct. 30, 1845, he gave a deed to the plaintiff, of all the interest and right he then had in and to a larger parcel of land, in Augusta, described by metes and bounds, and which embraces,

in the boundaries, the premises conveyed to Sawyer, with the covenant warranting against the lawful claims of all persons, claiming by, through, or under him. This deed was recorded earlier than the former, but it is agreed by the parties in this case, that the plaintiff, at the time he took it, had actual knowledge of the deed to Sawyer. The title of the school house lot was, therefore, in the latter, nothing therein having passed to the plaintiff. And, for the breach of the covenant of non-claim, this action is brought.

It cannot be supposed, that the plaintiff understandingly paid a valuable consideration for the school house lot, on the delivery of the deed to him, inasmuch as he must have known that he acquired no right whatever to that part of the premises described. If, therefore, the description of the land had been unqualified, we are warranted in drawing the inference, from the facts, that this lot was intended to be excepted, but the exception was omitted through mistake. In this respect, the case is precisely similar to that of *Leland* v. *Stone*, 10 Mass. 459, and a like result would be proper.

But on another ground, which distinguishes this case from the one cited, the plaintiff must fail to recover even nominal damages.

The deed from G. C. Child to the plaintiff, being only of the "right and interest" of the grantor in the premises, the land described in the deed to Sawyer was excluded from the description, and the covenant could not apply thereto. This seems to be the settled doctrine of the law. In *Allen* v. *Holton*, 20 Pick. 458, WILDE, J., in delivering the opinion of the Court, says, in regard to a deed conveying the grantor's right, title and interest in the land described, "the grantor conveys his own title only, and all the subsequent covenants have reference to the grant and are qualified by it. In *Sweet* v. *Brown*, 12 Met. 175, which was an action of covenant broken, it was held, that the covenant of warranty must be restricted to the grantor's title and interest, which was the language used in the description of the premises. *Hurd* v. *Cushing & al.*, 7 Pick. 169; *Blanchard* v. *Brooks*, 12 Pick.

47; *Adams* v. *Cuddy*, 13 Pick. 460; *Brown* v. *Jackson*, 3 Wheaton, 449; *Coe* v. *persons unknown*, 43 Maine, 432.

Judgment for the defendant.

RICE, HATHAWAY, APPLETON, MAY, and DAVIS, J. J., concurred.

AMASA HUTCHINSON *versus* WILLIAM HUTCHINSON.

When an agent takes a promissory note for his principal, payable to himself, and then transfers it to his principal, such principal stands in the position of the original holder, and the note in his hands is subject to whatever defences might have been made to it in the hands of the agent.

A parol contract to support one during life, is not within the statute of frauds. Such a contract is a sufficient consideration for a deed of real estate. And, if the grantee in such deed, give his promissory notes for the value of the property, to be held as collateral security for the performance of his contract, he is not liable upon the notes, except to an innocent purchaser for a valuable consideration, unless he fails to perform.

REPORTED by RICE, J., August Term, 1857.

This was an action of ASSUMPSIT, upon two promissory notes, dated October 13, 1855, each for the sum of one hundred dollars, one of them payable in one year, and the other in two years.

These notes were payable to Charles Hutchinson, or order, and were by him indorsed to the plaintiff, before maturity. When Charles Hutchinson received the notes, he gave the defendant a deed of the homestead farm, on which his father and mother were living. The plaintiff, also, had lived on the farm the most of the time, and was then forty-five years old. There was an incumbrance upon the farm, when it was deeded to the defendant, which he afterwards paid off and extinguished.

The defendant claimed, and testified, that the farm was held for the benefit of his father, and was conveyed to him by Charles, in consideration of his agreement to support his

father and mother; and that the notes were given as collateral security for his agreement, and were left in his brother's hands for that purpose, to be collected if he failed to perform it, and not otherwise; and that the plaintiff, though he had lived at home, had been out of health and had no interest in the farm. There was other corroborative testimony.

Charles Hutchinson testified, that the plaintiff had always lived at home, and, though sometimes out of health, had worked on the farm and helped support his father and mother; that the plaintiff, therefore, had an equitable interest in the farm, for which the notes were given, though the plaintiff himself was not a party to the transaction; that there was no agreement that the notes should be held merely as security for the contract of the defendant to support his father and mother; that, having taken the notes for the benefit of his father, when the plaintiff complained to him for conveying the property to the defendant, he transferred the notes to the plaintiff.

There was other testimony for the plaintiff, but all the facts, necessary to an understanding of the case, appear in the opinion of the Court.

Danforth, for the defendant, contended that the notes were given as collateral security for the agreement of the defendant to support his father and mother, to be paid only upon his failure to support them; that the notes were fraudulently put in circulation by Charles Hutchinson; and that the plaintiff, though he received them before maturity, having paid nothing for them, was not entitled to recover.

Vose, for the plaintiff, made the following points:—

1. That the testimony, that there was an agreement that the notes should not be paid, according to their tenor, being contradictory to the written contract, was not admissible.

2. That the notes having been transferred to the plaintiff, before maturity, even if there was an agreement between the original parties, that they should be held as collateral security only, the plaintiff, having no notice of any such agreement,

was entitled to recover. *Sweetser* v. *French*, 2 Cush. 313; *Fisher* v. *Leland*, 4 Cush. 458.

The opinion of the Court was delivered by

DAVIS, J. — The plaintiff had lived with his father and mother for many years. There had probably been some expectation that he should support them during their lives, and take the homestead farm at their decease. But if this was the case, he gave it up in 1853, and left the place.

The title to the homestead was in Harvey, a brother of the parties, probably for the purpose of keeping it from the creditors of the father. Harvey conveyed it to Charles, another brother. But there can be no doubt, from the testimony, that the equitable estate was in the father during the whole time.

As Charles declined to take care of his father and mother, William, the defendant, agreed to do it, and Charles gave him a deed of the property. William, at the same time, gave Charles the notes in suit; and afterwards Charles, because the plaintiff complained that he had deeded property to William in which he had an interest, indorsed the notes, not then due, to him.

The plaintiff now contends that, whatever defence might have been made to the notes in the hands of Charles, none can be made against them in his hands, as they were indorsed to him before maturity. But, according to his own testimony, he does not stand in the position of an innocent indorsee, for a good consideration. He does not claim to have *purchased* the notes of Charles. No consideration whatever passed from him to Charles at the time of the transfer. According to the plaintiff's testimony, Charles, in conveying the property and taking the notes, acted as his agent, without authority, — but he afterwards ratified his acts by taking the notes himself, not upon any new consideration, but as belonging to him by the original transaction. When an agent takes a note for his principal, payable to himself, and then transfers it to his principal, such principal stands in the position of an original holder, and the note in his hands is subject to whatever

defences might have been made to it in the hands of the agent.

But it is argued that the evidence in defence is inadmissible, because it contradicts the notes. And so it does. And the evidence is clearly inadmissible, except to prove that the notes were given without consideration. As the plaintiff paid Charles nothing for them, they are subject to the same defence that could have been made to them in his (Charles') hands. Could *he* have recovered upon them? Was any consideration given for the notes?

According to the testimony of Woods, the consideration for the deed was the agreement of the defendant to support his father and mother. This agreement was probably a parol contract only, though the case does not state that it was not in writing. But if a parol agreement, it was binding, nevertheless, and was a sufficient consideration for the deed. A parol contract to support one during life, is not within the statute of frauds; for he may die within the year. *Peters* v. *Westborough*, 19 Pick. 364. The contract between the parties, therefore, was complete, before the notes were given. They were consequently, if this view of the case is correct, given without any consideration, under a misapprehension that any security from the defendant, besides his promise, was necessary. And, after the defendant has thus far performed his part of the contract, it would be manifest injustice to compel him to pay the notes, if they were thus given without any consideration. But the plaintiff denies this, and contends that the notes were given for his interest in the premises.

On this branch of the case, the testimony is conflicting, and it is somewhat difficult to determine definitely what the transaction was. The defendant testifies that the notes were given as security for his agreement to support his parents, and were not to be paid, unless he failed to perform. Noah Woods, who made the writings between the parties, confirms this testimony. The only other person present at the time was Charles. He does not concur with the defendant and Woods. But he testifies that the notes were given for the

benefit of his father. If so, they could not have been designed for the benefit of Charles, nor of the plaintiff. If designed for the father, they must have been intended as security for his support. The notes appear to have amounted to nearly or quite the value of the farm, after deducting the incumbrance then existing upon it, which the defendant afterwards paid. So that, if the notes were intended to be paid absolutely, the defendant would have received nothing for his contract to support his father and mother. On the whole, we think the testimony clearly preponderates in favor of the conclusion that the notes were given as collateral only, without consideration, and were not to be paid unless the defendant failed to perform his contract. *Plaintiff nonsuit.*

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

JUSTIN E. SMITH, *Adm'r, versus* CALEB ESTES, *Trustee.*

Under the Revised Statutes of 1841, an action cannot be sustained, which was brought by an *administrator* against one for aiding a debtor of the plaintiff's intestate, in the fraudulent transfer of his property, contrary to the statute in that behalf provided, as the cause of action does not survive.

THE question submitted in this case was whether, upon the allegations in plaintiff's writ, this action can be maintained. The substance of the plaintiff's declaration is stated in the opinion of the Court.

Titcomb argued for the plaintiff, and

Drummond, for the defendant.

The opinion of the Court was delivered by

GOODENOW, J.—This case is submitted to the full Court upon the declaration in the writ, which makes a part of the case. If the plaintiff cannot maintain this action against the

defendant, by agreement of the parties, he is to become nonsuit; otherwise the action is to stand for trial.

The material facts stated in the declaration are, that, on the ninth day of October, 1857, one David L. Estes was indebted to John Richards, late of said Hallowell, since deceased; that, during his lifetime, he was a creditor of said David L. Estes, on that day, before and after, to the day of his decease. That, on said ninth day of October, 1857, the said defendant, at said Vassalborough, did knowingly aid and assist the said David L. Estes in a fraudulent transfer and concealment of his property, of great value, &c., with intent to secure the same from the creditors of the said David L. Estes, and to prevent an attachment of the same or seizure thereon on execution; that said Richards died on the —— day of November, 1857; that the plaintiff has been duly appointed administrator of the goods and estate of said John Richards, has accepted the trust and given bonds as the law directs; and, as such administrator, brings this action.

The writ is dated February 26, 1858.

The alleged fraudulent transfer was made in 1857, while the Revised Statutes of 1840 were in force. The cause of action was wholly given by statute. When a statute is repealed, though a similar one be then enacted, rights given wholly by the statute repealed cease to exist, unless preserved by a saving clause.

The statutes of 1840 gave a special action on the case, as a remedy in cases of this kind, and provided that, "in addition to actions which survive according to the rules 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.

This is not an action for damage done to the real or personal property, and, therefore, does not survive by virtue of the above provision of the statute. I need not say, if it could be maintained at common law, for single damages, still,

it would die with the person. The question does not arise, in this case, whether the cause of action would, or would not, survive under the Revised Statutes of 1857, if the case came within the operation of those statutes, as it clearly does not.

In our opinion the cause of action does not survive, and, according to the agreement of the parties, a

Nonsuit must be entered.

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

DANIEL A. POWERS, *versus* GEORGE W. SAWYER *& ux.*

In an action of trover against several defendants, the refusal of the presiding Judge to instruct the jury that they are authorized (if they so find,) to return a verdict against some of them, and in favor of the others, was erroneous.

But exceptions, for that cause, will not be sustained, where the jury found specially that there was no conversion by the defendants, or either of them; for, in such case, the instruction, had it been given, could have been of no benefit to the plaintiff.

EXCEPTIONS from the ruling of HATHAWAY, J.

TROVER for certain articles of household furniture.

It appears from the bill of exceptions, that, "on Sept. 9, 1855, the defendants rode to the plaintiff's house; said George W. Sawyer is a brother of plaintiff's wife; that plaintiff and said George went into the woods, and were absent about two hours; on their return, they found that plaintiff's wife had left with her infant child, and some furniture; the horse and wagon, and the female defendant had also disappeared. They then started for the house of defendants, which was about six miles distant. The plaintiff arrived first, and attempted to take from his wife her child, but was prevented by two of the neighbors, who were putting him out of the house, when defendant, George W. Sawyer, arrived.

"There was evidence in the case tending to show:—

"1st. That all the household stuff taken away from plaintiff's house, was claimed by the plaintiff's wife as her own, individual property, and that it was so.

"2d. That Mrs. Sawyer took no part in removing the property, except by permitting plaintiff's wife to put it into the wagon.

"3d. That neither of the defendants interfered with the articles taken from plaintiff's house, but that all was done by plaintiff's wife.

"4th. There was evidence tending to show, that plaintiff demanded the household stuff of defendants, and that they refused to let him go into the house for it, or to let him have it.

"There was evidence tending to show, that the household stuff, which had been removed in the wagon, from plaintiff's house, was all carried into a room in defendants' house, occupied by plaintiff's wife, and that defendants never made any claim to it as theirs."

There was much conflicting evidence in the case.

"The Court instructed the jury, *that* a demand by plaintiff on defendants, and their refusal to deliver the goods, would not be sufficient evidence of conversion to charge defendants jointly, unless the goods were in their possession; *that*, if the goods were in the possession of the plaintiff's wife, defendants were under no obligation to deliver them to plaintiff, and their refusal to deliver would not be a conversion by the husband and wife.

"Plaintiff's counsel requested the Court to instruct the jury, that, if they were satisfied from the evidence, that a conversion was made by one of the defendants only, it would be competent for them to find a verdict against one of the defendants, and in favor of the other; which requested instruction the Judge declined to give. Other instructions were given and the jury returned a general verdict, that the defendants were not guilty, and found *specially*, that the defendants, or either of them, did not convert any of the property sued for to their own use."

Stinchfield, for the plaintiff.

Whitmore, for defendants.

It was held, that the special finding by the jury, that there was no conversion by the defendants, or either of them, obviated the error in refusing to give the requested instruction. The instructions given are correct. If there was no conversion, and the jury have so found, the giving the requested instruction would have been of no service to the plaintiff. (2 Greenl. Ev. § 647.) *Exceptions overruled.*

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

SETH WYMAN *versus* PENOBSCOT AND KENNEBEC RAILROAD COMPANY.

Where a railroad company commenced the running of cars upon their road, before they had erected fences which they were bound to erect, and the plaintiff's horse, rightfully on land adjoining, had strayed on the track of the company and was killed by their engine, the company will not be exonerated from liability for damages, by proof that, at the time, certain persons were operating the road, under an agreement with the company that they should receive and retain the earnings, when it was further stipulated in the agreement that "the trains shall run under the direction of the company, and be under their control."

ON AGREED STATEMENT OF FACTS.

This is an action of TRESPASS ON THE CASE, to recover the value of two horses belonging to plaintiff. Plea, not guilty.

It is agreed that the company had been duly and legally organized; the railroad authorized by their charter located, built and in operation by drawing over it trains for the transportation of passengers between Bangor and Waterville, which commenced to run daily, excepting Sundays, between those termini, on the first day of August, A. D. 1855, and have so

continued since that time; that, on Aug. 31st, 1855, the two horses mentioned in plaintiff's writ were upon the track of said road in Benton, and were killed by the locomotive in drawing one of the regular passenger trains; and that said horses strayed on to said track by reason of the want of fences on the exterior lines of said railroad, where it passed through improved land in the town of Benton; and that the horses were rightfully in the field from whence they went on to the railroad; and that the fences for several weeks prior to that time had been in want of repair and insufficient.

The defendants offered to prove in defence, that Moor & Dunning contracted with defendants to build and complete this railroad, including the fences on the exterior lines of the same, for a specified sum for the whole job, and that, at the time said damage was done, Moor & Dunning were running the trains under a written agreement, and at that time the road had not been completed so as to discharge the contractors from their contract for building.

In the agreement between the defendants and Moor & Dunning, as to the running of the road in August, are the following stipulations: — "that regular passenger trains shall commence running on the morning of July 30, 1855; that Moor & Dunning shall run the same at their expense, and, for so doing, shall receive and retain the receipts. The trains shall run under the direction of the company, and be under their control. Said Moor and Dunning shall pay such compensation for the use and damage of the furniture and cars and engines as the company shall decide. This arrangement to end on the last day of August next, and the trains shall be run by the company, under its management and for its own use, on and after the first day of September next.

If the facts and evidence offered by defendants are admissible, they are to be considered in the case, and, if on the whole case, the plaintiff is not entitled to recover, a nonsuit is to be entered; otherwise, a default is to be entered and damages are to be assessed.

W. S. Heath, for plaintiff, argued:—

I. On the statement of facts, the plaintiff is entitled to recover. Charter of defendants, Special Laws, 1845, c. 285, § 11; R. S., 1841, c. 81, § 21; Laws of 1853, c. 41, § 20; *Whitney* v. *At. & St. Law. R. R. Co.*, 44 Maine, 362; *Norris* v. *Androscoggin R. R. Co.*, 39 Maine, 278.

II. The evidence offered by defendants, ought not to be admitted, for it does not affect their liability to the plaintiff.

In the first place, it is contended for the plaintiff, that a company, engaged in the prosecution of some great public work, endowed by law with certain powers and privileges, and subjected to certain duties, cannot shield themselves from their responsibility for damages, *arising from an omission* on their part to perform one of those duties required by law, by alleging a contract with other parties to perform such duties. *Lowell* v. *Boston & Lowell Railroad Co.*, 23 Pick. 24; *Bailey* v. *Mayor & Corp. of N. Y.*, 2 Denio, 433: *Hilliard* v. *Richardson*, 3 Gray, 349.

But, even if the view of the law taken in the cases cited, should not be taken by the Court, it is contended that, from the evidence offered by the defendants, it appears, that while the contractors were running the road from Waterville to Bangor, the trains were under the control and management of the defendant corporation, and that the contractors were acting as their *agents* when the injury occurred to the property of the plaintiff, on account of which this action is brought.

Drummond, for the defendants, argued:—

That, upon the facts appearing in the case, the defendants are not liable. There is neither any admission nor proof of carelessness on the part of any one.

The road was in the possession of the contractors who built the road under contract; and they were also to make the fences, which part of the contract they had not fully completed. The plaintiff's remedy is against them. The statute of 1853, making the corporation liable for the acts of contractors, is limited to trespasses on real estate. The section

relating to fences does not apply, as it merely imposes a penalty for neglect to build and maintain fences required to be built by the charter.

At common law the proprietor of land was not bound to fence it. Every man was obliged to keep his cattle on his own premises. Redfield on Railways, p. 374, § 167; *Rust* v. *Low*, 6 Mass. 90.

By sect. 11, of defendants' charter, they were required to build fences, and, it is upon this provision of their charter, that the plaintiff depends. By the evidence offered by the defendants, it is proved that the company contracted to have their fences built, and that the contractors, when this accident happened, had not completed the fences. They were running the trains at their own expense and for their own benefit. By their neglect the fences were not built, and, by their neglect, the plaintiff's horses were killed.

Is, then, the company liable for the acts of the contractors? See Redfield on Railways, p. 377, § 168, and cases cited p. 377.

But it is said that the contract, by which these trains were run, expressly provides that "the trains shall run under the direction of the company, and be under their control." So it does; but the horses were not killed by any negligence or carelessness in the management of the trains. If they had been, the defendants would have been liable. If it appeared that those managing the train were the servants of the company, and by their negligence, &c., the horses had been killed, the defendants would have been liable.

But this accident happened through the negligence of the contractors, over whom the defendants had no control. In *Steele* v. *South-eastern Railway*, 32 Eng. Law and Equity Reports, 366, the action was for damage done by the negligent manner in which certain work was done by the servants of a contractor, who was bound to do the work under the superintendence of a surveyor of the company. The injury happened because the workmen did not follow his directions. The Court held the action could not be maintained, and say,

"this work was done under a contract, and there is nothing to show negligence in any one, for whose acts the company are responsible." "This," says REDFIELD, "seems to be placing the matter on its true basis."

In this case, the damage was not done by any negligence or carelessness of the company or their servants; it happened by the negligence of the contractors, over whom the defendants had no control. The distinction is obvious, and, according to the authorities cited, the action cannot be maintained.

The opinion of the Court was delivered by

APPLETON, J.—It is the duty of the defendants to erect and maintain substantial and sufficient fences, on each side of their road, where passing through inclosed or improved land. This duty they neglected, and the plaintiff's horses, rightfully on his own land adjoining, strayed on the track of the defendants, by reason of the want of fences on the exterior lines of the railroad, where it passed through improved lands, and were killed by their engine. From the facts, as admitted, the defendants, in consequence of their own neglect, are to be held liable. *Norris* v. *Androscoggin Railroad Co.*, 39 Maine, 278.

Nor is the defendant corporation to be relieved from responsibility because, at this time, Messrs. Moore & Dunning were to receive and retain the receipts. In their agreement with the defendants, it is stipulated that "the trains shall run under the direction of the company and be under their control." It is immaterial to the person injured, who may receive the proceeds of the running. It is sufficient that the direction and control are in the defendants. Having this direction and control, they are justly responsible for any injuries occurring in consequence of their neglects. *Whitney* v. *At. & St. Law. Railroad Co.*, 44 Maine, 362.

Defendants defaulted.

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

DUDLEY P. BAILEY *versus* WARREN LOUD and AMBROSE MERRILL, *Trustee.*

The indorser of a negotiable promissory note, being exempt from liability to trustee process, on account thereof, his exemption is not affected, where a suit had been commenced by the promisee against the indorser, which was pending when the trustee process was instituted, and had been submitted to the Court, with jury powers, "to enter such judgment as the law and the facts may warrant," whose decision was that the indorser was liable upon the note.

EXCEPTIONS by plaintiff to the ruling of RICE, J., discharging the supposed trustee, upon his disclosure.

The said Merrill at the first term appeared and disclosed, as follows: — "There is a suit pending in this Court, in favor of said principal defendant against said supposed trustee, as indorser of a note for $5000, dated December 17, 1855, payable to the order of Rufus K. Page in one year, and indorsed by said Page, which suit is not yet determined, and upon which said supposed trustee claims that he is not liable to the said Loud."

At a subsequent term, the said Merrill further disclosed, "that on January 5th, A. D. 1857, the said Warren Loud commenced an action against the said Merrill, as an indorser of a note for $5000, dated December 17th, 1855, payable to the order of Rufus K. Page in one year, and indorsed by said Page; which action was returnable to and entered in said Supreme Judicial Court for said county of Kennebec, at the March term thereof, A. D. 1857, and was therein continued from term to term, until the November term of said Court, A. D. 1857, when the evidence in the case was taken out and the action continued and carried to the then next law term of said Court, upon a report of the evidence under an agreement of the parties thereto, as follows, viz: —

"It is agreed that the Court may draw such inferences as a jury might, and enter such judgment as the law and the facts may warrant."

Said action was further continued in said Court, and, on

the second day of March, A. D. 1859, a decision was received from the full Court in said action that the said Merrill should be defaulted. Judgment for balance due on note and interest thereon, after deducting $302,50."

The presiding Judge decided that the trustee should be discharged, and ruled that the liability of Merrill was merely as indorser of a negotiable promissory note, and that the agreement, and facts stated in his disclosure, do not change his exemption from liability to said process, or render him liable.

The full Court sustained this ruling, and directed an entry of *Exceptions overruled.*

COUNTY OF LINCOLN.

CHARLES NASH, *& als., Appellants from decree of Judge of Probate, versus* ISAAC REED.

The heirs of a testator, who contest the probate of his will, are not excluded as witnesses, "as heirs of a deceased party," and as being within the exception of § 83, of c. 82, of the R. S. of 1857.

A witness to a will, who, at the time of its execution, received from the testator a deed of land, and whose mother, by the will, was made the principal devisee, will nevertheless be a competent witness and "credible," within the meaning of the statute.

THIS was an appeal from the decision of the Judge of Probate, probating the will of Church Nash, deceased.

It appeared in evidence, that D. G. Wagner, one of the three subscribing witnesses, was the son of the testator's wife, by a former husband; that his mother married the testator when the said Wagner was about eleven years of age; that he had been brought up in the testator's family; married and living afterwards in another part of testator's house, with testator,

and occupied some portion of testator's farm, for planting, kept a cow, horse and some young stock in his barn, and pastured them in his pasture, for all which he compensated said Nash; and himself procuring hay sufficient for his stock during winter. It did not appear that there had been any particular settlement of these matters, but an equivalent had been rendered therefor.

It appeared, also, by the testimony of Wagner, that a deed was given to him, by the testator, of ten acres of land, which was made out, executed and delivered at the time of the making and executing the will, the consideration being, as testified by said Wagner, a certain amount of money which he had let the testator have a number of years before, at different times, some of which was of more than six years standing, and also a note for a further sum, which was never given up to the testator or cancelled.

In behalf of the appellants, it was contended that said Wagner was not a credible and disinterested witness to the will, within the meaning of the statute relating to wills; but the Court ruled otherwise, and his testimony was admitted.

The appellants offered as a witness Jacob Nash, and other heirs of the testator, who were appellants and parties in this case, but, being objected to, for that cause, as incompetent witnesses, the Judge decided and ruled that they were inadmissible and rejected their testimony.

It was proposed to prove, by said Jacob and the other heirs referred to, that the testator was not of sound disposing mind and memory, at the time of executing the will, and that the testator was induced to make such a will, by the fraudulent practices and influences of said Wagner and others.

Ruggles, in support of the exceptions, argued that,—

Wagner, one of the three witnesses, was not a disinterested or *credible* witness, within the meaning of the statute. His testimony shows that he took a deed of testator at the same time, the consideration of which was exceedingly questionable — an existing note not given up, and outlawed moneys of

which no account had been made. It is quite apparent, from all that could be elicited from him, that it was a part of the same transaction; the disposal of testator's estate by will and by deed, altogether and equally depending for validity on the same sound and disposing mind and memory. I say, a part of the same transaction, *quasi* a part of the will, conveyed by a deed, when it might and should have been in the will. And for what purpose? But to make him a witness to the will, and, as such, to avail of his opinion of sanity, &c., so often arising in such case, and actually *the* question in this case, in connection with that of "fraudulent practices and influences by said Wagner." Credibility or competency, in such a case, where opinions and judgment may be expressed by subscribing witnesses, should appear clearly and satisfactorily. It appears by the will that this Wagner's mother was the devisee of all the estate not conveyed by the deed, to the disinheritance of the children by the first wife. Was Wagner *credible* and competent on a question of sanity, in a case where his interest is so mixed up with the questions arising under the will?

2. Jacob Nash and other appellants and parties should have been admitted under the statute allowing parties to be witnesses. This case does not fall within the exception in the 83d § of the R. S., c. 82.

They were not heirs of a deceased "*party*." The testator was never a "*party*," and could never have been a "*party*." The action did not and could not arise in his lifetime. It might as well be objected in an action by one heir against another heir, on some controversy respecting their patrimony, that they were *heirs* of a *deceased party*. See statute, § 83.

Reed never was, and is not yet, executor, in the sense in which the statute would exclude him. He is styled in this proceeding, executor, not as being in fact and in law, executor, but as being the one nominated as executor by the will. The instrument is called a will; but it is, in fact, not a legal will until probated. Reed may decline the trust, never give bond, and not enter upon the duties of executor. He presented the

will for probate, which is made his duty by statute, not as executor, but as being nominated to that office, which he may decline or accept after the will shall be probated. He would not be liable to any suit as executor — could maintain none. Were one sued as executor in his own wrong, would such come under the excepting section? I think not, clearly; not being within the reason of the statute, and not actually executor.

3. These proceedings, in relation to establishing and approving wills by the Probate Courts, do not come within the reason of the exception, and so are not affected by it.

The object of the exception was to take those cases out of the operation of the statute, in which the parties would not stand on an equal footing, as to their knowledge of the transactions embraced in the suit, arising from the death of one in whose name the action might have been brought or had been brought in his lifetime, a party to the transaction, and who might have been a witness to it in his lifetime. It applies to the whole range of cases in assumpsit, debt, trespass, &c., where either party is executor, — distinguishable from these proceedings on the probate of wills. In these cases, the parties on both sides are always presumed to stand on an equality as to their means of knowing the facts to be enquired into. The (nominal) executor might be presumed even to possess a better knowledge than most others, being generally selected for that trust from the friends of the testator who are best acquainted with the matters to be enquired of. The testator could never be a witness in these cases at all, for no question would arise on which any action or process could be predicated in his lifetime.

The reason for the exception entirely fails here, in this entire class of cases. And there being no heirs of a deceased *party*, nor one who could at any time have, by possibility, become a party, and the plaintiff not being executor in law, it is not a case contemplated by the statute.

Gould, contra:—

1. Wagner was not devisee nor legatee under the will, nor had he any interest in the estate, having settled with the testator before his death. Nothing in the case shows that he was not a *disinterested* or a "*credible*" witness to the will.

But R. S., c. 92, § 2, (1840,) only required that witnesses to a will should be "credible," not disinterested, also, as R. S., 1857, c. 74, § 1. The old statute provided for the proof of wills by *legatees*, even, they forfeiting their legacies by offering themselves as witnesses. "Credible" witness, means competent at the time of attestation, under the statute. *Hawes* v. *Humphrey*, 9 Pick. 350; *Haven* v. *Hilliard*, 23 Pick. 10.

2. The witnesses who were rejected were "made parties as *heirs* of a deceased party." And the *other* party to the suit was an "executor." So that the witnesses were, for both of these reasons, within the *exception* of the statute admitting parties to testify. R. S., (1857,) c. 82, § 83.

It may be said, that the *appeal* vacated the decree of the Probate Court, and, therefore, Isaac Reed was not executor. But he is necessarily made a party to the proceedings, *as executor*, or they could not go on; and he is to be regarded as executor *de facto*, for the purpose of *setting up the will*, not for the purpose of executing its provisions, until it has been established; and he is to be *so* regarded, or he is *no party*, and he has no right to appear in the case. The person named as executor in the will, is so treated and regarded by the Court, for the purpose of representing the testator in the proceedings required by law to probate his will. In this representation, he is the testator's *executor*, and, as such, is by law made a party to the contest.

It is the *will* that is in contest. To it, the testator was a "party;" the appellants are made parties as his *heirs*, and the appellee, as his *executor;* both are within the *specific terms* of the statute. During the contestation of the will, there must be some party, legally authorized to represent it and the interests under it, entitled to the temporary custody of the estate, to prevent waste. If there is an executor appointed

by the testator, he must be the party, and thus, as already remarked, becomes executor *de facto*.

The *reason* of the exception in the statute would exclude the respondents, as well as the *terms* of it.

The exception was founded upon the consideration that, "where one of the parties to the contract or *transaction* in contest is dead, it would be unjust to admit the living to testify to facts which were within the knowledge of the deceased party; it would be giving the living an unfair advantage. They might falsify the facts with impunity."

The will, so far as the contest in Court, as to its *construction*, its *validity*, its due *execution*, &c., are concerned, is in the nature of a *contract*, to which the testator is a party; it is a contract between him and his devisees and legatees; that contract is in *contest*. The testator must be represented in Court by *somebody;* he appoints an executor; the executor knows nothing of the facts, and it would be unjust to the testator, and tend to pervert his wishes, if, in that contest, the party opposing should be admitted to testify to facts peculiarly within his knowledge, which, *unexplained*, might overthrow his will.

The respondents "are made parties, as heirs of a deceased party." This does not necessarily mean party to that *particular suit or proceeding*.

To give the statute such a construction would deprive the administration of justice of the beneficial effect of the exception, in a large class of cases.

The true construction is, "heirs of a deceased party, to the *res adjudicandum*." It should not be extended to contracts or transactions collateral or *incidental* to the suit; as the execution of a *deed*—but, as in the case of a *will*, to the *thing* which is *itself the suit*, so to speak—the *entire contest*.

The opinion of the Court was delivered by

CUTTING, J.—A question is here presented, involving the construction of R. S., c. 82, § § 78, 83 and 84, which being collated, may be read thus:—"No person shall be excused

or excluded from being a witness in any civil suit or proceeding at law, or in equity, (including special proceedings before courts of probate,) by reason of his interest in the event thereof as party or otherwise, except, at the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party."

On the trial in this Court, the case finds that, "the appellants offered as a witness, Jacob Nash, and other heirs of the testator, who were appellants and parties; but being objected to for that cause as incompetent witnesses, the Judge decided and ruled that they were inadmissible, and rejected their testimony."

The bill of exceptions does not necessarily present the question raised at the argument, as to whether the appellee can be said to be an executor of a will before its probate and before he has been legally qualified to act, for no such objection was specifically made to the admission of the witnesses, and therefore it may be inferred that the Judge did not rule upon that point.

The question then legitimately before us is, whether the witnesses, who were offered and excluded, *were made a party as heirs of a deceased party.*

Before, however, proceeding to the answer, it may be well to ascertain the origin and object of the statute, which has produced so great a change in the common law. The practicability of the statute allowing parties to be witnesses, is not of recent discovery. Nor was the idea originally suggested by Jeremy Bentham, or by any of his modern disciples. As early as 1765, and before Bentham's matriculation, Sir William Blackstone, speaking of the admissibility of parties as witnesses in Courts of equity and civil law, remarked that, "It seems to be the height of judicial absurdity, that, in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, and denied on the other; or that the Judges of the one and the same Court

should be bound by law to reject a species of evidence, if attempted on a trial at bar, but when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted or else universally rejected." This seed, so early sown in England, after a century had nearly expired, first germinated there, and subsequently became an exotic here.

But while the statute authorizes the parties to testify, it also places them upon an equality and excludes them both, when one is laboring under certain legal disadvantages. And since, by our declaration of rights, "no person shall be compelled to furnish or give evidence against himself," the statute excepts parties, where the cause of action implies an offence against the criminal law on the part of the defendant, unless he offers himself as a witness. And, also, in cases where one of the parties has deceased since the cause of action or proceedings accrued. The above embraces substantially the whole subject-matter of the three sections before cited, which were inserted for the benefit of the defendant, and the legal representatives of a deceased party; for the former, in order to protect his constitutional rights; and, for the latter, because of the decease of their ancestor, whose testimony alone, if living, might control that of his adversary. From the foregoing considerations, if the question was presented, it might not be too presumptuous to remark, that the statute exceptions were never intended to embrace proceedings in relation to the probate of wills.

But the question returns, were the appellants made a party as heirs of a deceased party? In our opinion they were not. The testator never was a party, and could not, in the nature of things, be a party to the present suit; and, unless once a living party, he cannot be said to be a deceased party;—correlatively the latter implies the former. That provision, now under consideration, had reference to c. 104, § 16, which provides that no real action shall be abated by the death of

either party, after its entry in court, but shall be tried after notice has been duly served upon those interested in his estate. In such case an opportunity is presented for the heirs of a deceased party to become a party, which brings it within the statute exception.

We entertain no doubt that Wagner, one of the three subscribing witnesses, was a credible witness, and properly admitted to testify. *Hawes* v. *Humphrey*, 9 Pick. 350; *Haven* v. *Hilliard*, 23 Pick. 10, cited for the appellee.

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

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

[This case was argued June Term, 1859.]

GEORGE FORSYTH *versus* ADONIRAM J. DAY *& al.*

Where one defends a suit upon a note to which his name has been affixed by a third person, if it appear that the defendant had given such third person authority to make notes, and put thereon his name as a party thereto, and to put notes thus executed into general circulation, as bearing his genuine signature, and had not, at the date of the note in suit, revoked such authority, and the agent, acting under such authority, executed the note in suit and passed it to the plaintiff, as bearing the genuine signature of the defendant, and it was received by the plaintiff as such, the defendant will be bound thereby.

Such authority is *express*, when directly conferred on the agent, by the principal, either verbally or in writing; and *implied*, when it arises from facts and circumstances, admitted or proved, which cannot be explained upon any other supposition, than that of authority; and from which the existence of authority may reasonably be inferred.

Other notes, which had been previously executed in the same manner, which had been shown or described to the defendant, before the date of the note in suit, and which he had acknowledged to be valid, are admissible in evidence, as bearing on the question of authority on the part of the agent; and, also, as indicating the degree of confidence which had been reposed in him on the part of the defendant.

And proof that the plaintiff took the note in suit, as having thereon the signature of the defendant, executed by *himself*, and did not suppose it had

been placed there by any other person for him, will not render such notes inadmissible in evidence.

There may be a ratification and an adoption of a forged note, by the person whose act it purports to be, although he has derived no benefit therefrom; and such ratification binds him from the date of the note. But the language or acts relied on, to establish such ratification, must be such as indicate his *intention* to be holden to pay the note.

Where such a note has been presented to the apparent maker of it for payment, who did not repudiate it, but deceived its holder by language and acts calculated to induce a reasonable belief that the note was genuine, although, thereby, he may not be regarded as *adopting* the note as his own, still, he will be *estopped* from denying his liability thereon, if the holder, acting upon the belief thus created, has suffered damage, or neglected to enforce any remedy he might have had against any other party.

Where one had given his own note, and placed thereto the name of another person as a joint promisor, who defended a suit against him, brought upon the note, on the ground that his name was put thereon without authority, evidence is admissible which tends to show that the defendant, after he had knowledge of the existence of the note, took from the party who had signed his name, security against general liabilities.

ON EXCEPTIONS from *Nisi Prius;* — also, on MOTION to set aside the verdict as being against law and the evidence.

This case having been sent to a new trial, [see *Forsyth* v. *Day*, 41 Maine, 382,] was again tried at May Term, 1858, RICE, J., presiding.

The action is *assumpsit*, on a promissory note of which the following is a copy: —

"$270. "Damariscotta, October 16, 1854.

"Four months after date, I promise to pay to the order of George Forsyth two hundred and seventy dollars, value received, at either bank in Boston.

(Signed) "Adoniram J. Day."

The name of Daniel Day is signed in blank on the back of the note.

A. J. Day had been defaulted. Daniel Day, alone, defended, and made affidavit, (as a rule of Court requires,) denying that the signature, purporting to be his, was genuine, or that he authorized any one to sign it for him.

There was a full report of the evidence introduced at the trial, from which it appeared that *John H. Converse* testified,

in substance, that, as plaintiff's attorney, he instituted this suit; that he received the note from plaintiff early in the month of March, 1855, and soon after that time, at his office, communicated to the defendant, that the note had been sent to him for collection. The note was exhibited to him; he took it in his hand and remarked that he had received no notice of its having been protested. Defendant was informed what the plaintiff's instructions were, if the note was not paid. He remarked that he did not want to be sued; that the note belonged to Adoniram to pay, and he was expecting to receive funds from him, (Adoniram was then in Florida,) and, if he received the funds, he would pay the note. Defendant, also, stated to witness that he expected Adoniram would be at home soon, and, when he came, the note would be paid. He declined to give a new note.

Witness further testified he had no recollection that defendant ever intimated to him that the note was not genuine; did not, in terms, say it was, or that it was not. Adoniram arrived at Damariscotta, from Florida, about the 1st of July, 1855. At the time of his receiving the note, witness thinks he was not acquainted with defendant's signature.

On cross-examination. Now knows defendant's signature. His name on the note in suit, does not resemble his handwriting. Supposed it defendant's genuine signature at the time he received the note; treated it as defendant's autograph while acting on the instructions he received from plaintiff, and he and his client in their correspondence treated it as such.

Thaddeus Weeks, called by plaintiff, testified, substantially, that he had a note purporting to be signed by Adoniram J. Day and Daniel Day, for $475, which is dated Sept. 1, 1852, payable in four months, with interest. *That* he went with A. J. Day, from his store to the counting room of Daniel Day, which was eight or ten rods distant, for the purpose of obtaining Daniel's signature to it. Daniel and Adoniram went into the counting room, witness thinks he did not go in, but that Adoniram delivered the note to him immediately on com-

ing out of the counting room; *that* Daniel was not present when he received the note. Were at the counting room but a short time.

Soon after the note became due, witness called on Daniel for payment; does not recollect that he showed him the note. Requested Daniel to pay it more than once. Thinks Daniel told him, at one time, that Adoniram would be at home soon, or send home money to pay it.

On cross-examination, witness stated that he had had several notes against Adoniram and Daniel. Defendant's counsel exhibited one for $672, dated May 16, 1851, payable to T. Weeks, in one year, and witness testified that he once held it; thinks he left it at Waldoboro' Bank for collection, and that it was paid at its maturity. Could not say that Daniel did not suppose that this was the note witness referred to, in the autum of 1853, when he requested of defendant payment of the note he held. Thinks the note of $672 has the genuine signature of Daniel Day.

The testimony of this witness was seasonably objected to by the counsel of defendant, but admitted by the Court. And the plaintiff was allowed to put into the case the note of $475, against the objection of the defendant's counsel.

Robert Kennedy, for plaintiff, testified that his son, Thomas C. Kennedy, before he went to the west to reside, left with witness a note (which was exhibited) for $416, payable to said Thomas, in one year, purporting to be signed by A. J. Day and Daniel Day, and by Joseph Day, now deceased. That the note is still the property of said Thomas; that he (witness) presented it to Daniel Day in October, 1854; cannot fix the day, but it was not after the middle of that month. Defendant took the note, looked at it, and said "it is good and we will pay it soon." This was at Damariscotta, in the street. Witness told Daniel he had not come to dun him, but to notify him and the administrator on Joseph Day's estate, that the note was not paid, as Adoniram had told him he was going to the South.

Witness further testified, that he next presented the note

to Daniel in July, 1855, after he had heard there was forged paper. Daniel took the note, examined it, and said he thought he did not sign it.

The testimony of Kennedy was seasonably objected to, but the Court admitted it. The substance, only, of the testimony on the direct examination is here given. Against the defendant's objection, the Court also allowed the Kennedy note to be read in evidence.

George Forsyth, (plaintiff,) called by his counsel, testified, that the note in suit was given him for furniture for the tavern-house, which A. J. Day was building in Jacksonville, Florida. A. J. Day came to his place of business in Boston, with a gentleman from Damariscotta, by whom he was introduced to plaintiff, and selected the furniture to be sent to Florida. He was to send his note with Daniel Day's name upon it. Received the note by mail, about the time of its date. Left the note at a Bank in Boston for collection; notice of non-payment was given to witness, which notice he sent by mail to Daniel Day; and, a day or two afterwards, wrote him, but received no reply.

There was other testimony in the case, but further reference to it is not deemed necessary to an understanding of the case.

Defendant's counsel objected to reading in evidence the note declared on, but their objection was overruled by the Court.

The plaintiff offered a disclosure of Daniel Day, as the trustee of A. J. Day, signed and sworn to by him, in January, 1856, in the suit, *Cotton* v. *A. J. Day & Daniel Day, trustee*, which was objected to by defendant. The Court ruled that so much of the disclosure as related to the taking of security by Daniel Day from A. J. Day for general liabilities, was admissible, and so much of it was read in evidence.

The plaintiff contended that it was competent for the jury to *infer* authority from Daniel to Adoniram to sign the note in suit, from the facts proved in relation to the Weeks and Kennedy notes.

The defendant contended that, inasmuch as the plaintiff did not take the note as one executed by an agent, but as a *genuine* autograph of Daniel Day, the testimony in relation to those notes could not have the effect claimed by plaintiff.

The defendant requested the Court to instruct the jury: —

1. That it is incumbent upon the plaintiff to satisfy the jury that the note was either signed by Daniel Day or by *some agent for him*, and that the fact is not to be *presumed*, but the plaintiff must *prove it.*

2. That, upon the testimony in this case produced by the plaintiff, the jury are not authorized to find that it is the *genuine signature* of Daniel Day.

3. That there is no testimony in the case, which authorizes the jury to find that Adoniram put Daniel's name upon the note.

4. That there is not testimony in the case sufficient to show that Daniel had authorized Adoniram to put his name on this note.

5. That there is no testimony in the case to authorize the jury to find that, prior to the date of the note in suit, Daniel had authorized Adoniram to sign his name to notes and put them in general circulation.

6. That the proof in this case does not authorize the jury to find the adoption by Daniel of his signature put by Adoniram on this note, even if Adoniram did place it there.

7. That there is no evidence, to authorize the jury to infer authority by Daniel to Adoniram, to sign his name to the note in suit.

8. That there is not sufficient evidence in the case, to authorize the jury to find that Daniel adopted the signature on this note as his own.

9. That there is not sufficient testimony in the case, to authorize the jury to find that Daniel ratified the signature on this note, purporting to be his.

10. That if plaintiff took the note as the genuine note of Daniel, signed by his own hand, and did not suppose that it was signed by Adoniram, or any one else for him, the testi-

mony relating to the Kennedy and Weeks notes cannot affect his (Daniel's) liability in this case.

11. If the defendant did not sign this note, nor authorize any one else to sign his name, and if it was not executed to be used in Daniel's business, and was not so used, and he had no benefit therefrom, Daniel is not liable upon it, even though the jury be satisfied that he did not inform Mr. Converse that his signature was not genuine, when the note was presented to him after it became due; that such a concealment of the fact that his name had been forged, will not render the defendant liable in this action.

In relation to this request, the jury were instructed that it was a question for them to determine, whether the defendant did or did not adopt or ratify his signature upon the note; that the testimony of Converse, as to what occurred on the presentation of the note to him, was to be considered with the other testimony in the case bearing upon that point.

The first request was given. The requested instructions from 2 to 10, (both inclusive,) were refused.

The jury were instructed that if the defendant, Daniel Day, had given Adoniram J. Day authority to make notes and put thereon his (Daniel's) name, as a party thereto, and to put notes thus executed into general circulation as bearing his (Daniel's) genuine signature, and had not, at the date of the note in suit, revoked such authority, and Adoniram, acting upon such authority, executed said note and passed it to the plaintiff as the note of Daniel, bearing his genuine signature, and it was received by the plaintiff as such, Daniel would be bound thereby.

Or, if Daniel, after he had knowledge that his name had been put upon the note in suit, as a maker, ratified and adopted the same, he would be bound thereby, although his name was originally placed upon said note without authority.

That if the jury shall find that Daniel Day, when the note was presented to him by Converse, for the purpose of giving him to understand that his (Daniel's) signature thereon was genuine, used language or conduct calculated to induce such

belief, and Converse was thereby actually induced to believe the signature genuine, it would constitute an adoption thereof, though the real intention of Daniel was only to gain time for the purpose of making some arrangement to avoid the exposure of the criminal conduct of his brother, and did not intend to adopt the signature as his own.

W. Hubbard, for plaintiff.

The first requested instruction was given. The refusal to give the eight following requests affords the defendant no cause for exceptions.

We are then brought to the consideration of the requested instruction numbered *ten*, which was, "if the plaintiff took the note as the genuine note of Daniel Day, signed by his own hand, and did not suppose that it was signed by Adoniram, or any one else for him, the testimony relating to the Kennedy and Weeks notes cannot affect his, Daniel's, liability in this case."

That is, if the plaintiff received the note as having the genuine signature of Daniel Day, he cannot establish Daniel Day's liability by proof that his name was subscribed *by an authorized agent.*

When this objection is carefully examined, there will be found nothing in it. *There is no such issue* between the parties. The issue is, only, whether Daniel Day promised to pay this note; did he become legally liable to pay it? There is no issue to be tried, whether the plaintiff was or was not correct in thinking he was liable on some particular ground, as that he made the signature with his own hand. All such considerations are irrelative. If the jury should find a verdict upon any such basis, the issue would not be determined. The Court might properly have disregarded the request, but the instruction given in relation to it is not liable to any just complaint.

The plaintiff was at full liberty to prove, either that Daniel Day subscribed the note with his own hand,—or, that he authorized A. J. Day to subscribe it for him,—or, that A. J.

Day did it without authority, and that Daniel ratified the act. Whether the plaintiff received it as executed in one of these or either of these ways, is of no consequence; *it is not matter in issue*, and does not affect the rights of the parties or the question in issue, which *only* is, whether Daniel Day did or did not promise, — whether he had become legally liable to pay the note.

The testimony to show that D. Day treated other notes, signed as this was, as genuine and obligatory contracts on him, is legitimate, as competent and proper evidence to prove that he had authorized A. J. Day to sign his name to this note. Story's Agency, (3d ed.) § § 54, 55 and 56.

As to liability by ratification, see *ib.* § 244, and cases cited in notes to it; also § § 253, 255, 443, 445.

In the opinion of this Court, when this case was previously considered, (41 Maine, 395,) it is said:—

"To hold a party responsible for drawing, &c., on an *implied authority*, it must be made to appear that the party had knowledge antecedent to, or concurrent with," the making of the contract, "that his name was being thus used by such *assumed agent*, and that he permitted it to be done; and, further, that injury has arisen in consequence of such permission to the moving party."

This is liable to misconception unless closely examined.

It may be, or not, correct, where authority *is to be implied* by permitting another to hold himself out as having authority. But it is not to be applied to a case, in which, *not an implied*, but an *actual authority* is to be proved, by showing that repeated acts of a similar kind have been treated *precisely as they would have been if the agent had actual authority.*

In such case, an actual authority is proved by conduct not to be explained upon any other supposition.

As to the adoption or ratification of the note, the *whole charge* as presented by the exceptions should be considered; and from the whole the jury could not have misapprehended their duty.

A. P. Gould, for the defendant.

There are a large number of suits now pending against the defendant, involving many thousands of dollars, all of which must depend, more or less, upon the principles settled in this case.

When Daniel saw the first forgery of his name by his brother, ignorant that there was another, he did not at once denounce him to the world as a *forger;* but, thinking that something might be done to cover his shame and to ward off the disgrace which must come upon the whole family, he was simply *silent* for a time. From this *silence*, a jury are now told, that they are authorized to *infer knowledge* on the part of Daniel, that Adoniram was using his name at that time; and, from the knowledge proved in *one prior instance*, they are authorized to infer an authority to sign Daniel's name to this note. Such is exactly one phase of this case; for knowledge of the existence of the *Kennedy note alone*, was proved.

If this *one instance*, and that of a *doubtful* character, is sufficient to authorize a jury to infer *general* authority, for this case, it may also be sufficient upon which to base future verdicts in other cases, where there is no *pretence of adoption* or subsequent ratification, as these can only take place where the particular note in suit is brought to the knowledge of Daniel; and we are settling principles, not for *this* case only, but for *many*.

The idea that the silence of Daniel, when the note in suit was presented to him, may be regarded by a jury as an *adoption* of his name upon it, though he did not *intend* it, also seems erroneous to us.

There was no question of *fraud* in this case, as the plaintiff does not show that he was *misled* by Daniel's silence, or that he lost any opportunity to collect, or was induced to delay any *remedy* which he would otherwise have pursued. But, on the contrary, Daniel declining either to pay the note or to give a *new* one, and informing plaintiff's attorney that it belonged to Adoniram to pay, the plaintiff at once put it in suit. Hence it is, that we find that counsel, in their posi-

tions to the jury, and in their *requests*, and the Judge in his charge, treated this as a case of *contract*, either of *previous authority* or subequent *adoption*, both of which rest in *contract*, demanding the usual *elements* of contract, the *consenting mind.*

There are some facts in this case, *undisputed*, necessary to be constantly borne in mind, in order that we may justly appreciate the principles and authorities relied upon, to make out a case.

Adoniram was *never* in Daniel's *employ*, never acted as Daniel's agent in *his* business. Neither the note in suit, or *any other* note introduced, about which there was any testimony, was made *to be* used, or *was* used for Daniel's benefit. There is no act of Adoniram proved which he *assumed to do* in *behalf* of Daniel. Are we not, then, destitute of the foundation upon which a subsequent adoption or ratification must rest?

Adoption can only take place where some act has been done by *another*, *professedly* in *behalf* of the person sought to be charged. The term "*agency*" implies an act done *for* or in *behalf* of another.

If an act is done solely on account and for the benefit of the person *acting;* there is nothing for another to *adopt.* It is only the act done for the *principal*, which can be adopted by the *principal*, as his own. So, ratification can only take place, where some act has been done for the party *ratifying.*

There are two principal grounds on which the defendant is sought to be charged.

One was, that previous authority might be *inferred* from what was proved in relation to the Weeks and Kennedy notes. The other was, that the conduct of Daniel, when Mr. Converse presented the note to him, amounted to an *adoption* of it. The Court authorized the jury to find for the plaintiff, on *either* ground, and we do not know which they adopted. If either, then, was erroneous, a new trial must be granted. I shall present, what I contend to be errors in the admission of testimony, and errors in the rulings to the jury together, for convenience.

First.— The plaintiff was not *deceived* by the previous recognition of Adoniram's right to use Daniel's name, but supposed, when he took the note, that it was signed by Daniel's own hand. If the plaintiff could prove that Daniel had recognized notes signed by Adoniram, before the date of the one in suit, it would not aid him, unless he could also show, that he took the note on the faith of that authority, which might be *implied* from the former use of his name. *St. John* v. *Redman*, 9 Porter, 428.

Forsyth did not "give credit to Adoniram in the capacity of *agent.*" 2 Kent's Com. 614, (786, 7th ed.); *vide* 41 Maine, 394.

If the plaintiff had taken this note, knowing that it was not Daniel's autograph, but that his name had been put there by Adoniram, and believing that he had authority to sign Daniel's name, it would have been competent for him to prove previous instances of the use of it, with Daniel's consent, and that those instances had come to the knowledge of the plaintiff before taking this note, and that such use induced the belief, in his mind, that Adoniram had general authority to sign Daniel's name. It is a fraud to thus hold another out as agent, who is not in fact such, because it induces a *false* belief or credit. But only those who have been defrauded by such conduct can take advantage of it.

All the books, in which it is held that agency may be *presumed*, from repeated acts of the agent, with the knowledge of the principal, prior to the one in question, put it upon the ground, that it is a *fraud* to lie by and see another use one's name, without authority, to the prejudice of innocent parties. But, that if any one would avail himself of such silence, he must show that he has been *injured* by it. This Court, in the former opinion (p. 395,) recognize this principle:— "To hold (defendant) responsible on an *implied original authority*, it must be made to appear that he had knowledge antecedent to, or concurrent with, the inception of the note, that his name was being used by Adoniram, (in other instances,) and that he *permitted* it to be done. And, further, that injury has

arisen in consequence of such *permission* to the moving party," (the plaintiff.) This is in substance what the Court say.

Not, that injury has arisen to the plaintiff, on account of the use of Daniel's name on *this* note, but on account of the use of his name in *other* instances; that is the thing necessary for the plaintiff to show, before he can avail himself of the proof of those other instances.

Not, that plaintiff is to be deprived of the privilege of showing, if he can, that Daniel authorized his name to be put on the note in suit, but he is not entitled to this species of proof, because he is not in a situation to avail himself of it. What *tittle* of testimony is there to show, in the language of this Court, "that injury has arisen to him in consequence of such permission," by the defendant, of the use of his name, in other instances.

This point was not brought out in the former argument, because the facts then proved, did not present it. It was never made to appear, until the last trial, that Forsyth took the note, *believing* it to be Daniel's genuine signature, and, upon this fact coming out, defendant's counsel, at once took the position, that the evidence relating to other notes, from which authority to sign this one was to be implied, was not admissible. It is an important point and applicable to all the other cases.

Counsel commented upon the case of *Brigham* v. *Peters*, 1 Gray, 139, contending that the principles there decided were not applicable to this case.

Second.—But if the plaintiff was in a situation to avail himself of the fact "that the defendant had given Adoniram authority to make notes and put thereon his, Daniels, name, as a party thereto, and put notes thus executed in general circulation," as the Judge charged, there is no proof of such fact. And, even if proved, it is not sufficient. It should appear that this had been done in Daniel's business.

The testimony of Weeks and his note dated September 1, 1852, for $475, were illegally admitted. (1.) It does not appear that Adoniram wrote Daniel's name upon it. (2.) The

note was not shown to defendant, nor so described that he knew to what note the witness referred.

The first objection is also applicable to the Kennedy note. Besides, it does not sufficiently appear that the existence of this note was known to defendant before the date of the note in suit.

Third.—There was no adoption of the note in suit by the defendant.

"The various acts and declarations which go to constitute adoption, are inferior evidences of a promise." PARKER, C. J., in *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1, 29, and this is followed by a remark indicating that nothing short of evidence equivalent to an express promise, will amount to an adoption of an unauthorized act.

This was not an act that was capable of adoption. But the conduct of the defendant, when the note in suit was presented to him, cannot in any way be treated as evidence of a promise. *Amory* v. *Hamilton*, 17 Mass. 109; 1 Am. Leading Cases, (3d ed.) p. 572; *Hall* v. *Huse*, 10 Mass. 39; *Hortons* v. *Townes*, 6 Leigh, 47; *Union Bank* v. *Beirne*, 1 Grattan, 226; *Wyman* v. *Hallowell Bank*, 14 Mass. 58; 2 Kent's Com. 787, (7th ed.)

Proof of adoption is only one mode of proving a contract. The jury were instructed, that if defendant, when the note was presented to him by the plaintiff's attorney, for the purpose of giving him to understand that the note was genuine, used language or conduct calculated to induce such belief, and the attorney was thereby induced to believe his signature genuine, "it would constitute an adoption of it," * * "although he did not intend to adopt the signature as his own." Thus making a contract without intending to do so—without having a "consenting mind."

The question is not, whether his conduct was *fraudulent*, and whether, by his fraud, he is estopped to deny his signature. This question might arise, if one thing more was assumed, viz.:—that the plaintiff was induced by such language to believe the signature genuine, and so took the note upon

the faith of it, or did some other act, or neglected something, which was seriously *injurious* to him in consequence.

The jury were authorized to find an *adoption*, if the language was calculated to induce the belief of genuineness, and *did* induce it, not in the mind of the plaintiff, but of his attorney, whether the plaintiff was *injured* by that belief or not. It was put upon the ground, that it made Daniel a party to the *contract.*

Fourth.—The trustee's disclosure should not have been admitted, not even for the purpose suggested by the Court. Even if defendant had taken security for this note, such fact would not have authorized the inference that it was genuine, or that authority had been given to sign it, as defendant might well have taken an indemnity against a contingent liability, or a possible one. *Hortons* v. *Townes*, 6 Leigh, 47.

But the purpose, permitted by the Judge, was still more mischievous.

In his answer to the 35th question, the defendant said, that he took a deed of the Judson House, and gave back a bond, that when Adoniram paid what was due, (on certain specified liabilities,) "and saved me harmless from all other liabilities which might arise, I would reconvey to him." This is what is meant by "taking security for general liabilities," in the ruling of the Judge.

The question at issue was, "Is the defendant liable on the note in suit?" This testimony was admitted as the basis of an inference that the note in suit was a "liability!"

What tendency can proof of taking security for general liabilities have, to show the existence of a particular liability, not mentioned in the security?

General liabilities, are legal liabilities dependent upon their own character; and the security taken could only cover such.

When that deed was given, this note was either the note of the defendant, or it was not; and if not, taking the deed could not operate to make it such. It could not be regarded as an adoption of it, without specifying it, and that even would not, upon the authority cited.

The opinion of the Court was drawn up by

MAY, J.—This case, being the same which was once before presented to this Court, as appears in the Maine Reports, vol. 41, p. 382, comes before us again upon exceptions taken to the rulings of the presiding Judge at the last trial; and also upon a motion to set aside the verdict as against the weight of evidence. It is apparent, from the whole evidence as now presented, that Daniel Day, the only excepting defendant, if he can be held liable upon the note in suit, must be so held either upon the ground that he authorized his signature to be placed upon it as a joint promisor with Adoniram J. Day; or that the same, having been placed there without any previous authority, he, in some way, subsequently ratified or adopted it as his own; or because he is somehow estopped by his words or conduct from denying the genuineness of his signature thereon.

In relation to the question of previous authority, the jury were instructed "that if the defendant, Daniel Day, had given Adoniram J. Day authority to make notes and put thereon his (Daniel's) name, as a party thereto, and to put notes thus executed into general circulation, as bearing his (Daniel's) genuine signature, and had not, at the date of the note in suit, revoked such authority, and Adoniram, acting upon such authority, executed said note and passed it to the plaintiff as the note of Daniel, bearing his genuine signature, and it was received by the plaintiff as such, Daniel would be bound thereby."

That this instruction is sufficiently guarded to protect the rights of the excepting defendant, and in harmony with law and justice, there can be no doubt. It is simply an enunciation of the common maxim, *qui facit per alium, facit per se;* than which, as a general proposition, there is no rule, either in law or morals, better established.

A more important question is, whether the case discloses sufficient evidence to lay a basis for, or to require the instruction given.

The authority to which the instruction relates, may be ex-

press or implied. It is express when directly conferred by the principal to the agent, either verbally or in writing; and implied when it arises from facts and circumstances, admitted or proved, which are inconsistent, upon the ordinary principles of human action, with any other theory than that of such authority, and from which its existence may reasonably be inferred.

It is not contended, on the part of the plaintiff, that there is any direct proof of such express authority. The argument is, that, from the facts which are proved, the jury were well authorized to find, that the signature of Daniel Day was placed upon the note by Adoniram, and the note put into circulation by him, with Daniel's permission; and that such permission was fairly to be implied, from the acts and conduct of Daniel, with reference to other notes of the same character, previously put into circulation, and from his acts and conduct with reference to the note in suit.

The note in suit is dated October 16, 1854, and there is testimony tending to show that, in the year 1852, one or two notes, if not more, were put into circulation by Adoniram with the signature of Daniel thereon, and, that these notes were either shown or described to him, and he admitted they were right, although, subsequently, he seems to have denied the genuineness of his signature thereon. To the admissibility of these notes, and the testimony thereto relating, the defendant objected, but they were admitted by the presiding Judge, and, we think, rightfully. It certainly was proper that the jury should know something of the dealings and relationship between these defendants, prior to the giving of the note in suit. If, upon the one hand, it could be made to appear that they had had no dealings with, or confidence in each other, or, upon the other hand, that an unlimited confidence had existed between them, the jury, in the light of such facts, would be the better enabled to determine upon the force and effect of the other facts proved, in their bearing upon this question of authority.

If extended business relations had subsisted between them,

and large confidence had often been placed in Adoniram by Daniel, in relation to his manner of doing business, and the jury were satisfied that Adoniram had occasionally placed the name of Daniel upon notes of hand, and put them in circulation, and these facts came to the knowledge of Daniel, and he recognized and treated them as valid, can it be, that in determining whether Daniel had conferred upon Adoniram authority to make and put in circulation such notes, or any subsequent one, the jury should be shut out from the light, which the former dealings and confidence between these parties would afford? We think not. The notes testified to by Thaddeus Weeks and Robert Kennedy, and the facts relating to them, were therefore properly admitted as bearing upon the question of the authority of Adoniram to affix the name of Daniel to the note in suit and to put it in circulation. The weight of this evidence was wholly for the jury, but, when taken in connection with the testimony of Mr. Converse, in regard to the acts and conduct of Daniel, when the note in suit was presented to him for payment, we cannot say that the verdict of the jury upon this point furnishes any such evidence of bias, partiality, corruption or mistake on their part, as will authorize us to set aside their verdict as against the weight of evidence.

If an authority to execute and use such notes had not been given, it is difficult to account for the silence and conduct of Daniel upon their presentment for payment. It would have been more consistent with his honor and integrity as a man of business, to have repudiated, at once, such paper, if forged, than to attempt to shield the forger, even though the offender might be a brother. His pecuniary interests would also have prompted to this. We do not say, that a man might not remain silent under such circumstances, but whether the excepting defendant did so, in the case before us, or was silent because he had given his brother authority to sign and put such notes into circulation, was properly left to the jury, in view of all the facts in the case. If Adoniram had such authority, it is of no consequence whether the plaintiff knew it or not;

nor is it important, upon this point, whether the plaintiff regarded Daniel's signature as genuine or as affixed by another with his permission.

If Daniel's signature was placed upon the note in suit, and the note put into circulation with his authority, in fact, the effect is precisely the same, whether such authority was express or implied.

When a person assumes authority to act, when in fact no such authority exists, and the assumed principal lies by and sees his name used under such circumstances, to the prejudice of innocent parties, and does not subsequently intentionally ratify or adopt those acts, still he may, under certain circumstances, be estopped from denying such authority. If a man will remain silent when he ought to speak, he will not be permitted to speak when he ought to remain silent. In such cases, as the authorities cited in defence fully show, it must appear, before the assumed principal can be charged, that the other party was induced to act, or did act to his own prejudice, by reason of the acts and conduct of the party attempted to be charged, or, in other words, on the faith that such acts and conduct were in fact what they assumed to be. It would be a reproach to the law, if a man could be permitted to lie by and see another act to his injury, upon the faith of his conduct and acts, which he knew were calculated to mislead him, and then turn round and say that he did not intend that which his conduct and his acts fairly indicated. No instruction upon this point was asked or given.

The jury were further instructed that if Daniel, after he had knowledge that his name had been put upon the note in suit, as a maker, ratified and adopted the same, he would be bound thereby, although his name was originally placed upon said note without authority. The soundness of this instruction is not questioned. The words ratified and adopted, as contained in it, seem to have been used as synonymous, and, in fact, a ratification is but the adoption of an act purporting to be the act of the party adopting it. It is not necessary, as is contended in defence, that the act which is ratified or

adopted, should have been originally done solely on the account of the party adopting it, or for his benefit. It is sufficient if it be, apparently upon its face, his act. If this appear, it will be competent for the apparent party to make it his own. The signature of Daniel Day, upon the note in suit, purported to be his own. He might, therefore, rightfully adopt it as such; and, if he did so, nothing is better settled than that such ratification binds him from the date of the note, and not merely from the time of the ratification.

It becomes unnecessary to consider whether the jury were authorized, from the evidence in the case, to find that the signature of Daniel Day, to the note in suit, was ratified and adopted by him as his own, for two reasons; first, because the jury may have found for the plaintiff upon the ground of previous authority; and, secondly, because the presiding Judge instructed the jury that, "if they should find that Daniel Day, when the note was presented to him by Converse, for the purpose of giving him to understand that his, Daniel's, signature thereon was genuine, used language, or conduct, calculated to induce such belief, and Converse was thereby actually induced to believe the signature genuine, it would constitute an adoption thereof, though the real intention of Daniel was only to gain time, for the purpose of making some arrangement to avoid the exposure of the criminal conduct of his brother, and did not intend to adopt the signature as his own," or, in other words, that such language and conduct, under the circumstances named, would be conclusive evidence of a ratification or adoption, in fact, notwithstanding no such thing was intended.

A contract necessarily implies, in its making, the assent of the parties to be bound by it, and such assent cannot exist in fact without corresponding intention. A contract, therefore, cannot exist without the intention of the party, either express or implied, to make it. It is not his contract until he has in some way intentionally assented to it. He may, however, by his conduct, as we have already seen, bind himself so far that he will be estopped to deny the validity of the contract. So,

also, in the case of a subsequent ratification or adoption of a contract, made in his name without authority, such ratification or adoption cannot exist, in fact, without or against the intention of the party to be bound by it. The party, however, may, by his conduct, estop himself from denying an intention to ratify or adopt it.

The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case, the party is bound, because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct, unless the law treat him as legally bound. In the one case, the party is bound because this contract contains the necessary ingredients to bind him, including a consideration. In the other, he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances, that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct and acts being what they purported to be, without apprising him to the contrary.

The presiding Judge, in the instruction now under consideration, makes any words or conduct, at the time the note was presented for payment, on the part of Daniel Day, calculated to induce the belief that his signature to the note was genuine, and actually having and intended to have that effect in the mind of Mr. Converse, the plaintiff's attorney, conclusive proof of the adoption of the note, notwithstanding he did not, in fact, intend to adopt the signature as his own. That this testimony was important upon the question of adoption, there can be no doubt, but its weight was for the jury. The fact that the plaintiff's attorney was intentionally induced to believe the signature to be genuine, did not make it such, unless Daniel intended to ratify and adopt it as such. If he did, it became his note. If he did not, the fact that he intentionally created such belief, in the mind of the attorney, would not necessarily, much less, conclusively, make the note

his; and, if the plaintiff suffered no detriment from the induction of such belief, the excepting defendant would not be estopped from showing that he did not intend to make the note his; and, without this instruction, the jury might possibly have found, in view of the evidence or facts referred to by the Judge, that it was not such. *Hall & al.* v. *Huse*, 10 Mass. 39.

If it be said, that the presiding Judge intended, by the language used, that these facts would be equivalent to an actual adoption of the note, and so the defendant, Daniel Day, would be estopped from denying it, whether he intended it or not, then there would be an infirmity in the instruction, in omitting to state that, before such estoppel could exist, it must appear that the plaintiff had been in some way prejudiced or suffered detriment by acting or omitting to act by reason of such belief. *Roe* v. *Jerome*, 18 Conn. 138; *Dezell* v. *Odell*, 3 Hill, 220; *Pickard* v. *Sears*, 6 Add. & Ell. 469; and *Cummings, Adm'r*, v. *Webster*, 43 Maine, 192.

Whatever view, therefore, we take of this instruction, it is found to be erroneous, and, for this cause, a new trial must be granted. As the cause is to be again tried, we deem it not improper to remark, that we see no error in the refusal of the Judge to give the several requested instructions which were not given, relating as they do to the effect and sufficiency of certain evidence, and not to matters of law; nor in the admission of the disclosure of Daniel Day, referred to as a part of the case, so far as it related to his taking security of Adoniram J. Day for general liabilities, and beyond this it was excluded.

Exceptions sustained and new trial granted.

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

DAVIS, J., stated his reasons for concurring in the result:—

In the trial of this cause, there were three questions for the jury, upon which testimony was admissible, and appropriate instructions were necessary.

1st. Was the signature of Daniel Day to the note in suit genuine?

It seems to have been conceded at the trial, that it was not; but on this point no questions are reserved by the exceptions.

2d. If the signature was not genuine, was it made by any person authorized by Daniel Day to sign his name upon it, for him?

Such authority might have been proved by evidence of *express grant;* or facts might have been proved, from which a jury could have *inferred* that such authority had been granted. The report furnishes no evidence of authority *expressly given.* If there was any evidence, from which a jury could have *inferred* that such authority was given to any one, it was to Adoniram J. Day. But I cannot concur in the opinion that such authority could have properly been inferred from the silence of Daniel Day when the note was presented to him. If it had purported to be signed by "A. J. Day for Daniel Day," it would have been otherwise. But it purported to have been signed by Daniel Day himself, and his silence furnishes no ground for the inference that he authorized any other person to sign it for him. The case does not show whether the handwriting was made to resemble his, or whether he examined the signature with sufficient care to have discovered that it was not genuine. And, even if he knew that it was forged, and refrained from disclaiming it, for the purpose of screening his brother from exposure, such impropriety of conduct could not authorize the inference that he had *authorized his brother to sign his name.* The question on this point is not one of *estoppel,* but one of *authority actually given.*

I agree, that the previous conduct and relations of the parties were proper matters of evidence. And, in regard to the other notes, which were admitted, with testimony tending to show that Daniel Day acknowledged them, they might properly have been admitted if it had been proved that *his name was signed upon them by A. J. Day,* and that *he knew that*

fact, at the time of his acknowledgement. Unless his name was signed by his brother, and he examined the notes so as to have known it, his acknowledgement would be no evidence *that he authorized his brother to sign his name.* Where one indorses frequently for another, it often happens that he does not read a note before signing, and cannot tell afterwards whether he signed a particular note, except by examining the signature. The case furnishes no evidence that the signatures of Daniel Day, upon the other notes, *were made by his brother;* or, if they were, that *he knew that fact*, at the time when it is contended that he acknowledged them. I think, therefore, they should have been excluded; or, if admitted, more specific instructions should have been given.

3d. But, if no *actual authority was given* by Daniel Day to his brother to sign his name, has he so conducted himself, *with* the plaintiff, as to be estopped from denying it? If one acknowledges his signature to a note to be genuine, and the person making the enquiry *takes the note on the faith of such admission*, he is afterwards estopped from denying the genuineness of his signature. *Cooper* v. *Leblanc*, 2 Stra. 1057; *Leach* v. *Buchanan*, 4 East, 226. Otherwise he is not estopped. *Hall* v. *Huse*, 10 Mass. 39. If, in consequence of such admission, the holder should delay enforcing his claim against another party, and lose security which he might have obtained, perhaps it would be the same as if he had taken the note on the faith of such admission. I am therefore of opinion, not only that the presiding Judge erred in instructing the jury that such admission was an adoption of the note, but I also think he should have instructed them that the defendant was not estopped by such admission from denying the signature, unless the note was taken in consequence of it, or the holder was otherwise injured by being induced thereby to refrain from enforcing it against the other party, when he might have secured it.

JOHN W. PICKARD *versus* BENJAMIN BAYLEY *& al.*

The statute (c. 64 of R. S. of 1841,) requires, that hay pressed and put up in bundles, for sale or shipment, shall be branded on the boards or bands enclosing the same, with the name of *the person pressing the same;* and it is no compliance with the statute to brand thereon the name of *another person*, although it be done with his consent.

An action cannot be maintained against the owners of a vessel, for the non-performance of a contract to transport hay, if the bundles are not marked as the statute requires. Nor, for neglect in taking care of the hay, after its delivery to them for shipment, whereby the hay was greatly damaged, the duty or promise to take care of it arising from the contract of affreightment, the performance of which would be in violation of the statute.

EXCEPTIONS from the ruling of MAY, J.

This was an action of ASSUMPSIT. The plaintiff in his writ, which is dated Dec. 2, 1854, declares against the defendants, as owners of the schooner *Sarah*, alleging an agreement by the defendants to carry on freight, from Alna to Boston, a quantity of hay, belonging to the plaintiff; and a non-performance of the agreement.

The second count alleges that, having delivered the defendants the hay, to be taken on board the vessel on freight, they promised safely to keep, take care of, and carry the same to market, but, by neglecting so to do, the hay became damaged and almost worthless.

There were several grounds of defence taken at the trial, and various instructions requested, to which the exceptions relate; but, as only one point in the defence is considered in the opinion of the Court, further reference to the other points which were argued becomes unnecessary.

The plaintiff proved, by John W. Plummer, that he (the witness) pressed the hay; that a part was marked by him and branded "N. Plummer"; that he marked the weight on the bales with red chalk, but put on no other brand; the last he screwed was not so marked, but he told the plaintiff he could mark it when he pleased; he might get the brand and put the name on, but whether the hay was afterwards branded

the witness could not say. The witness further stated that Nathaniel Plummer, his father, had consented that he might use his branding iron on all the hay he pressed. He also testified, that he and Samuel Paine owned the press which he used in pressing the hay, and that said Nathaniel Plummer, who owned the branding iron, allowed him to use it when he chose, and that he generally had it with the press.

Joseph Pickard testified, in behalf of plaintiff, that he afterwards procured a branding iron of Nathaniel Plummer, and branded the hay "N. Plummer," with that, and borrowed another iron, of a Mr. Dole, and branded it also thus, "Alna, Me.," and that the hay was not otherwise branded, except the weight was marked thereon, and he thought he put these marks upon all the bundles of both lots.

Nathaniel Plummer testified that he was the owner of the branding iron, and that Joseph Pickard applied for it and he let him have the use of it; but that he, (the witness,) did not press the hay, and was not present when it was done, and only knew that his son went to press it, and had no connection with the contract for pressing it.

The plaintiff, by his counsel, contended that such marking was a compliance with the statute.

The defendant's counsel contended that it was insufficient to justify the taking of the hay on board of the vessel to carry to a market.

The Judge, for the purposes of the trial and to have some other questions settled by the jury, together with the question of damages, instructed the jury that, if the plaintiff had satisfied them, from the whole evidence, that the hay which was agreed to be shipped, was all marked with the words "N. Plummer, Alna, Me.," and that the hay was screwed or pressed by his son, John W. Plummer, at said Alna, and that both said N. Plummer and John W. Plummer, lived in said Alna at the time, and that said hay was so marked by the consent and authority of said N. Plummer and John W. Plummer, the plaintiff, if the other facts in the case, necessary thereto, had been satisfactorily proved, might recover, and the

contract for carrying said hay on freight would not be void, so as to prevent a recovery for any breach of said contract.

Ruggles and Hubbard, for the defendants, argued that the instruction given, as to the pressing and marking of the hay, was erroneous. The requirements of the statute, (c. 64 of R. S. of 1841,) had not been complied with, as the plaintiff's evidence shows. The bundles were not branded *with the name of the person* by whom the hay was pressed. A construction of the statute, that will allow hay to be marked with the name of a person who had nothing to do with the packing or pressing of it, will defeat the very object and design of the statute.

Any contract for the sale of pressed hay, not branded or marked; or, not marked as the statute requires, cannot be *legally* enforced. Nor can hay, not branded as the law requires, be legally offered for shipment; and the law will not lend its aid for the recovery of damages, for a violation of a contract relating to the shipment of it, if the shipment would be unlawful.

Whitmore, for the plaintiff:—

The case finds that the defendants took the plaintiff's hay into their custody and agreed to take proper care of it, and that, by their neglect, and by exposing it to the weather, it became valueless.

Having taken the hay into their possession, the defendants undertook and were legally bound to take proper care of it. The defendants could not excuse themselves from this obligation, because the plaintiff had not literally complied with the requisitions of the statute as to branding the hay. In this view of the case, the ruling of the Judge, which was in accordance with the spirit of the statute, becomes wholly immaterial. The plaintiff has set forth facts enough in his declaration, viz.,— the delivery of the hay to the defendants, and their agreement to take proper care of it, and their gross neglect, and consequent damage to the plaintiff, to maintain the action, without the immaterial allegation of a contract to

take it on board their vessel. That portion of the contract might be erased from the declaration and the action maintained upon the evidence introduced. The jury, by their verdict, have found the facts proved.

The defendants say they should have been liable to a fine of two dollars for each bundle of hay taken on board of their vessel, and therefore did not take it on board. The cause of the plaintiff's injury is not, that they did not take the hay on board their vessel, but that they took it into their custody and agreed to take proper care of it; and we have yet to learn that there is law making it penal, after receiving the hay, to take proper care of it, — or any law which exempts them from liability for such neglect.

The opinion of the Court was delivered by

MAY, J. — This is an action of assumpsit against the defendants, as owners of the schooner Sarah, for the non-performance of a contract on their part, by which they agreed to take and carry with due care a quantity of pressed hay for the plaintiff, on freight, from Alna, Me., to Boston, Mass. The evidence in the case tended to show that said hay was wholly spoiled and lost, for want of proper care and attention after its delivery upon the wharf for transportation, in pursuance of said contract.

The principal ground of defence was that the said contract was illegal and void, because the bundles of hay were not branded in conformity with the requirement of the Revised Statutes of 1841, c. 64, § 1. This section requires that "all hay, pressed and put up in bundles for sale in this State, shall be branded on the bands or boards enclosing the same, with the first letter of the christian name and the whole of the surname *of the person* packing, screwing or otherwise pressing the hay, and also with the name of the place where the hay was pressed, or where the person packing or screwing the hay shall live, with the name of the State." By section 2, it is provided that "all screwed hay, offered for sale or shipping, unless branded in the manner mentioned in the preceding

section, shall be forfeited," &c.; and by section 3, it is further provided, that "if the master of any vessel shall take on board a vessel pressed hay not branded as before prescribed, he shall forfeit and pay two dollars for each bundle so received." In view of these several provisions, it is very clear that any contract for the transportation of pressed hay on board of any vessel, when the same is not branded in conformity with the provisions of the statute, is absolutely void. It is a contract which cannot be performed without a violation of law; and no damages can be recovered for the breach of a contract which cannot lawfully be performed. It has been held, under this statute, that a contract for the sale of pressed hay not branded as the statute requires, at the time of its delivery, cannot be enforced, and no damages can be recovered for its non-fulfilment. *Buxton* v. *Hamblen*, 32 Maine, 448.

It appears, from the evidence in the case before us, that the hay contracted to be shipped, was pressed by John W. Plummer of Alna, with a press belonging to him and one Paine, and that he branded a part of it with the name of his father, "N. Plummer," with a branding iron that belonged to him, and that this was done with his father's consent. The residue of the hay was not so branded by him, but the weight of it was marked on the bales with red chalk, and he told the plaintiff he could mark it when he pleased. The plaintiff testified that he afterwards procured a branding iron of Nathaniel Plummer, the father of John W. Plummer, and branded the hay "N. Plummer" with it, and also borrowed another marking iron of a Mr. Dole, with which he branded all the hay thus: — "Alna, Me."

Nathaniel Plummer testified that he was the owner of the branding iron, and let the plaintiff use it; that he did not press the hay and was not present when it was done, and only knew that his son went to press it, and he had no connection with the contract for pressing it.

Upon this evidence, the plaintiff, by his counsel, contended that such marking was a compliance with the law, while the other side contended that it was insufficient. The presiding

Judge, for the purpose of settling the damages and some other questions connected with the case, instructed the jury, *pro forma*, that if the plaintiff had satisfied them, from the whole evidence, that the hay which was agreed to be shipped, was all marked with the words, "N. Plummer, Alna, Me."; and that the hay was screwed or pressed by his son, John W. Plummer, at said Alna; and that both said N. Plummer and John W. Plummer lived in said Alna at the time; and that said hay was so marked by the consent and authority of said N. Plummer, and John W. Plummer, the plaintiff, if the other facts necessary thereto had been satisfactorily proved, might recover.

This instruction, in view of the express language of the statute, was clearly erroneous. The statute requires the name, to be branded on the bands or boards enclosing the hay, to be that of the person pressing it, and not that of any other person, by his consent and authority. Such a construction of the statute, as is urged for the plaintiff, would have little, if any tendency to prevent such frauds as the statute was designed to suppress, but, on the contrary, would tend to deceive, by holding out to the purchaser or shipper that the hay was actually pressed by the person whose name should happen to be branded thereon.

But it is now contended that, as the contract declared on contains a promise to take care of the hay and prevent injury to it, that part of the contract which is alleged, and relates to the shipping of the hay, may be rejected as surplusage, and the plaintiff can recover for the non-fulfilment of what remains. This cannot be so. Because the duty and the promise to take due care of the hay springs out of the contract of affreightment or shipment, and is incidental to it, and is, therefore, a part of one entire contract, which is unlawful as a whole. Beside this, there was no consideration for any of the incidental undertakings, springing out of the contract, other than the unlawful act of shipping, which the defendants had on their part stipulated to perform. The declaration does not allege, nor does the evidence show, any independent

engagement, aside from the principal contract, entered into by these defendants, in relation to the hay, or the care which should be taken of it after its delivery upon the wharf. Their duties, in regard to the hay, all arose from that principle of law by which a party, who contracts to do a certain thing, is bound to use all reasonable means necessary to effect it. *Savage* v. *Whittaker*, 15 Maine, 24. It is equally clear, in our judgment, that, under such circumstances, when the principal thing fails to be binding on account of its illegality, all its incidents are alike without validity or force. The other points raised in defence it becomes unnecessary to determine.

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

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

MOSES CALL *versus* THOMAS W. CHADBOURNE.

The provisions of the Act of 1852, c. 243, (R. S. of 1857, c. 11, § 26,) are not unconstitutional. For, notwithstanding the Legislature had conferred upon towns the authority to establish school districts and fix the limits thereof, within their respective towns, its power upon the subject was not thereby exhausted, so that it could not legitimately empower districts, within a town, to unite, without the consent of the town.

Nor was that statute so far repealed by the Act of 1854, c. 104, § 1, (R. S., c. 11, § 1,) as to take away from school districts the authority to unite, which was conferred by it.

The provision of § 3, art. 2, of c. 193 of Laws of 1850, (R. S., c. 11, § 15,) that "every school district shall in all cases be presumed to have been legally organized, when it shall have exercised the franchise and privileges of a district for the term of one year," was intended to overcome all objections of a technical nature, on account of irregularities and informalities of proceedings in the organization of a district.

But such presumption will not be held to be conclusive; otherwise, it might exclude the right to show that the organization had been procured by fraudulent and corrupt practices.

REPORTED by RICE, J.

This was an action of TRESPASS, for taking certain personal

property belonging to the plaintiff. The defendant justifies as sheriff of the county of Lincoln, having in his hands for service an execution against the inhabitants of school district No. 6, in Dresden, and in execution of the command of said precept, he levied on the property.

The plaintiff denied that he was, or ever had been, an inhabitant of said district No. 6.

It was admitted that the proceedings of the defendant, in making the levy, were regular and according to law; also, that he was duly qualified to act as sheriff.

It was further agreed that, in the year 1826, the town of Dresden established two districts, — district No. 6, and district No. 3, — one on the eastern and the other on the western side of Eastern river.

The plaintiff, at the time of the levy, lived in that part of the town which was embraced in district No. 3, and had resided therein for at least ten years before. Those districts remained as they were established in 1826, until 1852.

On the 23d day of September, 1852, a meeting of school district No. 6 was held, pursuant to a warrant issued by James Bickford, Agent, on the written request of five inhabitants of said district No. 6. It was not questioned that said Bickford was duly elected agent for the year 1852, but it does not appear by the *record* that he was sworn.

The 2d article in the warrant was, "To see if the district will agree to unite with district No. 3, to form a new district to be called district No. 6, according to an Act passed by the Legislature, and approved by the Governor, April 9, 1852, and pass any vote or votes in relation to the same."

The action of the district under this article, is thus recorded: — "*Voted*, that district No. 6 be united to district No. 3."

On the 22d day of April, 1854, under a warrant issued by Aaron Bickford, on written application of three inhabitants of the district, a meeting of district No. 3 was holden, at which it was "voted to dismiss the 5th article," (relating to uniting with district No. 6.)

A part of the record of the meeting at which the agent was elected, is as follows:—"Chose Aaron Bickford School Agent and sworn."

On January 9, 1856, a meeting of the inhabitants of district No. 3 was held, under a warrant issued by the selectmen of the town of Dresden, written application having been made to them by certain of the inhabitants of the district.

Article 2d of the warrant was "to see if the district will vote to unite with school district No. 6, to form a new district to be called district No. 6, according to the Act passed by the Legislature and approved by the Governor, April 9, 1852, and pass any vote or votes in relation to the same."

The record of the doings of the meeting contains the following:—"Art. 2d. *Voted* to unite with school district number six, to form one district, to be called number six, according to the article in the foregoing warrant."

On the 10th day of January, 1856, the clerks of the school districts No. 6 and No. 3, certified the action of their respective districts to the clerk of the town, by whom they were entered upon the town records.

It was agreed that, in the year 1856, the selectmen of Dresden apportioned the school money to the union district No. 6, and that it was appropriated to the support of schools in the union district No. 6, kept during the years 1856 & 7, and that, in 1857, the money was apportioned to districts Nos. 6 & 3, by the selectmen, and the selectmen drew orders in favor of district No. 6 and district No. 3, for the amount of money so apportioned, and schools were kept in both districts. The agent of the union district also drew his orders on the town treasurer for the money apportioned to districts Nos. 3 & 6, and drew the same from the treasury, viz., $276,25, and expended it for schools kept in that district during the years 1857 & 8.

The union district was organized March 22d, 1856, as appears by the records of said district.

A school house was built in said union district by Ephraim Alley, 2d, during the summer of 1856, in which the schools

of said district have been since kept. A portion of the scholars of both districts have attended the schools in the union district ever since schools were kept there.

A portion of the voters in the old districts, Nos. 3 and 6, have attended and voted at all the meetings of the union district No. 6, claiming to constitute a union district, formed from the old districts Nos. 3 and 6, and a portion have never attended, claiming that said districts were not united.

All legal objections to the introduction of the facts and records above set forth are reserved to each party.

An Act of the Legislature, approved March 19, 1858, entitled "an Act to make valid the proceedings of school districts numbers three and six, in Dresden," makes part of the case.

It appears, from the case, that Ephraim Alley, in the year 1857, recovered judgment against the inhabitants of school district No. 6, for a school house which he had erected for them. The writ of execution, which was issued upon the judgment, was delivered to the defendant to be enforced. The amount of the judgment was assessed (as provided by statute) by the assessors of the town, on the inhabitants of the district. A portion of them neglecting to pay the sums which had been assessed upon them, the officer levied upon their property.

The plaintiff contends that his property was illegally taken, because he has never been an inhabitant of said district, but is an inhabitant of district No. 3, which has not been legally united with the other district.

Morrill and *Danforth*, for the plaintiff.

It is admitted that if, at the time of the levy, these two districts had legally become one, and that one legally called district No. 6, then plaintiff was an inhabitant of No. 6, and liable to have his property levied upon; otherwise, he was not liable. These proceedings to unite the two districts, are undoubtedly intended to be founded upon the law of 1852, c. 243.

This law, we contend, is beyond the authority of the Legislature. By article 8th of the constitution of this State, the Legislature is authorized, and it is made its duty to compel *towns* to maintain public schools. This, it is believed, is the extent of its authority. So far as the compulsory power goes it is confined to towns. And, for the purpose of enabling towns more conveniently to perform the duty imposed upon them, the Legislature permits them to form districts, and, as a condition of the grant of this power, the Legislature gives such powers to the district, not inconsistent with the power of the towns, as it deems proper. By the law, as it existed at the time the statute of 1852 was passed, and as it was before and since, the towns had full power and control over the districts, to form, establish, change or annihilate them, as they chose; the Legislature simply defining the powers which districts might exercise when established. It is contended that, when this grant was made to the town, the Legislature had *exhausted its power* and could go no further. Otherwise, the Legislature could incorporate towns with powers, to a certain extent, exclusive over the territory incorporated, and then incorporate another body inside of that, with powers inconsistent with those given to the first; or give powers to a mere creature of the town, which make it stronger than the town itself.

All the statutes which have been enacted upon the subject, up to the one of 1852, seem to have contemplated districts as mere creatures of the towns, subject to their control, and simply to enable them conveniently to perform a duty.

But, in the law of 1852, power is given to the districts themselves to form other districts, taking from the towns all control over districts so formed; so that a district, instead of a creature of, and a convenience to towns, may, under that statute, acquire powers above and become burdensome to towns; and this too, when, theoretically, they are incidents to, and governed by, the officers of the town. In this very case it is claimed, that there is in Dresden a district beyond the power, and existing independent of the town, and yet re-

ceiving its sustenance from that very town; choosing its own agent, and that agent actually drawing, from the treasury of the town, money, the proceeds of a tax levied upon all inhabitants of the town. It is contended, then, that, for wise purposes, no power was given to the Legislature to form *such* school districts, and, much less, to enable districts, with such powers, to form themselves, and that, in the grant to the towns, the Legislature exhausted all the power they had.

But, whatever may have been the validity of the law, we contend that it was repealed by the law of 1854, c. 104. It is therein provided that towns shall have the entire control of districts, and all inconsistent Acts are repealed. It is certain that towns cannot have the exclusive control consistent with the law of 1852, which says that, in certain cases, they shall have no control. And we may well presume that the Legislature intended to repeal the law of 1852; for, if we compare that of 1854 with the statute of 1850, c. 193, art. 1, § 2, we shall find that the later is a reënactment of the former, with a slight change or addition at the end of the first section of the law of 1854. Now this reënactment would have been unnecessary, unless for the very purpose of repeal. Then, again, this addition to the law of 1854, is a confirmation of the above view. This addition makes it necessary, preliminary to a change in the alteration of the limits of school districts, to have the decision of the selectmen and school committee thereon, which decision was undoubtedly intended to take the place of the action of the districts, as provided in the law of 1852. This is the only ground on which the insertion of the whole of the first section, in the law of 1854, can be accounted for. In other parts of the same Act, it will be perceived that changes are made in the same manner. If repealed in 1854, then, at the time of the vote relied upon by defendant, in district No. 3, no law authorizing such a vote was in existence.

If the districts had power to unite, the proceedings are so fatally defective that the purpose was not accomplished. The first meeting, called for the purpose, was that of district No.

6, holden Sept. 23d, 1852, the very ground work of which fails. The notice was given by James Bickford, as agent, and no proof has been offered that he was sworn as required by the statute of 1850, c. 193, art. 2, § 10; and, until he was so qualified, he could not act as agent; and in no other capacity could he call a meeting. Laws of 1850, c. 193, art. 2, § 5. It is not enough that a meeting was holden. To be legal, it must have been legally notified. *Moor* v. *Newfield*, 4 Maine, 44.

Then, again, the article in the warrant, and the vote under it, were both insufficient. The article should state the purpose for which they are to vote. It simply says, "to see if the district will *agree* to unite with No. 6," &c., without saying for what purpose, except, "according to an Act," &c. Now there was no law authorizing districts to unite generally. Neither does it mend the matter by saying, "according to an Act approved by the Governor, April 9th, 1852," for it so happens that many Acts were approved on that day; and so no light is given as to the objects of the union. If the title to the Act had been given, it would have been some improvement; but it is respectfully suggested that the warrant should show the matter to be voted upon, the purposes to be accomplished, without looking further. Then, the vote is still more defective. By that, it is to be simply a union, but for what purpose does not appear.

Then comes the meeting of school district No. 3, holden Jan. 9th, 1856, relied upon by defendant as completing the union. There is the same objection to the warrant in this case, as in the former. Neither is there any legal return upon the warrant showing that notice was given.

It is further contended, that if each of these meetings were legal and the proceedings sufficient, still, taken both together, they do not accomplish the purpose. One was holden Sept. 23, 1852, the other, Jan. 9, 1856, nearly four years afterward. The law evidently contemplates that the action of the districts should be concurrent and cotemporary in point of time, or nearly so. The one is to be a proposition, the other an

acceptance. The situation of a district may essentially change, in the lapse of almost four years.

The vote of district No. 6 may have been passed under the peculiar circumstances existing at the time; as, for instance, the number of scholars in the district, or the want of repair of the school house, &c. And, when these circumstances ceased to exist, a union might be deemed to be inexpedient, on the part of district No. 6, while the change of circumstances may be the very consideration that would induce the other district to vote to unite. And the case shows that district No. 3, in the year 1854, was opposed to a union, but, in 1856, favored it.

But, further than this, we contend that the meeting in No. 3, April 22, 1854, was a complete answer to the one in No. 6. The proposition was rejected, and it was then as if nothing had been done. If No. 3 chose afterwards to have united, and voted to that effect in 1856, then certainly a meeting in No. 6 should have been called to accept or reject. As the matter now stands, one attempt to unite has failed; another has been made by one party only, and is nugatory until acted upon by the other.

Thus, the records not only do not show a concurrent action of the two districts, but really the opposite, that no such action has been had, and the defendant must fail, unless he shows it affirmatively, the burden being upon him.

Even a concurrent action of the districts is not sufficient. The clerks of the several districts must, by the law of 1852, § 2, forthwith furnish the town with a certified *copy of such votes*, which the town clerk is to record; and, from and after such record, such districts shall constitute one district, &c. This is not directory, simply, but is essential to the union. All school districts being an incident or constituent part of the town, and an important part of the system through which the town acts in supporting schools, it becomes necessary that the town records shall show the limits of the several districts. This, in fact, is the only guide which the town officers have in performing their duties to the schools. Hence the

law provides that, *only* from and after such record, the union takes place. Now, it is contended, in this case, that no such return or record has been made. In the case of No. 6, the person who claims to be clerk of something, but of what, whether of town, district, or something else, does not appear, certifies that the return is a copy, but, whether of a vote or mere statement of a fact, does not appear. It certainly is not a copy of the record of the vote of No. 6, as will appear by comparing it with that record. The return for No. 3 purports on the face to be the certificate of a fact, simply, and the attestation does not indicate any thing different, which is certainly insufficient, even if the statute did not expressly require a copy, as all these proceedings must be proved by the record or an attested copy. *Moor* v. *Newfield*, 4 Maine, 44; *Owen* v. *Boyle*, 15 Maine, 147; *Maguire* v. *Sayward*, 22 Maine, 230.

The defendant, apparently aware of these defects and deficiencies, undertakes to ease them by proof of certain acts of individuals and town officers, to all of which we object. We maintain that the union, if there is any, is to be proved by the records alone; and if, by those records, there is no union, none can be formed by municipal officers or individuals, whether acting as such or claiming to act in a corporate capacity. *Moor* v. *Newfield*, above cited.

Even towns, acting in a corporate capacity and recognizing districts already organized, and appointing agents for each district, do not, and cannot constitute districts legally established. *Tucker* v. *Wentworth*, 35 Maine, 393.

But, in this case, the union was not recognized any more than denied. The several districts kept up their organization, had their schools and received their money, as well as the union district. While one portion of the people claimed that there was a union, and acted accordingly, another portion, and for aught that appears, a proportion equally as large or larger, deny the union, and act in accordance with that denial. So that, in every particular, a repudiation of the union appears quite as plain as a recognition of it.

Neither does the organization of the alleged union district prove any thing. The law of 1850 declares that, when a district has exercised the franchise and privileges of a district for one year, its legal *organization* shall be presumed. But it does not say, its *legal existence* shall be presumed. Its establishment shall first be proved, then its organization may be presumed from its acts. It is, however, denied that, in this case, the union district did enjoy any franchise or privileges. Its existence was disputed. It was a mere association of individuals, claiming what was denied by others equally interested with themselves, and with equal rights.

If it were otherwise, and the organization and use of the franchise for one year, under such circumstances, proved the existence of the district, any body of men could organize themselves and form a district, in spite of any authority whatever, and one district might exist within another.

In this case, districts Nos. 6 and 3 were as much organized, as much enjoyed the franchise and privileges of a district as the union district. So, if defendant's proposition is true, there are in Dresden three districts, Nos. 6 and 3, and another, composed of those two.

But this exercise of franchise is mere presumption of organization, and not conclusive proof. In this case, we have the proof of the union, or, rather, want of union, and, of course, there is no occasion to resort to presumptions.

Next comes, as a sort of cure-all, the Act of March 19th, 1858. This, however, purports to cover only a part of the ground, simply making valid other doings of each district by itself. It does not make or purport to make valid any thing more than the proceedings of the meeting of No. 6, Sept. 23, 1852, and of the meeting of No. 3, Jan. 9, 1856; leaving the town records still defective, and the meetings themselves as inadequate as ever, as unconcurrent in their action as before the law.

But, it is respectfully contended that this law is null and void, if it accomplishes the union of the districts. It is retrospective, and interferes with the vested rights and proper-

ty of this plaintiff. The law was passed after the levy was made and after the action was commenced. If then, at the time of the levy, these districts were not united, the property taken belonged to the plaintiff, and, after it was taken, he had a claim upon the defendant for its value, which was really property.

But this law interferes, and not only takes away all remedy for that trespass, but actually takes away the claim itself. Before the law the property was his, after the law it was not his. Before it his property was wrongfully taken, after it the same taking was made right. *Proprietors of Kennebec Purchase* v. *Laboree & als.*, 2 Maine, 275.

It is also unconstitutional, if it is to have the effect claimed for it, because it is a special law exempting certain corporations from the effect or requirements of a general law. By the law of 1852, districts are authorized to unite for certain purposes and by a certain course of proceedings. This law, if it unites these districts, exempts them from the requirements of that law and says these two districts shall be united without such proceedings. 3 Maine, 326; 4 Maine, 140.

There is an objection to the act of the defendant, showing his levy without authority, even on the ground of the union of the two districts. That union never was consummated by an organization. The records, alleged to be the records of the union district, are fatally defective, but, more especially, do not apply to any such district. So far as they describe any district, it is that of No. 6. Now the union district never was legally known by any such name. The law of 1852 provides that the new district shall be known by such name as the inhabitants thereof may designate. If that applies to the inhabitants of the new district, as we suppose, it does not appear that any such name as that in the execution was ever adopted. If it applies to the inhabitants of the two districts, acting separately, then it has never been adopted, at least, by one of them, that of district No. 6, for the records of their meeting show no action whatever upon the subject. So that there was no district in the town of Dresden such as is de-

scribed in the execution, under which the defendant justifies, other than the original No. 6, established by the town in 1826, and of that the plaintiff never was an inhabitant, and defendant took his property without any authority.

Gould, for defendant.

The principal question for decision in this case is, were school districts Nos. 3 and 6, in Dresden, in any mode consolidated, so as to form one district on the 20th day of June, 1857? Did there on that day exist such a district as *No. six*, of which the plaintiff was an inhabitant? We prove this fact in several ways:—

(1st.) By the concurrent action of the old districts 3 and 6.

(2d.) By the "exercise of the franchise and privileges of a district for the term of one year," before that time.

(3d.) By the direct intervention of the Legislature.

1. "In the proceedings of our various and numerous municipal corporations, we ought not to look for a scrupulous observance of the most approved formalities. If their proceedings are in substance what they should be, and intelligible, it would be *mischievous* to set them aside for want of technical formality." *Soper* v. *School district in Livermore*, 28 Maine, 193, 203–4; Angell & Ames on Corp. § 5, Int.

Proceedings of *school districts*, like the proceedings of towns, "should receive a *liberal construction*, that they may, if possible, be supported." *Whitmore* v. *Hogan*, 22 Maine, 564, 567.

The union of districts Nos. 3 and 6 was formed under the law of 1852, c. 243.

The first objection made is, that *that* statute is unconstitutional.

This objection has not impressed itself upon any of the Legislatures since 1852, nor upon the learned commissioners who revised the statutes, as the law is retained in the new code of 1857, c. 11, § 26.

The plaintiff's argument proceeds upon the ground, that it is incompetent for the Legislature to incorporate a certain portion of the territory of a *town* into a school district; that,

by the Act of incorporating a town, the Legislature irrevocably *cedes* to the town all its power, in respect to the organization of the territory for school purposes. If this were so, there is a large class of legislative Acts, running through the whole history of the State, which contravene the constitution.

It has always been considered, that the Legislature might go *much further* than this; that shool districts and other *geographical portions* of towns might be invested with the power of *self taxation* for local purposes, independent of the action of the town. See the case of *Smyth* v. *Titcomb,* 31 Maine, 272, and authorities cited by HOWARD, J., on p. 286.

Geographical portions of towns, it has been repeatedly held, may be incorporated for the purpose of mutual protection against *fire* and other local interests, as well as for religious and educational purposes; and such legislative Acts have been regarded, not only as *constitutional,* but among the most useful class of enactments.

The *modus operandi,* creating union districts, is analogous to that authorized in the statutes for creating corporations for religious purposes, parishes and religious societies, in which authority is delegated to them to *organize themselves* into a corporation, with all the usual powers of such bodies; to hold property, build churches, support preaching, &c., &c. This mode of creating corporations has been long recognized, by courts and Legislatures, as competent.

In this case, we have no occasion to go any further than to consider whether a corporation may be *created,* by the joint action of two districts, under a statute authorizing it. Though we might do so with safety, we have no occasion to contend that it would have an independent power of taxation.

The general rule is, that "the Legislature has *entire control* over municipal corporations, to create, change or *destroy* them at pleasure." *The People* v. *Wren,* 4 Scam. 269.

I apprehend that there is no such thing as the Legislature "exhausting its power" on these subjects, as is contended by plaintiff. The legislative power over the territory of a town is as much unlimited *after* as *before* the Act of incorporation.

No vested *indefeasible* rights are granted to towns by their incorporation. Certainly not upon this subject.

It is also said, that the Act of 1852 was *repealed* by the Act of 1854, by necessary implication. This is not so, as will be perceived by an examination of the two Acts. If there is *any* incompatibility in those Acts, it is only between the *third* section of the Act of 1852, and the *first* section of the Act of 1854, (c. 104.)

There is nothing in the law of 1854 incompatible with the 1st and 2d sections of the Act of 1852. Under that Act, two or more school districts might still be *united;* though, perhaps, under the 1st section of the Act of 1854, the town might again *divide* it; the union would stand well so long as the town did not *interfere.* This is the *strongest* view that can be taken for the plaintiff.

But the Legislature of 1857 did not understand that there was even *this* incompatibility in the two Acts, for they retain *both* in the R. S., c. 11,—viz., the Act of 1854 in § 1, and the Act of 1852 in § 26.

2. The union district No. 6 had "exercised the franchise and privileges of a district, for the term of one year" and *more,* before the levy by defendant; and it is therefore "to be presumed to have been legally organized;" or, in the language of the marginal note in the statute, to be "*deemed*" to be legally organized. Stat. 1850, c. 193, art. 11, § 3, retained in R. S., c. 11, § 15.

This is not singular legislation. There have always been Acts upon the statute books of this State of *similar* character. The laws of 1821, c. 117, § 7, provided that all school districts then existing should be bodies corporate, &c. This was held, in *Whitmore* v. *Hogan,* 22 Maine, 566, "to embrace *all districts,* as well those existing only *de facto,* as those created *by a legal vote of the town.*" And it is further there said, that the statute was *intended* to embrace those districts which could not prove "a strictly legal existence."

In 1850, the Legislature thought it wise, for the purpose of preventing trouble and injury to the cause of education, by

some captious tax payer, who might be disposed to be hypercritical in his scrutiny of the doings of school districts, to pass a sort of "limitation Act," or an Act "to quiet titles." I submit that this statute did not design to make the "exercise of the franchise and privileges of a district "*prima facie* evidence of organization, merely. It is *conclusive*, certainly, as regards *strangers*, like defendant, who have occasion to deal with them.

The law under consideration, in *Tucker* v. *Wentworth*, 35 Maine, 393, cited by plaintiff, was not like the one now in question, which was for the first time enacted in 1852. The Act of 1847 did not contemplate a permanent union. The decision has no bearing on this case. By the Act of 1852, districts thus united became a "body corporate," &c.

What are the "*franchise and privileges* of a school district," but those which this union district is proved to have exercised and enjoyed? Their records are before the Court. By them it appears that the district undertook to organize the territory of old districts 3 and 6 into a *school district*, March 22, 1856; that, from that day until this action was tried, the organization, with the proper officers, has been kept up, meetings, annual and others, have been held, school house built, schools kept, land purchased, schools *graded*, &c., &c., doing all those acts, indeed, which are common to school districts.

3. That, if any defects existed in the proceedings of the districts, which were had for the purpose of uniting them into one district, they were cured by the Act of the Legislature, passed for that purpose, approved March 19, 1858. The Acts confirmed take effect as of the time when done, not when confirmed. Counsel cited, on this branch of his argument, *Walter* v. *Bacon*, 8 Mass. 472; *Patterson* v. *Philbrook*, 9 Mass. 151; *Locke* v. *Dana*, 9 Mass. 363; *Wilkinson* v. *Leland*, 2 Peters' R. 627; *Inhabitants of Lewiston* v. *Inhabitants of Yarmouth*, 5 Maine, 66.

Morrill replied.

The opinion of the Court was drawn up by

RICE, J. — The act complained of by the plaintiff, as a trespass upon his rights, was performed by the defendant, in his official capacity as sheriff of the county of Lincoln. That the defendant was, in fact, sheriff of said county, and duly qualified to act in that capacity, is admitted. It is also admitted that his proceedings, in seizing and selling the property of the plaintiff, were regular in form, and according to the rules prescribed by law. Nor is there any complaint that the tax, on which the property of the plaintiff was seized, was not, so far as the proceedings of the constituted authorities were concerned, assessed according to the forms prescribed by the statute. The objections of the plaintiff lie deeper. He denies the legal organization, or existence of the school district, for the benefit of which the tax was assessed, and consequently the right to assess the tax in any form, or to collect the same of him by any process whatever.

In 1826, the town of Dresden established school districts Nos. 3 and 6, in that town. The plaintiff, at the time of the levy of the tax, for the collection of which his property was sold by the defendant, resided within the territory originally included in district No. 3, and had resided there for ten years prior to the date of the acts complained of.

By certain acts of the two districts, 3 and 6, had in 1852 and 1856, and by the town of Dresden, it is contended by the defendants those districts became united in one, by the name of district No. 6, under the provisions of the Act of 1852, c. 243, with all the rights and subject to all the duties and liabilities of school districts organized by virtue of that Act. This result is denied by the plaintiff, for the reason that the Act itself is unconstitutional, and that the proceedings of the districts and of the town were irregular, informal and void.

By art. 8 of the constitution, it is provided that, "the Legislature are authorized, and it shall be their duty, to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."

Admonished by this specific requirement of the constitution, the Legislature have, from time to time, enacted laws requiring towns to make provision for the support and maintenance of public schools at the expense of such towns, and among other acts for the accomplishment of that object, it has authorized towns to divide the territory thereof into school districts. This power was, as has been seen, exercised by the town of Dresden, in 1826.

It is contended by the plaintiff that the Legislature, having once conferred this authority upon the towns, has exhausted its powers upon the subject, and therefore could not legitimately authorize districts, within a town, to unite, without the consent of the town for that purpose.

On examination, no such limitation on the power of the Legislature, will be found in this section of the constitution. It authorizes the Legislature to require towns to make suitable provision for the *support* and *maintenance* of public schools at their own expense. That is, the towns must provide means, in the way of funds suitable and necessary for the support and maintenance of public schools within their limits. And, because towns have, under this provision of the constitution, been required to do certain things for the support of public schools therein, it does not follow that nothing further can be done by the Legislature in the same direction and for the same general purpose. The construction contended for would not only compel towns to make suitable provision for the support and maintenance of schools, by raising money for the payment of instructors and other incidental expenses, but would also compel them to construct all the school houses and pay all the other expenses of our public schools, which are now, by law, imposed upon school districts. In fact, it would amount to a total abrogation of school districts as corporations.

The powers of our Legislature are not thus limited by the constitution.

By sect. 1, art. 4, the Legislature have full power to make and establish all reasonable laws and regulations for the

defence and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States.

No repugnancy is perceived between these two provisions of the constitution. They harmonize together; the provision in the 8th article being only a specific requirement upon the Legislature, to exercise a portion of the general power conferred by the 4th. It is not a limitation of the general power, but a requirement that, for the specific purpose therein named, it shall be exercised.

It is further contended that, if the law of 1852 is not in violation of the constitution, it has been repealed by the Act of 1854, c. 104, § 1, which provides that the inhabitants of every town, at their annual meeting, may determine the number and limits of school districts within such towns, and, if necessary, may divide or discontinue any such districts, and, in its concluding section, repeals all Acts and parts of Acts inconsistent therewith.

The provisions of the Act of 1854 are manifestly inconsistent with the third section of the Act of 1852, c. 243, which provides that, after two or more school districts shall have united, as provided for in the foregoing sections of this Act, the town in which such districts are situated shall not have power to alter or divide the same, without the consent of a majority of the voters of such district.

Under the Act of 1854, it is competent for the inhabitants of towns to divide or alter the limits of school districts, however formed, under the general laws of the State. Under the law of 1852, it was not competent for towns to alter the lines of districts which had united under the provisions of that Act. No other inconsistency between the two statutes, so far as this case is concerned, is perceived.

It is further contended that, should the objections which we have already considered, not prevail, still there were irregularities and informalities in the acts of the districts, which render the attempted organization of the new district wholly nugatory. Those irregularities and informalities have been pointed out with much distinctness and precision, by the coun-

sel for the plaintiff. As the law stood prior to 1850, we are of the opinion that some of the objections taken to this part of the proceedings might have been deemed fatal to the legality of that organization. They are, however, technical in their character, and do not go to the merits of the case, so far as the evident intention of a majority of the inhabitants of the districts were concerned.

The object sought to be attained, by those in favor of union, was laudable and highly creditable to them. It betokens an enlightened sentiment and a commendable public spirit, which deserves encouragement, so far as is consistent with a fair and just administration of the law.

It was evidently the intention of the Legislature to meet objections of this precise character, which had been upheld by a strict and rigid rule of judicial construction, that the provisions of § 3, art. 2, of c. 193, of laws of 1850, were inserted in that Act. The section reads as follows:—

"Every school district shall, in all cases, be presumed to have been legally organized, when it shall have exercised the franchise and privileges of a district for the term of one year."

It is true, as contended by the plaintiff, the statute does not say that this presumption shall be *conclusive*. Nor is it necessary that it should be so. Such a provision might exclude the right to show that the union had been procured by fraudulent and corrupt practices, which, of course, should not be encouraged or sustained in any case. But the presumption arising by force of that statute is sufficient to overcome the informalities, which are mostly of a negative character, disclosed by the records in this case, after the new district has exercised the franchise and privileges of a district for the term of one year, as was the case here, before the proceedings, of which complaint is made, were had. As this will determine the case, it is not necessary to consider the other points made by counsel. *Plaintiff nonsuit.*

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

FREEMAN FISK, *pet'r for partition, versus* JACOB H. KEENE *& al.*

In a proceeding by petition for partition of real estate, against persons named as co-tenants in the petition, where they contest the petitioner's claim, they will be liable to costs, if the petitioner prevail, to the time of the interlocutory judgment; but not afterwards, if they cease adversary proceedings.

EXCEPTIONS from the ruling at *Nisi Prius* of MAY, J., allowing costs for petitioner, in a proceeding for partition of real estate, after judgment for partition had been entered.

At October term, 1852, the respondents filed their plea of sole seizin. The case was withdrawn from the jury and submitted to the full Court, upon report of the presiding Judge. Judgment for partition, as prayed for, was ordered by the Court in December, 1853.

The respondents' attorney thereupon abstained from all adversary proceedings, but his name was continued upon the docket. On motion of the petitioner, commissioners to make partition were appointed, whose report was made at the October term, 1855. To equalize the partition, the commissioners awarded the payment, by the petitioner to the respondents, of $150; which sum was paid at January term, 1856, when, for the first time, the petitioner moved the acceptance of the report.

The presiding Judge allowed costs for petitioner up to the time of final judgment, including the commissioners' fees; to which ruling the respondents except.

Ruggles argued in support of the exceptions.

Bulfinch, contra.

The opinion of the Court was delivered by

RICE, J.—This is a question of costs, merely. The respondents appeared in Court and answered to the petition, pleading sole seizin of the premises sought to be parted. This question was settled by the full Court, on a report of the evidence, against the respondents; that is, it was deter-

mined that the respondents were not sole seized, but that the petitioner was entitled to partition. After the adjudication of the Court was duly promulgated, the case finds that the respondents no longer resisted the petitioner, but he proceeded and had commissioners appointed, who submitted their report, and, at such time as he chose to move, that report was accepted by the Court.

These facts bring the case within the rule of *Ham* v. *Ham*, 43 Maine, 285. By that rule, he is entitled to his costs until the interlocutory judgment for partition was entered, but not afterwards. To this extent the judgment of the Court below must be corrected.

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

BENJAMIN CALLENDER *& al. versus* JOSEPH FURBISH and CALEB G. MOFFATT and GEORGE W. STEVENS, *Trustees.*

Where a trustee refused to answer questions propounded to him, the answers to which, however given, would not affect his liability, the Court will not order that he disclose further. *Thus*, if a trustee, being the mortgagee of goods, of which he never had possession, be interrogated concerning the property, his answers will be immaterial upon the question of his discharge.

A trustee, who appeared at the first term, made his general denial of liability, submitted to an examination, and, at the second term, completed his disclosure, which he then verified by oath, will be entitled to his costs for both terms, if he be discharged.

AT the return term of the writ, the alleged trustee, Moffatt, filed his disclosure. Whereupon the plaintiffs moved that he be ordered to disclose further, and answer certain interrogatories that had been propounded to him, relating to certain personal property, which Furbish had mortgaged to him, to indemnify him against liabilities he had assumed for said Furbish, which interrogatories he had refused to answer.

But APPLETON, J., ruled that his answer would be imma-

terial, and adjudged that the trustee be discharged, on his disclosure. To this ruling and adjudication, the plaintiffs excepted.

At the same term, the trustee, Stevens, (being in attendance as a juror) made in writing, the usual general denial of liability, and submitted to an examination; but his disclosure was not signed, and verified by oath, until the next term, when the examination was further proceeded with and finished. The trustee declined to answer questions of the same nature as those put to Moffatt. On his disclosure, he was discharged by MAY, J., who ruled that he was entitled to costs for both terms. *Plaintiffs excepted.*

Thacher & Brother, for plaintiffs, made the following points:

1. (As to Stevens.) A trustee is not entitled to costs, unless he declare *under oath*, at the first term, that he has no effects, &c., in his hands. R. S., 1857, c. 86, § 13.

2. But, if that position cannot be sustained, he must, at least, in order to be entitled to costs, offer himself for examination at the first term, seasonably, so that such examination may then be had. The case finds that the trustee did not offer to disclose till just before Court adjourned *sine die*, and that there was then no time for his examination. *Cleaveland* v. *Clap & al.*, 5 Mass. 207.

3. In the case at bar, the alleged trustee neither traveled nor attended for the purpose of disclosing; he was in attendance on Court, during the whole term, as a juror. He neither traveled nor attended, *to disclose.*

4. But, whatever the rights of the trustee to costs might have been, had he disclosed fully, he was neither entitled to costs nor a discharge, because he refused to answer the last interrogatory. R. S., 1857, c. 86, § 50; also c. 81, § 65.

It was necessary that the plaintiffs should know whether the mortgage was still subsisting, because they might choose to exercise the right secured to them by statute, of paying the mortgage debt, so that they might avail themselves of such property. At all events, it was a pertinent question

touching the subject matter, to which the plaintiffs had a right to require an answer. Until it was answered, the plaintiffs could not know the actual state of the property, or whether the pretended incumbrance was real or fraudulent, or, if made *bona fide*, whether it was cancelled. The general denial of liability by a trustee is in the nature of a plea, and subject to a full investigation by question and answer. *Toothaker* v. *Allen*, 41 Maine, 324. The Court cannot, indeed, compel the trustee to answer. *Lyman & al.* v. *Parker*, 33 Maine, 31. But he must answer or refuse at his peril. *Smith* v. *Cahoon & al. & Tr.*, 37 Maine, 281. If he elect to decline to disclose fully, the Court should not discharge him. It results, if the premises are right, that Stevens ought not to have been discharged.

Nor should Moffatt have been discharged, for the same reasons apply to his case.

Wm. Fessenden, for the trustees.

As to the question of costs:—

The trustee appeared in person at the first term; made his declaration that he had not any goods, &c., of principal defendant in his hands, and actually submitted himself to examination; which examination was commenced and was reduced to writing, and, although not completed at that time, was at a subsequent term completed, signed and sworn to, and the trustee discharged.

He has thus entitled himself to claim costs under R. S., c. 86, § § 13, 14 and 22.

The statutes of Massachusetts are, with regard to costs in trustee process, like our own:—That, if the trustee submits himself to examination at the first term, he is entitled to his costs. See *Cleaveland* v. *Clap*, 5 Mass. 201; *Lee* v. *Babcock*, 5 Mass. 212.

It is not necessary that his general answer, made the first term, should be under oath. That is actually sworn to at the first term. *Chapman* v. *Phillips*, 8 Pick. 25.

Nor is it necessary that the answer should be completed at

the first term to obtain costs. *Crocker* v. *Baker*, 18 Pick. 407; *Macomber* v. *Wright & trustees*, 35 Maine, 136.

The alleged trustee, Moffat, should be discharged; he having disclosed such facts as preclude the possibility of his being trustee of defendant.

He was mortgagee of goods, not in his possession, nor under his control. Nor had he any right of possession at the time of the service of the process upon him. *Pierce* v. *Monson*, 35 Maine, 57; *Wood* v. *Estes*, 35 Maine, 145; *Mace* v. *Heald*, 36 Maine, 136.

The questions asked, which the trustee declined to answer, were not material, nor relative to the issue; and, however answered, the answers could have no effect to charge or discharge the trustee. *Lyman* v. *Parker*, 33 Maine, 31.

The opinion of the Court was drawn up by

APPLETON, J.—It has been repeatedly held that mortgagees, not having the possession of the goods mortgaged, cannot be charged as trustees. This being the case, the interrogatories proposed to Moffat, however answered, would not affect the question of his liability, because he was not in possession of the mortgaged goods. No reason is perceived for remanding the cause for the purpose of procuring immaterial answers.

The trustee, Stevens, appeared at the first term and submitted himself to examination, and was partially examined by the counsel for the plaintiff. The cause was then continued, and, at a subsequent term and after a full examination and disclosure upon oath, he was discharged. "It has not been deemed necessary that the mere general denial of effects, which is generally made at the first appearance, should be under oath," remarks PARKER, C. J., in *Chapman* v. *Phillips*, 8 Pick. 25. "If an examination on interrogatories is intended, the oath is generally administered at the close of the examination. And this course is quite consistent with the views of the Legislature; who intended to prevent any delay on the part of the trustee, by making his title to costs depend upon his presenting himself for examination at the first term;

if he does so, and is not examined, it is the fault of the plaintiff, and the trustee ought not to be deprived of his costs. If the plaintiff is satisfied with the general denial of effects, in order to be discharged and to have his costs, the trustee must make oath to his general answer." In accordance with these views, was the decision of this Court in *Macomber* v. *Wright*, 35 Maine, 156. *Both exceptions overruled.*

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

ELONIA C. MILLAY, *Appellant from a decree of the Judge of Probate, versus* JAMES WILEY, *Executor.*

Where the validity of a will is contested, a person named therein as executor, is not "a party prosecuting or defending," within the true intent and meaning of § 83 of c. 82 of R. S. of 1857, so as to exclude him as a witness.

The provisions of that statute were intended to apply to contests that operate upon and bind the estate, to which the testator, if living, would be a party.

EXCEPTIONS from the ruling of MAY, J.

This was an appeal from a decree of the Judge of Probate, allowing the probate of the will of Phineas Butler, who was the father of the said Millay.

The testator devised most of his estate to the said Wiley, whom he nominated as executor of the will.

At the trial in the Supreme Court, on the appeal, the said Wiley was called by his counsel as a witness; the appellant objecting to the admission of his testimony, the Court excluded it. To the exclusion of his testimony, his counsel excepted.

W. Hubbard, in support of the exceptions.

This ruling was erroneous. Wiley's interest could be shown only to affect his credibility. It would "not excuse or exclude him." R. S. of 1857, c. 82, § 78.

He could not have been excluded by the provisions of section 80, for he is not an attesting witness.

Unless he comes within the provisions of the 83d section, he was improperly excluded.

The intention in the enactment of this section clearly was, to prevent the inequality that might otherwise arise, from permitting one, who had dealings with the testator or intestate, while alive, to testify respecting them, while his executor or administrator, having no knowledge of such dealings, could give no testimony respecting them. It was to prevent one party to a transaction from giving testimony respecting it, when the other party could not.

The *reason* for the enactment does not apply to a case of contest respecting the validity of a will. In such case, there are no dealings or transactions between the deceased and the party opposing the will. No inequality can arise from permitting the parties contesting the will to be witnesses. They are not within the mischief to be provided against. "*Cessat ratio, cessat lex.*"

A construction contrary to the true intent is not required by the use of the terms, when the party is "an executor," &c.

By the law of England, one, appointed executor by a will, is, before the probate of it, actually executor; and, as executor, he may do almost all acts, which he could do after probate of it. But, even there, he cannot sue or be sued. He cannot be a party, as executor, until after probate of the will.

Generally, in this country, the law as to executors is different from the law of England. Very clearly, it is not the law in this State. Chapter 64, § 5, of R. S., provides that "every executor, before entering on the execution of his trust, shall give bond."

Letters testamentary are to be issued to him, only after the will is proved and allowed, and bond given. § 4. And none are permitted to intermeddle except those who give bond. § 7.

When there is a delay in granting letters testamentary, a special administrator may be appointed, who may act pending the appeal. § 27.

This has been done in this case, and, since the trial, a person other than Wiley has been appointed.

How can Wiley be regarded as the actual executor, while another person is the legal representative of the estate?

If one named as executor should act without letters testamentary, he would conduct so illegally, as to become executor in his own wrong. Ch. 64, § 32.

In Virginia, one cannot legally act till he has given bond, as decided by *Monroe, Ex'r,* v. *Jones,* 4 Munf. 104.

The person named as executor in a will may, after proof of it in the Court of Probate, become the real executor; but pending an appeal by the grant to him of letters testamentary. § 31. But such is not this case.

It is very apparent, therefore, that a person named as executor in a will, is so *only nominally;* and not so *really* and *legally.*

And the words executor and administrator, as used in c. 82, § 83, have reference to *real* and *legal executors* and *administrators,* and not to persons *nominally* such, without power to do any one legal act, further than to defend their right to become *legally* such.

The provision of section 84 has reference to "special proceedings," which *operate upon and bind the estate of the deceased person,* not to contests respecting the validity of a will, or who shall be appointed an administrator or executor. The language is all suited *to such contests as bind the estate, and not to such as do not.*

It will hardly be contended that this is a case contemplated in § 83, where one is "made a party as heir of a deceased party." That language has reference to cases where a suit *is pending* and a party to it dies, and his heir is allowed to come in and prosecute or defend.

If the appellant is heir at law of the testator, she is not made a party as heir of the *deceased party; for the testator could not be a party to this contest.*

Gould, for the appellant.

Is Wiley "executor"? It is not necessary that the will should be *probated*, and that he should receive letters testamentary in order to constitute him executor. He receives his appointment, by nomination in the will, from the *testator*, not from the Judge of Probate.

The will is not a void instrument, as though it did *not exist*, because it has not been proved and approved.

It may be *made* void by refusing it probate; i. e., it may be set aside. But, until this is done, it is a will, and, by appointment in it, Wiley is executor.

True, before he can proceed to *administer the estate*, by our statute, he must give bond, unless the testator provide to the contrary; but even *this* is within his control, and he must receive letters testamentary. But there are many things which he can do before this takes place. He may care for the property that comes into his hands, and see that there is no *waste* of the estate. And he must present the will and cause it to be proved. In what capacity does he do *this*, if not as executor?

He is spoken of in the statute as executor before the will is proved.

It has been repeatedly held, that probate of a will is not necessary to *create* an executor; that he is not made such *by the will*.

He derives the *office* from the testator. The office is *regulated* by the statute.

The question in this case is, not whether, in the exercise of his office, he may now proceed to *administer the estate*, but, does he now *hold* the office?

Blackstone says, "an executor may do *many acts* before he proves the will." Bl. Com. b. 2, p. 507.

In *Wankford* v. *Wankford*, 1 Salk. 301, it is held that, "before an executor proves the will, he may perform *most acts incident to the office*."

In *Smith* v. *Willes*, 1 T. R., 480, it is held that "an execu-

tor does not derive his title under the *probate*, but under the *will*, the probate is only *evidence* of his right."

In *Humphreys* v. *Humphreys*, 3 P. Williams, 351, it is said, "it is true that, in order to assert completely his claims in a court of justice, he must produce the copy of the will, certified under the seal of the ordinary. But it is not necessary, that he should be in possession of this evidence of his right, at the time he commences an action at law as executor. It will be in due time, if he obtain it before he *declares* in such action. So, if he file a bill in equity, in the same character, a probate obtained at any time before a hearing of the cause will sustain the suit."

And Blackstone, *ubi supra*, says further, after stating that an executor may do "many acts before he proves the will," gives the reason:—"But an administrator may do nothing until letters of administration are issued; for the *former* [the executor] *derives his power from the will*, and not from the *probate;* the latter owes his entirely to the appointment of the ordinary."

Starkie says, "the right of the executor is derived from the will, *and accrues immediately upon the death of the testator.*" 2 Starkie's Ev. part iv. p. *550.

The property of the deceased person vests in his executor *from the time of his death;* but in an administrator only from the time of his appointment." 5 Barn. & Ald. 714.

Our statute, c. 64, § 5, declares that "every executor, before entering upon the *execution* of his trust, shall give bond," &c.

The *existence* of the trust is presupposed. The question here is, did Wiley hold the *trust* or the *office?* Not, was he qualified to enter upon its *execution*. He could not enter upon its execution until the will was probated; and the present controversy is, whether or not it shall be. In that controversy he acts as the "executor" of the will of his testator, from whom he derives the trust. And the very question is, shall the will or wishes of his testator be *allowed* to be executed, or shall they be set aside.

What is Wiley's character in this controversy, if not executor? Is he a "party prosecuting" or a "party defending"? If so, it must be as executor, and he is therefore within the clear and unambiguous language of the exception in stat. c. 82, § 83.

If he does not represent the will in this controversy, as executor, who does? Some one *must*, the action could not proceed without parties, and one of the necessary parties is a representative of the testator. Is not Wiley legally so?

Before probate of the will he represents the testator and the estate, as we have seen by English cases, and it is the same in America, viz.:—"Upon the death of a testator, and before the probate of the will, the legal title to all the personal estate of the deceased becomes vested in the person named as executor, as trustee for the legatees, creditors and others under the will; and he is the only legal representative of the estate disposed of by the will." *Shirley* v. *Healds*, 34 N. H., 407. And, in the same case, it is held that "the person named as executor has sufficient interest in the estate of the testator, to give him a right under the statute to claim and prosecute an appeal from a decree of the Judge of Probate, refusing to admit the will to probate. His interest is sufficiently set forth by an allegation that he is named as executor of the will," &c.

What is the capacity in which he holds the property in trust for legatees and creditors, if not as executor? How does he become trustee, except by virtue of his office of executor? And we see that he possesses this character before probate of the will; and it is in this character that he acts in the suit, or proceedings to prove and set up the will.

If it was from the Probate Court that he derived his office and title of executor, there would be some propriety in contending that he was not yet executor, but was necessarily a party to the contest to see whether he *should be made such.* But we have seen that it is from the testator, not from the court, that he derives the office, and that it vests in him im-

mediately on the death of the testator, without awaiting probate of the will.

In *Shoenberger* v. *Lancaster Savings Institution*, 28 Penn. State Reports, 459, it is held, that "the appointment of executors by a testator makes them (if competent in other respects) representatives of the estate, so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note, even before they are qualified for the active duties of their office."

So, "an executor, whose appointment is *avoided*, by his being an attesting witness, may be appointed administrator with the will annexed." *Murphey* v. *Murphey*, 24 Missouri, (3 Jones,) 526.

How is his "appointment *avoided*," if he does not derive the office from the testator?

In *Hill* v. *Smally*, 1 Dutcher, N. J., 374, it is held, "in an action by executors, all the executors named in the will must join, and a non-joinder, even, of such as have *omitted to prove the will or administer the estate*, is ground of abatement."

The counsel for the appellee argues that Wiley does not come within the *reason* of the exception, and "*cessat ratio, cessat lex.*" But if *any person* should be excluded, it is one in Wiley's situation.

This statute is in derogation of the common law, and is to be strictly construed. If Wiley is in fact executor within the common law meaning of that term; then he is within the exception of the statute, by language that cannot be construed away.

The opinion of the Court was delivered by

CUTTING, J. — In *Nash & al., App'ts*, v. *Reed*, [*vide* p. 168,] we have decided that the appellants were not made a party as heirs of a deceased party, and, consequently, were competent on the trial, in which an issue was made as to the validity of their ancestor's will. In that case, the question now presented arose, not directly, but only incidentally, as to whether

the person named as executor in the will, was the party prosecuting or defending, within the true intent and meaning of c. 82, § 83, so as to be excluded as a witness, before the validity of the will was established.

It is here unnecessary to repeat, and we only refer to what was said in the former case, bearing upon this question. The Court, however, very strongly intimated, that the statute exceptions to the admission of parties were never intended to embrace proceedings in relation to the probate of wills; and we may here add, that the term "special proceedings," named in § 84, has reference only to such acts as operate upon and control the estate represented. If correct in such conclusion, it would be decisive of the present inquiry. But we will proceed to give some additional reasons for our present conclusion. And, *first*, the peculiar phraseology of the statute in this particular is worthy of notice, viz.:—"The provisions of the five preceding sections shall not be applied, &c., when, at the time of trial, the party prosecuting or the party defending *is* an executor." When *is* the person named in the will an executor? Let § 4, of c. 64, answer:—"When any will is duly proved and allowed, the Judge of Probate may issue letters testamentary thereon, if he is legally competent, accepts the trust and gives bond to discharge the same." From which it appears that the following prerequisites are necessary, to constitute the person an executor:—*First*, the probate of the will, which any person interested in may offer for probate. See § § 1, 2. *Second*, competency, in the opinion of the Probate Judge. *Third*, acceptance of the trust, for which purpose he may be cited in. See § 4. *Fourth*, delivery of a bond to discharge the same. § § 4, 5. And *fifth* and last, reception of letters testamentary.

Again, as to the party *prosecuting* or the party *defending*. It will not be pretended that James Wiley, the excluded witness, at the time of the trial, could prosecute or defend suits in the capacity of executor, or in any way interfere with the testator's estate without becoming an executor in his own wrong. See c. 64, § 32. By § 27, "when, from any cause,

there is delay in granting letters testamentary, the Judge of Probate may appoint a special administrator, who may proceed in the execution of his duties, until it is otherwise ordered by the supreme court of probate." Now, suppose such an administrator has been appointed on the estate of the deceased, (for the contingency has happened) would the person named executor in the will, and the administrator appointed by the Judge, both be excluded as witnesses, in the prosecution or defence of suits? Certainly not; Wiley would be a competent witness in a suit brought by or against such administrator; and still, Wiley was no less an executor after the appointment of the administrator, than he was before; and the conclusion is, he never has been executor at any time, and never may be. *Exceptions sustained.*

Verdict set aside, and new trial granted.

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

COUNTY OF SAGADAHOC.

OCTAVIA MCKEEN *& als., Appellants from a decree of the Judge of Probate, versus* PHEBE C. FROST, *Executrix.*

The execution of a will was proved by two of the subscribing witnesses thereto, where it was shown that the other witness was, and for several years had been, residing in California.

A person, named as executor in a will, is not really and legally such, until the will is proved and he has given bond; and, in a contest as to its execution, he is not within the exception provided by § 83 of c. 82 of R. S. of 1857.

The provisions of c. 82 of R. S. of 1857, do not change the law, which, on account of his marital relation, excludes the husband from testifying in a suit to which his wife is a party.

THIS was an appeal from a decree of the Judge of Probate in the county of Sagadahoc, approving and allowing the last will and testament of William Frost.

The appellee called Ebenezer Everett and A. J. Stone, two of the subscribing witnesses to the will, and proposed to examine them as to the due execution of it.

The appellants objected to the examination of these witnesses, unless one James G. Mustard, whose name was also on the will as a witness, was produced or his deposition taken.

The appellee, then, to account for his absence, offered the deposition of Fanny P. Mustard, wife of said James, and called A. J. Stone, who testified that Mustard left Brunswick, which was his place of residence, about six years ago, and had not returned since. That he left with the intention of going to California. Had not seen him since. That he (witness) lived in Brunswick and was acquainted with Mustard so well that he would have been likely to know it, if he had ever returned. That witness was postmaster at Brunswick. That a letter passed through the office from California, from said Mustard to his wife, two or three mails since.

Thereupon the presiding Judge, intending to reserve the

question for the full Court, admitted the two witnesses to testify. And their testimony fully substantiated all the facts necessary to prove the due and legal execution of the will.

In the progress of the trial, the appellants offered the deposition of Jane P. Frost, guardian of the minor children of Obed Frost, deceased, who in said capacity was one of the appellants, and also one of the obligors in the appeal bond.

The deposition, being objected to by appellee, was rejected.

The appellants also offered James McKeen, husband of Octavia McKeen, appellant, and Israel Putnam, husband of —— Putnam, appellant, also obligors in the appeal bond, as witnesses, who, being objected to, were not admitted to testify.

The appellant then offered the deposition of Wildes P. Walker, to so much of which, in answer to third interrogatory, as is embraced in these words,—"It was the subject of remark that he was failing, and, in my judgment, as much in mind as in bodily health"—the appellee objected, and it was excluded by the Court.

A verdict was thereupon taken for the appellee, and the appellants filed exceptions.

Evans & Bronson, for the appellants, argued in support of the exceptions:—

By the general rule of probate, "all the subscribing witnesses should be examined by the plaintiff."

This rule is only departed from *ex necessitate rei*. *Brown* v. *Wood*, 17 Mass. 73; *Chase* v. *Lincoln*, 3 Mass. 237.

No such necessity exists, so long as the moving party may obtain personal examination of witness. *Rich* v. *Trimble*, 2 Tyler, 349.

Nor, under present facilities of obtaining foreign examinations, is it to be presumed that it is out of the appellee's power to obtain Mustard's testimony. *Greyson* v. *Atkinson*, 2 Ves. 460.

Especially, under existing circumstances; witness being in a confederate State, and the ordinary methods of communication between him and his friends preserved.

All the presumptions against secondary evidence exist here in full force. The witness is the one whom the statute has specially designated as a security against fraud; yet, though within the process of the Court, no effort has been made to obtain his examination.

The rule of the common law courts, if apparently conflicting, does not apply:—

Because that grew up in those courts when commissions into foreign countries were unknown; while the statute creating our Probate Courts clothed them with ample powers of issuing the same:—

Because our Probate Courts are of a local and peculiar jurisdiction and character, having their origin in statute law, and with large facilities of moulding their rules of practice in conformity with the improved circumstances of the law:—

Because, in matters of wills, more especially, the practice of the common law is in no way analogous to our Probate practice. c. 64, § 3 of R. S., 1857, (R. S., 1841, c. 106, § 6.)

The rule we contend for is in accordance with the whole spirit of our statutes providing for depositions abroad, and, in turn, lending their aid for obtaining testimony for the use of courts in the confederate States.

We have a clear indication of the legislative intention in the statutes establishing our Probate Courts. Massachusetts statutes, 1785, c. 12, § 3; Maine statutes, 1821, c. 51, § § 12 and 13; R. S., 1841, c. 106, § § 5 and 6; R. S., 1857, c. 64, § § 2 and 3.

The above statute of 1785 conferred the power of issuing *dedimus potestatem* into foreign countries.

It conferred this power upon the Probate Court only; and this, of course, by *selection*, as all the courts were about that time reorganized; yet the common law courts did not receive the power till the statute of 1797, c. 35.

This power was *limited* to the examination of *attesting* witnesses.

The statute of 1785 gives foreign examination the "*force* and *effect*" of *viva voce* testimony. It would not have made

this careful declaration, had it intended that such unsatisfactory evidence as mere proof of handwriting should be substituted unnecessarily.

In *Sears* v. *Dillingham,* 12 Mass. 30, the Court had this statute in their mind and indicated their favorable inclination. By the whole of the clause "or gone into foreign parts beyond the authority of the State, or the power of the persons interested to procure depositions," they contemplated only a single state of events, else the latter portion would have been supererogatory and inconsistent.

The exceptions enumerated in R. S., c. 82, § § 80 and 83, do not exclude the deposition of Jane P. Frost. They relate to:—

"The attestation of the execution of the will," &c.:—

Cases where a "party prosecuting or defending is an executor," &c.:—

Cases where some one is "made party, as heir of a deceased party."

As to the first; the "attestation of the execution of a will," is only the subscribing the same by "three disinterested and credible attesting witnesses," as provided in R. S., c. 74, § 1.

Jane P. Frost was not a subscribing witness, and the admission of her deposition has nothing to do with the attestation, but leaves that to be made in whatever way the rule of law may require.

The statute intended that, whatever might be the law of evidence at the trial of issues, the safeguards which the law throws around testators should not be diminished. This intention can in no way be infringed by the admission of the deposition.

As to the second exception; the appellee is, as yet, no executrix; she cannot be until these issues are determined. For all present purposes, she is only the person offering the will for probate. Were this the case of a devisee, or some other person, offering the will, it would not be pretended that the exception would apply. The appellee here stands no better than would the devisee in the supposed case.

Moreover, this exception was only intended for cases which arose in the lifetime of the deceased, between him and the adverse party.

In such cases, the representative party cannot be presumed to be cognizant of the facts, and his testimony cannot balance that of the adverse party.

As to the third exception; there is here no "deceased party," either to the writ or its subject. Moreover, it is founded on the same reasons as the preceding, and only applies when the heir is sought to be charged on the liabilities of his ancestor. The exception was intended for the benefit of the heir; here it is sought to be used against him.

The foregoing applies to the testimony of McKeen and Putnam, unless excluded on account of their marital relations.

Husband and wife could not testify for each other on account of identity of interest. They could not testify adversely, not because of identity of interest, but for the sake of families.

Barrows, with whom was *Shepley & Dana, contra.*

Where the statute in regard to attestation of wills is complied with, the will may be admitted to probate without the testimony of all the witnesses. *Davis* v. *Mason,* 1 Pet. 503; *Hight* v. *Wilson,* 1 Dall. 94; *Deakins* v. *Hollis,* 7 Gill & Johns. 311; *Bowling* v. *Bowling,* 8 Ala. 538; [U. S. Dig. 1847, p. 486, § 38;] *Welch* v. *Welch,* 9 Rich. Law, (S. C.) 133; [U. S. Dig. 1857, p. 604.]

Where it is impossible, upon legal principles, to obtain the testimony of all three of the witnesses, or where some of them have become incompetent, or infamous, or removed from the State after the attestation of the will, the will may be admitted to probate upon proof by other witnesses. *Sears* v. *Dillingham,* 12 Mass. 358; *Patten* v. *Tallman,* 27 Maine, 17; *Price* v. *Brown,* 1 Bradford's (Surrogate) R. 293.

The case shows that Mustard, one of the witnesses, was out of the jurisdiction of the Court, and beyond the reach of the parties proponent. The witnesses who were present

proved the due and legal execution of the will. This, of course, includes proof of Mustard's signature as witness.

The true doctrine with regard to the production of the subscribing witnesses to a will is simply this, that the testimony of all shall be produced, or its absence satisfactorily accounted for, so that no reasonable suspicion may arise that it is suppressed lest it should prove unfavorable. And it is well settled that, when any of the witnesses are dead, out of the jurisdiction of the Court, or have become incompetent since the attestation, the testimony of the remaining witnesses, or other evidence, is admissible, and (the requisite facts appearing) sufficient to establish the will. Jarman on Wills, 3d American ed. vol. 1, p. 222, and cases there referred to; *Hawes* v. *Humphrey*, 9 Pick. 357; *Patten* v. *Tallman*, 27 Maine, 17; *Price* v. *Brown*, 1 Bradford's R. 293.

The opinion of the Court was drawn up by

TENNEY, C. J.—The names which appear, as attesting witnesses, upon the instrument purporting to be the last will and testament of William Frost, are Ebenezer Everett, Alfred J. Stone, and James G. Mustard. It was in evidence that Mustard had been in California for six years before, and was not present at the trial of this cause in this Court. Everett and Stone were allowed to testify, against the objection of the appellants, made upon the ground that the appellee was bound to produce the evidence of Mustard in some form, in order to establish the will.

It was decided, in the case of *Chase & als.* v. *Levi Lincoln, Ex'r*, 3 Mass. 236, that the three subscribing witnesses to a will must be produced at the probate thereof, &c.

It is said, in 2 Greenl. Ev. § 691, "the attesting witnesses are regarded in law as persons placed around the testator, in order that no fraud may be practiced upon him, in the execution of the will, and to judge of his capacity." And, in § 692, it is said, "this amount of proof, by all the attesting witnesses, if they can be had, may be demanded by any per-

son interested in the will." *Brown & al.* v. *Wood & ux.*, 17 Mass. 68.

The same doctrine is maintained in chancery, notwithstanding some remarks to the contrary have sometimes fallen from distinguished Chancellors, as in the case of *Powell* v. *Weaver*, 2 Bro. Ch. 504, Lord Chancellor THURLOW said, "I doubt whether the rule has ever been laid down so largely that the will could not be proved, without examining all the witnesses, although the practice has been to examine all."

In *Booth* v. *Blundell*, 19 Vesey, 500, Lord Chancellor ELDON states the general rule to be, that all the witnesses to a will must be examined. That rule, he says, is laid down by Lord HARDWICKE, in a manuscript note by Mr. Joddrill, when only two of the witnesses were examined.

But a material question is presented in this case, whether the fact, that Mustard was living in California, is sufficient to dispense with his testimony, so that the will could be approved and established by the testimony of the other two attesting witnesses.

As a general rule, when an instrument purports to have been attested by a witness, the party on whom the proof of the instrument lies must, unless the instrument appears to be thirty years old, either call the attesting witness, or show that the usual proof, by means of the attesting witness, has become impossible. For this purpose, he may prove that the witness is abroad, and beyond the process of the Court. 1 Stark. Ev. 338.

In *Sears* v. *Dillingham & al.*, 12 Mass. 358, it is said by the Court, "cases may arise where none of the attesting witnesses [to a will] can be examined; as if they should all be dead, or should become infamous, after the attestation, or should have gone into foreign parts beyond the authority of the State, or the power of the persons interested to obtain depositions. In such cases, there seems to be no reason why the rules of the law, which admit of evidence of an inferior character, in relation to deeds or other instruments, should not be applicable to a will, as to a deed or bond; provided

the formalities required by the statute appear to have been observed."

In the case of *Brown & al.* v. *Wood & ux.*, before cited, JACKSON, J., says, "we must suppose that there was a legal excuse for the absence of the third subscribing witness to the will. Various reasons may have existed, which would furnish such excuse."

A point was made, in *Lord Carrington* v. *Payne*, 5 Vesey, 404, whether one of the witnesses to the will, being abroad in Jamaica, it was necessary to send out a commission to examine him. His handwriting was proved, and the other two witnesses were examined. The Master of the Rolls, Sir RICHARD PEPPER ARDEN, held that "it was not necessary to have his examination, but it was the same as if he was dead." And, in *Mr. Fitzherbert's case*, one of the witnesses being in India, it was held "not necessary but very dangerous to send the will abroad."

It was decided, in *Wood* v. *Stane*, 8 Price, 615, that an exception to the general rule was reasonable, when one of the witnesses was proved to be in the West Indies. The rule would be in a like manner relaxed, if it appeared that one of the witnesses was, owing to any other cause, not amenable to the jurisdiction of the Court. *Frye* v. *Wood*, 1 Atk. 445.

In the case cited from 19 Vesey, 500, where two only of the witnesses to the will were examined, it was contended, on a bill of review, that this was error, apparent on the record. But Lord ELDON remarked that, "as the third witness was dead, HARDWICKE held that to be a necessary exception out of the rule. So in another case, in 1741, *Billings* v. *Brooksbank*, as the witness, being out of the kingdom, could not be examined, Lord HARDWICKE considered that to be another case out of the general rule; which, I repeat, is that all the witnesses must be examined, that general rule admitting necessary exceptions."

Mr. Phillips, in his treatise on Evidence, vol. 1, p. 440, says, "If a subscribing witness is abroad, who ought to be called if he could be produced, his handwriting may be proved in the

case of a will, as in cases on the execution of a deed, and the rule appears to be the same in courts of equity."

"When one of the attesting witnesses to a will is abroad, it seems to be sufficient, as in other instances of instrumentary proof, to give evidence of his handwriting. And this seems to be allowed by the practice of courts of equity, as well as in courts of law." 3 Stark. Ev. 1693.

In the case cited from 3 Mass. 236, it is held that all the attesting witnesses to a will must be produced, if living and under the power of the Court.

It is said by Mr. Greenleaf, in his work on Evidence, vol. 2, § 694, "It is ordinarily held sufficient, in courts of common law, to call one only of the subscribing witnesses, if he can speak to all the circumstances of the attestation; and it is considered indispensable that he should be able, alone, to prove the perfect execution of the will, in order to dispense with the testimony of the other witnesses, if they are alive and within the jurisdiction."

It is insisted that, inasmuch as the Rev. Stat. of 1841, § 5, of c. 106, and of Rev. Stat. of 1857, c. 64, § 2, provide for the taking of depositions, of witnesses who live out of the State, or more than thirty miles distant, or by age or indisposition of body are unable to attend Court, the depositions of such witnesses, taken before any magistrate authorized by commission from such Judge, shall be competent evidence of such witnesses. The testimony of all the attesting witnesses to a will are indispensable, notwithstanding they may be beyond the jurisdiction of the Court. The statute allows depositions so taken to be used, but is entirely silent as to the necessity of having all the testimony of attesting witnesses at the trial produced. It may be, and often is, impossible to compel a witness in another State to testify in a deposition; the court of another State cannot do this, and, unless the statutes of the State, in which the witness may be found, provide some compulsory means, the attempt to obtain his evidence may be abortive.

This provision, last referred to, had its origin as early as

the year 1785, in the statutes of Massachusetts, c. 12, § 3. In 1807, in the case of *Chase & als.* v. *Lincoln*, before cited, it is implied in the opinion of the Court that, if the witnesses to the will are not living, or not within the power of the Court, their presence is not indispensable to the probate of the will.

The testimony of the attesting witnesses, Everett and Stone, was properly received.

Another question presented is, whether the deposition of Jane P. Frost, guardian of the minor children of Obed Frost, deceased, who, in said capacity, was one of the appellants, and one of the obligors in the bond to prosecute the appeal, was properly excluded.

When a will is duly proved and allowed, the Judge of Probate may issue letters testamentary thereon, to the executor named in the will, &c., if he accept the trust and give the bond required by the statute. If the executor neglects, for the space of twenty days after the approval of the will, to give such bond, the Judge may grant letters to the other executors, if there be any capable and willing to accept the trust. R. S. c. 64, § 4, and, by the next succeeding section, "every executor, before entering on the execution of his trust, shall give bond, with sufficient sureties, &c. It follows, from the foregoing provisions, that the person named in the will, as an executor, has no power to act, ordinarily, as a party, in that character, merely by such nomination. The will may never be approved; the Judge may withhold, absolutely, letters testamentary from him; or he may not be qualified for the trust, by omitting to obtain the security required for the faithful execution of the trust.

By R. S., c. 82, § 78, "no person shall be excused or excluded from being a witness in any civil suit, or proceeding at law or in equity, by reason of his interest in the event thereof, as party or otherwise," except as is afterwards provided. By § 80, nothing in the preceding section shall in any manner affect the law relating to the attestation of the execution of last wills and testaments, &c. It is not understood that the

deposition of Jane P. Frost had any relation to the attestation of the will in controversy; and hence the provision last referred to has no application to the case.

By § 83, the provisions of the five preceding sections shall not be applied to cases when, at the time of taking the testimony or the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or administrator, or made a party as heir of the deceased party.

Does Jane P. Frost fall within the provision last cited? Is either party in this suit an executor or administrator, upon a proper construction of this statute, or is she made a party as heir of a deceased party? The word "party" is used here, undoubtedly, in reference to a person, who can legally be a plaintiff or defendant, in the general sense of those terms, to a suit, in the character of executor, administrator, or as having been made such as heir of a deceased party. And the exception applies only to those suits when one or the other is in fact such as is mentioned in the provision. From the terms used, a person cannot be considered an executor when the whole controversy is in relation to the probate of the instrument, purporting to be a will, in which he is so named. If the will should not be approved, he never becomes an executor.

When an executor becomes a party to a suit, as such, he is supposed to represent his testator, and the controversy involved therein, to appertain to matters which transpired, during the life of the latter, with the surviving party, who has full knowledge thereof, while the executor is entirely ignorant of the facts. Hence we see the great propriety of the exception. But, if the exception should be held to embrace the case arising upon the probate of the will itself, the reasons therefor are not apparent.

The appellee has not, and cannot become the executor of the will in question, till its approval, so that he can be treated as falling within the provision of § 83.

In no sense can the deponent be treated as having been made a party as heir of a deceased party. She contests

the probate of the will, simply as the guardian of some of the heirs at law of William Frost, deceased, in the appellate Court of Probate. The deposition was admissible, under § 78, if otherwise competent.

At the trial in this Court, the husbands of two of the appellants, on being offered as witnesses, were excluded. Under the well settled principles of marital relations, this ruling was not erroneous.

The part excluded of the deposition of Wildes P. Walker was clearly inadmissible, and this point is not relied upon by the appellants in argument.

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

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

CHARLES CROOKER, *in Equity, versus* W'M D. CROOKER *& als.*

In equity, the creditors of an insolvent co-partnership have a right to the payment of their claims out of the partnership property, superior to the right of creditors of an individual member. All the members of a co-partnership have a joint interest in its property, while the interest of each, as a separate member, is his share of the surplus remaining after the payment of the partnership debts.

And the implied trust or pledge, which each member of the partnership has, that its property shall be applied to the payment of its debts, extends, as well to the real estate, which has been purchased for partnership uses, with the funds of the partnership, as to stocks, chattels or debts; notwithstanding the real estate may have been conveyed by such a deed, as, under our statutes, would, *at law*, make the partners tenants in common.

And, where the creditors of one of the members of a co-partnership had instituted suits at law against him, and attached his *legal* interest in real estate thus conveyed, intending to levy thereon to satisfy their judgments, when rendered, the Court, in the exercise of its chancery powers, will interpose to protect the rights of the other partners, when the estate attached will be required to pay the debts of the firm, (including the firm's liabilities to its individual members,) and, if without it, the partnership will be insolvent.

EXCEPTIONS from the ruling of MAY, J.

BILL IN EQUITY. The plaintiff sets forth in his bill that, in the year 1826, he formed a co-partnership with William D. Crooker of Bath, under the name and style of C. & W. D. Crooker, upon an understanding and agreement to share the losses and divide the profits of the co-partnership business equally between them. Said co-partnership was from time to time engaged in the buying and selling of merchandise, the building and sailing of ships, the cutting and marketing of lumber, and other business, until the nineteenth day of June, 1854, when said co-partnership was dissolved.

That, on said nineteenth day of June, aforesaid, said co-partnership was owing debts to a large amount, which are still outstanding and unpaid, and that the assets of said co-partnership consist mainly of parts of certain ships, and of parcels of land.

Said parcels of land were all purchased on the credit and with the moneys of said co-partnership, but were conveyed to himself and the said William D., to have and to hold to them, their heirs and assigns, as tenants in common; and the legal title in and to said lands is now vested one-half in himself, and the other half in the said William D. Crooker.

That certain persons and corporations, [thirty in all, whose names are given,] on certain days [named in the bill,] sued out of the Supreme Judicial Court of this State writs of attachment against the said William D. Crooker, directed to the sheriffs of the several counties of said State, and their deputies, and bearing date respectively of the several days aforesaid, and caused all the right, title and interest of the said William D. in the parcels of land aforesaid to be attached. All of said suits were commenced for the recovery of debts contracted and incurred by the said William D. on his own separate and individual account and credit, and in the prosecution of business in which the said Charles had no concern or interest. The exact aggregate amount of said debts, your orator is unable to state, but, upon information and belief, avers it to be between twenty-five and forty thousand dollars.

That the plaintiffs in the aforesaid suits have threatened, and he believes it to be their intention, to obtain satisfaction of the judgments which have been or may hereafter be rendered in said suits, by levying their executions upon the legal estate of the said William D., in the parcels of land aforesaid, and he fully believes and avers that, if said intention be carried into effect, one-half of the assets of said co-partnership will be absorbed by the payment of the separate and individual debts of the said William D., and that the remainder and residue thereof will be utterly insufficient to pay and discharge the just debts and liabilities of said co-partnership.

That he (plaintiff) has already been obliged to pay debts of said co-partnership to a large amount, out of his separate and individual property; that he has repeatedly urged said William D. to come to a settlement with him of the partnership accounts and dealings, and join with him in selling the co-partnership property, and paying the co-partnership debts. All of which the said William D. has neglected and refused to do.

That he has no adequate remedy at law, and therefore prays that the said William D., and the plaintiffs in the aforesaid suits at law against him, may be required, upon their several and respective oaths, full, true, direct and perfect answers to make to all and singular the matters and things herein before stated and charged; that the plaintiffs aforesaid may be restrained from satisfying the judgments, which have been or may be rendered in the aforesaid suits, by sale of any interest in the property of said co-partnership, or by levy on the estate of said William D. in the parcels of land aforesaid; and that said attachments may be dissolved, that a receiver may be appointed, that the said William D. may be required to join your orator in conveying to him all the aforesaid land, and all other property of said co-partnership, that he may be ordered to sell and dispose of the same, and out of the avails thereof to pay and discharge the debts of said co-partnership, and the balance to pay over as this honorable Court shall

direct; and that your orator may have such further relief in the premises as the nature of his case may require, and to your honors shall seem meet and proper.

William D. Crooker did not appear; and a portion only of the parties named as plaintiffs in the several suits at law appeared. Such as had entered their appearance on the docket filed general demurrers to the bill; and, at April Term, 1858, MAY, J., ruled *pro forma* that the demurrers be sustained and the bill be dismissed. Plaintiff thereupon *excepted.*

Bradbury, Morrill & Meserve, and *Rogers,* for the plaintiff, argued in support of the exceptions: —

A general demurrer admits the facts stated in the bill to be true; and, being true, do they authorize the Court to grant the relief asked for?

The facts, being thus admitted, show the case to be within the jurisdiction of the Court. It is a case of partnership, and between part owners of vessels and certain real property; and is brought for a settlement of partnership accounts and matters. R. S. c. 77, § 8; 19 Maine, 211; 24 Maine, 322; 4 Met. 540.

The relief prayed for is virtually the marshalling the assets of the company between its creditors, and the creditors of one of the partners, the assets not being enough to satisfy both.

The defendants are the creditors of W. D. Crooker, in his individual capacity, and not as a partner, and are endeavoring to satisfy their debts out of the company property, while the company are largely in debt and their affairs unsettled.

The case comes, therefore, within the jurisdiction of a court of equity.

The whole interest of W. D. Crooker in the company property will be absorbed in the payment of his separate debts, and will thus leave the whole company indebtedness to be paid by this plaintiff.

The *creditors of the company* have a right to the company

property to pay their claims, and this right is superior to any claim which the creditors of the individual members of the firm may have upon it for the payment of their debts. *Commercial Bank* v. *Wilkins*, 9 Greenl. 28; Story's Equity, § 1253, p. 500; *Thompson* v. *Lewis*, 34 Maine, 167; 3 Paige's Ch. R. (N. Y.) 518; Story on Part. § 376, 377, 382; *Allen* v. *Wills*, 22 Pick. 450, 452–3; 2 McCord's Ch. R. (S. C.) 302.

The plaintiff asks that a receiver may be appointed to take charge of the company property, and, out of the proceeds thereof, to pay the company debts, and the balance to pay over as the Court shall direct.

He further asks that, in the meantime, the defendants may be restrained from satisfying their executions out of the company property, and that their attachments may be dissolved.

He alleges that he has no adequate remedy at law; and it cannot be pretended, that he has any remedy for the great injury which will fall upon himself, unless it is by a bill in equity. There is no process at law that will afford relief. *Kennedy* v. *McFaddon*, 3 Har. & Johns. (Md.) 194.

A bill in equity is the appropriate remedy. Story on Part. 470, and authorities above cited; *Cropper & al.* v. *Coburn & al.*, 2 Curtis' C. C. U. S. R. 465, and authorities there cited.

The complainant has a right to insist that the company property shall go to pay company debts. *Commercial Bank* v. *Wilkins*, 9 Maine, 28; *Smith* v. *Barker & al.*, 10 Maine, 458; 3 Kent, 74, note et sequel; Story on Contracts, § 359, p. 233; *Cropper & al.* v. *Coburn & al.*, 2 Curtis, 465, above cited; 4 Met. 542; 5 Met. 575.

If the parcels of land attached by the defendants, in their suits against W. D. Crooker, are partnership property, as we have assumed they are, there can be no ground for sustaining the demurrer.

That real estate purchased with partnership funds, for partnership purposes, constitutes partnership property, in equity, cannot now be questioned. This doctrine has been settled, upon the fullest and most thorough discussion, by the Courts of the several States, and is recognized by all the text writers

of authority. 3 Kent's Com. 37; Story on Contracts, 232, 233, and cases cited; Story on Part. § 92, p. 135.

In the case at bar, all the lands were purchased with the money and on the credit of the partnership, and for partnership purposes. They are all partnership property, and a court of equity will hold them as a fund for the payment of the partnership debts, in the first instance, allowing the creditors of the individual members of the firm, the surplus, if any, of their debtors' share of the proceeds thereof, after the payment of the company liabilities.

The whole subject of partnership property, in lands situated and held as these are, was fully discussed in a recent case in Massachusetts, and the doctrine laid down, as it is now claimed by us. *Fall River Whaling Co.* v. *Borden, assignee,* 10 Cush. 458. See, also, *Burnside & al.* v. *Merrick & al.,* 4 Met. 537; *Dyer* v. *Clark,* 5 Met. 562, and cases cited; *Howard & al.* v. *Priest & al.,* 5 Met. 582; *Peck* v. *Fisher,* 7 Cush. 386.

The doctrine is fully and ably discussed in these cases, and the conclusion of the Court the same in all.

Barrows, for the Union Bank:—

1. The principles and rules applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. This was settled by the Supreme Court of New York, in the case of *Coles* v. *Coles,* 15 Johns. 159, upon the strength of Lord THURLOW'S opinion in *Thornton* v. *Dixon,* and of the opinion of the Master of the Rolls, in *Balman* v. *Shore,* 9 Vesey, 500.

In *Deloney* v. *Hutchinson,* 2 Rand. 183, the appropriation of partnership lands, as assets, to partnership debts in preference to other debts, was denied, and it was held that land purchased by partners for partnership purposes was an estate in common, both at law and in equity.

In *Blake* v. *Nutter,* 1 Appleton, 16, our own Court held, citing *Goodwin* v. *Richardson, Adm'r,* (in which 11 Mass. on page 475, the rationale of the opinion is made clearly to

appear,) that the superior right of partnership creditors over creditors of the individual partners, to real estate purchased with partnership funds, *for partnership purposes, and so used and enjoyed*, does not apply at common law, and it is doubted whether, in this State, a different rule would be adopted in equity.

2. In this State, (whatever may be the decisions in equity elsewhere,) the rule is the same in equity that prevails at the common law. No principle in equity can call upon this Court to give a construction to the title acquired by this complainant and his brother, to those parcels of real estate, that shall be in direct contravention of the express terms of the statutes of the State, which were in force when they acquired their title, and still continue to be the law of the State.

Statute of 1821, c. 35, § 1, provides, that lands conveyed to two or more persons, shall be held by them as tenants in common, and not as joint tenants, unless it is set forth in the conveyance that they are to hold jointly, or unless it contain other words clearly and manifestly showing that intention. This statute was in substance reënacted in the R. S. of 1841, c. 91, § 13, and, again, in R. S. of 1857, c. 73, § 7. It was doubtless competent for the complainant and his brother, if they had seen fit so to do, at the time they took the deeds, to have had it set forth in those conveyances, that they were to *hold jointly*, or to have used any "words clearly and manifestly showing their intention." *But they did not.* It is hard to conceive what equities can exist, *as between themselves*, which would require the Court to put a different construction upon the deeds under which they hold, from what the law puts upon them.

3. It is nowhere alleged in the bill that these defendants had either actual or constructive notice that this was partnership property. Setting aside the statute entirely, this alone would be fatal to this bill, for even in the strongest cases that the complainant's counsel can cite, such as *Edgar* v. *Donally*, 2 Munf. 387, and *Hoxie* v. *Carr*, the rights of purchasers and encumbrancers without notice are secured from being affected

by a claim of partnership rights, of which they were ignorant. Even where the equitable rights of partnership creditors to real estate are maintained in their broadest extent, and independent of any statute provision, it is held that, where lands are bought with partnership funds, and afterwards sold by the partner who has the legal title to the whole, or to a part, as tenant in common, neither the firm nor its creditors have any lien on the land, for partnership purposes, against a purchaser without notice or knowledge, where the deed to the partners did not describe them as members of a firm, or otherwise indicate the fact that the land was purchased as partnership property—the equity of which is obvious. *Forde* v. *Herron*, 4 Munford, 316; *McDermot* v. *Lawrence*, 7 Sergeant & Rawle, 438.

It is analogous to the case where there is a dormant partner. *French & al.* v. *Chase*, 6 Greenl. 166.

4. The bill is utterly vague and void for uncertainty. There is no allegation of the amount of partnership liabilities, or of the value of the partnership assets, from which it could be determined whether there was any necessity for the interference of the Court in equity. The complainant only alleges that, at the time of the dissolution, the "co-partnership was owing debts to a large amount," and then he alleges that he "has already been obliged to pay debts of said co-partnership to a large amount," from which two allegations taken together, perhaps the fair inference would be, that the partnership liabilities are now all discharged, an inference strengthened by the fact that no partnership creditor has thought it worth his while to interfere here; and it nowhere appears but what the complainant has been reimbursed out of the partnership property for the "large amount" which he says he has paid.

Bronson, for Lincoln Bank; Bath Mutual Marine Ins. Co.; and Hyde, Farrar & Co., defendants.

Fessenden & Butler, for Casco Bank, defendant.

The opinion of the Court was drawn up by

MAY, J.—As between the principal respondent, Wm. D. Crooker, and the orator, this is a case where the latter seeks, by his bill, to compel the adjustment of the affairs of a co-partnership of long standing between them, but which was dissolved June 19, 1854. The bill seeks to do this by causing the co-partnership property, both real and personal, to be applied, through the agency of a receiver, to the payment of the partnership debts. The said Wm. D. Crooker having failed, after notice to appear and answer, the bill is to be taken *pro confesso* as against him. The decree, however, to which the orator is entitled, cannot properly operate upon property, even though it belong to the co-partnership, in which other persons have acquired a better right or higher equities; and a receiver, if appointed, can only take the co-partnership effects as subject to all such superior claims.

Of the other numerous respondents, declared against in the bill, nine only have appeared. The others, upon whom due notice has been served, by neglecting to appear and answer, are properly to be regarded as consenting to such a decree against them as is sought in the bill.

The principal question, therefore, which arises, is whether those respondents who have appeared and filed their several demurrers to the bill, ought in equity, in view of all the facts alleged in the bill, and admitted by the demurrers, to be restrained in their legal efforts and attempts to satisfy certain judgments, which they have, or may hereafter obtain against the said Wm. D. Crooker for his sole debts, out of the parcels of land which are described in the bill and claimed as partnership property. The solution of this question depends upon the facts and the principles of equity jurisprudence applicable thereto.

The bill charges, that a co-partnership between Charles and Wm. D. Crooker was formed in 1826; that it was engaged from time to time in the buying and selling of merchandize, the building and sailing of ships, the cutting and marketing

of lumber, and other business; that it was dissolved in June, 1854; that, at the time of its dissolution, it was owing debts to a large amount, which are still outstanding and unpaid; that the assets of the co-partnership consist, mainly, of parts of certain ships, and of parcels of land, which were purchased on the credit, and with the moneys, of said co-partnership, but were conveyed to the said Charles and Wm. D. Crooker, their heirs and assigns, as tenants in common; that these respondents have caused the same lands to be attached upon their several writs against Wm. D. Crooker, for his private debts; and that these creditors of said Wm. D. have threatened, and said orator believes it to be their intention, to obtain satisfaction of the judgments which have been or may be rendered in said suits, by levying their executions upon the legal estate of said Wm. D. Crooker in said lands; and, further, that if said intention shall be carried into effect, one half of the assets of said co-partnership will be absorbed by the payment of the separate and individual debts of the said Wm. D. Crooker, and that the remainder and residue thereof will be utterly insufficient to pay and discharge the just debts and liabilities of said co-partnership. The bill further charges, that the said orator has already been obliged to pay debts of said co-partnership, to a large amount, out of his separate and individual property; and that he has repeatedly urged the said Wm. D. Crooker to come to a settlement with him, of the co-partnership accounts and dealings, and to join with him in selling the co-partnership property and paying the co-partnership debts; all which the said Wm. D. has neglected and refuses to do. Such are the admitted facts in the case.

In regard to the established principles of equity jurisprudence applicable to partnership property, it is now well settled that the creditors of a co-partnership, in case of insolvency, are to be deemed as having a priority of right to payment out of such property, which may be enforced before the claims of the creditors of a separate partner. The interest of the co-partnership in such property is joint, while each individual partner, as such, is entitled only to his share of

what may remain after the co-partnership debts are paid. This preference, being generally disregarded at law, can be effected only by means of the equity which the partners have over the whole funds. Story on Equity, vol. 1, § 675, and cases there cited; *Jackson* v. *Cornell*, 1 Sandf. Ch. R. 348; *Jarvis* v. *Brooks*, 3 Foster, 136; *Fall River Whaling Co. & als.* v. *Borden*, 10 Cush. 458; *Murrill* v. *Neill*, 8 How. 414; *Douglass & al.* v. *Winslow*, 20 Maine, 89; *Cropper & al.* v. *Coburn & al.* 2 Curtis, 465.

It is also true that each partner is regarded as having an equitable lien upon the whole partnership property for the payment of the partnership debts. *Commercial Bank* v. *Wilkins*, 9 Maine, 28. This lien, or, as it is sometimes more appropriately called, implied trust or pledge, reaches the whole partnership property, whether it consists of lands or stock or chattels or debts. Real estate, purchased with partnership funds and for partnership uses, is, for the purposes of equity, regarded as standing upon the same footing as personal estate. *Peck & al.* v. *Fisher*, 7 Cush. 386.

Each partner is entitled to regard the whole estate as held for his indemnity against the joint debts, and as security for the ultimate balance which may be due to him for his own share of the partnership effects. Story on Equity, vol. 2, § 1243; *Hoxie* v. *Carr*, 1 Sumner, 173; *Buchan* v. *Sumner*, 2 Barb. Ch. R. 198–199.

In relation to real estate, when it is a part of the partnership effects, it is to be treated in equity, to all intents and purposes, as a part of the partnership funds; and, whatever may be the form of the conveyance, it will be held subject to all the equitable rights and liens of the partners, which would apply to it if it were personal estate; and this rule prevails notwithstanding the legal title may, by the death of the particular party holding it, have been cast by descent upon his heirs at law. 1 Story's Eq., § 674, and cases there cited; *Dyer* v. *Clark*, 5 Met. 562. Such is the rule, also, notwithstanding the estate may have been conveyed to the partners by such a deed as, under our R. S. of 1841, c. 91, § 13, and the revision

of 1857, c. 73, § 7, would, at law, make them tenants in common. *Burnside* v. *Merrick*, 4 Met. 537; *Howard* v. *Priest*, 5 Met. 582; *Fall River Whaling Co. & als.* v. *Borden*, 10 Cush. 458, before cited. Nor does it make any difference that the deed contains no reference upon its face to the grantees as partners. *Tillinghast* v. *Champlin & al.*, 4 Ames' (R. I.) R. 173.

No reason is perceived why that same equity which may be invoked for the protection of a partner in cases of actual insolvency, may not also be successfully invoked in cases of threatened insolvency, when it is apparent from the facts that, unless the contemplated acts which are threatened are restrained, the result must be an *actual* insolvency. *Deveau* v. *Fowler*, 2 Paige's Ch. R. 400. In cases of this kind, we have no doubt that the equity powers of the Court may as properly be exercised to prevent a wrong, as for the purpose of making an equitable appropriation of such effects as may remain after the wrong has been perpetrated, or has in any way happened. As between these partners, then, we find no difficulty, upon the principles of general equity and the facts conceded in the case, in coming to the conclusion that the bill is well sustained; and, under our Revised Statutes of 1841, c. 96, § 10, and the revision of 1857, c. 77, § 8, by which equity jurisdiction is conferred upon this Court in all cases of partnership, the orator is well entitled, upon the facts, to a decree against the said William D. Crooker, such as is sought by the bill; and would be equally so entitled if the said William D. Crooker had appeared and demurred to the bill.

While such are the equitable rights and remedies which exist between Charles and William D. Crooker, as partners, and such the power of this Court to enforce these rights, as between them, it is equally clear, in view of the authorities which have been cited, and many others that might be, that, at law, the title to the real estate attached by the sole creditors of William D. Crooker, was in him at the time of the attachments. In fact, the bill admits that he was seized as tenant in common with said Charles Crooker, of the legal

estate in all the parcels of land which were attached. Nothing appears upon the face of the deeds conveying said lands to them, nor upon any record in the case, that said lands were in any way connected with the partnership affairs, or that they were paid for, or, when purchased, were to be paid for with partnership funds. No partnership lien or trust, even by implication, exists upon the face of the deeds, or any of them. The bill, however, charges that they were *in fact partnership assets*, and this is admitted by the demurrers in the case. Under such circumstances, the right of the creditors of William D. Crooker, at law, to attach, and levy their executions when obtained, upon his undivided moiety of these lands, in satisfaction of his private debts, cannot be questioned. *Blake* v. *Nutter*, 19 Maine, 16. "Whether a different rule should be adopted in equity in this State," says WESTON, C. J., in the case last cited, "the Court is not at present called upon to determine. When such a case arises in equity, it will be matter of grave consideration what effect the express terms of our statute is to have upon the question." The statute here referred to is that of 1821, c. 31, § 1, which is found to be, in substance, the same as our statute now in force, c. 73, § 7, and the statute of 1841, c. 91, § 13, both of which are before cited. The question, to which C. J. WESTON here alludes, has now arisen.

It is now contended by the several counsel in defence, for the first time in this State, that, notwithstanding the lands attached may, in fact, belong to the co-partnership, and may be needed for the payment of outstanding co-partnership debts and for any balance which may, upon the final adjustment of the affairs of the firm, be found to be due to either partner; and notwithstanding they may, in equity, as between these partners be treated as co-partnership assets; still the legal estate, being apparently held as the individual estate of each of these partners, and so appearing upon the records in the registry of deeds, is liable to attachment and levy upon execution by any judgment creditor of either partner, for his sole debts, to the extent of such partner's apparent legal interest

in the lands. It is said, that it would be manifestly unjust to allow partners to hold real estate in their own names and as their separate estate, and, upon the strength of such apparent ownership, to contract individual debts; and then to withhold from such individual creditors the right to attach and levy their executions upon the same lands which induced them to give individual credit, notwithstanding it may afterwards be made fully to appear that such lands were in fact a part of the co-partnership effects. There is, undoubtedly, great weight in the suggestion, and, if this were a question affecting in its application merely the rights of the partners, it would deserve the most serious consideration. The same objection would apply with equal force to the personal estate of the co-partnership, when it should happen to be in the possession of one of the partners, such possession being, by law, *prima facie* evidence of title in such partner, and thereby furnishing an apparent basis for individual credit. It would, therefore, be equally unjust to restrain the creditor of the individual partner from satisfying his debt out of the personal estate of the firm, when so held, before the implied trust which the partnership relation creates has been discharged.

But so long as the partnership debts are unpaid, and the partners severally have a right to have the partnership property appropriated for the purposes of the co-partnership, and the fulfillment of such obligations as necessarily spring from that relation, if all or either of the partners have the sole custody or legal title in them of any property, which, in equity, belongs to the co-partnership, there is, as all the authorities show, a resulting trust in relation to such property, which, under appropriate circumstances, may be enforced by any particular member or by the creditors of the firm, the latter working out their security through the equities of such member. It is this trust which this Court, sitting as a Court of equity, will enforce; and no reason is suggested or perceived why tenants in common, whether made so by force of the statute or otherwise, may not take an estate in trust, where the trust results from implication of law, as well as

any other grantee. Giving, therefore, to the statute, the whole force which is claimed for it in defence, we find nothing in its language or purpose to cut off the equities resulting from any of the conveyances to which it relates.

Whenever, therefore, there is, as in the case before us, a resulting trust in favor of any person or persons, growing out of any conveyance of partnership property, whether it be made in severalty or to tenants in common, such trust will be respected and enforced in the same manner as similar trusts in other cases, notwithstanding the record may show an absolute legal title in the grantee, unless the estate has been alienated in such a way by the trustee as to cut off the trust, or unless the law has, in some other mode, provided for its extinguishment. So long as such trust exists in relation to the partnership property, where the co-partnership is insolvent, or evidently to be made so by a levy upon the property, a judgment creditor of one of the partners in the firm cannot levy his execution, except upon the contingent interest of such partner in the partnership effects. *Smith* v. *Barker & al.* 10 Maine, 458. This rule is, in itself, so proper, so advantageous to commercial interests, and so conducive to the safety of creditors and persons entering into the partnership relation, and so much in accordance with natural justice, that it ought not to be broken in upon for slight reasons.

Do then our statutes, in relation to the attachment and levy of executions upon real estate, so far affect the rights of the *cestuis que trust*, in cases such as we are considering, that a creditor, who has legally attached such estate as the property of the trustee, acquires, by force of his attachment and the record title of the land, a better right or higher equity than the *cestuis que trust* possess? In other words, does such a creditor, by his proceedings, acquire such a right to proceed and complete his levy upon the legal interest of the trustee, for his sole debt, that the Court is thereby deprived of all power to compel the execution of the original trust? Ordinarily the attachment of property, whether personal or real, in which the debtor has the legal interest, creates a lien which

the attaching creditor may enforce as against all other persons. It is so in all cases, at law, where there are no outstanding equities which a court of general equity will enforce, and where the party making the attachment has no notice of any defect in the debtor's title, at the time when the attachment is made. Thus, where goods are attached while in the hands of a fraudulent purchaser, by a creditor ignorant of the fraud, and before the vendor has exercised the right which the law gives him of rescinding the contract of sale within a reasonable time after the discovery of the fraud, such creditor will be upheld in his right to levy upon the goods, even as against the defrauded vendor. The reason is, because the rights of both parties depend upon the law, and upon the law alone. So, too, in cases where there is an attachment of real estate, which the debtor has conveyed, and the deed of the grantee has not been recorded, the creditor, if he had no actual notice, at the time of the attachment, of the conveyance, will be legally entitled to levy upon such estate notwithstanding the claims of the grantee.

On the other hand, where there are outstanding equities or trusts, which a court of equity will enforce, the attaching creditor is not regarded as acquiring, by force of his attachment, merely, any right which is in its nature higher than the equitable rights which exist. These will be regarded as subsisting until the attachment is perfected by a judgment and levy, notwithstanding the creditor may have had no knowledge of their existence when his attachment was made. Thus, in cases of foreign attachment, when the funds in the hands of the trustee have been equitably assigned, prior to the service of the writ, even though both the creditor and the trustee were in fact then ignorant of the assignment, still such funds will be protected against the attachment, upon notice from the assignee to the trustee, being stated in his disclosure, at any time before judgment; and the reason is, because the outstanding equities are regarded as higher in their nature than the legal estate.

The provisions of the present statute in relation to trusts,

c. 73, § 12, and the R. S. of 1841, c. 91, § 32, may also be regarded as having an important bearing upon this question. By the present statute it is provided, that "the title of a purchaser for a valuable consideration, or a title derived *from levy of an execution*, cannot be defeated by a trust, however declared or implied by law, unless the purchaser or creditor had notice thereof." The statute of 1841, just cited, though different in its phraseology, when taken together, was evidently intended to convey the same meaning as the present revision. By these statutes there is a strong implication that a trust, whether declared by some instrument in writing, or, as in the present case, implied by law, will not be cut off except by *a sale of the estate or a levy upon execution.*

In the case of a creditor without notice of the trust, it is the levy, and not the attachment, which gives him protection against the trust. The respondents, therefore, by virtue of their attachments, have acquired no such rights in the lands, which we find, in view of the facts, to be held by Charles and Wm. D. Crooker as tenants in common, in trust for the partnership purposes, as can properly prevent this Court, when sitting as a court of equity, from interposing to protect the orator, and, through him, the partnership creditors, against an appropriation of the partnership property which will be to their injury, and in violation of the trust; and this rule, we think, is in harmony with the principles of general equity. 3 Kent's Com. 65; *Evans* v. *Chism & al.*, 18 Maine, 220.

In the case of the *Commercial Bank* v. *Wilkins*, before cited, the outstanding equities of a co-partnership and its creditors were held to be a justification to an officer for not selling upon execution, personal estate, which had been attached by such officer at the suit of a creditor of one of the partners. Why, then, should not equity intervene to prevent a misappropriation of such property to the injury of any partner or the creditors of the firm?

That, in such cases, the equities springing out of the co-partnership are superior, and properly held "to bear down the letter of the law," when invoked at any time before the

sale of the property has taken place, upon the execution against the individual partner, seems to have been settled in the case of *Thompson* v. *Lewis & trustee*, 24 Maine, 167.

No reason is perceived why the same rule should not be extended to real estate. It is the law of other States. In the case of *Peck & al.* v. *Fisher*, 7 Cush. 386, before cited, the contest related to the title to real estate, which had been held by two partners, as tenants in common, and levied upon as the individual property of such partners; and then, subsequently, for a partnership debt. The action was a writ of entry, and it appeared that the creditors of the individual partners held, or claimed to hold, by the earliest attachment. But, notwithstanding such creditors had an indefeasible title at law, which might be defeated in equity, and, as it was understood an equity suit was pending, the Court suspended the case to await the result of that suit.

So, in New Hampshire, a subsequent attachment by the creditors of a firm overrides the earlier attachment of a creditor of one of the members of the firm. *Tappan* v. *Blaisdell*, 5 N. H., 190; and, in the case of *Jarvis & al., Adm'rs*, v. *Brooks & al.*, 7 Foster, 37, the facts are found to be, in many respects, very similar to the facts in the case now before us, and yet it was held that a levy upon real estate belonging to a co-partnership, and held by its individual members as tenants in common, in trust, not by deed upon its face, but by implication of law, for the firm and its creditors, was valid against a prior attachment of the same property, as the individual property of the separate members of the firm. "The partnership creditors, having precedence, nothing more is requisite than that they should have a valid execution properly levied, in order to avail themselves of their right of priority, and this follows as a necessary result of the principle, that their claim is superior to that of the creditors of the individual members of the firm." No rights were therefore acquired by the previous attachment which was not defeated by the subsequent levy made by the creditors of the firm. If such a levy would protect the rights of the partnership cred-

itors, no reason is perceived why the same rights, and the rights of the moving partner, may not be protected in the equity suit before us.

In the case of *Tillinghast* v. *Champlin & als.*, before cited from the Rhode Island Reports, AMES, C. J., while treating of the equitable lien which is created upon partnership property, in favor of partners and co-partnership creditors, in a case where the deed was precisely like the deeds before us, a deed to the partners, as tenants in common, and contained no reference to their relation as partners, says, "this lien is, we think, familiarly administered in equity, in favor of those respectively entitled to it, upon their own direct application, and as their own equitable right. Even the courts of law administer it in New England, under our attachment laws, in case of *quasi* insolvency, by giving to the creditor of the firm, though *subsequently* attaching the firm property, a priority of lien and payment upon and out of such property, over the separate creditor of one of the co-partners *first* attaching it, thus setting aside the legal right of prior attachment in favor of the equitable lien of the co-partnership creditors, upon the co-partnership property.

In view of our statute authorizing the attachment of real estate, we do not think it was intended, when taken in connection with the statute for the protection of trust estates, resulting from implication, which has been cited, to overthrow and destroy the equitable rights arising therefrom, provided the *cestuis que trust* took the proper steps to secure their rights before a levy upon execution.

Thus we are brought to the conclusion that the equities which attach to partnership property, whether personal or real, are not absorbed in the legal estate, until such property has been transferred to a *bona fide* holder, ignorant of the trust, either by a sale or upon execution. Equity will therefore enjoin or restrain the appropriation of such property to the payment of the debts of an individual partner, until the partnership debts are paid, and the indemnity to which the other parties are entitled is obtained, and the attaching cred-

itors in this case cannot hold by virtue of their attachments, until the equities springing out of the partnership relation are satisfied. But this contingent interest may be protected for them by an appropriate decree.

The other objections to the bill, such as want of due diligence, and certainty in its allegations, in the judgment of the Court, are not sustained. The result is that, upon the facts as stated, the orator is entitled to a decree, not only as against his co-partner, Wm. D. Crooker, but also against the attaching creditors, named as respondents in the bill, to be made in accordance with the principles of equity before stated; and the exceptions which are taken to the *pro forma* rulings of the presiding Judge at *Nisi Prius*, all of which were made without examination, and only for the purpose of presenting such questions of law and equity as might arise in the case, to the full Court, are sustained; and the case is remanded to the Court within and for the county of Sagadahoc, where the respondents whose demurrers have been overruled, can answer further if they shall desire.

Exceptions sustained.

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

SAMUEL D. REED, *Complainant, versus* MARY ELWELL *& al., Appellants.*

To make effectual a notice by an *assignee* of a mortgage of real estate, of his claim to foreclose the same, by publication in a newspaper, as provided by statute, it must appear that, at the time of such proceeding to foreclose, the assignment to him of the mortgage had been recorded, or the person entitled to redeem had actual notice that he was assignee; otherwise, the mortgage will not be foreclosed, at the expiration of three years from the time of publication.

And, where the assignment had not been recorded until long after the publication of such notice, whether the time for redemption will expire in three years from the time of recording the assignment, *quære.*

The process of forcible entry and detainer, as provided by c. 94, of R. S. of 1857, does not seem to be adapted to a case where the relation of mortgager and mortgagee exists; for the person in possession, with right to redeem, should not be regarded as a disseizor, within the true sense of the statute.

REPORTED by CUTTING, J.

THIS was a process of FORCIBLE ENTRY AND DETAINER, commenced before a justice of the peace and of the quorum, who rendered judgment for the complainant. The respondents entered in this Court their appeal from said judgment, at the August term, 1857, for the county of Sagadahoc.

At the trial, the complainant read in evidence a deed of mortgage, from Timothy Batchelder to Samuel Swanton, 2d, which was dated May 8, 1850, and recorded on the 8th of October following. Also, an assignment of the same by said Swanton to the complainant, dated December 7, 1852, and recorded on the 16th of January, 1856. Also, the notice of complainant of his claim to foreclose the mortgage, published in a newspaper in the months of April and May, 1853.

Christopher Small, for complainant, testified that he went with Reed upon the premises, on the 16th of November, 1856, and took possession of the house and farm, which were then unoccupied. Reed desired him to see to the place, and, if any thing happened, to inform him.

On the 8th day of April, 1857, was at Bath, and Reed informed him that Catlin was to occupy the premises, and that

he should send him down to Phippsburg, with his furniture, during that day. Catlin went down on that day, with his goods, and put them into the house late in the evening.

The next morning, respondents came and removed his things from the house into the highway.

The report of the case contains the testimony of other witnesses on the part of the complainant.

In defence.—The deed of Timothy Batchelder to S. H. Osgood was read, a quitclaim of all his right, title and interest, embracing the house, dated and recorded September 6, 1850. Also, a like deed from William M. Reed to Mary Elwell, dated December 6, 1850, recorded January 7, 1853. Also, quitclaim deed of the pasture from Batchelder to him, (Reed,) dated November 28, 1850. Also, deed from said Osgood to Mary Elwell, September 29, 1854.

Several witnesses were called and examined for the respondents.

The cause was then withdrawn from the jury, and submitted to the full Court, on Report of the presiding Judge.

C. R. Porter, for the complainant, argued:—

1. The title of complainant, originally that of assignee of mortgagee, was made absolute by foreclosure and the expiration of the three years, in April or May, 1856. The assignment was recorded in January, 1856; this was several months before the expiration of the three years, and gave ample time and notice for redeeming. *Wing* v. *Davis*, 7 Greenl. 31.

2. The title of Mary Elwell was not adverse to complainant,—hers being only by quitclaim of all right, title and interest. She, in fact, was but the assignee of the mortgager, Batchelder, and had no higher or superior right than he had, prior to his conveyance to Osgood and subsequent to his mortgage to Swanton. *Coe* v. *persons unknown*, 43 Maine, 432; *Blaney* v. *Bearce*, 2 Greenl. 132; *Miner* v. *Stevens*, 1 Cush. 482.

3. The mortgager or his assignee, being a mere tenant at will to the mortgagee or his assignee, the entry of Reed, in

November, 1856, after the expiration of the right to redeem, and giving Small the care of the premises, was an entire extinction of all right in Mary Elwell, and any entry of hers subsequent thereto was a trespass, or a disseizin, at the election of Reed.

4. Reed had a perfect and indisputable right to place Catlin in possession; and having done so, in 1857, the expulsion of Catlin, the servant of Reed, was the expulsion of Reed in law, and, being done in a violent and threatening manner, the process of forcible entry and detainer was open to Reed. *Benedict* v. *Hart*, 1 Cush. 487; Statute of 1850, c. 160, also statute 1849.

Bronson & Sewall, for the respondents.

This process does not lie. When the complaint was filed, the mortgage was not foreclosed in such a manner as to cut off the defendant's right of redemption, which she acquired by the deed of Osgood to her, dated September 6, 1850, and recorded same day.

The notice of foreclosure was published in April and May, 1853, and, though it appears to be after the assignment from Swanton to plaintiff, yet it was before the assignment was recorded.

Now, defendants contend that, though the assignment was dated and made before the notice, yet it was not made public by being put on the record, where the law requires it to be placed. Third persons, therefore, ought not to be affected by such a notice. The record title was still in Swanton, and the record disclosed no assignment.

The construction of the statute should be a liberal one, and such as not to entrap parties, and to give a fair opportunity for persons having a right to redeem.

Swanton was not obliged to tell to whom he had assigned the mortgage, if he had been applied to; and, so far as the notice of foreclosure having any effect under such circumstances, it might have been as well made by any other person.

It will be noticed that this was not put on record until just before the time of redemption expired; to wit, in Jan. 1856.

It is further contended that, if the title by the records did not appear to be in the plaintiff, then the putting the assignment on record, at a time so long subsequent, cannot make that a good notice which was deficient at the time of making it.

A mortgagee or assignee, at the time of giving the notice, must have his record title perfected, in the same manner required to obtain judgment in a contested suit on a mortgage. The assignee cannot, in an action in his own name, read the assignment until after it is recorded, and recording is, therefore, one of the necessary steps to show his title and obtain judgment.

Now, the time within which the mortgager, or one holding under him, may redeem, in the one case, is three years from the taking possession under the judgment, and, in the other, three years from the publication of the notice.

The opinion of the Court was drawn up by

MAY, J.—The complainant claims title as the assignee of a mortgage, dated May 8th, 1850, but not recorded until October 8, of that year, which he contends was absolutely foreclosed, prior to the forcible ejection of his servant from the premises on the 9th day of April, 1857. The assignment is in due form and dated December 7th, 1852, but it was not recorded until January 16th, 1856. Timothy Batchelder, the original mortgager, appears to have conveyed, by his deed of quitclaim, dated September 6th, 1850, all his right, title and interest in the premises, to Stephen H. Osgood, who, by a like deed, on September 29, 1854, conveyed to Mary Elwell, one of the defendants. Such a deed passes only the equity of redemption. *Coe* v. *persons unknown*, 43 Maine, 432.

The said Batchelder also gave a similar deed, dated Nov. 28th, 1850, of the pasture lot, a part of said premises, to William M. Reed, who conveyed the same to Mary Elwell, by his deed of quitclaim, dated December 6th, 1850. By these conveyances the said Mary Elwell became seized of the entire equity of redemption which the said Batchelder had in

the premises, after the making of the mortgage under which the complainant claims.

The other defendant, who is the son of Mary Elwell, justifies under her title and as her servant. If the mortgage had not been foreclosed at the time of the complainant's entry by his servant, which appears to have been on the 8th day of April, 1857, and his subsequent ouster by the defendants immediately thereafter, then the relation of the parties to each other, in this proceeding, is that of mortgagee and mortgager, and their legal rights must be such as necessarily attach to that relation.

The only foreclosure relied upon, by the counsel for the complainant, is that provided for in the first mode of the R. S. of 1841, c. 125, § 5, by which, after condition broken, the mortgagee, or any person claiming under him, not desirous of taking and holding possession of the premises, may give public notice, in a newspaper printed in the county where the premises are situated, three weeks successively, of his claim by mortgage on such real estate, describing such premises intelligibly and naming the date of the mortgage, and that the condition in the same has been broken, by reason whereof he claims a foreclosure; and cause a copy of such printed notice, and the name and date of the newspaper in which it was last published, to be recorded in each registry of deeds in which the mortgage deed is, or by law ought to be recorded, within thirty days after such last publication.

It is contended in defence that, notwithstanding all these requirements have been strictly complied with, still, inasmuch as it is the purpose of the statute to give the party entitled to redeem three full years notice of such claim to foreclose, before his estate in the premises shall be forfeited, no foreclosure can be perfected in this mode, unless it also appear, from the registry of the assignment of the mortgage, that the person claiming under such mortgage held the record title at the time of the publication of his notice to foreclose. The argument that any claim of title under the mortgage, and of a right to foreclose it, when made by a person having no

record title thereto, may be disregarded by the party entitled to redeem, is one of great weight. No reason is perceived why such party should be called upon to act or forfeit his estate, without reasonable or legal evidence that the party claiming to foreclose is the owner of the mortgage, or has authority to receive the money due upon it. A mere claim of ownership, without any evidence that the party claiming has the possession of the mortgage, or an assignment of it, by record or otherwise, affords no sufficient basis of title to lay a foundation of a forfeiture of real estate. A mere newspaper claim cannot be evidence of title unless made so by statute.

It may be said, however, that the language of the statute, under which a foreclosure is claimed to have been perfected, fairly indicates that the Legislature intended that such a claim, without any record or other notice of title in the claimant than that which such claim implies, should be sufficient, when accompanied by the other things required by the statute, to create a foreclosure.

Such is, undoubtedly, the literal construction of the statute. But when we take into consideration, in connection with this statute, the provision of the Revised Statutes of 1841, c. 91, § 26, by which it was provided that "no conveyance of any estate in fee simple, fee tail, or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person other than the grantor, his heirs and devisees, and persons having actual notice thereof, unless it is made by a deed recorded" as is required by that chapter, we have no doubt that the provisions of the statute relating to the foreclosure of mortgages, before cited, were intended to apply only to cases where the party holding the mortgage, and claiming to foreclose, is able to show his ownership of the same and notice thereof to the party holding the equity of redemption, at the time of the publication of his claim to foreclose, which notice, however, must be co-existent with such publication, but may be either actual or by the record; and in no case can the three years time, which must elapse before the foreclosure can become absolute, commence running,

until it appears that the party entitled to redeem, or some one under whom he claims, had notice, in one of the modes above stated, of the title being in the party claiming to foreclose. Such a construction is not inconsistent with the language of the statute. That provision which requires the mortgagee, or person claiming under him, to state in his notice that he claims by mortgage, cannot be for the purpose of furnishing evidence to the party entitled to redeem that he holds the mortgage, because it is alike required, whether the title be in the mortgagee or his assignee, and whether the instrument of title be on record or not. If upon the record, this is notice as to the title to every body; and if not, the mere statement of a claim of title in the notice is neither reasonable, nor legal evidence of any such fact. The mortgage itself is actual notice to the mortgager, or his assignee, that the title is in the mortgagee, unless the record or some other evidence shows that it has been legally assigned. In the absence of any such evidence, the mortgager, or person claiming under him, may properly act upon the assumption that the title is in the mortgagee, and may disregard all claims of any other person claiming to foreclose. *Mitchell, in equity,* v. *Burnham,* 44 Maine, 286. It will be seen, also, that the construction we adopt will make the words in the statute, requiring the notice of foreclosure "to be recorded in each registry of deeds in which the mortgage deed is, or by law ought to be recorded," both necessary and proper, without regarding them as expressive of a legislative intention that such notice should be effectual to foreclose the mortgage, whether the party entitled to redeem had the necessary notice of title in the person claiming to foreclose, or not. The fact that actual notice of title in such person is sufficient, without its being recorded, shows why reference was made to the registry in which the mortgage deed ought to be recorded. This provision was intended to show that such notice should, as in other cases, be regarded as equivalent to a notice from the record itself. The construction arrived at is in harmony with the principles of natural justice, which require reason-

able notice before one's rights shall, by reason of the acts of others, be either forfeited or lost.

It appearing, in the case before us, that the assignment of the mortgage, under which the complainant claims title in the premises, was not recorded until January 16, 1856, nearly three years after the publication of his notice to foreclose, and there being no evidence in the case tending to show that the defendant, Mary Elwell, had any notice of such assignment, prior to its registry, we are brought to the conclusion that the mortgage was not in fact absolutely forclosed, if it now is,* of which we give no opinion, until long after the night of April 8th, 1857, when the complainant entered by his servant, whose entry was resisted by the defendants, as soon as they had notice of it, upon the following morning. The rights of the parties, therefore, at this time, were clearly those which are incident to the relations of mortgagee and mortgager, after condition broken.

By the statute of 1841, under which these proceedings were had, c. 125, § 2, it is provided that any mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof, before any breach of the condition of the mortgage, when there is no agreement to the contrary; but, by sections 3, 4, and 5, of the same chapter, after condition broken, several different modes of proceeding are provided for the purpose of a foreclosure, any one of which may be adopted by the mortgagee, or party claiming under him, at his election. Among these modes, however, no provision is made for that of a clandestine entry. To effect a foreclosure by means of an entry, such entry must be with the consent, in writing, of the mortgager, or person claiming under him, or it must be unopposed, peaceable, and open, in the presence of two witnesses. But the entry in this case was not made for the purpose of foreclosure. Nor does it appear to have been made under the authority of section two in the statute before cited, with a view to account for the rents and profits

* This opinion was delivered, A. D. 1860.

in case the mortgage should be paid and the estate redeemed. It was an entry upon the premises when the defendant, Mary Elwell, was in possession, as mortgager, occupying the barn with her hay cut upon the premises, and the house had been occupied by her with her family, although, at the time of the entry, she was temporarily absent therefrom. It also appears that the complainant, on the 17th day of November, 1856, went with a witness into the western room of the house, (the house being then unoccupied,) and there said that he took possession of the house and farm, but he did not retain actual possession, but went away, requesting the witness to see to the place, and if any thing happened, to let him know it. Neither of these entries appear to be of the character contemplated by the statute in any of its provisions. The possession of the complainant was at no time exclusive. The mortgager's grantee still continued in the occupancy of some portion of the premises. Such an entry as either which has been shown is not deemed sufficient evidence of possession, as between mortgagee and mortgager, to sustain a complaint for forcible entry and detainer, as against parties in possession claiming under the mortgager, when it appears that the only acts of ouster consist in the expulsion of the mortgagee, or his servant, from the joint occupation of the premises with themselves, or from a separate occupation of any particular part, less than the whole.

This process does not appear to be adapted to the relation subsisting between mortgagee and mortgager. It cuts off the latter from the benefit of the conditional judgment, provided in cases of mortgages after condition broken, in actions for possession by a writ of entry. R. S. of 1841, c. 125, § 7. The remedy does not seem to be provided for such cases, by the R. S. of 1857, c. 94, § 1. By that statute, it is only against a disseizor, who has not acquired any claim by possession and improvement, and against a tenant holding under a lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, if the process is commenced within seven days from the expiration or forfeiture of

the term; and against a tenant at will, whose tenancy has been terminated in the manner provided in the second section of the statute.

This statute was intended to combine, and does combine in one section, all the cases provided for in the R. S. of 1841, c. 128, and the statute of 1850, c. 160, and of 1853, c. 39, § 1, as they were in force at the time of its enactment. With the exception of the provision in the statute of 1850, and of the present statute relating to disseizors, our statutes will be found to be somewhat similar to the revised statutes of Massachusetts, c. 104.

In the case of *Hastings* v. *Pratt*, 8 Cush. 121, it is said by SHAW, C. J., that "although, in a loose sense, a mortgager in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the R. S., c. 104, § 2. He is not lessee, or holding under a lessee, or holding demised premises without right after the determination of the lease. The remedies of a mortgagee are altogether of a different character, clearly marked out by law."

Nor does the provision in our statutes, providing this summary process against a disseizor, who has not been in possession of the premises long enough to be entitled to betterments, apply to the case of a mortgager in possession, who has prevented the mortgagee from taking actual possession, or excluded him after possession taken. The disseizin contemplated by this statute, is not a disseizin which exists only at the election of a party, for the purpose of trying his title, but a disseizin at the common law, which cannot exist as between mortgagee and mortgager, so long as the debt secured by the mortgage remains unpaid. *Noyes* v. *Sturtivant*, 18 Maine, 104; *Sweetser* v. *Lowell & al.*, 33 Maine, 446.

The result is that, in view of all the facts in this case, this process cannot be maintained against these defendants, and the complainant must seek his remedy for the acts complained of in some other mode.

Complaint dismissed, with costs for defendants.

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

COUNTY OF SOMERSET.

ROBERT TUTTLE *versus* OLIVER WALKER.

The owner of a parcel of land conveyed by deed a part thereof, reserving a strip at one end, three rods wide, for a road, if the town (in which the land is,) should lay out and accept a road over it; otherwise, reserving the same for a private way. And it was held that the fee of the whole part described in the deed passed to the grantee, subject to the easement, for a town way, if laid out; otherwise, for a private way.

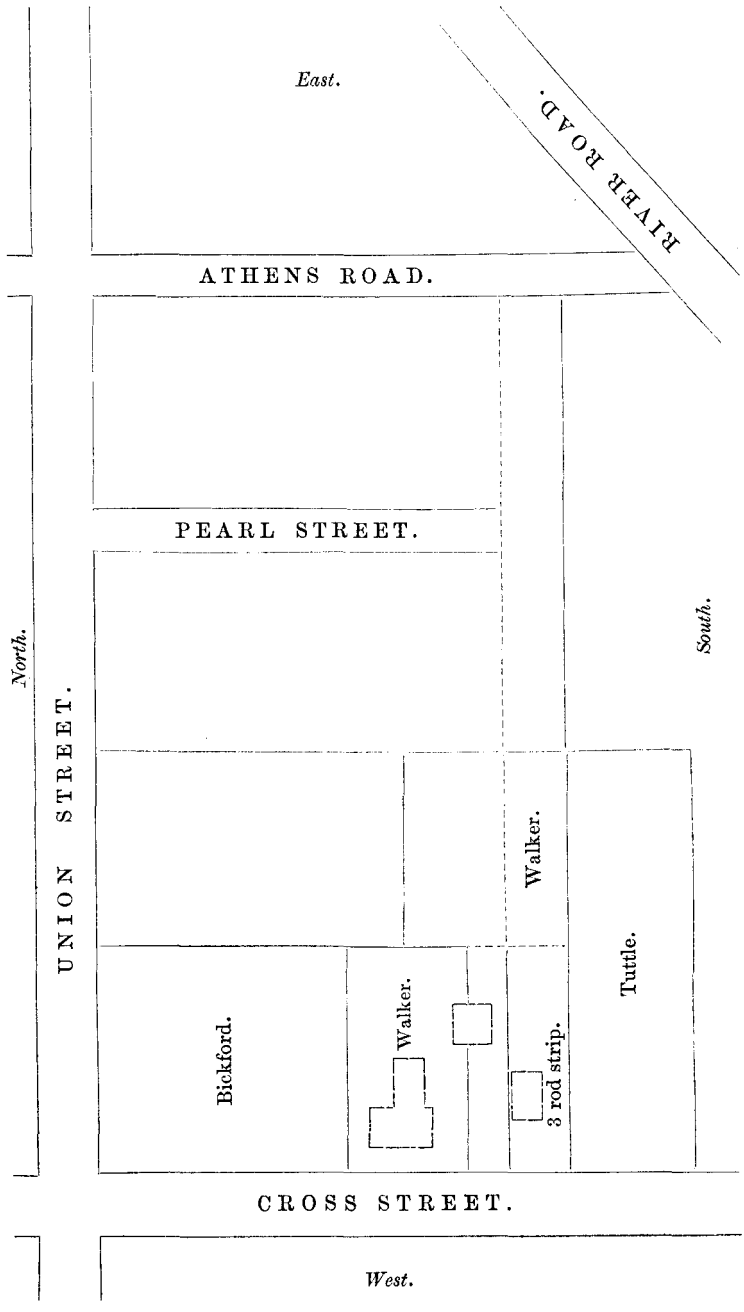
And if such grantee obstructs the right of way, he will be liable in an action of the case for the actual damages caused the grantor or one who has acquired his rights. If no actual damage be proved, the plaintiff will be entitled to nominal damages.

THIS action was CASE; in which the plaintiff claimed to recover damages of the defendant, for placing a work-shop upon a strip of land which adjoined the land of plaintiff, over which strip he claimed to have a right of way, which the defendant had thus obstructed.

After the evidence had been introduced at *Nisi Prius*, the case was withdrawn from the jury, the parties consenting that TENNEY, C. J., who presided at the trial, should REPORT the same for the decision of the full Court, with jury powers.

From the case, it appears that, prior to Dec. 9, 1825, William B. Morrill, being the owner of a tract of land in Milburn, (now Skowhegan,) bounded on the north by Union street, on the west by Cross street, and extending southwardly to the river road, conveyed to Samuel Bickford fifteen rods of the same on Cross street, and six and a half rods on Union street, "excepting and reserving as follows,—if the town should hereafter lay out and accept a road from" Cross street, "to the river road, then the south end of the above described premises shall be considered and occupied for the use of the same, three rods wide, and otherwise, reserving the same for a private way forever."

Tuttle *v.* Walker.



On Feb. 9, 1833, Bickford conveyed the southerly portion of the same lot, with the same reservation, as was contained in Morrill's deed to him.

The land reserved for a way, is designated on the plan as the "3 rod strip," and the controversy in this action is as to the rights of the parties thereto.

The plaintiff having become the owner of the lot adjoining the strip on the south, afterwards obtained from Morrill a release of all his right and interest in the three rod strip "reserved in his deed to Bickford."

It was admitted that the defendant placed the building upon the premises in dispute.

The town has never laid out a road, as contemplated in Morrill's deed.

The defendant introduced testimony tending to show a possessory title in him; and plaintiff offered testimony tending to show that defendant had no such title.

D. D. Stewart, for the plaintiff.

The deeds show that the defendant never bought, paid for, or acquired any title to the strip in controversy, by deed; nor has he acquired any title by adverse occupation.

The language in Morrill's deed to Bickford, and in Bickford's deed to the defendant, is a technical *reservation* of a *right of way in gross,* to Morrill and his assigns. It is a *reservation* rather than an *exception,* because it creates out of the estate granted a right of way, which is a *new thing.* 7 Met. 110. The distinction between a reservation and an exception is, perhaps, more shadowy than real; and it may be unimportant to decide the point in the present case. 6 Cush. 135. It is supposed, however, that the correct construction of Morrill's deed, results in a technical reservation of a right of way in gross to Morrill and his assigns.

In *Bowen* v. *Conner,* 6 Cush. 137, SHAW, C. J., says, in delivering the opinion of the Court, "the Court are of opinion that the law is settled in Massachusetts by a series of decisions, that a right of way may be as well created by a reservation or

exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement or servitude, as by a deed from the owner of the land to be charged, granting such way, either in gross or as appurtenant to other estate of the grantee. The rule has been rather assumed and taken for granted, than discussed and formally decided; but it has been judicially stated, adopted and acted upon as settled law in repeated instances, of which it will be necessary to cite a few only. *White* v. *Crawford*, 10 Mass. 183; *Atkins* v. *Boardman*, 20 Pick. 291, and 2 Met. 457; *Newell* v. *Hill*, 2 Met. 180; *Mendell* v. *Delano*, 7 Met. 176.

The private way reserved by Morrill, having been conveyed to the plaintiff, and the defendant having obstructed the same, this action is maintainable. *Munn* v. *Stone & al.*, 4 Cush. 146.

Morrill having been the original owner of all the land now owned by both parties, had the right, (to use the language of SHAW, C. J., in *Salisbury* v. *Andrews*, 19 Pick. 252–3,) "to carve out and sell any portion that he pleased, and the terms of the grant, as they can be learned, either by words clearly expressed or by just and sound construction, *will regulate and measure the rights of the grantee.*"

If the defendant objects that the action is not maintainable because no special damages are shown, the Court are referred to *Atkins* v. *Boardman & als.*, 2 Met. 469, as decisive upon that point.

Coburn & Wyman, for the defendant.

1. The fee of the *locus in quo* passed to Bickford by Morrill's deed of Dec. 9, 1825. The land is clearly and specifically granted, and the reservation is of a right to locate a road, and, in case the road should not be located, then of a private way.

If the reservation be construed to be an exception, and to cover the soil, it is repugnant to the deed and void. *Hart* v.

Chalker, 5 Conn. 311; 3 Kent's Com. 468, and cases cited; 2 Hilliard on Real Property, 352; *Cutler* v. *Tufts*, 3 Pick. 272.

2. If the plaintiff claims the soil, he has misconceived his action. Instead of case, for obstructing the *way*, it should have been trespass or a real action.

A *way* imports, *ex vi termini*, a right of passage over *another person's* land. *Fenner* v. *Sheldon*, 11 Met. 521–6; 3 Kent's Com. 419; 2 Bouv. Law Dic. 627.

3. The reservation was for the benefit of the town. It was a dedication, which the town might avail itself of by laying out a road, or by using the *locus* as a private way, at its option. The dedication has not been accepted in either mode, and, until such acceptance, the owner of the soil will have unrestricted use.

It has been settled, both in this State and in Massachusetts, that a town may become seized of a right of way, by grant, prescription, reservation or dedication, and that such way will not be a public road which the town is obliged to repair, but a *private way*, open only to inhabitants of the town, imposing none of the obligations and liabilities of a statute way. *Commonwealth* v. *Low*, 3 Pick. 408; *Larned* v. *Larned*, 11 Met. 522; *State* v. *Sturdevant*, 18 Maine, 66; 2 Greenl. Ev. 662.

4. *If* any right was left in Morrill, by virtue of the reservation, it was a right of way *in gross*, and *not assignable*. Such a way, even if assignable, would not pass by deed of the land. 3 Kent's Com. 420; *Whelock* v. *Thayer*, 16 Pick. 68.

5. Such right, if any existed, whether in gross or appurtenant, was abandoned and lost before action brought. For thirty years after the reservation, no way was opened or used; more than twenty years of this time, the defendant had the land enclosed with his own, and used it for cultivation and other purposes.

The obstructions and expenditures for permanent improvement, being known and acquiesced in, are the strongest evidence of abandonment, if there was any right to abandon, and can be accounted for on no other ground. 2 Greenl. on

Ev. 665; 3 Kent's Com. 448; *Morse* v. *Copeland*, 2 Gray, 302; *Emerson* v. *Willey*, 10 Pick. 310.

6. Such right cannot have become appurtenant to the premises of which the plaintiff is alleged to be seized, for it does not appear that Morrill owned said premises at the time of the reservation. The deed from Morrill to Atwood, in 1846, may be evidence of title in Atwood, but not in Morrill; much less, of title in Morrill twenty years prior to its date.

7. It does not appear, that the plaintiff is seized of said premises. The evidence leaves the title in Cony Pooler.

8. A *bare right of way, not a way in fact*, will not pass as an "appurtenance." It is an essential idea of appurtenant, that the incident *be used with* the principal. "An appurtenant," says SEDGWICK, J., in *Leonard* v. *White*, "is a thing *used with* and related to, or dependent on, another thing, more worthy." Chancellor KENT says, of incorporeal hereditaments in general, "they are, *by their own nature* or *by use*, annexed to corporeal inheritances."

COKE says of appurtenant, "prescription, (*which regularly is the mother thereof.*)" It is difficult to perceive how, in any other way than by use, a visible connection, or any actual connection, can be established between them. Nor is any reason perceived why a right of the grantor, existing outside of the granted premises, which has never been used with them, and of which the grantee has no knowledge, should pass to the grantee. *Leonard* v. *White*, 7 Mass. 8; *Grant* v. *Chase*, 17 Mass. 443; 3 Kent's Com. 402.

9. The obstructions complained of were erected by the consent and license of those under whom the plaintiff claims. The evidence on this point is conclusive and uncontradicted. The objection made in the case of the stable, five or six years after its erection, and not persisted in, does not qualify this position. If it had been persisted in, it was too late, whether we put it on the ground of a license, clearly implied from the facts, or on the ground that Morrill stood by and saw the defendant expend money without making known his claim. Morrill's right was concluded when the building was erected.

Whatever conflict there may have been in the authorities on the question whether a license, executed, is revocable, all agree that it is a complete justification for acts done prior to its revocation. And the later authorities seem to have settled the question respecting a revocation, by distinguishing between licenses, to do acts on one's own land in derogation of an easement, and licenses to do acts on the land of another. The first are held not to be revocable, when executed, and to amount to an abandonment of the easement so far. *Pitman* v. *Poor*, 38 Maine, 237; *Dyer* v. *Sanford*, 9 Met. 395; *Morse* v. *Copeland*, 2 Gray, 302; Oliver's Precedents, 381, note; 1 Story's Equity, 387, 391.

10. The plaintiff has declared for a way by prescription. It is said, that in a declaration against the owner, the kind of way, as by grant, prescription, &c., should be set forth. However this may be, the plaintiff, having set forth the kind of way, must prove it as alleged. 1 Chitty's Plead. 380; *Melville* v. *Whitney*, 10 Pick. 295; *Kent* v. *Waite*, 10 Pick. 142; *Odiorne* v. *Wade*, 5 Pick. 421; *Coolidge* v. *Leonard*, 8 Pick. 504.

11. The way has never been opened. The plaintiff has never attempted to use, or had occasion to use it. He has not, therefore, been obstructed in its use. Until he manifests a disposition to use the way and is subjected to some damage, he has no right of action. *Sutherland* v. *Jackson*, 38 Maine, 80.

The opinion of the Court was delivered by

HATHAWAY, J.—William B. Morrill formerly owned all the land between Union street and the river road, and bounded on the west by Cross street, in Skowhegan. [See plan, p. 281.]

By deed of December 9, 1825, he conveyed to Samuel Bickford a lot bounded northerly by Union street and westerly by Cross street, fifteen rods long on Cross street, and six and a half rods wide. In the deed was the following reservation:—"excepting and reserving, as follows:—If the town should hereafter lay out and accept a road, from the

road first mentioned (Cross street on the plan) to the river road, near the house of J. H. Hill, then the south end of the above described premises shall be considered and occupied for the use of the same, three rods wide; and otherwise, reserving the same for a private way forever," and by deed of February 9, 1833, Bickford conveyed the southerly part of his lot to the defendant, with the same reservation as was contained in Morrill's deed to him.

The plaintiff became the owner and occupant of the land south of, and adjoining, the three rod strip specified in the deed as reserved, which strip was conveyed to him by Morrill, by deed of July 3, 1855. The question is concerning the rights of the parties to the three rods reserved.

It was clearly Morrill's intention to reserve a right of way for a town road, if the town would lay it out and accept it; and if the town declined to do so, *then*, for a private way, as was obviously for his interest, as it would give him, and those to whom he might convey, easy access to his land adjacent, and therefore render it more valuable. Owning the whole lot, Morrill had an undoubted right, when he sold it, to make such reservations as he chose to make, either with a view to his own interest, or to that of other individuals, or for the public benefit. *Salisbury* v. *Andrews*, 19 Pick. 250. Morrill's deed to Bickford, from whom the defendant received his title, conveyed the fee of the whole lot of land described therein, subject to an easement for a town way over *the three rods*, if the town would accept it, and if the town did not use it for that purpose, as it seems they did not, then it was to be for a private way forever. *Hind* v. *Curtis & al.*, 7 Met. 94; *Bowen & al.* v. *Conner*, 6 Cush. 132.

The testimony reported does not show title in the defendant by adversary possession. His request to Morrill, in 1848, to convey his right to him, is inconsistent with any such claim of title.

The plaintiff took, by Morrill's deed to him of July 3, 1855, nothing more than the right which Morrill had reserved in the land, which was only a right of way, and as the defendant

maintained obstructions in the way, he is liable in this action. Proof of actual damage is not necessary. 16 Pick. 241. Whether the plaintiff is entitled to recover actual, or merely nominal damages, will be determined by the presiding Judge, by whom the parties have agreed the question of damages shall be settled. *Defendant defaulted.*

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

MOSES GLEASON, *Comp't, versus* WENTWOTH TUTTLE, JR., *& al.*

In a complaint under the statute, for flowing land, to establish a prescriptive right of the mill owner to flow, it must appear that he and his grantors have been accustomed to flow the land, without interruption, for twenty years or more, prior to the date of the complaint, thereby causing, during that period, actual damage.

A voluntary omission to flow in such a manner as to occasion annual damage, when such omission is accompanied by no acts indicative of an intention to resume the right, will afford no evidence of a continued adverse claim to exercise such right.

REPORTED by MAY, J.

COMPLAINT, under the statute, against the owners of mills and dam, for flowing complainant's land.

[No copy, either of the complaint or of the report of the case, is found among the papers in the case.]

D. D. Stewart, for complainant.

Abbott, for respondents.

The opinion of the Court was drawn up by

MAY, J.—The complainant's title to the land alleged to be overflowed, as well as the fact that it is overflowed by means of the respondent's mill-dam, is fully established by the deeds and other evidence in the case; and it is conceded that the title to the water privilege, including the spot where the mills

and dam which occasion the flowing are maintained, is shown to be in the respondents. The complainant, therefore, is entitled to prevail upon the merits, under the general issue, unless the special plea in bar is sustained by the evidence relied upon in defence.

The special plea, in substance, alleges that the respondents "have the right to, and rightfully may and do maintain the mills and dam described in said complaint;" and that they and their grantors, for more than forty years next before the filing of the complaint, "have had the right to flow the land described in the complaint, to the full extent of any and all flowing of which they have been the cause, and of which said dam and said mills have been the cause, without compensation to be paid therefor." The replication to this plea tenders an issue to the country upon the facts alleged, which being duly joined, the burden of proof is upon the respondents to establish the facts necessary to sustain it.

The right to flow the complainant's meadow does not appear to have been conveyed to the respondents, or their grantors, by any of the deeds which have been put into the case. If, then, any such right exist, it must depend upon prescription, or a user showing that the respondents, or their grantors, have been accustomed to flow the premises uninterruptedly for twenty years or more, prior to the date of the complaint, thereby causing damage during that period.

Damages are not to be presumed from the mere act of flowing. *Underwood* v. *The North Wayne Scythe Co.*, 41 Maine, 291. They must be proved to have been of yearly occurrence, unless a temporary omission to flow may have been occasioned by the leaky condition or prostration of the dam, in which case the time necessarily and reasonably spent in repairing or rebuilding the dam, will not interrupt the running of the twenty years, or prevent the acquisition of the right to flow. *Dana* v. *Valentine*, 5 Met. 8; *Wood* v. *Kelley & al.*, 30 Maine, 47. A voluntary omission to flow in such a manner as to occasion annual damage, when such omission is accompanied by no acts indicative of an intention to resume the

right, will afford no evidence of a continued adverse claim to exercise such right. Unless the flowing is of such a character as to enable the owner of the land to maintain a process to recover damages, no prescriptive right to flow the land will be acquired. *Nelson* v. *Butterfield & al.*, 21 Maine, 220.

In view of the preceding principles, does the evidence in this case raise any presumption of a grant to flow, or in any manner show the acquisition by the respondents of any such right? We think it does not. The testimony shows that no less than four dams, for the working of mills, have been successively erected and maintained, for longer or shorter times, upon the falls on Fifteen mile stream, at or near the village of Canaan. The first was erected in 1801. It was very high and leaky, and stood about 70 or 80 feet below the village bridge. In 1810 or 1811 a new dam was built, a few feet below the place of the first. This second dam was tighter, and, perhaps, a little lower than the other. The third dam was built in 1821, some 100 feet or more further down the stream than those which preceded it. By it the former dams were flowed out and rendered useless, and all the mills which had been worked by them were moved down the stream and placed upon the new dam, where they still remain in successful operation. In 1841, the fourth dam was built, and now remains. It is above the bridge and about 380 feet from the lower dam.

It becomes unnecessary to determine whether all these dams were erected upon the same mill site, so as to bring the case within the principle of *Stackpole & al.* v. *Curtis*, 32 Maine, 383, because we are fully satisfied, upon a careful analysis of the whole evidence, that, notwithstanding the meadows may have been sometimes overflowed, still there has been no flowing of the land described in the complaint, except in times of freshets, by which it was damaged in any degree, prior to the erection of the fourth dam; nor, since that, does there seem to have been any flowing, annually, prejudicial to such land, until after 1852, when this dam was rebuilt or repaired. The testimony fails to show that, before this, the trees or grass,

or soil, upon the complainant's meadow, have been usually injured by the water thrown upon them by any of the dams. Much less does it show an annual injury. Whether the fact, that no such damage was sustained, is owing to the former dams being somewhat lower and much more leaky than the last, or to some other cause, is not material. This is not a case of the occasional absence of damage in any one year or years, arising from the state of the dams, but a case in which, if actual damage is shown to have existed in any particular years, its existence is only an exception to the usual condition of the land, after the erection of the dams. It is sufficient for the complainant, that no such continued, annual damage has been shown to exist, prior to the filing of his complaint, as will sustain the prescriptive right to flow without compensation, which is claimed by the respondents in their special plea.

It appears from the testimony of the engineers, Crosby and Wilde, that the fourth dam is at least six feet higher than the one now in use below it. The other testimony shows that it is this fourth, or upper dam, which causes the flowing now complained of. It was first erected by the respondents upon land belonging to their father, but by his consent; and it was repaired, or rebuilt, in 1852, by Frost and Burrill, under a lease of the privilege upon the west side of the stream, from these respondents; since which time it has been occupied by them and their lessees for their several mills; the latter using it for a machine shop, and the respondents for a shingle machine, a planing machine, and a door and blind factory. Whether, during the three years next preceding the filing of the complaint, the complainant's meadow has been annually overflowed, and, if so, whether it was occasioned by the respondents' dam, together with the extent of the flowing, and, whether it was prejudicial to the complainant or not, are questions, in the first instance, for the commissioners who are to be appointed in pursuance of the statute, and by whom the yearly damages, if any, are to be assessed. *Prescott* v. *Curtis & als.*, 42 Maine, 64.

It is objected, in defence, that the complaint in this case is insufficient to authorize a judgment upon it against the respondents. If this objection is open to them upon the pleadings, the complaint will be found to contain all which the statute, upon which it is founded, requires. It is true, it does not allege that the water mill and dam of the respondents were erected upon their own land, or on the land of another, with the owner's consent. Such an allegation was held to be necessary under the statute of 1821, c. 45. But this statute was so modified by the R. S. of 1841, c. 126, upon which this complaint was brought, that such an allegation has been held, in the case of *Prescott* v. *Curtis & al.*, just cited, to be unnecessary. The form of the complaint in that case and in this are very similar. Whether the provisions of the statute of 1821, in relation to this particular, have been so far incorporated into the revision of 1857, c. 92, § 1, as to render a similar averment now necessary, we are not called upon to determine. In view of all the facts, we think the defence fails, and that the complainant is entitled to the appointment of commissioners to adjust the time and manner of flowing, and to assess the yearly damages which have been, and which may hereafter be occasioned by the respondents' dam, as the statute requires. *Defendants defaulted.*

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

SKOWHEGAN BANK *versus* SAMUEL FARRAR *& al.*, and WILLIAM G. CUTLER, *Trustee.*

To constitute the relation of trustee, there must be a privity of contract, express or implied, between the principal debtor and the alleged trustee, or, the former must have entrusted and deposited goods and effects with the latter.

Where one has possession of mortgaged property as the agent of the mortgagees, to whom he is accountable, he is not chargeable therefor as the trustee of the mortgager; for the mortgager has not *intrusted or deposited* the property in his hands.

Nor, can he be regarded as having in his possession any goods, effects or credits, which *he holds* under a conveyance fraudulent and void, as to the defendant's creditors, for he has no conveyance from him. Such a case is not within sect. 63, of c. 86, of Rev. Stat.

The holder of a negotiable note of a third person is not chargeable therefor, as the trustee of the owner of the note, it being a mere chose in action.

By a mortgage bill of sale of "all the desks, chairs, trunks and *office furniture* in" a certain office, the mortgager intended all the articles of use in the office at the time should pass; and an iron safe, which was then used there, would be embraced as an article of office furniture.

REPORTED by TENNEY, C. J., March Term, 1858.

This was an action against Samuel Farrar and Lysander Cutler, as principal defendants, and William G. Cutler of Dexter, and Ebenezer and Theron J. Dale of Boston, (the last two being partners under the firm name of Johnson, Sewall & Co.) as trustees.

The principal defendants were defaulted at a previous term. To determine the liability of W. G. Cutler, as trustee, he and the plaintiffs agreed that the case should be reported for the adjudication of the full Court, upon the disclosures which the trustee had made. It was admitted that notice had been issued and served on said Dales to appear and maintain their right under the mortgage to them from the principal defendants, (which said Cutler disclosed,) as provided in Rev. Stat., c. 86, sect. 32, and that said Dales did not appear.

From the disclosure, it appears that the principal defendants, for several years prior to December 6, 1856, had been

extensively engaged in the manufacture of woolen goods, at their mills in Dexter, and were largely indebted to the said firm of Johnson, Sewall & Co.; that, on said Dec. 6th, they conveyed their mills, and also mortgaged to said creditors their stock on hand and all furniture, tools for manufacturing, &c., "all desks, chairs, chests, trunks and office furniture, now in and about the mills and manufactories."

The trustee was appointed soon afterwards as the agent of the said mortgagees, who continued to operate the mills. As their agent, the alleged trustee had possession of manufactured goods, at the time of the service of the writ upon him in this case.

It further appeared from the disclosure that, at the time he was summoned as trustee, there was in his possession a winnowing machine belonging to the principal defendants. He held, also, a negotiable note belonging to them, given by one Abbott, upon which there was then due about $100.

There was also an iron safe, in use in the office at the time the mortgage was made of the office furniture.

It also appeared that one of the principal defendants had conveyed, in mortgage, to the Mercantile Bank, certain real and personal estate, to secure certain notes due to the bank, which the trustee purchased and took assignments of the mortgages to himself.

The said trustee having been summoned to appear as agent for said Dales, protesting that he was not the agent of said Dales, except for certain specific purposes, nevertheless submitted himself to examination.

The disclosures are very voluminous; but the substance of them is given, so far as they relate to the points considered, in the opinion of the Court.

The case was argued by

Coburn & Wyman, for the plaintiffs, and by

Josiah Crosby, for the trustee.

The opinion of the Court was delivered by

APPLETON, J. — The trustee writ in this case bears date Nov. 24, 1857. It appears, from the disclosure of the supposed trustee, that Messrs. Farrar & Cutler, the debtors, on Dec. 6, 1856, mortgaged their personal property to Messrs. Dale, of Boston, who, in the February following, appointed the trustee, as their agent, to manage and dispose of the same, and that he has since acted as such, and was so acting at the time of the service of the trustee writ upon him.

By R. S., 1857, c. 86, § 4, it is provided that a service of the trustee process "on the trustee, shall bind all goods, effects or credits of the principal defendant, *intrusted and deposited in his possession*, to respond the final judgment in the action, as when attached by the ordinary process."

To constitute the relation of trustee, there must be a privity of contract, express or implied, between the principal debtor and the supposed trustee, or the former must have intrusted and deposited goods and effects with the latter. "It has never been considered," remarks REDFIELD, J., in *Barker* v. *Esty*, 19 Vermont, 131, "that it extended to any other class of debtors, or demands, than such as are the ordinary result of contract, express or implied, creating a fiduciary relation. It is the *fidii commissarius* of the civil, and the factor of the common law." The mere possession of property, without any claim to hold it against the owner by virtue of any contract or agreement, would not seem to be sufficient to hold one as trustee. *Staniels* v. *Raymond*, 4 Cush. 314. The trustee cannot be charged, unless he owes the principal debtor or has property of his in his possession. The trustee, in this case, holds the property mortgaged as the agent of the mortgagees, and is accountable to them. The principal debtors have neither intrusted nor deposited any goods or effects in his hands, so far as relates to the mortgaged goods, and he cannot be charged as their trustee on account of them.

The trustee, not having in his hands any goods, effects or credits of the principal debtors, so as to be regarded in any

way as their trustee, is not within § 32; which applies only where the relation of trustee arises. But here, there being no privity of contract, express or implied, the section does not apply.

The alleged trustee has not in his possession any goods, effects or credits of the principal defendants, which *he holds* under a conveyance fraudulent and void as to the defendants' creditors, for he has no conveyance whatever from them. The disclosure, therefore, cannot be regarded as within § 63.

Neither is the trustee to be charged by reason of the assignment to him by the Mercantile Bank of a mortgage, including the real and personal estate of Lysander Cutler, one of the principal defendants. The trustee gave his own notes as the consideration of the assignment. Nothing in the disclosure indicates that this mortgage was fraudulent or that it has been paid. The trustee, taking the assignment, is entitled to the same protection as if he had been the original mortgager. The plaintiffs have not brought the case within § 50. *Atkins* v. *Vickery*, 42 Maine, 132.

The trustee cannot be charged for the negotiable note of Abbott, that being a mere chose in action.

The safe is included in the phrase "all the desks, chairs, chests, trunks and office furniture." The assignment is most general, and the intention of the assignor was to pass all the articles of use, in the office at the time.

The trustee is to be charged for the winnowing machine.

TENNEY, C. J., and RICE, CUTTING, MAY, and DAVIS, J. J., concurred.

STEPHEN HILTON *& ux. versus* SULLIVAN LOTHROP *& al., Ex'rs.*

A bill in equity, to obtain a decree to redeem mortgaged premises, is not technically one for discovery, and its verification by oath is not required.

Where a married woman is the owner of an equity of redemption, her husband is properly joined with her in a bill in equity to redeem. (Rev. Stat. of 1857, c. 61, § 3.)

A mortgager who has conveyed all his interest in the mortgaged premises, should not be made a party to a bill in equity to redeem.

The heirs or devisees, as well as the personal representative, of a deceased mortgagee, should be made parties to a bill in equity to redeem mortgaged real estate.

Where a promissory note was secured by a deed which was unconditional upon its face, but a bond of defeasance was given back, (thus constituting a mortgage,) and subsequently the parties entered into a verbal agreement that a further sum should be advanced to the mortgager and his note given up to him, and he should surrender the bond held by him, and the note was actually given up, and nearly the whole amount agreed to be paid, was paid, still, if the bond was not in fact surrendered or cancelled, the mortgager would be entitled to redeem.

In such a case, if the mortgager or the purchaser of his right, brings his bill in equity to redeem, he will be held to account for the amount of the note given up, and for the amount paid to the mortgager under such parol agreement.

SUIT IN EQUITY, which was heard on bill, answers and proof.

The case was argued by *D. D. Stewart,* for plaintiffs, and *J. S. Abbott,* for defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—This suit is for the purpose of obtaining a decree, permitting the complainants to redeem the premises described in the bill, from a mortgage, alleged to have been given by one James Rogers to the defendants' testator, on August 29, 1835, to secure certain notes, with interest thereon, payable on time, for the sum of $555. It is stated in the bill that, after the giving of the mortgage, the mortgagee went into possession of the premises, and received the rents, profits and income of the same, to July, 1849, when he died, hav-

ing duly made and executed his will in writing, in which he appointed, as the executors thereof, the defendants, who assumed the trust and were qualified; that, on October 8, 1849, the mortgager conveyed the premises to Agnes Hilton, one of the plaintiffs, and that the complainants afterwards notified the defendants to account, &c. The bill is not verified by the oath of the complainants, or any other in their behalf; and the defendants, in answers which they file, insist that, for this defect, the bill cannot be successfully prosecuted; and, they further contend, that Stephen Hilton is improperly joined with his wife as complainant. It is also insisted, that the bill is fatally defective, because James Rogers and Jane Hilton, the widow of the testator, and who is the devisee in the will, of the premises, are not made parties defendant. It is also alleged in the answers, that the plaintiffs are not entitled to the relief sought in the bill, or to any relief in equity; and that, at the time mentioned in the bill, when Rogers gave his notes, as therein stated, he gave an absolute deed of the premises to the testator, and, if a bond of defeasance was executed by the testator at the same time and delivered to Rogers, under a subsequent arrangement between those parties, the notes of Rogers were surrendered to him, and, in consideration thereof, the bond was surrendered to the testator. The whole matter is submitted on bill, answers and proof, and the parties have been heard by their respective counsel.

1. The bill is not regarded, as technically one for discovery, and its verification is not necessary. Story's Equity Pl. § 288; Rules of Chancery Practice, 18 Maine, 444, Rule 2; 37 Maine, 581, Rule 1.

2. By the statute of 1848, c. 73, § 1, and by R. S. of 1857, c. 61, § 3, Stephen Hilton was properly joined with his wife in the bill as a complainant.

3. James Rogers had released all his interest in the premises to the plaintiff, Agnes Hilton, before the institution of this suit, absolutely, and also to the bond of defeasance; and, by a well established principle in equity pleading, no necessity for his being made a party existed.

4. The will of Nathaniel Hilton is among the exhibits of the case, and it appears, therefrom, — that the testator devised the premises to his wife and her heirs forever; and, from copies of proceedings in probate, it cannot be doubted, that his estate is solvent, and that all debts and legacies have been paid. If, however, it were otherwise, such condition of the estate would have no bearing upon the question, whether Jane Hilton should be made a party to the bill.

The necessity of making the devisee of the premises a party in the suit, is denied by the plaintiffs' counsel, and he relies upon the cases of *Johnson* v. *Candage*, 31 Maine, 28, and *Taft & als.* v. *Stevens*, 3 Gray, 503, in support of his denial. These cases are quite distinguishable from the one before us, and the doctrines thereof, which we do not controvert, have no application to the question here raised.

Who are the proper parties to be made defendants in a bill to redeem real estate under mortgage? It is a general rule in equity, that all persons legally or beneficially interested in the subject matter of a suit, should be made parties. Story's Equity Pl. § 77. And, again, it is said in section 188 of the same work, "it may be stated, in general terms, that all persons ought to be made parties, whose interests or rights may be affected by the decree. The mortgagee, is, of course, the only necessary proper party, in all cases where there is no other outstanding interest under him. If the mortgage is in fee, and the mortgagee is dead, the heir at law of the mortgagee, or other person in whom the legal estate is vested, by devise or otherwise, must be made a party; because he has the legal title and is to be bound by the decree. And the personal representative of the mortgagee, also, must be made a party; because, generally, he is entitled to the mortgage money, when paid, as it is to be returned to the same fund out of which it originally came."

The bill cannot be maintained as it now stands.

But, that the parties may have no further controversy, if it can be avoided, it may not be improper very briefly to indicate our views, upon the evidence before us, of their rights.

The deed from Rogers to the defendants' testator was, upon its face, absolute and unconditional. But, as a part of the same transaction, the grantee gave to the grantor an instrument of defeasance. This, with the deed, constituted a mortgage. In April or May, 1843, nothing having been paid on the notes, and the mortgager having had the possession of the premises, a negotiation was entered into between the parties to the mortgage, by which, for a consideration agreed upon, the title of the mortgagee was to become absolute, and, on May 1, 1843, a receipt was given to him in the following terms:—"May 1, 1843. This day reckoned with Nathaniel Hilton, and found that said Hilton has paid me, on the farm, that I now live on, $1531,59. James Rogers." About this time, James Rogers moved from the farm described in the bill, and Nathaniel Hilton went into possession, and remained in possession till his death. It is fully proved that the amount due upon the notes given by Rogers to Hilton, and secured by the mortgage, was a part of the sum for which the receipt was given, and that the notes were given up to Rogers, who produces them. This would render it reasonable to suppose that, under the new arrangement, by which the testator was to acquire an absolute and indefeasible title to the premises, that the bond of defeasance would be cancelled and given up. And there is evidence tending to prove, that this was actually done; but, from other evidence in the case, it would appear, that the parties to that negotiation gave little attention to the bond, further than to agree, orally, that it should be given up when the transaction should be made complete, according to their agreement. As the evidence is now presented, it may be regarded as doubtful, at least, whether the bond was ever cancelled, as it is now in the possession of Rogers. Even if it was agreed to be surrendered, that is not sufficient, without further acts, and it must be treated as outstanding, though such agreement be established.

But if the bond is uncancelled, the notes are unpaid and are so treated by the complainants themselves. A difference of opinion between the parties to the mortgage having arisen,

in reference to the sum to be allowed as the value of the premises, it is probable, from the evidence, that they postponed the final settlement in relation to the new arrangement, from time to time, till the death of the testator; both parties treating the matter as one, which would end in the acquisition of a perfect title by Hilton.

If it should turn out that the bond was not surrendered, the mortgage is still open. *Farrar* v. *Farrar*, 4 N. H., 191. And the complainants are entitled to redeem.

If a new suit should be instituted, with proper parties, and the Court should hold that the plaintiffs would be entitled to a decree allowing them to redeem, an account would be taken, of necessity, by a master, unless the parties could agree. And if they should stand upon their strict rights, it may be a question so complex, as to be regarded as one of delicacy.

We see no reason why the plaintiff, Agnes Hilton, does not stand in the place of James Rogers, having no different rights and obligations than those which attached to him before his deed of October 8, 1849.

The sum to be paid in order to redeem, if any, will be what is due in equity and good conscience; if the balance should be in favor of the complainants, execution may be awarded for such balance. R. S., 1857, c. 90.

It now appears that large sums had been advanced by the testator to Rogers, in order to make the title of the former absolute, over and above the sum due upon the mortgage notes, some of which were prior to the new negotiation, and which it was agreed should be paid, in order that the redemption should take place. The possession of the testator was taken, in connection with the new negotiation, when the notes of Rogers were surrendered; and it cannot be said that the possession was taken and held under the mortgage, but by virtue of the informal contract to become the unconditional owner of the estate.

The complainants seek equity, standing in the place of Rogers. Can they contend that the large sums which may have been realized by the testator in rents and profits, shall be applied to reduce the amount of the notes secured by the

mortgage, rather than to operate as a set-off to the money, which he paid as the consideration of an indefeasible title to the farm, which he never acquired? And can it be insisted that, if the testator caused improvements upon the premises, that, in order to redeem, the value of them shall not be also paid? It is the business of a court of equity to afford protection in such cases, but not to punish a party for his ignorance or carelessness, merely, further than is required for such protection. *Green* v. *Winter*, 1 Johns. Ch. 26.

If the complainants should hereafter, in another suit, obtain the right under a decree, to redeem the premises, care will undoubtedly be taken, so far as equity principles will allow, that the redemption may be obtained by the payment of such a sum as will be found due, upon a proper account taken in equity and good conscience; but that they shall not be relieved from allowing such sums as may be required of them by well settled rules. *Bill dismissed with costs.*

RICE, APPLETON, HATHAWAY, MAY, and DAVIS, J. J., concurred.

GOING HATHORN *versus* NATHANIEL M. TOWLE.

THE defendant was a stockholder in the Kennebec and Portland Railroad Company, and plaintiff brought his action against him to recover a debt which he had failed to collect of the corporation.

The case came before the full Court on demurrer, and was argued by

D. D. Stewart, for plaintiff, and by

J. S. Abbott, for defendant.

No written opinion was prepared. The case of *Coffin* v. *Rich*, 45 Maine, 507, was considered decisive of this, and the Court directed an entry of *Plaintiff nonsuit.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT.

1858.

COUNTY OF PENOBSCOT.

THEOPHILUS CUSHING *& al. versus* MATHIAS E. RICE *& al.*

If an agent makes a purchase of a quantity of lumber for his principal, without disclosing his agency, taking a bill of sale to himself, and paying therefor according to the bill, if the lumber falls short in quantity on delivery, the principal may recover back the excess of payment by an action in his own name.

In such an action, evidence that the purchase was for the principal, is admissible, notwithstanding the agent took the bill of sale to himself, and then gave another bill of sale of the same lumber from himself to his principal.

Evidence is also admissible that the vendors warranted the lumber, in quantity and quality, though the bill of sale contains no such warranty.

Evidence of false and fraudulent representations is also admissible, though contradictory to the bill of sale.

In an action to recover back a part of the consideration paid for a quantity of lumber, on the ground that it fell short of the quantity agreed to be delivered, it is not necessary for the plaintiff, first to offer to rescind the contract, or to restore that which has been delivered.

EXCEPTIONS from the rulings of CUTTING, J., and motion for a new trial.

This was an action of ASSUMPSIT for money had and received. The plaintiffs claimed to recover back money paid to

the defendants, on the ground that certain lumber purchased by them was inferior in quality, and less in quantity, than the defendants contracted to deliver.

It appeared in evidence, that Bragg & Moor, in May, 1854, bought of the defendants a quantity of lumber, taking a bill thereof, of which the following is a copy.

"Bragg & Moor bought of Haynes & Rice, to be delivered at North Twin Dam,—

7,698 spruce logs, containing	927,161 feet,	
9,337 spruce and Norway pine logs,	1,389,765 feet,	$21,000 00
639 timber and old pine butts,	154,972 feet,	
Interest, commission, &c.,		640 00
Scaled by M. Webster,		$21,640 00

"Settled and received payment by drafts on Cushing & Co., Frankfort. Haynes & Rice."

"July 1, 1854."

Bragg & Moor, on the same day, gave Cushing & Co. a bill of sale of the same lumber, taking their acceptances for the price, which they indorsed to the respondents in payment.

The plaintiffs offered testimony to prove that Bragg & Moor bought the lumber of the defendants as the agent of the plaintiffs. This testimony was objected to on the ground that it was contradictory to the written bills of sale; but it was admitted by the Court.

The plaintiffs also offered testimony to prove that the defendants falsely and fraudulently represented to Bragg & Moor that the lumber corresponded in quantity and quality with Webster's scale bills, and the bill of sale; and that it fell short in quantity on delivery. This testimony was objected to by the defendants, but admitted.

It was contended on the motion for a new trial that the verdict for the plaintiffs was against law, and against the evidence. There was no evidence that the plaintiffs had offered to rescind the contract, or to return the lumber or any part thereof.

The case was argued by *A. Sanborn,* for the defendants.

1. The bill of sale given by the defendants was to Bragg & Moor, and was a written contract. Parol evidence was therefore inadmissible to show that the contract was really with the plaintiffs, through Bragg & Moor, as their agents.

2. The bill of sale contained no warranty. Parol testimony was therefore not admissible to prove that the sale was with a warranty. Parsons on Contracts, 472; *Van Ostend* v. *Reed,* 1 Wend. 424; *Wilson* v. *Marsh,* 1 Johns. 503; *Reed* v. *Wood,* 9 Verm. 285; *Lamb* v. *Crafts,* 12 Met. 353; *Dean* v. *Mason,* 4 Conn. 432; *Randall* v. *Rhodes,* 1 Curtis, 90.

There was no offer to return the property or to rescind the contract, before commencing this suit. The action, therefore, cannot be maintained. Chitty on Contracts, 276; 1 Parsons Con. 475, (491,) and cases there cited; 2 Parsons Con. 276, and notes, s, t, u, v.

Ingersoll argued for plaintiffs.

It is a well established rule of law, that, in parol contracts, an agent may contract in his own name for the benefit of his principal, and that the principal may maintain an action in his own name to enforce it.

Story on Agency, § 61, says, "A few cases may be sufficient in this place, (as the subject will necessarily occur in other connections hereafter,) to illustrate not only the exceptions to the general rule, as to sealed instruments, but also the more liberal doctrine applicable to unsealed instruments. Thus, for example, upon a written contract made by a factor in his own name, for the purchase or sale of goods for his principal, he may sue and be sued thereon, exactly as if he were named in it; for it is treated as the contract of the principal, as well as that of the agent. So, if an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon; for it is treated properly as a contract, to which the principal, as well as the agent, is a party. So, if a master of a ship, by a written contract in his own name, should contract for or order

repairs, the owner may be sued therefor, as well as the master; and the contract will be treated as the several contract of each. So, a bottomry bond, properly entered into by the master of a ship, in his own name, will bind the owner; and a charter party made by the master, in his own name, or a bill of lading signed in his own name, in the usual course of employment of the ship, will bind the owner."

And in § 60, it is said, "the doctrine maintained in the more recent authorities is of a far more comprehensive extent. It is, that if an agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent, or not, whether the principal be known or unknown, he, the agent, will be liable to be sued, and entitled to sue thereon, in all cases, unless, from the attendant circumstances, exclusive credit is given to the agent."

Formerly, in contracts under seal, and even now, as a general rule, an agent must make use of his principal's name, in order to bind him. It must be the deed of the principal, and not of the agent; but, in all *parol* contracts by an agent, he may or may not disclose his principal, and still bind him. The necessities of trade and commerce have required a more liberal doctrine than was allowed under sealed instruments.

The question, stated in the strongest terms against the plaintiff, is, that parol evidence was received, to prove an agency in purchasing the logs, without disclosing the principals.

The exceptions allege that plaintiffs offered "*testimony*" to prove that Bragg & Moor bought the said lumber of defendants, for plaintiffs, acting as their agents. Where an agent contracts in his own name, he binds himself, as well as his principal; and Story, in § 270, says, "there is no doubt that parol evidence is admissible, in behalf of one of the contracting parties, to show that the other was an agent only in the sale, though contracting in his own name, to fix the principal."

In a note to section 270 of Story on Agency, the law upon this point is fully discussed, and several English cases are cit-

ed. In *Higgins* v. *Senior*, 8 Mees. & Wels. 440, Mr. Baron PARKE, in delivering the opinion of the Court, said, "there is no doubt that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contracts, so as to give the benefit of the contract, on the one hand to, and charge with liability, on the other, the unnamed principals; and this, whether the agreement be, or be not required to be in writing, by the statute of frauds."

In another case, cited in said note, *Sims* v. *Bond*, 5 Barn. & Adol. 393, the Lord Chief Justice, in delivering judgment, said, "it is a well established rule of law that where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue on it. This rule is most frequently acted on in sales by factors, agents, or partners, in which cases either the nominal or the real contractor may sue."

It is further stated in this note, on the authority of several English cases, that "the true rule is, that parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract."

According to this doctrine, which appears to be established by a large number of authorities cited by Story, it would follow that it is competent for plaintiffs or defendants to prove the agency of Bragg & Moore, by parol, in an action against each other; while it would not be competent for Bragg & Moor to prove such agency in a suit against themselves, on this contract of sale, by either plaintiffs or defendants.

In a suit by these defendants against Bragg & Moor, for the consideration money of the contract, they could not prove, in defence, that they were only agents, and not liable because they disclosed their principals; because the contract of sale showed them to be principals, and such evidence would vary or alter the written contract. But the defendants could, in an action for the same, against these plaintiffs, prove Bragg & Moor agents, for the purpose of introducing a new party;

and, for such cause of action, the defendants would have a remedy against either Bragg & Moor or plaintiffs. And, for the same reason, the plaintiffs may have their remedy against these defendants.

If the bills of sale from Rice & Haynes to Bragg & Moor, and from Bragg & Moor to Cushing & Co., show they acted as principals, by the authorities cited, parol evidence may be here introduced, to prove the agency and introduce another party to the contract. Cushing & Co. have a remedy on these defendants as well as Bragg & Moor.

This rule of law is now well established in the English courts, by the decisions above alluded to, and by Judge Story, in the notes to his Commentary on Agency, and who gives them his full approval and sanction as the law of this country. By the decisons in Massachusetts and New York, there is an apparent conflict with this law of agency, though the decisions on the subject were long ago made, and upon contracts excepted from the operation of it in the English courts, to wit, promissory notes and bills of exchange.

In the *New England Marine Ins. Co.* v. *DeWolf*, 8 Pick. 56, the Court say, that the rule "that an agent, or attorney, to bind his principal, must sign the name of the principal, applies only to deeds, and not to simple contracts." The same principle was decided by this Court, in *Andrews* v. *Estes & als.*, 2 Fairf. 267.

The principle contended for in this case appears to have been adopted by this Court, in *Upton & al.* v. *Gray*, 2 Greenl. 373, and also in *Williams & al.* v. *Mitchell*, 17 Mass. 98. And the same reasons are given for their conclusions in these cases, as are given in the English cases cited by Story, viz., — that the admission of evidence to introduce a new party to a parol contract, made by an agent, rests upon the same principles and necessities as of *dormant* partners. The Court, in *Williams & al.* v. *Mitchell*, say that the case is somewhat analogous to dormant partners, but much stronger, and the case of *Upton* v. *Gray* is decided on the authority of *Williams* v. *Mitchell*, and approves it, and the reasonings.

The opinion of the Court was delivered by

CUTTING, J.—In this case, the exceptions disclose no objection to the *form* of the action, or to the instructions of the presiding Judge; but only that certain testimony was illegally admitted.

The action is brought to recover back money paid to the defendants for certain logs, which, although embraced in a bill of sale, the plaintiffs say they have never received. It appears from the bill of sale, dated May, 1854, *that* "Bragg & Moor bought of Haynes & Rice" (the defendants) a certain specified number of logs and feet, "to be delivered at North Twin Dam." And it further appears, from another bill of sale of same date, that "Messrs. Cushing & Co. (the plaintiffs) bought of Bragg & Moor, at North Twin Dam," the same lumber, since both bills contain the same number of logs, quantity and marks. The plaintiffs then further offered parol testimony, tending to show that the lumber was purchased of the defendants by Bragg & Moor, while acting as their agents, which was ruled to be admissible, against the defendants' objection.

In 1 Am. Lead. Ca. 643, where many authorities on this point are collected, it is held that, "In case of a purchase or exchange of goods, by an agent, even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, vests in the principal; and the right of action upon an implied warranty, or on fraudulent representations made to the agent, is in the principal; for the damages, which ground the action, follow the property." In addition to the authorities referred to on this point by plaintiffs' counsel, *vide Eastern Railroad Co.* v. *Benedict*, 5 Gray, 561, and the cases there cited.

Exception, in the second place, is taken to the admission of testimony as to false and fraudulent representations made by the defendants to Bragg & Moore, as irrelevant, and because it explained or contradicted the bills of sale. If Bragg &

Moor were acting as the agents of the plaintiffs, any representations made to them would be as material as though they were made to the principals. And whether such representations were introduced for the purpose of explaining or contradicting the bill of sale, it does not appear; however that might be, a party to a contract obtained by his fraud, can never shut out such testimony and shield himself under such a pretence. It is not the case, where a bill of sale made in good faith excludes parol evidence of warranty, as in *Lamb* v. *Crafts*, 12 Metc. 353. *Randall* v. *Rhodes*, 1 Curtis, 90, and other cases cited by defendants' counsel.

Again, it is contended that this action cannot be maintained, because, prior to its commencement, there was no offer on the part of the plaintiffs to rescind the contract or to restore the lumber to the defendants. It appears, from the first bill of sale, that the defendants received payment for the lumber by drafts on the plaintiffs, and this action is not brought to recover back the whole consideration, but only a part proportional to the logs not "delivered at North Twin Dam." It is founded on a failure of consideration in part only; it seeks to recover only the contract price paid for as many logs as were not so delivered. Whether the jury found that there had been fraudulent representations in making the sale, or otherwise, the case nowhere discloses, or upon what grounds the verdict was returned. The words, "to be delivered at North Twin Dam," create an obligation executory on the part of the defendants, to deliver the quantity of lumber mentioned in the bill of sale at that place, and if not all delivered, such circumstance did not prevent the plaintiffs from receiving what was delivered. The plaintiffs do not seek to rescind the contract, but to enforce it, and the authorities, therefore, cited by the excepting counsel on this point, have no very material application.

We perceive, from an examination of all the evidence reported to sustain the motion, that it was somewhat conflicting, and came appropriately within the province of the jury

to weigh and consider, and we cannot discover any sufficient reason to disturb the verdict; consequently the

Exceptions and motion are overruled.

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

WILLIAM RAMSDELL, *in Equity, versus* CYRUS EMERY *& als.*

If the obligee of a bond, for the conveyance of land, assign such bond to a third party, with a verbal agreement that it shall be held as collateral security for sums due on account, and the account not being paid, the assignee of the bond pays the obligor, and takes a deed to himself, there is no implied resulting trust.

And if, afterwards, the parties compromise, and settle their accounts, and give mutual discharges, without mentioning the land so conveyed, but which is really worth less than the amount due from the original obligee of the bond, he is not entitled to have a conveyance to himself, and a court of equity will not interfere.

THIS was a BILL IN EQUITY, in which the plaintiff sought to compel the defendants to convey to him one third part of township number 8, in the 4th range, and to account for certain quantities of lumber sold therefrom. The case was heard on bill, answers and proof.

It appeared that, in 1844, the plaintiff procured from one Benjamin Shaw, a bond for the conveyance of one undivided third part of the said township, which bond the plaintiff assigned to the defendants, as collateral security for sums already due on account, and for such further advances as they might make for him. There was no written agreement relating to such collateral holding. The defendants also held other collaterals.

In 1845, the plaintiff was indebted to the defendants more than five thousand dollars, which debt increased from year to year, until, in 1847, it amounted to over nine thousand dollars. The defendants then paid Shaw the amount due for

the one third of said township of land, and took a deed thereof to themselves.

The debts due to the defendants, from the plaintiff, continued to increase, annually, instead of diminishing, until October, 1850, when they amounted to $32,521. He being then unable to pay, if not actually insolvent, the parties entered into a settlement, by which, upon certain conditions, the plaintiff surrendered all his interest in the collaterals held by the defendants, and they exchanged mutual discharges from all demands. But there was no surrender of any interest in township number eight, because, as the defendants allege, they already had the title thereof. They thereupon took possession of all the property and occupied it as their own,—but, still keeping an account of the proceeds thereof for their own satisfaction, and, as partners, to be able to adjust the operation among themselves.

The defendants alleged that the entire proceeds of the property, exclusive of the township number eight, did not amount to so much as the plaintiff's indebtment to them by $14,144,27, and that said township was worth far less than that amount. They admitted that they, after the settlement in 1850, gave permits, and operated on said township, as they claimed the right to do; but they alleged that said operations resulted in a loss, instead of a gain, to themselves,—so that, while they denied their liability to account to the plaintiff, there was no balance in their hands.

The case was argued by *N. Wilson*, for the plaintiff, and—

A. W. Paine, for the defendants.

The opinion of the Court was delivered by

Goodenow, J.—The bill seeks a decree to compel the defendants to make a conveyance of one third part of township No. 8, to the plaintiff; and further, to compel them to pay such sums of money as may be due for stumpage, &c.

In *Fisher* v. *Shaw & als. in equity*, 42 Maine, 32, it was held that no relief could be decreed by ordering a conveyance

of real estate, where there was no written obligation between the parties. This is not, in our opinion, a case of resulting trust. The last payment made to Shaw, the obligee, was made by the defendants. It was their own money. The deed from Shaw to them was absolute. They were willing to sell to the plaintiff at cost, and that he should have a right of preëmption; and, for this purpose, they kept an account of the profits and loss, arising from their interest in this township. In all cases of implied trust, the right is perfect when the money of the *cestui que trust* has been paid. The land is substituted for the money.

But it appears that various settlements have been made between the parties. That their business transactions had been of long standing, and were various and complicated. That, as late as October 23, 1850, and November 1 & 2, 1852, there was a final settlement, and there was found due from the plaintiff to the defendants the sum of $32,521,92, for which, as the plaintiff alleges, they held townships No. 7 & 8, and personal property, as collateral security.

By the terms of that settlement, according to the proof, we are led to the conclusion, that it must have been the fair understanding of the parties at that time, that the title of $\frac{1}{3}$ of township No. 8 was to remain, undisturbed, in the defendants, where it then was, absolutely.

From the proof in the case, the whole property received by the defendants as collateral security, for advances made by them to the plaintiff, including $\frac{1}{3}$ of township No. 8, was found insufficient to save them harmless by more than $12,000. It appears to have been a losing concern all round. The plaintiff lost his time and they lost their money.

The bill must be dismissed, with costs for defendants.

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

EBEN S. COE *versus* JOHN H. WILSON.

Where, by the terms of the lease of a farm, occupied by the lessee, it is stipulated that "all the hay and straw shall be used on said farm," the hay raised thereon by the lessee is subject to this condition, and cannot be attached or taken on execution by his creditors.

THIS was an action of TRESPASS, brought by the owner and lessor of a farm, against a deputy sheriff, who attached a quantity of hay raised thereon, as the property of the lessee. The attachment was upon a writ in favor of one of the creditors of the lessee, and the hay was afterwards sold on execution.

The following is a copy of the lease:—

"This memorandum of agreement by and between E. S. Coe on the one part, and H. D. Watson on the other part, witnesseth, that said Watson agrees to take and manage the Lawrence farm, in Newport, upon the following conditions, viz.:—to occupy the best house with his family, lease the other house, and collect and account for half the rent yearly, cultivate and plough such portion of the fields as required from time to time, and cut the grass in good season, and do all the farming work in good and proper season, and carry on said farm in good and husband-like manner, and do all that is necessary to keep the fences in good repair, and deliver to said Coe, or sell for his benefit, one-half of all the products of said farm yearly, and one-half of all the growth on the stock, when the same is sold, all of said hay and straw to be used on said farm; said Watson to furnish all the tools, excepting one set of cart wheels and carts and one breaking up plough, and pay one-half of the taxes yearly. Said Coe agrees, on his part, to furnish said Watson with the stock for the farm, viz.:—one yoke of oxen, two cows, one horse, two shoats, and such other stock as may be necessary for the farm, and one large plough and one set of cart wheels,—all to be charged at cost; and when said stock is sold, one-half of all gain or loss to belong to said Watson; and said Coe to pay

for all manure and plaster of Paris put on the farm this season, and pay for setting over the fences around the field, and repair the house and barn. When said Watson leaves the premises, the stock is to be appraised, and hay, and one-half of all the gain or loss to belong to him. This agreement to continue from year to year, unless otherwise altered, and continue in force as long as said Watson remains on said farm; and, when he intends to leave, he is to give six months' notice. All of said stock and tools furnished and to be furnished, to be and remain the property of said Coe; all my part of the crops and the growth of stock to be held as collateral security to pay my notes to said Coe, and advances, from time to time, until paid in full with interest."

Signed, "E. S. Coe. "Henry D. Watson."

The foregoing lease was made May 8, 1854, and Watson immediately took possession of the farm, and continued in the occupation thereof until after the commencement of this suit. He cut the hay on the farm in 1857, and, after it was put in the barn, August 26th, a part of it was attached by the defendant, upon a writ in favor of one Sullivan Lothrop.

The case was argued by *A. W. Paine,* for the plaintiff.

D. D. Stewart, argued for the defendant.

The contract between the plaintiff and H. D. Watson, provides that Watson shall "carry on the farm," on which the hay grew, "in good and husband-like manner, and deliver to said Coe, or *sell* for his benefit, one-half of all the products of said farm, yearly, and one-half of all the growth on the stock, when the same is sold."

Towards the close of the contract the following language is used:—"This agreement to continue from year to year until otherwise altered, and continue in force as long as said Watson remains on said farm, and, when he intends to leave, he is to give six months notice."

This contract is clearly a lease from year to year, in the strictest sense of the law, with a proviso for six months no-

tice to quit; the farm to be carried on for a rent of one-half of the crops.

For any breach of the lease by Watson, the remedy is by suit at law. All the crops are raised by the labor of Watson, and are his property until a division and delivery to Coe. No such division or delivery has ever been had, and the hay was liable to attachment on Watson's debts. The case falls directly and fully within numerous decisions of this Court. It is unnecessary to cite more than three. *Turner* v. *Bachelder*, 17 Maine, 257; *Symonds* v. *Hall*, 37 Maine, 354; *Garland* v. *Hilborn*, 23 Maine, 442.

The closing language of the lease is as follows:—"All my part of the crops, (i. e. all Watson's part,) and the growth of stock, to be held as *collateral security* to pay my notes to said Coe, and advances from time to time, until paid in full with interest." This is undoubtedly a mortgage to the plaintiff, in terms. But when it was executed, on May 8, 1854, the property was not in existence. It was therefore invalid, as against an attaching creditor. *Jones* v. *Richardson*, 10 Met. 481; *Head* v. *Goodwin*, 37 Maine, 181; *Chapin* v. *Cram*, 40 Maine, 561.

Besides, the mortgage was never *recorded*, nor was there ever any *delivery* of the property to the mortgagee.

For these reasons, also, the mortgage was invalid as against an attaching creditor. *Bailey* v. *Fillebrown*, 9 Greenl. 12.

The opinion of the Court was delivered by

HATHAWAY, J.—Henry D. Watson had the possession and management of the plaintiff's farm, in pursuance of the contract of May 8, 1854. The question presented is whether or not the hay, which Watson cut on the farm, under that contract, was his property, and liable to attachment as such by his creditors. One of the stipulations in the contract was that all of the hay and straw should be used on the farm.

The case is not distinguishable in principle from *Lewis* v. *Lyman*, 22 Pick. 437, in which case the Court said what may,

with equal truth, be said of the contract in this case, that, "taking the whole contract together, it is manifest that the tenants had a limited right or interest in the hay and fodder; *to wit:* only such a right or benefit as would result to them, from having it given to the stock upon the farm, whereby their proportion of the produce of the dairy and of the produce of the stock would be increased." See also *Moore* v. *Holland*, 39 Maine, 307. The cases relied upon by the defendant were essentially different from this case, and from *Lewis* v. *Lyman*, as seems to have been the opinion of the Court in the case cited by the defendant, *Garland* v. *Hilborn*, 23 Maine, 446.

As agreed by the parties, the action must stand for trial.

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

WEBBER BARTLETT *versus* JOHN C. SAWYER *& al.*

If, in a suit upon a poor debtor's bond, the damages are reduced to the sum of five dollars, and the judgment rendered thereon for that sum, with costs, is paid, the original judgment is thereby paid and discharged to the amount of five dollars and no more.

But the fact, that the word "paid" is indorsed upon the execution issued on such judgment, without any evidence that it was done by the plaintiff, or by any one acting for him, is not sufficient evidence of such payment.

REPORTED by CUTTING, J., at the October Term, 1857.

THIS was an action of DEBT, on a poor debtor's bond. The facts sufficiently appear in the opinion of the Court.

The case was argued by *C. P. Brown*, for the plaintiff, and

H. P. Haynes, for the defendants.

The opinion of the Court was delivered by

RICE, J.—Debt on a poor debtor's bond, dated August 8, 1854. Plea, general issue, with a brief statement, alleging

that the bond was executed by the principal defendant under duress, and also that a former judgment, based upon the same original cause of action, had been paid.

The bond, execution and judgment, put into the case by the plaintiff, make for him a *prima facie* case.

To establish a defence, as set out in their brief statement, the defendants put into the case, under objection, several pieces of testimony, principally in writing, to which allusion will be made in the order of their dates, rather than in the order in which they were introduced in the case.

First, then, is a copy of a judgment recovered by the plaintiff against the principal defendant and one Charles H. Gilman, at the October term of the District Court, for the Eastern District, Penobscot County, 1842, for the sum of $28,24 damages, and $9,61 costs. This judgment was founded on a bond dated Nov. 24, 1841.

Next, in order of time, is the copy of a bond given by the principal defendant, with one E. N. Nickerson as surety. This bond is apparently founded upon the judgment above referred to, and is dated Feb. 1, 1844.

In relation to this bond, the defendant, who was called as a witness, testified that, some time in May, 1844, he thinks, he disclosed on said bond before Phineas Ashman and John McArthur, at Brooks, and took the poor debtor's oath, that he had no certificate of discharge, but he thinks one was made, but he has never seen it; that Mr. Ashman is dead; that McArthur lives in Augusta; that he has made search among said Ashman's papers for said discharge, but has not found it, and has written to McArthur, but has never seen him; that, at said disclosure, neither said Bartlett nor any one in his behalf, was present, nor does he know that said Ashman or McArthur were magistrates.

The defendant also introduced a copy of a judgment, evidently recovered on said bond, at the District Court for the Middle District, Waldo County, February term, 1845, for the sum of five dollars damage, and costs taxed at seventeen dollars and seventy-eight cents. Taking this evidence all

together, without any regard to its competency, it does not establish the fact that the principal defendant disclosed and was legally discharged, on the bond last above referred to, but the contrary. The action on that bond was entered at the August term, and was continued till the succeeding February term. From this fact, the inference is that the defendant appeared and answered to the action.

At the February term, the action was defaulted and judgment entered up for $5,00 damages, and $17,78 costs. Now, if the defendant had been legally discharged from said bond on his disclosure, the plaintiff would have failed in his action. The fact that judgment went for only five dollars damages, authorizes the inference that for some cause there was a hearing in damages by the Court, and that the penalty was reduced at such hearing.

The oral testimony of the defendant was also clearly inadmissible. There was no such diligence shown as would authorize the introduction of such testimony to supply the place of written evidence, if such existed.

The defendant therefore fails to show that he had been discharged on his disclosure, as he alleged, and, consequently, fails to show that the bond in suit was given under duress, if that question were open to him in this stage of the proceedings.

Next, has the judgment relied on by the plaintiff been satisfied by payment, or in any other way discharged?

The giving of a bond on an execution, and the recovery of judgment upon such bond, was at the time of these proceedings no satisfaction, or discharge of the original judgment, on which such execution issued. The giving of such bond had the effect only to liberate the person of the defendant from arrest or imprisonment, and all proceedings thereon were simply collateral to the original judgment, and operated in whole or part liquidation and discharge thereof as *payment* was actually made. *Spencer* v. *Garland*, 20 Maine, 75.

When the plaintiff sued his judgment, on which the bond now in suit is based, it would have been competent for the de-

fendant to have proved in defence to the action, or in reduction of damages, any payments which might have been made to the plaintiff, on collateral proceedings under the bond. He failed to do so, and it is too late now, even if such payments were actually made, to avail himself thereof in this proceeding.

The evidence, however, does not show any such payment as matter of fact. Or, to take it in its strongest possible light for the defendant, shows only the payment of five dollars which could by any possibility have been applied to the reduction of the plaintiff's judgment.

Thus, on the bond whereon the defendant claims to have disclosed, judgment was obtained for only five dollars damages, and costs. If the judgment, on this collateral proceeding, had been *paid*, the sum of five dollars only could have been applied in payment on the former judgment; the costs, being an expense incurred in the prosecution of that suit and incident thereto, could not have been thus applied.

But that judgment was not paid, as the defendant himself concedes, but was sued, and resulted in another judgment in favor of the plaintiff, in 1846, for $36,95 damages, and $10,25 costs. This last judgment, the defendant contends was paid by E. N. Nickerson, one of the defendants therein.

To prove the fact of payment by Nickerson, the copy of an execution, issued on such supposed judgment, is introduced, upon which is found this memorandum:—"Exo. paid by E. N. Nickerson." "Prove by him." It is admitted that this memorandum is all in the same handwriting, and was written at the same time, but by whom or when, does not appear. It is not in form of an officer's return, nor of a receipt, but had rather the appearance of a memorandum of a fact supposed to exist, and of the person by whom such supposed fact might be proved. The evidence is entirely insufficient to establish the fact sought to be proved thereby; but, were it otherwise, as we have already seen, it would only prove the payment of five dollars, of which the defendant might have availed himself, in defence of a former suit, out of which the bond now

before this Court originated. That, however, he did not choose to do. The fact of payment, therefore, even if proved, is now wholly immaterial.

What would have been the condition of the defendants, in relation to the bond in suit, had the fact of a former disclosure and legal discharge, under the poor debtor Act, been established, becomes immaterial. The defence relied upon failing, *A default must be entered.*

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

THOMAS J. STEWART *& als. versus* TIMOTHY REED *& al.*

The defendants chartered a brig, owned by the plaintiffs, "for a voyage from Bangor to Palermo and Messina, in the island of Sicily, and back to Boston or New York," for which they agreed to pay as follows: — "thirty-eight hundred dollars and all port charges, including consul's fees, interpreter's fees, and lighterage; and, if said brig is required to go to the second port before named, thirty-nine hundred and fifty dollars, and all port charges as above." The voyage was performed according to the written directions of the defendants, from Bangor to Messina, without calling at Palermo, and thence back to Boston; — *It was held*, that Messina was the "second port named" in the charter party, and that the plaintiffs were entitled to recover the sum of thirty-nine hundred and fifty dollars.

ASSUMPSIT upon account annexed, with the money counts. The plaintiffs claimed the sum of $3950, as due from the defendants, under a charter party, dated Oct. 22, 1856. The contract was not under seal. The defendants hired the brig Mary Stewart, owned by the plaintiffs, "for a voyage from Bangor to Palermo and Messina, in the island of Sicily, and back to Boston or New York." The vessel was to take "a full cargo of box shooks and dry lumber at Bangor, and a cargo of Sicily produce at Sicily." The defendants were to pay the sum of "thirty-eight hundred dollars, and all port charges, including consul's fees, interpreter's fees, and lighter-

age; and, if the brig [was] required to go to the second port, before named, thirty-nine hundred and fifty dollars, and all port charges, as above." And there were other stipulations in regard to the number of lay days, and demurrage.

The voyage was performed, under the written directions of the defendants. The vessel sailed directly from Bangor to Messina, passing by the harbor of Palermo without calling. The port of Messina is about two hundred miles beyond Palermo, by the coast line, and it was proved to be worth more to go there for that reason. It was also in evidence that, at both of the Sicilian ports, there are consul's fees, and interpreter's fees, but there are no such charges for an American vessel in New York.

The plaintiffs claimed the larger sum, $3950, on account of the vessel's having gone to Messina instead of Palermo. But the defendants contended that the vessel was bound, if required by them, to go to *both* of these ports, and that the alternative stipulation, in regard to freight, depended upon the return of the vessel to Boston or to New York. As she returned to Boston, they declined to pay more than $3800.

The case was brought to this Court on REPORT by APPLETON, J.

Sanborn argued for the defendants.

The brig, on her outward voyage, was to go to "Palermo *and* Messina." On her voyage homeward, she was to go to "Boston *or* New York." Palermo *and* Messina were the terminus of the one, and Boston *or* New York was the terminus of the other. She was bound, if required, to go to *both* of the former, but to only *one* of the latter. The former was fixed by the charter party; the latter was not fixed, but was to be determined by the choice of the defendants. Hence the stipulation, that "if said brig is required to go to the second port, before named," referred to Boston and New York, between which the defendants had the right of election. Of these, New York was the "second"; and, as the return voyage was made to Boston, the plaintiffs were entitled to recover only $3800.

The counsel for the plaintiffs contends that "and," connecting "Palermo" and "Messina", should be construed "or". This is sometimes done, where it is apparent from other parts of the instrument, that such was the intention of the parties. *Jackson* v. *Topping*, 1 Wend. 388; *Jackson* v. *Blanchan*, 6 Johns. 54. But in this charter party no such intention is apparent. It is clear that the parties intended that the vessel should go to both of the foreign ports, and only one of the home ports.

Peters, for the plaintiffs.

The opinion of the Court was delivered by

HATHAWAY, J. — The plaintiffs chartered the brig Mary Stewart of Bangor, to the defendants, for a voyage, "from Bangor to Palermo and Messina, in the island of Sicily, and back to Boston or New York," for the freight of thirty-eight hundred dollars, and all port charges, including consul's fees, interpreter's fees and lighterage, and, if said brig was required to go to the *second port*, before named, thirty-nine hundred and fifty dollars, and all port charges, *as above*." It was also stipulated that "the party of the second part shall be allowed for the loading and discharging of the vessel, at the respective ports aforesaid, lay days, as follows; that is to say,—dispatch at Bangor and Boston or New York,—twenty-five running lay days in both ports, in Sicily."

The case finds that, "by the written directions of the defendants, the brig went from Bangor to Messina, and back to the port of Boston, and performed *the voyage*, to the satisfaction of the defendants, and in pursuance of their directions of the same."

The question presented is whether, by the true construction of the charter party, "*the second port*" mentioned therein was Messina or New York. The plaintiffs contend that it was Messina, and the defendants insist that it was New York.

It was, obviously, contemplated by the parties that the brig might be required to go to one only of the ports in

Sicily. She went to but one, and to that by the defendants' written directions.

It is equally obvious that she might have been required to go to both ports in Sicily. There was a provision, in the charter party, for "twenty running lay days, in both ports in Sicily."

The charter party is in the form usual in such cases, and its plain meaning is that, as to her ports of destination, the brig should be under the direction of the defendants, limited to the ports specified, and that she should go to both ports, in Sicily, or either, and return to Boston or New York, as the defendants should require.

The stipulation for extra freight was, "if said brig is required *to go* to the second port before named." The brig was bound to go to Sicily "and back to Boston or New York." To go back is to return. The construction contended for by the defendants would not be in accordance with the common use of language. The port, to which the brig might be required *to go*, was one in which consul's fees, interpreter's fees and lighterage were to be paid; and the case finds that such charges were required to be paid in Messina, but none such, for an American vessel, in New York; and besides, by looking at the charter party, it will be perceived that Messina was *literally*, "the *second* port, before named," therein. The case is free from doubt.

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

MAHALA PALMER *versus* INHABITANTS OF BANGOR.

In a suit against a town for an injury to the plaintiff, caused by a defect in the highway in the town, the plaintiff is admissible as a witness under the statute of 1856, (R. S., c. 82, §§ 78, 79,) although no inhabitant of the town has been offered as a witness for the defendants.

EXCEPTIONS from the ruling of CUTTING, J.

THIS was an action against the city of Bangor for injuries sustained by the plaintiff, in consequence of an alleged defect in the highway. Upon the trial of the case, the plaintiff offered herself as a witness, before any of the inhabitants of the city had been called in defence. The counsel for the defendants objected to her admission, on the ground that the cause of action implied an offence against the criminal law on the part of the defendants. But the Court ruled that she was admissible as a witness, to which the defendants excepted.

The case was argued by *Briggs*, for the plaintiff, and by—

Waterhouse, with whom were *Ingersol* and *Kent*, for the defendants.

The opinion of the Court was delivered by

APPLETON, J.—It is enacted, by c. 266, § 1, of the Acts of 1856, that "no person shall be *excused or excluded* from being a witness in any civil suit, or proceeding at law or in equity, by reason of his interest in the event of the suit, as a party or otherwise, *except as is hereinafter provided;* but such interest may be shown for the purpose of affecting his credibility."

The language of this section is most general. More comprehensive phraseology cannot readily be imagined. *No person* is excused or excluded from testifying, by reason of his interest as a party or *otherwise*, "except as is hereinafter provided." The plaintiff, therefore, was properly admitted to testify, unless she was included in the exceptions "hereinafter provided."

The counsel for the defendants, to sustain their exceptions to her admission as a witness, rely on § 2, of the same Act, which provides, that "parties shall not be witnesses in suits where the cause of action implies an offence against the criminal law, on the part of the defendant, unless the *defendant shall offer himself* as a witness, *in which case* the plaintiff may also be a witness; and, in case the defendant in such suit *shall offer himself* as a witness, he shall be held to waive his *privilege* of not testifying, when his testimony might render him liable to prosecution for a criminal offence."

The argument urged is that, as a town is liable to indictment by reason of its roads being out of repair,—and as the cause of action is their being out of repair, which implies a criminal offence on the part of the defendants,—and as in suits where the cause of action implies a criminal offence, the plaintiff shall not be a witness, unless the defendant shall first offer himself as a witness,—that, inasmuch as none of the inhabitants were first called or received as witnesses, the plaintiff should not have been admitted to testify.

This argument, however, is without any foundation derived from the statute. The second section refers to "offences against the criminal law," which are *personal* offences on the part of the defendant, who shall offer himself as a witness, who is entitled to the privilege "of not testifying when his testimony might render him liable to prosecution for a criminal offence," and who, having this privilege, might waive it. It rests on the old maxim *nemo temtui suprum accusare*, which has been incorporated in the constitution in the clause providing that the accused "shall not be *compelled* to furnish or give evidence against himself." The Legislature, while admitting the parties, simply mean to preserve this clause of the constitution in full and unimpaired vigor.

Now, nothing of this nature can be predicated of a corporation, which cannot offer itself as a witness nor testify, and which, having no privileges "of not testifying," can waive none.

The correctness of this construction is still more apparent

when it is remembered that, by the then existing law, the inhabitants of a town were competent witnesses. If called for the plaintiff, in a suit against the town for its corporate neglect, they were not regarded as within the exemption from testifying, protected by the constitution. The purpose of the statute under consideration was to enlarge the admission of evidence. By § 2, the testimony of the plaintiff is made dependent upon the previous admission of the defendant, upon his own offer, and in cases where, but for the provisions of this statute, neither plaintiff nor defendant would have been received. It would be a forced and unnatural construction to regard a corporate neglect of duty, for which the witness could not be personally liable, and for which the corporation is indictable, as "an offence against the criminal law on the part of the defendant," on account of which he is to be excused from testifying, because "his testimony might render him liable to prosecution for a criminal offence."

Exceptions overruled.

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

NATHANIEL CROCKER, *in Equity, versus* LUKE B. CRAIG.

In a bill in equity brought by an administrator of an insolvent estate, to obtain a re-conveyance of land alleged to have been conveyed by the intestate, without consideration, to defraud his creditors, it must be alleged in the bill that the suit is instituted for the benefit of *all* the creditors of the estate.

This Court, when sitting in the several districts to determine questions of law, has no original jurisdiction, and cannot grant leave to amend. Such leave can be granted only at *Nisi Prius*.

THIS was a BILL IN EQUITY, inserted by the plaintiff in a writ of attachment, and was brought by him as administrator of the estate of one George Craig. He alleged his own appointment and qualification as administrator; the due return

of an inventory of the estate, in which was embraced the homestead farm of the deceased, valued at $650; that the estate was represented insolvent, and commissioners were duly appointed, before whom certain specified claims were proved and allowed for debts contracted by the intestate before February 1, 1855; and that, on that day, the said intestate conveyed said homestead farm to the defendant, without any consideration therefor, and with the intent, on the part of the intestate and the defendant, to defraud the creditors of the former. The bill concluded with a prayer for a discovery and for a decree for a re-conveyance of the premises. The writ was entered at the October term, 1857, and the defendant demurred generally to the bill.

The case was set down for argument upon the demurrer at the law term for the Eastern district, in May, 1858, when the plaintiff moved for leave to amend his bill, by adding to it the allegation that the creditors therein named were the only creditors of the estate.

Rowe & Bartlett argued for the plaintiff.

The creditors of the estate have no claim against the defendant for the penalty provided by the R. S. of 1841, c. 148, § 49, and R. S., 1857, c. 113, § 47.

The administrator is entitled to the aid of a court of equity, to obtain the real estate or the proceeds thereof. *Caswell* v. *Caswell*, 28 Maine, 232; *Fletcher* v. *Holmes*, 40 Maine, 364.

The aid of a court of equity is needed, both for discovery and for relief.

The Judge of Probate has no power to compel discovery in a case of this kind. His power is limited to a discovery in relation to personal property. R. S., 1857, c. 65, § 55.

By the provisions of c. 71, § 22, R. S., a Judge of Probate may grant license to sell lands fraudulently conveyed by the intestate. Before a license, there should be proof of the fact that the lands to be sold had been fraudulently conveyed; as the authority is not to license a sale of those suspected or charged to have been fraudulently conveyed. The fact should

be settled, too, prior to the sale. The sale of a law-suit is contrary to the policy of the law.

The statute contemplates a sale of *the land.* The sale of a disputed title to the land would bring far less in the market, than the land itself.

By the R. S. of Mass., c. 71, § 12, referred to in *Slomans, Ex'r,* v. *Brown,* 8 Met. 51, it is provided that, before proceeding to sell, the administrator shall obtain possession of the land by entry, or by action at common law. We have no such provision in our statute. That its omission is no defect in our statute, we think will be apparent to the Court on perusal of the case of *Norton* v. *Norton,* 5 Cush. 524, where, in a writ of entry by an administrator, the Court, in order to give a beneficial effect to that provision, and not do wrong to others, after the demandant had obtained a verdict, abandoned the course of proceedings at common law, and, instead of giving judgment on the verdict, seemed to have made something very like a decree of a court of equity, based upon the verdict.

In this State, no action could be maintained at law for the recovery of the land by the administrator. To bring about a result which would be just to all parties, such an one as that in *Norton* v. *Norton,* we have no recourse but to a court of equity.

D. D. Stewart, for defendant.

The defendant demurs to the plaintiff's bill, and presents the following grounds to the consideration of the Court:—

1. The plaintiff brings this bill as administrator on the estate of George Craig, deceased, and alleges that the defendant holds property conveyed to him by the deceased, in fraud of creditors; and he seeks to reach such property by the aid of this Court, sitting as a court of equity. The first objection, which is apparent on the face of the papers, is that the bill is not brought in behalf of *all* the creditors, but of *two* only. Such a bill cannot be sustained. *Fletcher, Adm'r,* v. *Holmes,* 40 Maine, 364.

2. The plaintiff has not exhausted his remedies at law, nor *tried any* of them.

He has not applied to the Judge of Probate to summon the defendant before him.

He has not brought his *writ of entry* to recover the land, which he might do if the facts are as the bill alleges. *Norton* v. *Norton*, 5 Cush. 524.

Nor has he brought a suit against the defendant, under the statute for fraudulently aiding and assisting in cloaking property from creditors. *Fletcher, Adm'r*, v. *Holmes*, 40 Maine, 364, before cited.

The case last cited is precisely such a case as the present. The whole subject is thoroughly examined and discussed by RICE, J., who drew the opinion of the Court, and the conclusion is arrived at that such a bill as the present cannot be maintained. This case is so recent that a further examination of authorities is wholly unnecessary. If the counsel should attempt to distinguish that case from the present, by saying that *this* embraces real estate and personal property, while *that* related to personal property alone, the answer is that the reasoning of the Court is general, and fully covers the present case. So long as the plaintiff has an adequate remedy at law, the Court hold that he cannot ask the aid of a court of equity. This is the substance of that opinion.

Now in the present case the plaintiff may bring his writ of entry at common law to recover the land. *Norton* v. *Norton*, 5 Cush. 524, before cited.

Or, he may bring his suit against the defendant, under the statute, for aiding to cloak the property. The statute embraces both real and personal property. R. S., (1841) c. 148, § 49; R. S., (1857) c. 113, § 47.

And there is another statute provision, expressly designed to meet this identical case, so far as the real estate is concerned. The R. S., (1841) c. 112, § 31, is as follows:— "Lands of which the testator or intestate died siezed in fee simple or in fee tail, general or special, and also all such estate as he had fraudulently conveyed, or of which he had been colorably disseized, with intent to defraud his creditors, shall be liable to be sold under any license for the payment

of his debts, under the provisions of this chapter." This provision is reënacted in R. S., (1857) c. 71, § 22.

Here, then, is a full, complete and perfect remedy, under this statute alone. There is no sort of occasion for the aid or interposition of this Court as an equity court. The plaintiff has three ample modes of redress at law. This would seem to be enough. It is unnecessary to consider whether he could have any aid from the Court of Probate, to enable him to reach real estate fraudulently conveyed by the intestate. It is not supposed that the power of the Court of Probate would extend to such a case. The language of the statute seems hardly broad enough to embrace it. But it is unnecessary to consider the question. The other remedies are clear and ample, and are decisive of the present case.

The opinion of the Court was delivered by

CUTTING, J.—It nowhere appears in the bill that the suit was instituted for the benefit of all the creditors, consequently the demurrer must be sustained. *Fletcher, Adm'r,* v. *Holmes,* 40 Maine, 364.

As a court of law, sitting *in banc,* we cannot entertain the motion for an amendment. R. S., c. 77, § 17, gives us jurisdiction at such times over "cases in equity presented on demurrer to the bill; or when prepared for a final hearing." Amendments can be permitted only at the *Nisi Prius* terms, and before the plaintiff joins in demurrer, after which we can determine nothing but the issue presented. The case goes back, where the Justice presiding may not, or may, grant the amendment upon terms, or even without terms, as he may deem equitable; provided the plaintiff shall think proper there to renew his motion, and shall have a reasonable confidence and expectation that his bill when amended will be sustainable and his prayer granted, or that the question of jurisdiction will be opened to him after the decision in *Caswell* v. *Caswell,* 28 Maine, 235.

Demurrer sustained.

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

1859.

COUNTY OF AROOSTOOK.

THOMAS HOWE *& als., Petitioners, versus* COMMISSIONERS OF AROOSTOOK COUNTY.

The proceedings of the County Commissioners, under the Revised Statutes of 1841, c. 25, § 44, in laying out a road over unorganized lands, and over a number of townships, must show at whose expense such road is laid out over any one of the townships; whether at the expense of the proprietors of such township, or of the county, or partly at the expense of each; nor is it competent for the Commissioners to order that one of such townships shall pay the expenses of opening and making such road through other townships.

The Commissioners must also decide whether, in their opinion, a township over which such road is laid would be enhanced in value thereby, and they must assess upon each tract, which they consider to be enhanced in value, such sum as in their opinion would be proportionate to the value and benefits likely to result from the establishment of such road.

PETITION FOR CERTIORARI, and to quash the proceedings of the County Commissioners of Aroostook, laying out a road through townships Nos. 14 and 15 in range 6.

The case was submitted to the full Court upon a copy of the record of the proceedings of the County Commissioners, in laying out and establishing the road, the Court to make such disposition of the matter as the law requires.

The following are copies of such parts of the petition for *certiorari*, and of the proceedings of the Commissioners, as are necessary to understand the determination of the Court.

"*To the Hon. Justices of the Supreme Judicial Court:*—

"Respectfully represent, Thomas Howe of Dorchester, in the Commonwealth of Massachusetts, Cyrus S. Clark, William H. McCrillis and George K. Jewett, all of Bangor, in the county of Penobscot and State of Maine, and Edward D.

Jewett of St. Johns, in the Province of New Brunswick, that, at the July term of the Court of County Commissioners for Aroostook county, A. D. 1851, one John F. H. Hall and nine others, all inhabitants of said county of Aroostook, entered their petition, in which they represented "that the road then traveled, from township No. 11, range 5, was inconvenient to travelers and expensive to make and maintain," and asked said Court of County Commissioners "to survey said road, commencing at the south line of township No. 11, range 5, where it crosses the State road, and thence continuing north, on or near said State road," through townships No. 11, range 5, No. 12, range 5, No. 12, range 6, No. 13, range 6, No. 14, range 6, No. 15, range 6, No. 15, range 7, No. 16, range 7, No. 17, range 7, No. 18, range 7, to Fort Kent, and lay out and locate a county road on said route; and thereupon, at said term of the County Commissioners for said Aroostook county, it was ordered that the said petitioners give notice to all persons and corporations interested, that the County Commissioners will meet at the house of George W. Smith, in township No. 11, range 5, on Tuesday the 7th day of October next, at 10 o'clock, A. M., and thence proceed to view the route mentioned in said petition, immediately after which view, a hearing of the parties will be had at some convenient place in the vicinity, and such further measures taken in the premises as the Commissioners shall judge proper. And that said notice be given by publishing an attested copy of the petition and this order thereon, six weeks successively in the Age, a newspaper published by the printer to the State, the last publication to be at least thirty days before the time of said meeting and view, that all persons may appear and be heard if they think fit." Said petition was thence continued from term to term of said Court to the January term, A. D. 1852, when said Commissioners of said Court made their return and report as follows:—

"Pursuant to an order of notice issued by the Court of County Commissioners for the county of Aroostook, at their July term, A. D. 1851, on the petition of John F. H. Hall &

als., we, the undersigned, Commissioners for the said county of Aroostook, met at the house of G. W. Smith, in No. 11, range 5, of townships W. E. L. S. on Tuesday, the seventh day of October, 1851, at ten o'clock A. M., and proof appearing that due notice had been given as aforesaid, and having viewed the route proposed, and heard the several parties and their proofs and allegations in favor of and against the same, are of opinion that the prayer of said petitioners ought to be granted, and we have accordingly laid out and located a highway or county road, according to the following courses and distances, as follows, viz.:—Beginning on the south line of No. 11, range 5, of townships W. E. L. S. in the centre of the State road, as now traveled, from Masardis to No. 11, about six rods from the north end of the bridge across the Squaw pond stream, so called." The report of said Commissioners then describes their location of said road, by courses and distances, and the townships through which they have laid it out, among other townships, through those numbered 15, range 6, and the 14th, range 6, of townships west from the east line of the State, to the new bridge built by the State across Fish river, near its junction with St. Johns river." The Commissioners, in their report, further state "that, believing no persons to be injured by the laying out of said highway or county road, or liable to be injured thereby, they have not awarded damages to any one;" and "that the opening and making of said county road shall be at the expense of the several owners of the tracts; that the lands over which said road passes, and other lands liable by law to be taxed for opening and making the same, are, or will be, enhanced in value to the amount of the expense of opening and making said road; that the term of twelve months from the time when all proceedings shall have been closed on the original petition, on which these proceedings are founded, is given the owners of the land, over which the road passes, to remove the timber from said lands, and the term of twelve months from the expiration of said twelve months, is given to said owners to open and make the same passable." This report and re-

turn thus made by the Commissioners, and by them signed, was made to said Court of County Commissioners, at their January term, A. D. 1852, and accepted by said Court at said term and recorded, and at the January term, A. D. 1853, of said Court, all proceedings were closed in said Court, as appears by the record.

"And your petitioners say that they are owners of tracts of land, through which said road was thus laid out by said Commissioners, namely, Thomas Howe, Cyrus S. Clark, William H. McCrillis, are owners of west half of township 15, range 6, and George K. Jewett and Edward D. Jewett are owners of said township 14, range 6.

"Your petitioners would represent to your honors that the proceedings had upon said petition were not according to the provisions of the statutes for laying out and locating public highways, and were defective by reason of the following errors; to wit:—

"1st. The Commissioners did not cause notice of the time and place of their meeting to view the premises, to be posted up in three public places in each town through which said route was laid out, or to be served on the clerk of such towns, or to be published in any newspaper in said Aroostook county, and it did not appear by the record that there was no newspaper published in said county.

"2. No personal notice was given or ordered to be given to the owners of the land over which said highway was proposed to be located, of the pendency of the petition and the time and place appointed to consider and adjudicate thereon, by service on said owners of attested copies of the petition and Commissioners' order thereon, fourteen days or more before the time appointed; nor does it appear that the owners of the townships and tracts of land through which said route was laid out, were unknown.

"3d. No notice was ordered to be given, or was given, of the time and place at which parties might be heard in opposition to said petition and road, or of the time and place to consider and adjudicate upon the said petition; nor was any

such place appointed by the Commissioners; nor does it appear at what time or place the hearing was had.

"4th. It does not appear by the record that notice was given of the petition and order thereon, by publishing them in the State paper.

"5th. Said County Commissioners did not order at whose expense so much of said road as is laid out through said township, numbered 15, range 6, shall be made, and did not order whether at the expense of the proprietors of said township or of the county of Aroostook, or partly at the expense of each.

"6th. Said County Commissioners did order that said township 15, range 6, should bear part of the expense of opening and making said highway through other townships and tracts.

"7th. Said Commissioners did not decide whether, in their opinion, said township numbered 15, range 6, would be enhanced in value by said highway. The same errors as the last three, Nos. 5, 6, 7, exist in the proceedings of said Commissioners in regard to township numbered 14, range 6.

"8th. Said County Commissioners did not assess upon each tract, which they considered to be enhanced in value, such sum as in their opinion would be proportionate to the value and benefits likely to result from the establishment of said road.

"9th. If any hearing was had before the Commissioners, it was before the time of the view and not after, at the house of G. W. Smith, No. 11, and not at some convenient place in the vicinity.

"And your petitioners further say, that notwithstanding the insufficiency of the proceedings of said County Commissioners on said petition, and the errors in the order of notice and report, taxes have been assessed on said tracts of land, of which your petitioners are owners, for the laying out and making said highway; and that said tracts are liable to be sold therefor, unless your petitioners pay for the laying out and making said highway; and that the acts and doings of said Commissioners in the premises are contrary to law and to the great injury of your petitioners.

"Wherefore your petitioners pray your honors that you will grant and issue a writ of *certiorari* commanding the said County Commissioners to certify to this Court the records and proceedings aforesaid, to the end that the same may be quashed, and to grant unto your petitioners such other or different relief as justice and law may require.

"Thomas Howe & others."

Petition of John F. H. Hall and others for location of a county road in township No. 11, range 5, to Fort Kent.

"To the Court of County Commissioners to be holden at Houlton, within and for the county of Aroostook, July term, A. D. 1851.

"We the undersigned, inhabitants of the county of Aroostook, would respectfully represent that the road now traveled from township No. 11, range 5, is in many places inconvenient to persons traveling, and expensive to make and maintain. Wherefore your petitioners would ask that your honors would survey said route, commencing at the south line of township No. 11, range 5, where it crosses the State road, and thence continuing north, on or near said State road, through townships No. 11, range 5, No. 12, range 5, No. 12, range 6, No. 13, range 6, No. 14, range 6, No. 15, range 6, No. 15, range 7, No. 16, range 7, No. 17, range 7, No. 18, range 7, to Fort Kent; and lay out and locate a county road on said route.

"As in duty bound will ever pray.

"John F. H. Hall, and 9 others."

"STATE OF MAINE.

"AROOSTOOK, SS. "Court of County Commissioners, July Term, A. D. 1851.

"On the foregoing petition, ordered, that the petitioners give notice to all persons and corporations interested, that the County Commissioners will meet at the house of George W. Smith, in township No. 11, range 5, on Tuesday, the seventh day of October next, at 10 o'clock, A. M., and thence proceed to view the route mentioned in said petition; immediately after which view, a hearing of the parties will be had

at some convenient place in the vicinity, and such further measures taken in the premises as the Commissioners shall judge proper. And that said notice be given by publishing an attested copy of the petition and this order thereon, six weeks successively in the Age, a newspaper published by the printer to the State, the last publication to be at least thirty days before the time of said meeting and view, that all persons may appear and be heard if they think fit.

"Attest, B. L. Staples, *Clerk*."

"*January Term*, 1852.

"And the same was thence continued from term to term, to this term, and now the Commissioners make return and report in words and figures as follows; viz:—

"Pursuant to an order of notice issued by the Court of County Commissioners for the county of Aroostook, at their July term, A. D. 1851, on the petition of John F. H. Hall & als., we the undersigned, Commissioners for the said county of Aroostook, met at the house of G. W. Smith, in No. 11, range 5, of townships west from east line of State, on Tuesday the 7th day of October, 1851, at 10 o'clock, A. M., and proof appearing that due notice had been given as aforesaid, and having viewed the route proposed, and heard the several parties and their proofs and allegations in favor of and against the same, are of opinion that the prayer of said petitioners ought to be granted. And we have accordingly laid out and located a highway or county road according to the following courses and distances, as follows: viz." [Here follow the courses and distances.]

"And believing no persons to be injured by the location and laying out of said highway or county road, or liable to be injured by the opening of the same, we have not awarded damages to any one.

"And we would also report that the opening and making of said county road shall be at the expense of the several owners of the tracts, townships or plantations over which said highway or county road is thus located or laid out. And we would further report that the lands over which said road

passes, and other lands liable by law to be taxed for opening and making the same, are or will be enhanced in value to the amount of the expense of making and opening said road. And the term of twelve months, from the time when all proceedings shall have been closed on the original petition upon which these proceedings are founded, is given the owners of the lands over which said road passes, to remove the timber from said lands, and the term of twelve months, from the expiration of said twelve months, is given to the owners of the lands over which said road passes, to open and make the same passable.

"And we now hereby report such location and laying out, together with the boundaries and admeasurements of the same, to the Court of County Commissioners, at their January term, 1852, for their acceptance.

"Joel Wellington,
"J. Trueworthy,
"Milo Walton,
} *County Commissioners.*"

"Which return and report, being read and not contested, is now accepted, and said petition is now continued agreeably to statute provisions.

"Attest, B. L. Staples, *Clerk.*"

"*January Term*, 1853.

"Petition of John F. H. Hall & als., for road from No. 11, range 5, to Fort Kent.

"This petition was entered at the July term, 1851, at which time notice of a view and hearing of the parties was ordered, and the same was thence continued from term to term to the January term, A. D. 1852, when the Commissioners made return thereon, and caused the same to be recorded on page 358, vol. 1st. And the same was thence continued agreeably to statute provision, from term to term, to this term, and now all proceedings on this petition are closed.

"Attest, B. L. Staples, *Clerk.*

"A true copy of record,—Attest,

"B. L. Staples, *Clerk.*"

Rowe & Bartlett, for petitioners.

It does not appear from the proceedings whether the tracts described are organized plantations, or not:—

No. 1, of the errors assigned shows fatal errors in the proceedings, if they are such. R. S., 1841, c. 25, §§ 2 and 3. The other errors assigned regard them as unorganized lands.

No. 2. R. S. of 1841, c. 196, § 1, p. 778, required personal notice to the owners, if known.

It is not alleged in the petition, nor is it stated in the record, that the owners were unknown; and until that fact judicially appears, notice by publication is not authorized or sufficient.

No. 3. The notice was, that the Commissioners would meet on Oct. 7th at Smith's house, and thence proceed to view, immediately after which view, a hearing would be had at some convenient place in the vicinity.

When they would proceed to view, when the view, extending over a route of more than 60 miles, would be terminated, and at which of the convenient places in the vicinity the Commissioners would be found, is left entirely uncertain. *Ware, petitioner,* v. *Penobscot County Commissioners,* 38 Maine, 494.

No. 4. The record recites that the Commissioners met at Smith's, and, "proof appearing that due notice had been given as aforesaid," they proceeded to adjudicate, &c. It does not appear that the Commissioners found that notice had been given, that the proof offered on that point was satisfactory, or that the "due notice," of which proof was offered, was in accordance with their order. The record should show that it did appear that the notice ordered had been given.

Nos. 5 & 6. R. S., 1841, c. 25, § 44, provides that when a road is laid out through an unincorporated township, that the same shall be made at the expense of the proprietors of such township or of the county, or partly of each, as said Court of Commissioners shall order; and that all the proprietors of such township shall be held to pay according to their interest; that is, that the road through No. 15, range 6, shall be built wholly, or in part, by the proprietors of that township, each

paying proportionately to his interest in said township; and, if not wholly at the expense of such proprietors, then, in whole or in part at the expense of the county of Aroostook.

The Commissioners made no such order; but, instead of that, ordered that the expense of making the road in No. 15, range 6, should be borne by all those who own in any of the 10 townships named in the petition; and that such expense should be borne by such owners equally, and not in proportion to their several interests. Thus compelling the owners of No. 15, range 6, to expend a sum different from what it would cost to make the road in said township, and perhaps a much greater sum; and severally to expend a sum different from the relative proportions of their land; and requiring them to expend money for building a road off their own territory. *Pingree* v. *Penobscot County Commissioners*, 30 Maine, 351.

Nos. 7 & 8. R. S., 1841, c. 25, § 47, requires that the Commissioners shall decide whether, in their opinion, each tract, through which the road runs, will be enhanced in value.

The Commissioners have here reported that "the lands over which the road passes, and other lands, liable by law to be taxed for opening and making the same," will be enhanced to an amount equal to the expense of the road.

That may be true, and it be equally true that townships No. 15, range 6, and No. 14, range 6, would neither of them be enhanced in value.

The same section seems to require that they shall assess upon each tract such sum as, in their judgment, will be equal to the enhanced value. They did not assess *any* sum. *Pingree* v. *Penobscot County Commissioners*, 30 Maine, 351.

No. 9. The report shows that the Commissioners adjudicated upon the subject matter, at Smith's house, on Tuesday, October 7, 1851, and then and there laid out and located said highway. There clearly was no hearing at any other time or place, nor *after said view*, unless said view had been had prior to that date.

Blake & Garnsey, for respondents.

The petition alleges nine errors.

I. To the first we say, that these proceedings were had under that portion of c. 25, R. S., 1841, § § 44 to 56, relating to the location, &c., of ways in *unincorporated* places, and c. 196, § 1, of Laws of 1841, which do not require that notice be given by posting in each town, &c., or by publication in some newspaper in said county. It is sufficient that the petition to, and order of the County Commissioners, be published six weeks in the State paper, (c. 196, § 1, Laws, 1841,) as appears to have been done in the present case.

The Court will judicially take notice that townships 15, range 6, and 14, range 6, are not incorporated towns. 1 Greenl. Ev. c. 2, § 6. And, if they would not, the maxim *omnia praesumuntur legitime facta donec probitur in contrarium*, would seem to have a special application, and the burden be thrown upon the petitioners. Were any portion of said highway laid out through *incorporated* places, would they not have shown it, or at least so claimed in their petition? There is no proof, no allegation, even, of incorporation.

The second objection resolves itself into this, that the record does not state the fact that the owners of the land, over which the route lay, were unknown. As we have before seen, if the owners were unknown, the notice was sufficient. Is it necessary that the record should state that fact? The record of the County Commissioners is amendable at any time, according to the facts, and it is competent for them, at this time, to come in and make it conformable thereto. This objection is purely technical and does not go to the merits of the case at all. In *Inhabitants of Vassalboro', petitioners*, 19 Maine, 340, the first objection raised was, that the record ought to show the mode and manner of notice, but the Court refused their petition. *Taylor* v. *Hamden County Comm'rs*, 18 Pick. 309; *Berwick* v. *York County Comm'rs*, 25 Maine, 69.

But the record finds an appearance and hearing "of the

several parties, their proofs and allegations in favor of, and against," &c. The petition does not deny that the petitioners had actual notice, nor aver that they were not present at the hearing, or duly represented. And, if present, surely it is too late, at this stage, to object to the insufficiency of notice. *Sumner* v. *Oxford*, 37 Maine, 119. In support of the objection, the Court will not presume any thing in favor of the petitioners, in the face of the record that they were heard.

To the *third* objection, we say answer has been sufficiently made in our answer to the *second*. But it is not sustained by the record on its face, which particularly names the time, (Tuesday, Oct. 7th, at 10 o'clock,) the place, (house of Smith,) and the fact of the hearing and adjudication of the Commissioners, and decree that the prayer of petitioners be granted.

To the *fourth*, we answer that the petition to County Commissioners, their order of notice thereon, and their further record, that "notice appeared to have been given as aforesaid," viz., as ordered, are to be taken together and properly connected, and thus constitute their record. *Berwick* v. *York County Comm'rs*, 25 Maine, 73.

Thus considered, they show that the notice in State paper was given.

To the *fifth*, the answer is the language of the record, "that the opening and making of said county road shall be at the expense of the several owners of the tracts, townships, &c., over which said highway or county road is thus located or laid out." The meaning of this is obvious, that each owner shall bear the expense of building the road over his own land, and no other. It was unnecessary to state it more definitely.

To the *sixth*, we make the answer in the answer to the fifth, that to hold as alleged by the petitioners, is to subject the language of the record to a forced and unnatural construction, never intended by the Commissioners.

To the *seventh*, the record states that the land over which said road passes will be enhanced in value to the amount of the expense, &c. It was not necessary to state how much each tract specifically would be enhanced. If so, not only

how much No. 14, range 6, but how much each and every other parcel, large or small, is enhanced, must be specified. The record shows a sufficient compliance.

Objection *eighth* is founded upon an alleged non-compliance with the requirements of section 47 of chapter 25 aforesaid, which provides that the Commissioners may assess such sum as shall be *proportionate* to the value, &c., to result to the land from the road.

Taking this section in connection with section 48, following, it does not seem to have been the intention of the law to require specific assessments, before a way can be said to have been laid out. But merely that it be determined what *proportionate part* of the expense of the road is to be borne by the several tracts. In the case at bar it was found that each tract should pay the whole expense of the road through it, respectively. This is a plain designation of the amount of the incumbrance each tract is subject to in this behalf, which, to us, seems to have been all that section (47) was intended to require.

We are confirmed in this view by section 48, which goes on to provide, that "*thereupon*, (i. e. after proceedings before required,) the County Commissioners *shall cause an assessment* to be made." In any other light, section 48 is mere surplusage. *Pingree* v. *Penobscot County Commissioners*, 30 Maine, 351, which might seem to conflict with this view, will, on examination, be found rather to support it (2d ¶, p. 353, opinion.)

The 9th error is answered by the record itself, which says, "having viewed the route proposed and heard the several parties," &c. The Court will not presume these acts to have taken place in an order the reverse of that stated.

We further say, that the provisions of section 3, as to any view, apply solely to ways through incorporated places.

II. The application for *certiorari* is addressed purely to the discretion of the Court, and does not follow for merely technical error, and where the parties petitioners have suffered no essential injury. *Cushing* v. *Gay*, 23 Maine, 9; *Berwick*

v. *York County Comm'rs*, 25 Maine, 73; *Inhabitants of West Bath, petitioners*, 36 Maine, 74; *Rutland* v. *Worcester County Comm'rs*, 20 Pick. 71.

This case is submitted on the record; no proof of any injustice or injury is offered. The petitioners fail to bring themselves within the rule for the exercise of discretion by the Court. Had they no interest, the Court would not entertain the petition. *Turnpike* v. *Magoon*, 8 Maine, 292; *Harkness* v. *Waldo County Comm'rs*, 26 Maine, 353.

Without proof of injury, these petitioners are in no better position, and with the presumption that their rights are unprejudiced.

III. Proceedings in laying out this road were closed at the January term, 1853, of the Commissioners. After a lapse of more than *four years*, this petition was first entered, at Bangor, to wit, July 10, 1857.

In the exercise of their discretion, the Court will regard all the circumstances of the case; the length of time which has elapsed, the probable changes in the state of things, and the consequences of their action generally, not only as regards the rights of the petitioners, but of third parties. Errors that, if seasonably taken advantage of, might have been sufficient, will not be regarded, after so long neglect on the part of the petitioners. If they suffer, it is the consequence of their own *laches*. The Court will not inflict ruinous and mischievous results upon others, for the correction of an error, which, if taken seasonably, could have been corrected without injury to any one. *Rutland* v. *Worcester County Comm'rs*, 20 Pick. 71; *Hancock* v. *Boston*, 1 Met. 122; *Whately* v. *Franklin County Comm'rs*, 1 Met. 338; *Holden* v. *Berkshire*, 7 Met. 560.

Rowe & Bartlett, in reply.

The record does not show that the petitioners for *certiorari* were present at the hearing. The record does not state who the parties present were; and the argument is that the parties were unknown. Nor is it stated that the parties were

heard at the time and place named in the notice for the hearing; but that some parties, who happened to be present at Smith's, on October 7th, were heard prior to the view. It not being denied, but conceded, that the petitioners own the land, as alleged, the law infers an injury to them, from an illegal adjudication as to them, in imposing burdens on their land.

The opinion of the Court was delivered by

DAVIS, J.—The record in this case is brought before us by the parties, and submitted by agreement. The objections stated in the 5th, 6th, 7th, and 8th errors assigned, are well taken. *Pingree's case*, 30 Maine, 351.

Writ granted.

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

RUFUS MANSUR *versus* MILES KEATON.

A., having commenced an action against B., which was defaulted and continued for judgment, agreed, after default and before judgment, to accept an execution held by B. against C. in full payment, which agreement was not carried out by A.; — *Held*, that this did not constitute a consummated payment, or accordance and satisfaction; and that the execution against C., though in the hands of A., by virtue of the agreement, was still the property of B.

THIS was an action of DEBT on a judgment recovered by plaintiff at the February term, 1849, of the late District Court for Aroostook county. Plea, *nil debit*, with brief statement of payment.

The defendant offered evidence that, in February, 1847, he recovered a judgment against one Samuel Stackpole, and took out execution thereon on March 1, 1847; that, in the fall of 1847, he made an agreement with said Mansur, by which he

was to take said Stackpole execution in full discharge and payment of the demand he had against said Keaton; that the action upon which said Mansur's judgment was founded was commenced and entered in Court in February, 1846, and defaulted at first term and continued for judgment till February term, 1849, and that defendant, at the time he made said agreement with Mansur, supposed that judgment had been rendered in said suit against him, and that said Mansur held the execution; that said Stackpole execution was then in the hands of John B. Trafton, of Fort Fairfield, his attorney, and that said defendant employed one Elijah Gordon to procure said execution and deliver it to said Mansur; that afterwards said defendant had an order on Mansur from one Esty, for about $12, and that he presented it to Mansur for payment; that said Mansur retained out of it some 7 or 8 dollars, which he said he had been obliged to pay to Trafton for fees, in order to get the Stackpole execution; that thereupon said defendant demanded of said Mansur his execution or demand against him; that said Mansur said the execution was over in the clerk's office, that he could go and get it, but that the clerk always kept them on file; that said defendant, afterwards, in 1847 – 8, called on plaintiff several times for the execution against him; that Mansur never refused, but put him off with excuses; that he has never seen him since on the subject, and that he had never been called upon for said execution against him from that time until the commencement of this suit.

Defendant also offered to prove that said Stackpole execution was delivered to Mr. Mansur, and that Mansur had called upon Stackpole to pay it to him, and that he has said execution now.

Defendant also offered the deposition of Elijah Gordon of Bangor, in evidence of the alleged agreement.

The Court excluded the evidence offered by the defendant, as inadmissible, to which the defendant excepted.

——— ———, for plaintiff.

Blake & Garnsey, for defendant, contended that the evidence offered by the defendant and ruled out by the Court, was properly admissible, and cited *Marriott* v. *Hampton*, 7 Term R. 268; *Holmes* v. *Aery*, 12 Mass. 136; *Jordan* v. *Phelps*, 3 Cush. 545.

The opinion of the Court was delivered by

DAVIS, J. — The facts proved, and offered to be proved, do not constitute a *consummated* payment, or accord and satisfaction. The plaintiff having neglected or declined to carry out the arrangement, the Stackpole execution is still the property of the defendant. *Exceptions overruled.*

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

WILLIAM H. TYLER *versus* WILLIAM H. WINSLOW.

The statute which authorizes an officer attaching property of a debtor, to permit such property to go back into the hands of the debtor, upon taking a receipt for the same, contemplates, or, at least, does not prohibit a reasonable use of the property by the debtor.

The debtor himself, in such case, being the receipter, and having agreed to keep the property for such compensation as the officer might deem just and reasonable, is at liberty to charge the officer the full amount which he himself has charged upon the writ as part of his fees and expenses, for the same service, without deduction on account of loss by the debtor of a portion of the property, especially when it does not appear that the creditor has made any claim on the officer for such loss.

Nor is the liability of the officer to the debtor, to pay such compensation, affected by the fact that the property had, previous to the service of the trustee process, been mortgaged by the debtor, and that the attaching creditor had compromised with the mortgagee, nor by the circumstance that the officer was a "public officer," under the statute of 1841, c. 119, § 63, and R. S., c. 86, § 55.

An attachment by trustee process is not dissolved by the death of the principal debtor and the issue of a commission of insolvency on his estate, if, before the death of the debtor, the plaintiff issues his execution, and duly demands of the trustee to pay over an amount sufficient to satisfy the same,

although, subsequent to such demand and the death of the principal defendant, *scire facias* issued and further disclosure was made thereon.

The trustee having been charged on *scire facias* for a sum greater than the amount of the judgment against the original debtor, that sum is reduced, so as to cover only the amount of the judgment, with legal interest and costs.

SCIRE FACIAS against the defendant, as trustee of Samuel J. Foster.

The facts, contained in the several disclosures of the trustee and other papers, and agreed by the parties, are very fully stated in the opinion of the Court.

J. Granger, for defendant, argued that,—

1. The principal defendant was accountable to the trustee for loss on the property attached, by reason of his negligence in keeping, and improper use of the same.

2. That the property attached having been mortgaged to Howe before the attachment by the defendant for Sawyer, and Sawyer having been obliged to pay Stone for it, it would be grossly unjust that Foster should have the benefit of keeping the stock through Howe, and have pay for it from Sawyer, through the defendant.

3. That the case came within the third exception of c. 119, § 63, of the statute of 1841. That the defendant was acting as a public officer; he had attached the stock, and was bound to provide for its safe keeping. That the same construction was given to the old statute, before this express provision for exonerating public officers was enacted. *Chesley & al.* v. *Brown & trustee; Thompson* v. *Brown*, 17 Pick. 462, and cases there cited.

4. That the death of the principal defendant and the insolvency of his estate, operated necessarily to dissolve the attachment. R. S., 1857, c. 81, § § 79, 80, 81, 82.

B. Bradbury, for plaintiff.

The opinion of the Court was drawn up by

MAY, J.—The defendant made his disclosure in the original action, at the September term, 1856, and was charged as the

trustee of the principal defendant. *Scire facias* having been sued out, he was permitted at the March term, 1858, to be examined anew, and to prove any matters proper for his defence thereto. The question of his liability is to be determined by the state of facts existing at the time of the service of the original writ upon him, unless some fact has since occurred which may legally operate as a discharge therefrom.

Our first inquiry, then, is whether, upon the disclosures in this and the original suit, and such other facts as were proved or admitted in the case, the defendant had, at the time of said service, any goods, effects or credits in his hands or possession belonging to the principal defendant. That he was properly charged upon the first disclosure is not denied. The new examination upon *scire facias*, has very much modified the facts as at first presented.

The defendant, if liable at all, was liable to be charged only for the balance due upon the contract between him and the principal debtor, for keeping a large number of cattle and horses, which the defendant, as sheriff, had attached upon a writ in favor of one Sawyer, against said debtor. The attachment was made November 28th, 1855. The price to be paid under said contract was $13,50 per day, from the day of the date of the attachment, so long as the cattle and horses should be kept up and fed on hay, or until said attachment should be dissolved. The payments were to be made monthly, and certain hay, attached upon the same writ, if used by the debtor, was to be allowed in part payment, at $8,00 per ton. The property was kept by the debtor until June 25th, 1856.

The time of the service of the trustee writ upon this defendant does not appear from the papers in the case, but his counsel states, in his argument, that it was made May 7, 1856. This was 160 days after the attachment, and the cattle and horses must have been kept up and fed upon hay during this time, because it appears, from the last disclosure, that the defendant charged upon the writ, *Sawyer* v. *Foster*, for keeping them 161 days, at $13,50 per day. The keeping, according

to the terms of the written contract, had amounted, at the time of the service upon the defendant, to $2160; of which it appears that $1620,04 had, in some way, been previously paid, thus leaving a balance then due from this defendant to the principal debtor of the sum of $539,96. For this sum the debtor might have had his action; and the defendant is therefore properly chargeable for that amount, unless the same is reduced or cancelled by some of the other facts stated in the case, or he is in some way discharged therefrom.

Various grounds are taken in defence. The first is, that the debtor worked the horses and some of the cattle, during the time he was keeping them under said contract, and greatly diminished their value thereby; and, further, that some of the horses were lost. If they were his property, he might, perhaps, reasonably use them during the attachment. There was nothing in the contract to restrain such use. If, however, either the cattle or horses were lost or diminished in value, through the negligence or fault of the debtor, he would have been liable therefor upon his contract. He was bound to use ordinary care. Whether he did so or not does not distinctly appear. His contract is evidently in the nature of a receipt. The statute which authorized the defendant to permit such property to go back into the hands of the debtor, upon taking a receipt, without dissolving the attachment, we think, contemplates, or at least does not prohibit, a reasonable use of the property by the debtor. Under our laws, where the action in which the attachment is made may be pending several years, a construction of the statute which should prevent such use by the debtor would be hard and oppressive upon him. R. S. of 1841, c. 114, § 37. It has been held in this State that a receipter for a horse attached is not liable for its value, where it dies in his hands, without his fault, before a demand. *Shaw* v. *Laughton*, 20 Maine, 266.

But it further appears in this case that the defendant, having ascertained that the property was being used, called upon the debtor in February after the attachment, and made a new agreement, by which the terms of the original contract were

entirely changed, and the price to be paid for the keeping was to be such as the defendant might deem to be just and equitable under all the circumstances. No settlement having been made between the parties, the defendant charged upon the writ, as a part of his fees and expenses, the full price agreed to be paid by the terms of the original contract. This charge was one which fell upon the debtor to pay, and which, in fact, was paid out of the avails of the property attached. Under such circumstances, we do not think it lies in the mouth of the defendant to say that any deduction should now be made by reason of the use or loss of the property, or the modification of the contract as aforesaid. It would be manifestly unjust to charge the debtor with the contract price, upon the writ against him, and to take that price out of the avails of the property, and then, upon settlement, to allow him a much smaller sum. It does not appear that the creditor has made any claim upon the defendant for any injury to, or loss of the property attached; and, if he should do so, the defendant's remedy for indemnity is by an action upon his contract, so far as such injury or loss was occasioned by the fault of the debtor. The defendant having been paid to the full extent of the original contract price, by the debtor, no deduction can properly be allowed him, in this action, for uncertain damages which may or may not be hereafter claimed by the creditor, for injuries to, or loss of the property. He is properly to be regarded, under the circumstances of the case, as indebted to the principal debtor, at the time of the service of the trustee writ upon him, for the amount then due, according to the terms of the original contract.

It is further urged that the defendant ought to be discharged because the property attached was not the property of the principal debtor, but belonged to one Howe, as mortgagee of said debtor, by whom the defendant has been sued for it, which suit was compromised upon the payment of $1350 by the attaching creditor. It is not perceived how these facts can possibly affect the contract between the defendant and the debtor. The obligation to pay for the keeping of the cattle

and horses did not depend upon the state of the title, but upon the contract and the fact that they were kept. The circumstance that the debtor was the mortgager of the property, in no way changed the nature or efficacy of the contract. In the absence of all fraud in the making of the contract, both parties were bound by it; the one to keep the property, and the other to pay for such keeping, if kept.

Again, it is objected in defence, that the defendant, even if indebted to the principal defendant, cannot legally be charged as his trustee, because, as is alleged, he was a public officer, and therefore exonerated from this process by the third clause of section 63, chapter 119, of the Revised Statutes of 1841, and section 55, chapter 86, of the revision of 1857. These statutes were evidently intended to apply only to money or other things coming into the hands of a public officer in such manner that the same should be regarded as being, in some sense, within the custody of the law. They in terms apply only to cases of official accountability. They were not intended to apply to cases of personal indebtedness on the part of such officers, arising from their contracts with third persons, even though such contracts were made in connection with the performance of their official duties. Such a construction would exonerate a public officer from this process where his indebtment arose from the hiring of a horse to be used in the service or execution of a civil process. It is wholly inadmissible.

It is next contended that this action cannot be maintained, because the original attachment was dissolved by the death of the principal debtor prior to the commencement of this suit; and a commission of insolvency of his estate was issued within one year next after his death. It is provided by the R. S. of 1841, c. 114, § 83, and the same in substance by those of 1857, c. 81, § 77, that "when any estate or goods and chattels are attached, and the debtor dies before they are taken in execution, the attachment shall remain in full force, in like manner as if the defendant were alive, unless the estate of the deceased shall be represented, by his executors or admin-

istrators, as insolvent; and a commission of insolvency shall thereupon issue within one year next after the defendant's death." Substantially the same provision was contained in the statutes of 1821, c. 60, § 32. These statutes have been held to apply alike to all property, whether attached in the ordinary mode or by foreign attachment. They apply as well to money due to the debtor as to his visible goods. *Martin* v. *Abbott*, 1 Greenl. 333; *Grovesner* v. *Gold*, 9 Mass. 209; *Franklin Bank* v. *Bachelder*, 23 Maine, 60. Where the property attached has been taken on execution before the death of the debtor, the officer may proceed to dispose of the same according to law, in the same manner as if the debtor were living.

In the case before us, the debt for which the defendant was charged was not literally taken in execution before the death of the debtor, but we think it may fairly be considered as having been constructively so taken. After the recovery of his judgment, and while the debtor was living, the creditor appears to have done all that could be done to avail himself of it. The only reason why it was not actually appropriated to the payment of his execution was the fault of the defendant in the non-performance of his legal duty. The plaintiff had sued out his execution, and, within thirty days after judgment, had caused a legal demand to be made upon this defendant to pay over an amount sufficient to satisfy the same. This he refused or neglected to do, and thereby rendered his own goods and estate liable for such an amount as he might be properly charged for in this suit. R. S. of 1857, c. 86, § 67.

That the right of the creditor to the fund in the hands of the trustee had become absolute, and the liability of this defendant unconditionally fixed by the judgment, execution, and demand thereon, in the lifetime of the debtor, cannot well be doubted. The subsequent proceedings on the *scire facias* were proper to ascertain the extent of that fund; but neither these, nor the death and insolvency of the debtor, after the demand, ought to have any effect in discharging the defend-

ant from the payment of the debt due from him to the principal defendant at the time of the service of the trustee writ upon him. This rule is not only in accordance with the principles of right and justice, but will be found to be in harmony with the analogies of the law in cases somewhat similar to this.

In the case of the *Franklin Bank* v. *Bachelder*, before cited, which was a case in which the same steps had been taken to charge the defendant and to fix his liability, as in this, and where the principal defendants were judicially declared to be bankrupts, after the demand upon the execution had been made upon the defendant as trustee, and where they subsequently obtained their respective certificates of discharge as bankrupts, which were pleaded in bar of the plaintiffs' suit, it was held that these facts constituted no defence to the plaintiffs' right to recover in that action, which was *scire facias*, the value of the goods, effects, and credits of the principal defendants in the hands of the trustee, when service was made upon him. The refusal of the defendant to pay or deliver, upon demand, the property in his hands, vested an immediate right of action in the plaintiff ,to recover therefor, of which he could not be deprived by subsequent events. So far as the plaintiff and trustee were concerned, the recovery of a judgment, the issuing of an execution, and a seasonable demand of the property upon it, were equivalent to a seizure of the property, so far as to make the defendant, after his refusal to deliver it, responsible for its value. The right of the plaintiff to recover its value became absolute after such demand and refusal.

It has also been held, in an action against a receiptor, for property attached, that the death of the debtor, after judgment, execution, and a seasonable demand, affords no ground of defence. Such demand is constructively a seizure of the property attached for the preservation of the plaintiff's rights, and subjects the receiptor to an action for the value of the property, which may be maintained notwithstanding the subsequent bankruptcy and death of the debtor. *Farnham* v.

Gilman, 24 Maine, 250. So, too, in the case of the death and insolvency of the debtor. *Hapgood* v. *Fisher*, 30 Maine, 502. In this last case, the opinion of the Court, as drawn by TENNEY, J., concludes as follows:—"The defendants, by failing to deliver the property, as they had agreed to do, are to be considered as appropriating it to their own use, and they cannot avail themselves of events which occurred after their liability was fixed, in justification or excuse of the omission to redeliver the property, which was at the time unauthorized." These cases are so strongly analogous to the one before us, that no reason is perceived why the same rule is not alike applicable to both.

The result is, that the exceptions must be overruled. There is, however, a clerical error in the amount for which the defendant is to be charged. The amount of the plaintiff's judgment against the original debtor, was only $239,23 debt, and $11,42 costs of suit. It was recovered at the March term, 1857. The defendant's liability in this suit cannot exceed the amount of that judgment, with legal interest and costs. The amount, therefore, for which he was charged, in this action at *Nisi Prius*, being $542,44, as is stated in the bill of exceptions, must be reduced so as to cover only the plaintiff's judgment for debt, interest and costs, as before stated.

TENNEY, C. J., and APPLETON, CUTTING, DAVIS, and KENT, J. J., concurred.

WILLIAM EVERETT *versus* NELSON HERRIN.

By c. 81, § 36, of R. S. of 1857, a debtor can have no interest in a horse exceeding in value $100, which is exempted from attachment.

And if he owns two horses, neither of which is of the value of $100, but whose aggregate value exceeds that sum, he may elect which shall be exempt.

But if one of the horses is of a less, and the other of a greater value than $100, he has no election, the former only being exempted.

A debtor, temporarily within the State, is not excluded from the benefit of these provisions, because he is a citizen of another State or country.

ON REPORT by APPLETON, J.

This was an action of TRESPASS against the defendant, as sheriff of the county of Aroostook, whose deputy had attached, on a writ against the plaintiff, a horse, which the plaintiff claimed was exempt from attachment.

It was admitted the plaintiff would testify that he had no oxen, and but one horse beside the one in suit, which was attached by defendant's deputy at the same time; that, at the time of the attachment, he was at work at letter E, in Aroostook county, where the horses were attached; that he had been at work there three or four months; that the value of the horse, when attached, was $80. The defendant proved that plaintiff was a resident of New Brunswick, having a family there; and that he had been a resident there for the seventeen years last past, and that he was never known to have resided in this State.

C. R. Paul, the deputy sheriff by whom the attachment was made, testified that plaintiff demanded the black horse which was attached, before its sale; that he claimed it under a statute of the State, which he said gave him one horse; that it was worth $125; that he did not at this time claim the bay horse, worth about $50; that he did not give up either; that the black one was the only one demanded; that this was at Plymouth.

Isaac Hacker, called by plaintiff, testified that E. C. Blake was with plaintiff; that he said two horses would be exempt,

if not worth over $100; that plaintiff said he thought he had the right to select; that he wanted the best; wanted both, if the law would give them; that he did not know law; that he wanted what the law would give him; that plaintiff demanded the articles attached, because witness had not proceeded legally; that afterwards he demanded the black horse, as exempt; that he attached just four horses; that he gave up two; that he kept the other two about 10 days or more, before they were sold.

The plaintiff being called, testified that the horse of least value was worth $90; that he understood the law would allow him the best horse; that he claimed that; that afterwards he understood he could have but one horse of the value of $100; he claimed the other horse; that, the second time he called on Paul, he told him he chose the best horse,—if the law did not allow that, he claimed the other; that he claimed whatever the law would allow him.

Upon this evidence, with authority to draw such inferences as a jury might draw, the Court are to render such judgment, by nonsuit or default, as the legal rights of the parties may require.

Blake & Garnsey argued for the plaintiff, contending that, as the horse of less value than $100 was the only one exempt from attachment, the plaintiff had no election; that, by the attachment of it, the officer became a trespasser. Even in a case where the debtor might elect, the right to do so being for his benefit, he may waive it, and thus compel the officer to choose.

2. The fact that the debtor was a foreign resident, temporarily within our jurisdiction, does not deprive him of the benefit of the statute. Its language is general. Certain specific articles are enumerated as exempt from attachment. Whoever may be the owner is entitled to the provision of the law. No exception is made, except in section 31, (c. 81,) of a boat, which, to be exempt, must be owned exclusively by an inhabitant of this State.

Aliens are allowed to sue and be sued in our courts. Their rights are the same as our own citizens, unless specially disabled by some law of the State where the action is brought. 1 Story's Confl. of Laws, § 565. But those rights must be protected according to the forms of proceeding and by the remedies afforded by our laws. *Ib.* § 556. The *lex loci* governs as to all remedies sought. *Barrett* v. *Benjamin*, 15 Mass. 354, 358; *Judd* v. *Lawrence*, 1 Cush. 534.

J. Granger, for the defendant, contended,—

1. That the horse was not exempt from attachment, because the debtor waived his claim to have it exempt, by demanding and insisting on having both horses or the best one, and not claiming the bay horse, if at all, for aught that appears, until after it was sold on the writ.

Is an officer bound, at his peril, to know whether a foreigner coming into our State has, or not, oxen and horses at home? If he refuses or neglects to attach the property, he is liable to the creditor. If he attaches it, and, without being able to ascertain how the fact may be as to the debtor's property at home, attaches his only horse, worth less than $100, without any notice from the debtor of any claim to have the horse exempted, is the officer liable?

Does not the debtor waive his claim by not asserting it? Does he not waive his right to have *one* horse exempt, by his claiming to have *another?* Suppose the deputy had given up the black horse and held on to the other. According to the argument of plaintiff's counsel, he would have been liable because he attached his only horse exempted from attachment, there being no room for election. It was the officer's folly to give up the one, which he could hold, and attach the other, which was absolutely exempt. This would be a hard law. The Court would not come to this conclusion except from imperative necessity.

2. Is a debtor resident in a foreign country, temporarily here, entitled to the benefit of the exemption?

Although, as a general thing, foreigners are incidentally

entitled to the benefit of our laws, yet they are made for the protection and benefit of our own citizens.

A yoke of oxen or a span of horses, and implements of husbandry, are exempted with a view to encourage agriculture, and also to enable a man to take care of himself and family, so that they may not become a public charge by being stripped of all means of getting a livelihood.

These reasons do not apply in the case of a person, with a family resident in a foreign country.

It would seem to be unreasonable, if a foreigner comes into this State and commits a trespass, while he and his family reside in New Brunswick, that he should be screened from paying the damages and go off clear, with $2500 worth of personal property exempted from attachment.

It is by comity that we allow foreigners to sue and be sued in our State; and it is hardly correct to say "that they have all the rights of citizens of our State, unless *specially* disabled." We do not give effect to a foreign assignment, to the prejudice of our own citizens. We require that the debts of our citizens shall be paid before we allow the funds to be withdrawn under the assignment. So we require the debts of our own citizens to be paid in full, as against the administrator and creditors of an insolvent estate of a debtor in another State or country. We do not allow the funds to be withdrawn until the claims of our own citizens are satisfied. And why should a man, indebted in this State, resident in another country, be permitted to withdraw his property from his creditors under our statutes of exemption?

The opinion of the Court was drawn up by

KENT, J.—A statute of this State, c. 81, § 36, art. 12, exempts from attachment and execution "one or two horses, not exceeding in value one hundred dollars;" and, if the two horses exceed that sum in value, the debtor may elect which of the horses shall be exempt. In this case the debtor had two horses, one of the value of eighty dollars, and the other of the value of one hundred and twenty-five dollars, both of

which were attached by the defendant. The debtor claims, in this suit, to recover for the one valued at a sum less than one hundred dollars, on the ground that that horse was exempt from attachment.

It seems clear that the Legislature intended to exempt only a horse not exceeding in value one hundred dollars. A horse worth more than that sum is not exempted, although it may be the only horse the debtor owns; and the debtor cannot protect any portion or interest in such horse. But the debtor may hold as exempt two horses, if the aggregate value of both does not exceed one hundred dollars. The right of election in the debtor exists and can be exercised only where both horses are of greater aggregate value than the above sum, but neither of them of the value of one hundred dollars.

In this case no right or duty of election existed. One of the horses was exempt, and one was not exempt. There was no right or obligation on the part of the debtor to elect, and all that was said or done by him, in relation to such election, was void and inoperative, and left the rights of the parties unaffected. The horse sued for was exempt by law from the attachment made by defendant, and his act was illegal, and a violation of the rights of the plaintiff.

An objection is made that the debtor, not being a citizen of this State, but a resident of New Brunswick, is not entitled to avail himself of any of the provisions of our law exempting property from attachment. This objection cannot prevail. If a citizen of this State attempts to secure the payment of his debt or claim against a foreigner temporarily within our jurisdiction, by availing himself of the provisions of our laws authorizing a suit and attachment of the "debtor's" property, he cannot claim any greater rights, or cause the precept to be executed in any different manner, than when it is against a citizen of Maine. The statute exempts certain property of the "*debtor*," and does not limit the exemption to the property of a citizen, except in the single case of a fishing boat.

The exception in this single case strengthens the presump-

tion that the Legislature intended that, in all other cases, the specified property of the debtor should be free from attachment, without any limitation as to citizenship. In the absence of any statute distinction, the general principle must prevail that the forms of remedies, and the modes of proceedings, and the service and attachments on processes, are to be regulated by the laws of the place where the action is instituted. Story's Conflict of Laws, § 556.

Judgment for plaintiff for $90 *and costs.*

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

COUNTY OF WASHINGTON.

ATKINS SCOTT *versus* CHARLES WATSON.

An infant is liable in *trespass quare clausum*, though the trespass complained of was committed by the express command of his father.

ON FACTS AGREED.

TRESPASS *quare clausum*, tried before the Municipal Court of Calais.

The facts appear in the opinion of the Court.

J. Granger, for plaintiff, cited *Haycroft* v. *Creasy*, 2 East, 104; 2 Greenl. Ev. § 368; Parsons on Contracts, title Torts of Infants; 6 Dane, 132; 2 Kent's Comm. 241; 10 Verm. 71; 9 N. H., 441; *Denny, petitioner*, 11 Pick. 265; *Stearns* v. *Foss*, 18 Maine, 19; *Porter* v. *Sherman*, 21 Maine, 258; *Winslow* v. *Anderson*, 4 Mass. 376; 1 Chitty's Pl. 165; *Ex parte Leighton*, 14 Mass. 207; *Lewis* v. *Littlefield*, 15 Maine, 233; *Wallace* v. *Morse*, 5 Hill; *Bullock* v. *Babcock*, 3 Wend.

391; *Vasse* v. *Smith*, 6 Cranch, 226; *Higgins* v. *York*, 5 Mass. 341.

G. W. Dyer, for defendant, argued—

That the *animus* with which torts are committed, is material. *Vosburgh* v. *Moak & als.* 1 Cush. 453; *Brown* v. *Kendall*, 6 Cush. 292; Story on Contracts, § § 65, 66, and notes; *Jennings* v. *Randall*, 8 Term R., 335.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of trespass *quare clausum*, for breaking and entering the plaintiff's close and carrying away his hay; to which the only defence interposed is, that the defendant was a minor, acting under the authority and by the direction of his father.

"*Trespasse. Transgressio, derivatur a transgrediundo*," (says Lord COKE, as cited by the learned counsel for the defendant,) "because it passeth over that which is right." Coke's Ins. 56, b. Now, the defendant, by entering without the plaintiff's license or permission upon his land, and cutting and carrying away his hay, very much "passeth *over* that which is right." Nor is his infancy any defence, for infants are liable for torts. *Campbell* v. *Stokes*, 2 Wend. 137; *Fitts* v. *Hall*, 9 N. H. 441; *School District in Milton* v. *Bragden*, 3 Foster, 507; *Lewis* v. *Littlefield*, 15 Maine, 233. The parent is not answerable for the torts of his minor child, committed in his absence and without his authority or approval, but the minor is answerable therefor. *Tifft* v. *Tifft*, 4 Denio, 177. The minor is not exempt from liability, though the trespass was committed by the express command of the father. *Humphrey* v. *Douglas*, 10 Verm. 71.

Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defence. No such construction can be given to the command "children obey your parents in the Lord, for this is right," as to sanction or justify the trespass of the son upon the land of another, and the asportation of his crops,

even though done by the express commands of his father. The defence is as unsound in its theology as it is baseless in its law. *Defendant defaulted for* $10.

TENNEY, C. J., CUTTING, DAVIS, and KENT, J. J., concurred.

The following dissenting opinion was read by

MAY, J.—I am not quite satisfied with either the law or the theology of the opinion in this case. That sins of ignorance may be winked at, is both a dictate of reason and of scripture. It is true, as a general rule, that infants who have arrived at the age of discretion are liable for their tortious acts. But, for the protection of infants, ought not the rule to be limited to cases where the infant acts under such circumstances that *he must know or be presumed to know* that the acts which he commits are unauthorized and wrong, when it appears that in the commission of the acts he was under the control and direction of his father? Will not an opposite doctrine tend to encourage disobedience in the child, and thus be subversive of the best interests of the community? Will it not also tend to subject him to embarrassment and insolvency when he shall arrive at full age? If all the members of a family under age are to be held liable in trespass or trover for the food which they eat, when that food is in fact the property of another, but, being set before them, they partake of it, in ignorance of such fact, by the command or direction of the parent, and under the belief that it is his, will not such a doctrine be in conflict with the principle that the common law is intended as a shield and protection against the improvidence of infancy? While the decided cases upon this subject seem to be limited to cases of contract, is there not the same reason for extending it, and applying it to cases like the one before us? In all the cases which I have examined in which infants have been held liable, the proof shows acts of positive wrong committed under circumstances where the infant must have known the nature and character of his acts. If the doctrines of the opinion are to prevail in a case like this, then

the common law is but the revival of the old doctrine that the parents, by eating sour grapes, have set the children's teeth on edge. The rule that a servant who acts in ignorance of the rights of his principal is to be held liable for his acts, does not fall within the principles for which I contend.

LUTHER TIBBETS *& al. versus* OTIS S. TIBBETS.

A person who has the rightful possession of logs for the purpose of driving them under a contract, has such a qualified interest in the logs, that the timber may be regarded as his, for all purposes connected with the driving, within the meaning of the R. S. of 1857, c. 42, § 6, and sufficient to enable him to maintain an action against the owners of logs which have become intermixed with the logs he has driven under such contract.

EXCEPTIONS from the ruling of GOODENOW, J.

THIS was an action against the owner of logs which had been driven to market by persons whose timber had become intermixed with that of the defendant, and was based upon the R. S., c. 42, § 6.

The plaintiffs were not the owners of the logs they were driving and which had become intermixed with the defendant's, but were driving them under a contract with the owner.

The presiding Judge instructed the jury, that the plaintiffs, by virtue of their contract to drive the logs, had such a qualified ownership, as would enable them to maintain the action.

The case was submitted without argument.

The opinion of the Court was drawn by

KENT, J. — This action is based upon the provisions of the 67th chapter, section 9, of the R. S. of 1841, which are reënacted in c. 42, § 6, of the R. S. of 1857. The statute provides, that "any person, whose timber" becomes intermixed with the logs of another, so that the same cannot be conveniently separated, may drive the whole to market and may recover a reasonable compensation from the *owner*.

The only question raised by the exceptions is, whether a person, who had contracted to drive the logs of others, and having the logs in his possession for that purpose, can maintain an action for driving, against the owner of the logs, with which the logs he was thus driving become intermixed, upon proof of such facts as would enable the absolute owner to maintain the action.

The object of the statute is to secure payment from the owners, for driving their logs, when they have left them in such a position, that they become mixed with others and cannot conveniently be separated. It can make no difference to such owner, whether the person claiming payment for driving, has an absolute or a qualified ownership or possession of the other logs. The ground of his liability is, that another person has performed valuable services in relation to his property. It may be important to the person who thus drives, to hold the owner of the logs, rather than a contractor for driving, who may be irresponsible. The statute seems to contemplate this distinction, as it provides that "*the owner*" of the logs shall be responsible, but in reference to the person who drives for another, it does not use the word "owner," but designates him as a person "whose timber" becomes intermixed.

We think that the true construction of the section is, that any person who has a rightful possession of the logs for the purpose of driving them, under a contract, has such a qualified interest or right in the logs, arising from that possession, that the timber may be regarded as his, for all purposes connected with the driving, within the meaning of the statute, and sufficient to enable him to maintain an action like this.

Exceptions overruled,—
Judgment on the verdict.

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

RUFUS MADDEN *versus* JOSEPH TUCKER.

Statements of the scrivener of a deed, as to what the parties directed him to do at the time of the drawing a deed, are not admissible to show which of two lots of land were intended to be conveyed by the deed.

The controlling description in a deed being, "the McKay farm, so called," what was the McKay farm at the time the deed was given, is a question properly submitted to the jury.

The first part of a description of land in a deed, answering equally well the hypothesis of either party, as to the boundaries of the land conveyed, the intention of the parties to the deed must be discovered by the concluding part, if that renders the description certain.

The case of *Webster* v. *Emery*, 42 Maine, 204, explained.

MOTION for a new trial, and exceptions to the ruling of MAY, J.

This was a writ of entry. After verdict and before judgment, the defendant, against whom the verdict was rendered, moved to set it aside and for a new trial, because,—

1. The verdict was against the weight of evidence and the instructions of the Court;—

2. The verdict for damages was excessive, and not authorized by any evidence in the case.

Demandant claimed the north half part of lot No. 62. The general issue was pleaded and joined, and, by leave of Court, upon terms, defendant, in a brief statement, disclaimed all that part of the north half of lot No. 62 which lies north of a line 24¼ rods south of the north line of 62.

The plaintiff claimed under a deed from the defendant, dated November 24th, 1840, of fifty acres of land in Cherryfield, bounded easterly by the Narraguagus river, northerly by Stephen O. Madden's lot, meaning to convey the north half of the McKay farm, (so called.)

Defendant offered to prove what land the parties directed Mr. Burbank to draw a deed of from Tucker to Madden. Objected to by plaintiff's counsel, and ruled inadmissible if different from that expressed in the deed. Defendant testified that the deed put into the case by him, from Gowen and George

W. McKay, was present at the time the deed to plaintiff was drawn, and was exhibited to Burbank to draw the deed from.

The following question was asked defendant by his counsel, viz.:—"Was Mr. Burbank directed to draw a deed of the north half of the land described in the said deed of McKay to him (Tucker)?" Objected to by plaintiff's counsel as inadmissible, (but not leading,) and ruled out by the presiding Judge.

There was evidence tending to show that lot No. 62 was the McKay farm, and so known and called for many years. There was also evidence tending to show that lot No. 62 and lot No. 80 were called and known as the McKay farm, and that the southerly half part of lots 62 and 80 were conveyed by the McKays to Freeman & Dinsmore, May 25, 1835, and by them to defendant. That the northerly half of 62 and 80 was afterwards conveyed to the defendant in March, 1836, and it was contended from this, and other circumstances, that the northerly half part of lots Nos. 62 and 80 must have been called and known as the McKay farm. And it was contended by the defendant, that the deed embraced the north half of the north half of lots Nos. 62 and 80.

The presiding Judge instructed the jury that the plaintiff was entitled by his deed to the north half of the McKay farm, as it was known and called at the time the deed was given, and not as the parties understood McKay's farm to be, unless it was so known and called.

The verdict was for demandant.

From the report of the evidence it appears that plaintiff read in evidence deed of Joseph Tucker to Rufus Madden, dated November 24, 1840; deed from Gowen W. McKay and George W. McKay to Wm. Freeman and Israel Dinsmore, May 25, 1835; deed William Freeman and Israel Dinsmore to Joseph Tucker, dated August 16, 1836, both deeds duly acknowledged and recorded. Plaintiff read the following depositions, viz.:—William Small, 2d, Nathaniel Strout, Wm. B. Nash, Freeman Kingsley, David Small and Isaac Patten, and then read the deed of Joseph Tuckerman and wife to

Gowen W. McKay, dated May 20, 1839, acknowledged and recorded, and rested his case.

Defendant read deed from Gowen W. McKay and George W. McKay to himself, dated March 29, 1836, acknowledged and recorded, and testified that James A. Campbell was employed to survey and run out the land sold by him to plaintiff. But it was first run out by Sabin P. Jordan, the same season plaintiff bought the land, after the deed, both himself and plaintiff present. Began at Stephen O. Madden's line and chained southerly, to get the width of the lot; chained 24¼ rods and put down stakes. The surveyor sighted east and stakes were put down along as far as plaintiff wanted to occupy. No stakes were placed on No. 80 at that time. Plaintiff assisted in the survey. Don't know whether plaintiff requested the survey or not. He claimed 50 acres out of the two lots 62 and 80. Sometime after this Madden appeared to be dissatisfied; said he ought to have more front. I told him he might get any surveyor he wished, to run it, and, if there was any mistake, I was willing to have it rectified. After this one of us, Madden or I, got James A. Campbell to run it. He chained across, chained down to the stakes where Jordan chained. He made the width the same as Jordan. Madden, at this time, drove two or three stakes on the line further west than any were placed before. He (surveyor) asked if we wanted to run it any further. Madden was satisfied at that time; appeared to be. There was no fence put up on this line. I lived on the part I bought of Freeman and Dinsmore. Madden occupied one side of that line, where stakes were, and I the other. He cut and hauled wood from lot No. 80, same as from No. 62. His occupancy has always been so, down to this time, of 80 as well as 62. The whole width of the whole lot 62, is 92 rods. He was entitled to 23. The whole width was supposed to be 97 rods; it was marked so on the plan. Plaintiff has always cut to those stakes, ever since he bought.

Defendant further testified, Madden went into possession the same season of the deed to him, and, soon after, built a

house on the land. I had a barn on the south part of the north half of lot 62, a new 40 feet barn, worth $200. Madden did not claim this barn. He came to me and wanted me to let him put his hay in it, and he would pay me for the use of it. And he did so for two years. The barn is about 20 rods south of the line between Madden and me.

Cross-examined.—I moved on to the premises, October 11, 1836. I moved into the old McKay house, the one William McKay built. I bought it in the spring; I cut the hay on it. Before that, I lived upon the place I sold to Charles Hall. I bargained with Freeman and Dinsmore and with the McKays about the same time, but did not get my deed of the McKays until the next year.

Defendant read the depositions of James A. Campbell, Alfred Tracy, Sybil Jackson, Caleb Tracy, Daniel McLaughlin, James A. Milliken, Levi C. Corthell, Joseph W. Foster, William Freeman, Caleb Burbank, and Joseph Adams.

Plaintiff resumed and read depositions of John Low, Daniel E. Nickels, Sabin P. Jordan, second deposition of same witness, and Jere O. Nickels' deposition.

Rufus Madden, (plaintiff,) sworn. Testified, prior to the purchase of Tucker, I had lived three or four years in Cherryfield. I had no acquaintance with the lots in the vicinity when I bought. My object in buying this land was to get hay. I was not present when the deeds were drawn up. They were read to me after I came there. It was in November I got the deed. Mr. Tucker showed where he said the line should be, before I took the deed. He told me it should be near the upper barn. It was very near the centre of the McKay farm of lot No. 62. I did not go into occupation that fall. I desired to have the line run before the deed was made. Mr. Tucker objected to it; said there was time enough to have that run at any time. I wanted it done then, because I was going away. I went into the woods logging. This conversation was before the deed was given. Tucker told me that it would cut 6 or 7 tons of hay on the upland, and one or two on the marsh. I gave for the land $550.

The next haying season, about July, I sent Daniel E. Nickels to cut the grass. He went and commenced. I told him there had been no line run. Tucker came and forbid him cutting where he was cutting. I went down and asked Tucker what he drove Nickels off for. He said he was cutting over the line. I said, did you not tell me the line came near the barn? (I was then near the barn.) He said no. I said he did, and I could prove it. He said I was crazy. It was on the north side of the barn he said the line would come, say, two rods north of the barn. He said, this farm is 200 acres, consequently, you will have to take a quarter. That was the first time any thing was said about the width of it. I told him, if I had known it, I would not have bought it at all, and that such a narrow piece of land was not fit to make a farm of, and complained that he had deceived me. Nothing more was said. He went off and got a surveyor. I say, he got the surveyor. They say, I got him. Sabin P. Jordan came there first with chain and compass. I was near there; do not recollect of taking any part in it, because I was opposed to it. I gave no orders. I did not stick up any stakes at that time. I gave no orders to Jordan; had nothing to say in the matter. Nickels went on and cut the hay and I made him a discount for the deficiency of the hay. I employed J. A. Campbell a year or two after for the sake of bringing a lawsuit to determine the difference there was in contention between me and Tucker. Neither of the surveyors had my deed. We did not do much. Esquire Freeman said, to make it legal, I had to give Tucker three days notice. It was on the river side of the road that Campbell surveyed. I could not tell how many stakes we put up; perhaps half a dozen. Where Nickels was cutting was outside of the stakes 15 to 20 rods. I have improved and cleared it some. He cut between one and two tons. I have cut the grass since 1840 to this date; average from two to three tons. I never took any means, for a long time, to have the line run. I employed a man to commence proceedings. I counseled with him to that effect. I remained on the premises 8 or 10 years

before I went to California. I built a house on it two or three years after I bought. I was gone one and a half years to California. Very little on the 23 rods is cleared. Four years, next fall, since I undertook to assert a title to half of the front lot. In 1855 I claimed to the centre of the whole lot. I supposed, if there was 200 acres, and I was to have 50, it would be only a quarter of it, and I must take it the whole length of the lot. I carried my deed to a lawyer four years ago next fall.

I was on a raft with Levi C. Corthell. I did not have any such conversation with him as he testifies to. I told him my case was then before referees, and that I knew nothing about there being two lots of land. I supposed that Bracey squatted on the McKay farm; that he occupied a part of the McKay farm. I told him that I supposed there were 200 acres of the McKay farm, and there were but 100 acres, and I was going to try for the front lot. I did not say that the deed embraced land that was not intended to be conveyed. I said Tucker would have to give me what I bought. I don't know but I might have said Tucker was a little uneasy about it. I think there was an old log there, where Tucker said the line would go.

Cross-examined.—I was to have 50 acres; nothing said about McKay farm. Tucker showed me where the 50 acres would come. Nothing was mentioned about the Bracey lot. We didn't go back on the back lot. Nothing was said about a back lot. The place he showed me, was to be the line of the lot he sold me. Nothing was said about the width of the lot or of the width of what he sold, or of half. I don't remember whether Campbell measured across or not. I made complaint to a good many about not getting land enough, and that Tucker had wronged me. I understood, that if the McKay farm was the two lots, I had been cheated. I understood what I bought was about half the front lot. Tucker made objections to running the land out now, because I was going away in the woods. The dispute between us was about 15 or 20 rods width. Have stated that my land would go 15

or 20 rods further. Never told any body that I was to have 25 rods width.

Joseph Tucker, recalled.—I never told Mr. Madden that the line would go near the barn. I had no such conversation with him as he has given. I showed him within a rod or two of where the line actually came. I told him I supposed it would go across a log and not far from a certain stump, and it did go within a rod of it.

Cross-examined.—I told him the whole lot, before the McKays sold any, was 200 acres. Lots 62 and 80 were called the McKay farm, before they sold the 100 acres to Freeman and Dinsmore.

J. Granger, with whom was *Freeman*, argued for the defendant:—

The presiding Judge erred in instructing the jury that the McKay farm must be taken to be what was so known and called, and not what the parties understood it to be. Evidence of what was the understanding of the parties, not inconsistent with the language of the deed, should have been admitted. *Hanson* v. *Russell*, 28 N. H. 117; *Hall* v. *Davis*, 36 N. H. 572.

The evidence discloses an ambiguity arising from the use of the words, "McKay farm, so called"; and it was not only proper, but absolutely necessary, to resort to parol evidence to determine what tract was intended. The parol evidence was intended to identify the subject on which the deed was to operate. *Waterman* v. *Johnson*, 13 Pick. 261; *Stone* v. *Clark*, 1 Met. 380; *Emery* v. *Webster*, 42 Maine, 204.

They argued, also, that the verdict was against the weight of evidence.

Geo. F. Talbot, argued for plaintiff:—

The answers of Burbank were objectionable, because they do not meet the true issue, *what was conveyed by the deed?* What the parties intended, was not the question. A grantor cannot limit the effect of his deed by his own testimony.

Gray & ux. v. *Hutchinson*, 36 Maine, 142; *Osgood* v. *Davis*, 18 Maine, 146.

The case does not come within the rule that parol evidence is admissible to identify the subject matter upon which a deed operates, as in *Waterman* v. *Johnson*, 13 Pick. 261. What the McKay farm was, evidence ought to be, and was admitted to show. The defendant wanted to show what the parties understood it to be.

Nor is the defendant's case within the rule allowing parol evidence of the construction given by the parties themselves, as proved by the manner in which they exercised their respective rights under the deed, to explain ambiguous words not explainable by the context. *Choate* v. *Burnham*, 7 Pick. 276; 3 Dane, p. 363, § 16.

Mr. Talbot, in order to show the true limit and purpose of parol testimony in reference to deeds, cited also *Comstock* v. *Vandenson*, 5 Pick. 163; *Linscott* v. *Fernald*, 5 Maine, 496; *Elder* v. *Elder*, 10 Maine, 80; *Osgood* v. *Davis*, 18 Maine, 146; *Pride* v. *Lunt*, 19 Maine, 115; *Lowell* v. *Robinson*, 16 Maine, 357; *Farley* v. *Bryant*, 32 Maine, 474; *Jordan* v. *Otis*, 38 Maine, 429; *Rogers* v. *McPheters*, 40 Maine, 114; *Wellington* v. *Murdough*, 41 Maine, 281.

He also argued against the motion for a new trial upon the evidence.

The opinion of the Court was delivered by

CUTTING, J.—On November 24, 1840, Tucker conveyed to Madden, "a certain lot, piece or parcel of land situate in said Cherryfield, and containing fifty acres, and bounded on the east by the Narraguagus river, and on the north by the farm on which Stephen O. Madden now lives. The land which is hereby conveyed is the north part of the McKay farm, (so called.)"

It appears that, at the time of the conveyance, Tucker was the owner of two lots; viz., a front lot, No. 62, bounded on the east by the Narraguagus river, and another lot, No. 80, in

the rear of the front lot, and originally occupied by one Bracey; each containing one hundred acres, and both bounded on the north by the farm of Stephen O. Madden, (according to the testimony of Daniel McLaughlin,) claiming title to the north half of the two lots by a deed from Gowen W. and George W. McKay, dated March 29, 1836, and to the south half of the same lots, by deed from Israel Dinsmore and William Freeman, bearing date August 16, 1836, who claimed under a deed from the McKays.

At the trial, a question arose as to what constituted "the McKay farm, (so called,)" on November 24, 1840. It was contended by Tucker that it embraced the north half of both lots, and by Madden that it was the whole of the front lot. The verdict has settled that issue in favor of the latter, which, on examining the evidence under the motion, we see no cause to disturb, unless the ruling of the presiding Judge in excluding certain evidence offered in defence, was erroneous.

The deed from the McKays to Dinsmore and Freeman, of May 30, 1835, after describing certain exterior lines of the south half of the two lots, contains this language, "meaning and intending to convey the south half of all the farm whereon we now live, *together* with one half of the Bracey lot, so called."

The deed from the above grantees to Tucker, (this defendant,) of August 16, 1836, conveys one hundred acres, "being the same tract or parcel of land which we purchased of Gowen W. McKay and Geo. W. McKay, as their deed to us, *now on record, will more particularly show.*" Both deeds were witnessed by, and acknowledged before, Caleb Burbank, Esq. When Tucker took this deed, it may be presumed that he knew the record title to which therein he was referred; and it was the south half of all the farm on which we (the McKays) now live, together with (or in addition thereto) one half of the Bracey lot, so called, — "together" being a term of exclusion and not inclusion, in reference to the farm.

The case finds that, when the deed of the north half, from the McKays to Tucker, of March 29, 1836, before referred to,

had been introduced by the defendant and proved to have been shown to Mr. Burbank when he wrote the deed from Tucker to Madden, "the following question was asked defendant by his counsel, viz.:—Was Mr. Burbank directed to draw a deed of the north half of the land described in the said deed?" which, *together* with a similar question before asked, as to what the parties directed him to do, were ruled inadmissible.

It needs no labored argument or citation of authorities to establish the correctness of the rule of law which excluded such testimony; otherwise, titles by deed, however solemnly executed, would become as evanescent as human memory, and landmarks become only idealities.

Again, exception is taken, because the Judge instructed the jury, "that the plaintiff was entitled, by his deed, to the north half of the McKay farm, as it was known and called at the time the deed was given, and not as the parties understood McKay farm to be, unless it was so known and called."

This instruction was substantially the language of the deed, especially its concluding and most important part of the description; for the former part bounded the grant on the east by the Narraguagus river, and on the north by the S. O. Madden lot, which description alone would answer equally as well the hypothesis of either party as to those boundaries. We must then discover the intention of the parties in the concluding part, which, by the term "farm" gives such a certain description as will determine the extent of the lot conveyed. *Abbott* v. *Pike*, 33 Maine, 204; *Chesley* v. *Holmes*, 40 Maine, 536. Taking, therefore, the whole description together, there is no ambiguity in the deed,—the grantor conveyed the north half of the McKay farm, so called; and what were the boundaries of the "McKay farm, so called," was a question of fact for the jury, as in all cases of boundaries. The ambiguity is wholly in the conflict of the testimony as to the boundaries; or, in other words, whether both or only one of the lots was called the McKay farm, there being no controversy as to the exterior lines of either lot. The legal

interpretation of the term "so called," is not what I or we say, but what the public generally say, and such was virtually the language of the grantor in his deed, and what the jury were instructed to find. It is not the duty of courts to unsettle all record titles to real estate, by violating rules of law, because some unskillful, ignorant or misinformed scrivener may not have obeyed, in every particular, his instructions.

As to the case of *Webster* v. *Emery*, 42 Maine, 204, cited and relied upon by defendant's counsel, if it means that a monument, answering in all particulars the call in the deed, is to be removed by parol testimony, and another monument, dissimilar, erected in a different place, then it cannot be law. But, if it means that, where there are two monuments, either of which may answer the call, it becomes a question of fact for the jury, it is law and in harmony with the instructions of the presiding Judge in this case.

Exceptions and motion overruled.

Judgment on the verdict.

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

FRANCES W. DWELLY *versus* JAMES N. DWELLY.

Statutes in derogation of the common law cannot properly be extended by construction, so as to embrace cases not fairly within the scope of the language used.

The objection to the admissibility of the wife, in a proceeding in which she and her husband are parties, does not, at common law, rest solely upon her interest as a party, but is based upon reasons of public policy.

It seems, that this rule is so important, that the common law would not allow it to be violated, even by agreement of the parties.

Neither the statutes of 1855, c. 181, § 1, of 1856, c. 266, § 1, nor the provisions of the R. S. of 1857, c. 82, § 78, and five following sections, remove the disability at common law, of the husband or wife to give testimony in a libel for divorce, to which they are parties.

Dwelly *v.* Dwelly.

The legal relation of husband and wife is not changed by the filing of a libel for divorce, or any steps preliminary to the judgment.

In a libel for divorce, a motion to dismiss the exceptions, and render judgment on the verdict, because the libellee has failed to comply with an order of the Court, passed at *Nisi Prius*, after filing the exceptions, directing him to pay the libellant to aid her in prosecuting her exceptions, will not be entertained by this Court sitting in *banc*.

The proper course in such case seems to be to proceed against the libellee as for contempt, before the Judge at *Nisi Prius*.

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

THIS was a *libel for divorce*.

The libellant was offered as a witness in the case, and was objected to by the libellee, but was permitted, by the presiding Judge, to testify.

There was a motion filed by the libellant to dismiss the exceptions, because the libellee had not complied with the order of the Court, at *Nisi Prius*, to pay the libellant the sum of twenty-five dollars, to enable her to prosecute her exceptions.

J. A. Lowell, for the libellant, argued,—

That the language of the statute of 1857, c. 2, § 78, was sufficiently broad to embrace cases of divorce.

Walker, for libellee.

The opinion of the Court was drawn by

MAY, J.—The personal right which every one has to be a witness has been held to be subject to many limitations and restrictions, by the common law. The grounds upon which this right has been abridged or denied are various. Incompetency to testify, as declared in the judgment of the Courts, has arisen from numerous causes. At common law, this incompetency still exists, except in cases where it has been modified or annulled by the provisions of some statute. Among the causes creating such incompetency, we mention only such as are embraced in an interest, either in the event of the suit or in the record as party or otherwise; and in the relation that exists between the witness and the person for or against

whom he is called to testify; such, for example, as that of husband and wife. The question before us calls for the consideration of no other.

That parties to the record, as well as persons interested in it, or having a certain and direct interest in the result of the suit; and that husband and wife, when called upon to testify in cases affecting each other, except in certain rare instances which need not be stated, have almost uniformly been excluded from giving testimony in the Courts of this State, until the passage of the statutes of 1855 and 1856, which are embodied in the revision of the statutes in 1857, c. 82, § 78, and the five succeeding sections, is a proposition which cannot be denied. Such is the common law.

Our inquiry then is, have these statutes so changed the common law as to make the husband and wife competent witnesses in a proceeding between them by libel for divorce? The statute of 1855, c. 181, § 1, merely removed the incompetency arising "by reason of interest in the event of the action." The statute of 1856, c. 266, § 1, provided that "no person shall be excused or excluded from being a witness *in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same, as party or otherwise,*" except in certain cases mentioned in the subsequent sections of the same chapter. The provisions of the Revised Statutes of 1857, c. 82, § 78 and the five following sections, are so nearly identical with the statute of 1856, that it is unnecessary to recite them. None of these statutes, in terms, professes to remove any disability to give testimony, existing upon parties or persons, except such as is based upon "interest as a party or otherwise," in the suit or proceeding in which they may be called. This is made more evident by the fact that these same statutes provide that such interest may be shown, as affecting the question of credibility. These statutes, being in derogation of the common law, cannot properly be extended by construction, so as to embrace cases not fairly within the scope of the language used. The legislative intention limits the application of these statutes, most clearly, to such incom-

petency only as is created by an interest in the event of the suit, as a party or otherwise.

In the case before us, the objection to the admissibility of the wife does not rest solely upon her interest as a party to the proceedings. *Its foundation is in the public good.* It strikes deeper than mere questions of interest, *and is based upon reasons of public policy.* The rule of the common law is, that "husband and wife cannot be witnesses *for* each other, because their interests are identical, nor *against* each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them and occasioning perjury." 2 Starkie's Ev., (4th Amer. ed.,) part 4, p. 706. And this rule is said to be so important that the law will not allow it to be violated, even by agreement; and the wife cannot be examined against the husband, although he consent. Greenl. Ev. vol. 1, § 340, and cases there cited. Such is the law of England, and it has been followed in this country. In this State, however, the law has recently been so modified that, "in the trial of civil actions, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband, by and with the consent of his wife." Stat. of 1859, c. 102, § 1. But this modification may properly be regarded as a legislative expression, (not, however, binding upon the Courts,) that the previous statutes, which had been passed by former Legislatures, and which are before cited, were not intended to abrogate the rule of the common law, that husband and wife shall not be witnesses *for or against* each other; and, in our judgment, the statutes to which reference has been made, cannot be construed as having been intended to remove that incompetency to testify, which has its foundation in those principles of public policy which lie at the basis, not only of social life, but of civil society.

If it be said that a libel for divorce is a proceeding of such a character, as to show that the domestic relations, as between the parties, have already been sundered; and that that mutual confidence and peace in the conjugal and family relation, which

the law aims to promote for the public good, has been destroyed, so that reasons of public policy no longer require the parties to be excluded from testifying in such a case, the answer is, that no case can be found where such has been held to be the law. The parties to a libel for divorce, have always been excluded as witnesses, prior to the statutes before cited; and the law will not now permit such a state of things to be presumed as will justify their admission. The filing of a libel is but the act of one party; and its allegations, as to the relations subsisting between the husband and wife, (for they continue to be such until the prayer of the libel is granted,) must be proved before the Court can act upon them, for any purpose, but that of notice to the adverse party, in arriving at the judgment to be given. The result is, that the exception to the admission of the libellant as a witness, is well taken, and a new trial must be granted.

Exceptions sustained.

Accompanying the argument of the libellant's counsel in this case, is found a motion to dismiss the exceptions and render judgment on the verdict, because the libellee has failed to comply with an order of the Court passed at the April term, A. D. 1859, after the filing of the exceptions, wherein he was directed to pay to the clerk, within sixty days, the sum of twenty-five dollars for the libellant. It appears also, from the certificate of the clerk, dated Aug. 29, 1859, that the same has not been paid. The allowance was made under the Revised Statutes, c. 60, § 5, and was undoubtedly intended to aid the libellant in prosecuting her exceptions. We are not satisfied that this Court, sitting in *banc*, has any jurisdiction over the question when presented upon motion, as in the case before us. The proper place of proceeding, in a case like this, seems to be before the Judge at *Nisi Prius*, where the party complaining of the neglect, may proceed against the libellee, as for contempt, in disregarding the decree of the Court, in which proceeding the libellee may appear, upon proper notice, and purge himself of the contempt, by showing his

pecuniary inability to comply with the order, or any other facts which may properly produce a like effect; or, perhaps, an execution might issue for the sum allowed. We are of opinion that we cannot, in this summary way, overrule the exceptions of the libellee, which are found to have been well taken. *Motion denied.*

TENNEY, C. J., and APPLETON, CUTTING, DAVIS, and KENT, J. J., concurred.

LEVI WHITNEY *& als. versus* WILLIAM DEMING *& als.*

In proceedings in equity to redeem a mortgage, the complainant is entitled to costs, if the respondent unreasonably refuses or neglects to render a true account.

BILL IN EQUITY for the redemption of a mortgage, in which it is alleged, that on the 18th of April, 1853, one William E. Slayton was seized in fee of a certain parcel of land, and, on the same day, conveyed the same in mortgage to one Sewall Baker; that said Baker, on the 15th June, 1855, conveyed his interest in said property to the defendants; that afterwards defendants took possession, and remained in possession and received the rents and profits of the mortgaged premises; that, on the 11th Nov., 1856, the plaintiffs purchased the right in equity of redeeming the premises; that, on Jan. 1, 1857, plaintiffs requested the defendants to state the amount they claimed to be due on the mortgage, which they neglected to do; but, some days after, that they set up an unjust claim to the sum of $2844,76, to the first day of January, 1857, allowing nothing for the rent of the property, and claiming large sums said to have been expended in repairs and for insurance, without furnishing any vouchers for the same; and many items of which the said defendants had no legal right to claim or receive; and, therefore, not being able to ascer-

tain the exact sum due on said mortgage, could not tender the same; and pray that, upon bringing and lodging in Court such sum of money as your honors shall find to be equitably due to the defendants, the plaintiffs may be restored to the title and possession of said property.

The respondents' answer admitted that, on or about April 18th, 1853, William E. Slayton was possessed of, and did execute a mortgage deed of the premises described in plaintiffs' complaint, conditioned for the payment of the two notes as alleged in said bill of complainant; no part of which has ever been paid to Baker or to defendants.

That Sewall Baker recovered judgment for condition broken against said Slayton, in the S. J. Court, January term, 1855, in this county, and the conditional judgment was rendered for the amount of the first note in said mortgage mentioned, and interest; to wit, for $612,57, and costs of suit taxed at $14,04. Writ ,25, officer's fees $3,25; delivered to an officer May 25, 1855; premises, at the time, unoccupied, said Slayton having a short time before left; much out of repair; not in a tenantable condition.

Defendants having become the purchasers jointly, under the firm of Deming & Son, from said Baker, of said mortgage and judgment, and all his rights, as by his deed, caused necessary repairs to be made on the house, cellar and outbuildings on said premises. On the 6th of September, 1855, William Deming, jr. moved into the house and mortgaged premises, and continued to occupy them ever since.

That in the schedule annexed to the answer, they have set forth, according to their best knowledge, information and belief, a true and particular statement of the sums due on said mortgage; and their charges for repairs and expenses of said mortgaged premises, and also of the fair rents and profits of the same, up to January 1, 1858.

And the respondents utterly deny that either the said Slayton, or said plaintiffs, have any right in equity to redeem the said mortgaged premises; they deny that they have ever set up any unjust claim, as alleged in plaintiffs' bill of complaint.

The general replication was filed.

George W. Dyer was appointed Master.

The schedule annexed to the respondents' answer, and the master's report upon the same, will be sufficiently understood by reference to the following abstract of the report furnished by counsel:—

Defendants claimed in their schedule annexed to their answer, various items not allowed by the master; to wit:— Defendants claimed sums, with interest to June 25, 1856, for the mortgage, repairs, &c., $2778,70, less rent of premises at $150 a year from September 6, 1855. Master allowed, exclusive of rent, $2613,51. Master disallowed items claimed, to amount of $165,19. Master found due to defendants on the mortgage, after allowing rent of $150 a year, from June 25, 1855, to the date of report, May 11, 1858, $2459,27.

Thomas L. Hamilton testified that he was one of the plaintiffs; that he called upon William Deming, jr., one of the defendants, in the fall of the year 1857, for the amount due on the mortgage of William E. Slayton to Sewall Baker, and transferred from Baker to defendants.

It was before the bill in equity was made. Deming said he would make out his account as soon as he could get in his bills of repairs.

Afterwards he called upon him, and he handed him the annexed bill, marked A, except the credits for rent, which he added afterwards; that he brought the account to Joseph Granger, attorney for defendants, before the credit was added. He directed him to get the rent credited, and he did. Granger came to Deming's store when witness was there. They talked over the bill; witness thought the bill in some particulars was incorrect.

Deming said he could produce vouchers for the charges, but did not. Thinks the charge for insurance was one of the items objected to, but is not certain. Claimed $200 as rent of the property. Also objected that some of the repairs were not necessary for the protection of the property. Deming declined paying more t an $150 for rent, and claimed the

amount of the bill marked A, as the amount due to the respondents on the mortgage.

Cross-examined.—Did not ask Deming to produce his vouchers. Witness afterwards went down with Deming to examine the premises, with a view to ascertain the amount he had expended.

Joseph Granger testified that, in the spring of 1857, or latter part of the winter, Thomas L. Hamilton, one of the complainants, came to me with the account now annexed to his deposition, marked A, precisely as it now is, excepting the credit of rent and the heading "Calais, Jan'y 1, 1857," and consulted me as to the rights of mortgager and mortgagee; what repairs and expenses mortgagee in possession had a legal right to charge, and the mode of ascertaining the rents and profits. I saw there was no credit of rent in the account, and told Hamilton he had better get respondents to credit rents and profits.

He took the account for that purpose. I happened into the respondents' store shortly after, and William Deming, jr., Hamilton and myself had some conversation respecting the value of the rents, and for what repairs mortgagee was entitled to charge. Witness thinks Deming, at that time, added the words "Calais, Jan'y 1, 1857," as the date up to which interest was reckoned on the notes; and also added the credit of $237,50, for the rent up, I think, to April, though not positive as to the time; know it was earlier than June, 1857.

The said Deming at that time claimed, as the amount due on the mortgage, the amount of the aforesaid bill, marked A, with interest from January 1, 1857, less $237,50, for rent.

It was after this I concluded to file a Bill in Equity to redeem, as the best method of determining the rights of the parties. Accordingly, in August, I commenced this action at plaintiffs' request.

J. Granger, for complainants, argued, —

1. That, as the respondents did not render a correct account of the amount due on the mortgage, when the account was demanded, and neglected to render an account of rents and profits, and set up an unfounded claim to the property, and unjust and illegal charges for expenditures, to the amount of $300 and over, the respondents are liable to the complainants for costs.

2. The failure to furnish the exact amount due on the mortgage, within a reasonable time, is regarded as an unreasonable neglect and refusal. *Pease* v. *Benson*, 28 Maine, 336.

3. Setting up, in such demand, by the party entitled to redeem, a claim to a larger amount than is actually due, subjects the respondents to costs. *Sprague* v. *Graham*, 38 Maine, 328.

Downes & Cooper, for respondents, contended, —

1. That neither law nor equity required the exact sum due should be furnished, on demand of the holder of the equity. *Whitwood* v. *Kellog*, 6 Pick. 420.

2. If both parties are in fault, costs are allowed neither. *Clark* v. *Read*, 11 Pick. 446, 449; 1 U. S. Equity Digest, 202, No. 124. In not offering to pay the sum justly due in their bills, as provided in R. S., c. 125, § 16, and in new R. S., c. 99, § 13, the complainants are in fault. They also claimed $200 a year rent, while the master allowed only $150. The complainants excepted to the master's report, and afterwards withdrew the exceptions, thus protracting the proceedings. *Richards* v. *Barlow*, 1 Paige's C. R., 323; *Norton* v. *Wood*, 5 Paige's C. R., 260; *Methodist Church* v. *Jaques*, 3 Johns. C. R., 77; 1 U. S. Eq. Dig., 204, No. 187.

3. Complainants are not entitled to costs as prevailing parties. The better rule is, that costs rest in the discretion of the Court. See American Ch. Dig., before cited, and cases there referred to.

4. A better rule is, where the parties stand equally fair

in every respect, the actor, who brings the other into Court, ought to pay the expense. American Ch. Dig. 122, No. 7.

The decree of the Court was announced by

DAVIS, J.—The plaintiffs are entitled to a decree for a release of the mortgage title, upon payment of $2454,24, on or before July 18, 1860, and to recover their costs.

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

WINSLOW BATES *versus* BRIDGET BUTLER.

When notes are taken for fines and costs, as provided by R. S. of 1841, c. 175, if not paid voluntarily, they must be collected, wholly or partially, or cancelled, in the manner provided in said statutes, c. 152, § § 28, 29, and 30.

The statute, requiring such notes to be made payable to the treasurer of the county, confers no authority upon him to indorse and transfer them to another individual.

The statute does not require them to be negotiable.

A., as county treasurer, received certain notes for fines and costs, under the R. S. of 1841, c. 175, payable to him or order, and indorsed them over to B., without recourse, agreeing that B. should have a per centage of what he might collect: —

Held, that such indorsement and agreement was a proceeding not contemplated by the statute: —

Held, that B. had no authority to commence a suit on said notes in his own name.

The statute, allowing convicts to give their notes for fines and costs, confers no authority to require such notes to include the expense of their board in jail, while confined under sentence of imprisonment.

If a note is given by an imprisoned person, to procure his discharge, it is not given under duress, and it cannot be avoided on that plea.

ON AGREED STATEMENT.

This was an action on two notes of hand given by the defendant on her release from imprisonment in the county jail,

and included the amount of fines and costs against her, and for her board.

The notes were made payable to the treasurer of the county or order, and by him were indorsed over to the plaintiff, without recourse.

At the same time, the plaintiff received other notes from the county treasurer, and signed the following paper: —

"Schedule of certain notes belonging to the county of Washington, given by discharged prisoners under the poor convict Act, c. 175, R. S., and placed in the hands of Winslow Bates of Eastport, for collection, with the understanding that he is to have twenty-five per cent. of the amount which he collects, and the county is not to be subjected to any costs or expenses in collecting said notes."

Previous to putting the notes into the hands of the plaintiff, the treasurer, in a conversation with the chairman of the County Commissioners, was informed that the board advised such a disposition of the notes, and at the April term following, of the County Commissioners, the following order was passed: —

"*Ordered*, that the county attorney take such legal measures for the collection of the county notes and securities as he shall judge expedient; and that the county treasurer be also authorized to compound with the persons liable on such notes or securities, on such terms as the best interests of the county may require."

George F. Talbot, for plaintiff, argued that the notes were properly negotiable, and that the law in this State, in reference to suits upon negotiable promissory notes indorsed in blank, is as follows: —

First. The said suit may be brought by any *bona fide* holder, such notes passing by delivery alone, like notes payable to bearer, so long as the indorsement remains blank. *Marr* v. *Plummer*, 3 Greenl. 73; *Fisher* v. *Bradford*, 7 Maine, 28; *McDonald* v. *Bailey*, 14 Maine, 101; *Southard* v. *Wilson*, 29

Maine, 56; *Beckman* v. *Mulson*, 9 Met. 434. Plaintiff was a *bona fide* holder of the notes.

Second. The suit upon such note may be brought by any person having an interest in it. *Franklin Bank* v. *Lawrence & al.*, 32 Maine, 586; *Bragg* v. *Greenleaf*, 14 Maine, 395; *Manufacturers' Bank* v. *Cole*, 39 Maine, 188. Plaintiff certainly had a direct interest in the notes, according to the schedule, aside from his interest as indorsee.

Third. The suit upon such note "may be brought in the name of any person who subsequently ratifies it, although he has no interest in the note or knowledge of the commencement of the action, or of the existence of the note, where there is no evidence of fraud, oppression or any corrupt or improper motive." *Golder* v. *Foss*, 43 Maine, 364; *Fisher* v. *Bradford*, 7 Maine, 28; *Franklin Bank* v. *Lawrence*, 32 Maine, 586.

A. Hayden, for defendant, contended,—

1. That the notes were void, having been given under *duress*. 2 Bacon's Ab., title "Duress."

2. The sheriff is not authorized by the statute to require a negotiable note. Negotiability is not implied by the words "promissory note." Bayley on Bills, 1.

3. The note exceeded the fine and costs, and was therefore void.

The opinion of the Court was drawn up by

TENNEY, C. J.—When any person convicted of a criminal offence shall be sentenced to pay a fine and costs, or costs only, and stand committed until sentence be performed, if the sentence be not complied with, by payment of the sum due within thirty days next following, the sheriff may liberate him from prison, if committed for no other cause, and if he is unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed on demand, with interest, accompanied with a written schedule, containing a true account

of all his property of every kind, by him signed and sworn to; which note and schedule shall be by such sheriff delivered, within thirty days next following, to said treasurer, for the use of the county. R. S., 1841, c. 175, § 1.

The sheriff in each county shall, as often at least as every three months, deliver over to the treasurer of his county, all notes or other securities by him taken for fines and costs, on the liberation of poor convicts from prison pursuant to law.

The county treasurer shall, at the next following session of the County Commissioners, lay before them a schedule of all such notes, with the amounts due on them respectively, to be filed with the clerk.

The Commissioners shall, from time to time, examine such notes and securities, and order the county attorney to take such legal measures for their collection, by suit or otherwise, as they shall judge expedient; and they may authorize the treasurer to compound with any of the persons liable on such notes or securities, or cancel the same, on such terms as the board shall direct. R. S., 1841, c. 152, § § 28, 29 and 30.

It appears, from the facts agreed, that the notes in suit were taken by the sheriff, under the authority of the provision first cited, as the consideration of the maker thereof for her discharge from prison. Without the statute, the sheriff had no power to receive the notes for fines and costs, unpaid, and release her from her imprisonment. And, unless the payment of such notes is made voluntarily, the statute last referred to provides the manner in which they shall be collected, wholly or partially, or cancelled.

Negotiability is not an essential element in a *promissory note of hand.* Such is a plain and direct engagement in writing to pay a sum specified at the time therein limited, to a person therein named, or sometimes to his order, or often to the bearer, at large. 2 Black. Com. 467. It was for sometime unsettled, whether it was not essential that a bill or note should be payable either to order or bearer, but it is now decided that it is not. *Smith* v. *Kendall,* 8 Term R., 123; *Rex* v. *Box,* 6 Taunt. 325; Bayley on Bills, 21.

We do not intend to say that the negotiable words in the notes in suit would render them void, for that question is not necessarily raised in the case. But the statute, which has been cited, confers no authority upon the treasurer of the county to indorse and transfer such notes to another individual. And the statute does not require that they shall be negotiable. If the notes are not paid after a certain time, the treasurer's duty requires him to lay before the County Commissioners the specific amount of the notes to be filed with the clerk. This being done, he seems to have nothing further to do with the notes, unless it be to receive the sum due on any of them, any further than he may receive directions from the County Commissioners to compound with any persons who may be liable thereon, or to cancel the same, not according to the discretion of the treasurer, but on such terms as they shall direct.

If the Commissioners think it proper that payment shall be attempted to be enforced against parties liable on such notes, by suit or otherwise, the treasurer has no authority touching such matter, and they have not the power conferred by statute to direct the treasurer to sell and transfer the notes in *his* discretion; but they may order the county attorney to take such measures for their collection, as they deem expedient. And it does not appear that they can employ any other person than the prosecuting officer of the county to do this service.

The indorsement of these notes by the treasurer, and the delivery of the same to the plaintiff, under the attempted contract between them, was a proceeding not contemplated by the statute. The authority given to the county attorney afterwards, by the County Commissioners, "to take such legal measures for the collection of the county notes and securities as he shall judge expedient," was not a ratification of the acts of the treasurer in the indorsement and transfer of the notes to the plaintiff, and conferred upon him no authority to commence and prosecute a suit thereon in his own name. And the order, "that the county treasurer be also authorized

to compromise with the persons liable on such notes or securities, on such terms as the best interest of the county may require," did not make legal the indorsement and transfer already made to the plaintiff, so that the suit can be maintained. If the Commissioners had the power to pass such an order, it was quite unlike an order to the treasurer to make the indorsement and transfer, which he in fact made, by placing the notes in the plaintiff's hands for collection, with the understanding that he was to have twenty-five per cent. of the amount which he collected, and the county was not to be subjected to any costs or expenses in collecting the notes.

The power given to Commissioners, to authorize the treasurer to "compound" and "cancel" the notes as *they* shall direct, cannot be regarded as identical with the power to order to "compound on such terms as the best interest of the county may require."

The notes were placed in the plaintiff's hands, in a manner not provided for by the statute, and the transaction cannot be upheld. The information given to the treasurer, in a conversation with the chairman of the County Commissioners, that the board advised such a disposition of the notes, for reasons already given, was without effect.

It is insisted that the objections relied upon in the defence are legally of no avail, because the defendant, being at all events liable on the notes, is not prejudiced by the transfer thereof and a suit in the plaintiff's name. If no power to negotiate was given by the statute to the treasurer, the notes have never become the property of the plaintiff in any respect, and he cannot maintain the action. Again, the County Commissioners having, by the statute, the control of the notes, so far that they can compound or cancel them through the treasurer, according to such terms as they shall direct, or to order the collection by a public officer alone, the transfer to a stranger, whose interest would induce him to obtain from the notes all which he could, might be putting the maker in a position less favorable than that in which she would otherwise stand.

A part of each note is for the expense of the maker's board, while confined under sentence of imprisonment, aside from the subsequent confinement for the non-payment of the fine and costs. We find no authority in the statute to require promissory notes for such portion as a condition of discharge. This part of the sum for which the notes were given, can be ascertained with perfect certainty from the facts agreed.

It is insisted by the defendant, that the notes were given under duress of imprisonment, and that, therefore, the suit upon them cannot be maintained. If a man be lawfully imprisoned, and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. 1 Black. Com. 136.

The defendant was lawfully imprisoned and the notes were taken for too large a sum. It does not appear that this was by means of any oppression on the part of the sheriff, but probably, under a misapprehension of the law by him and the defendant. She is not liable for the amount of the notes, which was for her board. But she would be liable in a suit properly instituted, for the balance, upon the facts agreed in the case. *Plaintiff nonsuit.*

APPLETON, CUTTING, MAY, GOODENOW, DAVIS, and KENT, J. J., concurred.

ENOCH RICHARDSON *versus* MAINE INSURANCE COMPANY.

A., by letter, applied to B., who was agent of an Insurance Company, for insurance. Thereupon B. filled out an application, which contained a statement that there was "no mortgage," on the property to be insured, and signed the name of A. to it, without his knowledge. A policy was issued, referring to the application as part of the policy, which was accepted by A. — *Held*, that, by accepting the policy, the plaintiff covenanted and engaged that the application contained a just, full and true statement in regard to the condition of the insured property, and that he thereby ratified the application. — *Held*, that the company were not bound by the letter from the assured to their agent. —

Held, that the representation that there was no mortgage on the property, was material, though the company had no lien on the real estate mortgaged.

Parties to all contracts in writing, are supposed to have the intentions which are clearly manifested by the terms thereof.

ON REPORT.

THIS was an action brought on a policy of insurance issued by the defendants. All the essential facts in the case are stated in the opinion of the Court.

Geo. Walker, for plaintiff, contended,—

1. The only application made by the plaintiff, was by his letter to the agent, and he was not bound by the application signed for him by the agent, without his knowledge.

2. The statement that there was "no mortgage," though untrue, was not an essential misrepresentation. *Strong* v. *Manufacturing Ins. Co.*, 10 Pick., 40; *Curry* v. *Com. Ins. Co.* 10 Pick., 535.

3. The plaintiff, by accepting the policy, only covenants that the application contains a true statement of "the condition, situation, value and risk of the property insured." There is no covenant as to title.

Cross & Topliff, for defendants.

The policy refers to the application as a part of the contract to be taken in connection with the policy, therefore the application is a warranty. *Farmer's Ins. and Loan Co.* v.

Snyder, 16 Wend., 481; *Wall* v. *Howard Ins. Co.*, 14 Barb., S. C., 383; *Burritt* v. *Saratoga Co. Mutual Ins. Co.*, 5 Hill, 188; *Egan* v. *Mutual Ins. Co.*, 5 Denio, 326; *Fowlers & al.* v. *Etna Ins. Co.*, 6 Cowen, 673; *Williams* v. *N. E. Fire Ins. Co.*, 31 Maine, 219; *Kennedy* v. *The St. Lawrence County Mutual Ins. Co.*, 10 Barb. 285; *N. Y. Central Ins. Co.* v. *National Protective Ins. Co.*, 20 Barb. 468.

If the warranty is not complied with in all particulars, the insurer is discharged. *Kennedy* v. *the St. Lawrence County Mutual Ins. Co.*, 10 Barb., 285; *Farmer's Ins. and Loan Co.* v. *Snyder*, 15 Wend., 481; *DeHayn* v. *Hartly*, cited 2 Denio, 81.

In the case, *Marshall* v. *the Columbian Ins. Co.*, 7 Foster, 157, relied on by the plaintiff, the point, whether the company were chargeable with the knowledge of their agent, was not a point in the case, and is a mere *dictum*. On this point we ask the attention of the Court to the following—"The rule which prevails upon sales of property, that a warranty does not extend to defects known to the purchaser, does not apply to warranties contained in policies of insurance." *Kennedy* v. *St. Lawrence County Mut. Ins. Co.*, 10 Barb., 285; *Jennings* v. *Chenango Ins. Co.*, 2 Denio, 75.

If there be in the policy a warranty, which is broken, the fact that the agent of the insurance company drew the application, and knew of the defect, is immaterial. *Kennedy* v. *St. Lawrence County Mut. Ins. Co.*, 10 Barb., 285; *Jennings* v. *Chenango Ins. Co.*, 2 Denio, 75; Marshall on Ins., 347.

The case, *Masters* v. *Madison County Ins. Co.*, 11 Barb., 624, cited by plaintiff, is directly opposed to *Kennedy* v. *St. Lawrence County Mut. Ins. Co.*, 10 Barb., 285. And the decisions in the *Bank of the U. S.* v. *Davis*, 2 Hill, 453, and *N. Y. Central Ins. Co.* v. *National Ins. Co.*, 29 Barb. 468, hold that official knowledge of the agent is necessary to charge the company.

The plaintiff cannot compel the company to pay, on the ground that the provisions of the by-laws refer only to buildings, not to personal property. The application states, that "the same description should be given of the building con-

taining the personal property, as if insurance is wanted on the building itself." A building *per se* is personal property. A warranty in a policy of insurance, as to position, &c., extends to the goods in the building described. *Kennedy* v. *St. Lawrence County Mut. Ins. Co.*, 10 Barb., 285; *Wilson* v. *Herkimer County Mut. Co.*, 2 Seld., 53. The company do not take advantage of their own wrong, but resist an attempt of the plaintiff to take advantage of his own wrong. The company did not, in this case, waive its by-laws, but were deceived into their violation by the falsehood of the applicant.

Bion Bradbury, in reply, for the plaintiff.

Williams & Cutler, in reply, for the defendants.

The opinion of the Court was drawn by

TENNEY, C. J.—Israel Cox was the agent of the Maine Insurance Company, in soliciting applications for insurance. In the month of August, in the year 1855, he was at the plaintiff's place of business in Jonesborough, and viewed his store and took some admeasurements, and represented to him that he was ready to obtain insurance on his buildings, &c., but at that time no application was made by the plaintiff.

On Sept. 25, 1855, the plaintiff wrote to Cox, requesting him to obtain, in some good stock insurance company, insurance on his store and goods, and on another building standing upon his land, in which he stored some merchandise. A policy was obtained by Cox from the Maine Insurance Company, insuring against loss by fire, for one year from Oct. 3, 1855, the property referred to in the letter; and on Oct. 6, 1855, Cox sent the policy to the plaintiff. The buildings and the greater part of the goods insured were destroyed by fire on Nov. 29, 1855. The defendants deny their liability, because in the application annexed to the policy, which has the name of the plaintiff as the applicant, signed by Cox, to a part of the seventh interrogatory, whether there was any mortgage upon the property, it is answered, "No mortgage"; and it is admitted that there was an outstanding mortgage upon the

land on which the buildings stood, and upon which was due the sum of two hundred dollars.

The policy contains the following language: — "This policy is made and accepted in reference to the application for it and to the conditions herein annexed, which are hereby made a part of the 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 expressly provided for. And the assured, by his acceptance of this policy, covenants and engages that the said application contains a just, full and true statement of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, and that if any fact or circumstance shall not have been fairly represented, the risk taken by this company shall cease and this policy shall be void."

The plaintiff treats the application in his letter of Sept. 25, 1855, as the only one in the case which can affect him, and says the denial of the existence of a mortgage upon the property is not *his* denial.

It is not improbable that the answer to the seventh interrogatory in the application, which is annexed to the policy, was not noticed by the plaintiff when he received it from Cox. But as he received the policy, paid the premium, and has instituted the present suit, he must be regarded as having received and accepted the policy as it issued from the company. If he did not so receive and accept it, he has no ground of action thereupon.

By the acceptance of the policy, according to the terms just quoted, the plaintiff covenanted and engaged that the application contained a just, full and true statement, &c., in regard to the condition, &c. He must, therefore, have ratified the acts of Cox, in affixing his signature to the application, and in the answers to the several interrogatories therein, and the same are to have the effect they would have if the signature was made with his own hand.

The question is not so much what the plaintiff stated or represented, in his letter to Cox, of Sept. 25, 1855, but upon

what representations, statements and denials, and warranties the insurance was made by the company. It does not appear, that the directors of the company had any knowledge of this letter, and the policy could not have issued upon the facts therein stated alone.

It is true, Cox, the agent of the company, knew all which was contained in the letter, but the policy, which is the sole basis of the present action, from its terms, was not executed upon the application contained in that letter, and the company cannot be holden, as they might be, if the letter was referred to as containing the statements, &c., as a part of the contract.

The policy is countersigned by Cox, as the agent of the company, after the execution thereof by the president and secretary, in obedience to a provision, that the same may become binding upon the parties. But such countersigning cannot alone make the policy effectual, as issued upon the application in the plaintiff's letter to Cox, of September 25, 1855. *Lowell* v. *Mid. M. F. Ins. Co.*, 8 Cush. 127.

But it is insisted, in behalf of the plaintiff, that the erroneous answer to the seventh interrogatory in the application, is entirely immaterial, in a stock company, which has no lien upon the real estate, upon which the property insured is situated. In *Davenport* v. *Mutual Fire Ins. Co.*, 6 Cush., 340, the Court held, that a similar representation, in an application for insurance, was clearly material, irrespective of the lien. And the doctrine of this case is affirmed in the case of *Packard* v. *Agawam M. F. Ins. Co.*, 2 Gray, 334.

Parties to all contracts in writing, are supposed to have the intentions which are clearly manifested by the terms thereof. And when one party is bound, only by a compliance, by the other, with certain conditions expressed, and those conditions are not complied with, the former party cannot be by law holden. In the case before us, the conditions, &c., make a part of the contract. They are free from ambiguity and doubt. A statement in the application, which is one of the conditions, is not in fact true, though no moral wrong is imputed to the plaintiff. The Court cannot withdraw this

statement from its consideration. The parties have made it essential; and to disregard it would be the substitution of another contract for that made by the parties.

Again, it is contended for the plaintiff that, upon the construction claimed for the company, the "condition, situation, value and risk" of the property insured could have had no reference to the outstanding mortgage. The store and the barn were covered by the mortgage. The company deemed it important to know every thing which the questions in the application were suited to elicit. Whether there was a mortgage upon the property, upon which the insurance was sought, was one of these important questions. This question had a relation to this property. And it cannot be denied that this question had some reference to the condition and situation of the property, touching the title thereto, and that the value of the insurable interest of the plaintiff, and the risk of the insurers was essentially involved.

The risk of the company was to cease, and the policy was to be void, if any fact or circumstance had not been fairly represented. The contract contained no provision that the risk should continue in relation to that portion of property insured, concerning which no misrepresentation had been made in the application, but it was entire, and the risk was to cease and the policy to be without effect, on the discovery of the existence of such facts or circumstances. *Brown* v. *People's M. F. Ins. Co.*, 11 Cush., 280.

According to the agreement of the parties, the plaintiff is to become *Nonsuit.*

APPLETON, CUTTING, MAY, and DAVIS, J. J., concurred.

THOMAS SAWYER *versus* EASTERN STEAMBOAT COMPANY.

Upon matters in issue, in which the courts of common law have concurrent jurisdiction with courts of admiralty, if the parties elect the common law remedy, they thereby voluntarily submit to the legal principles and modes of proceeding which prevail in the courts affording that remedy.

The rules of navigation and the usages of the sea are not regarded in our courts of common law jurisdiction as positive in their nature.

The principles that, at common law, apply in cases of collision of carriages traveling upon our highways, apply also to collisions upon navigable waters.

In an action against the owners of a steamer, for collision with a schooner, the Judge was requested to instruct the jury that, "if they should find that the persons in charge of the steamer saw the schooner in season to notify her of their approach, by ringing the bell or blowing the whistle, before the schooner saw the steamer, and, in consequence of neglecting to do so, the collision occurred, then they were in fault, and the defendants should pay the damages, unless they should also find that the vessel was in fault for some other cause:" —

Held, that the Judge properly refused to give the requested instruction. —

Held, that it is not the right of a party, in cases of this kind, to seize upon one, two, or more of the facts bearing upon the question of fault, and ask the Court to rule upon their weight or effect as evidence.

THIS was an action for damages occasioned to the schooner Hiram by the steamer Admiral.

The presiding Judge instructed the jury as follows: —

That the burden of proof was on the plaintiff to prove the defendants in fault. If the collision was occasioned without fault on either side, a mere accident, the action could not be maintained. If by fault on both sides, it could be maintained, and the damages should be divided. If by fault of the Admiral only, the plaintiff would be entitled to recover for all the damages sustained by him. That it was a rule at sea that a vessel going free must give way to one on the wind; one on the larboard tack gives way to one on the starboard tack; and steamers must give way to sailing vessels. These rules are based upon the simple principle "that the vessel which can alter her course most easily must do so," and they are often qualified by the application of this principle.

That the jury should find, if they could, from all the evidence, which party was in fault, whether one only, or both, or neither.

After the conclusion of the Judge's charge, the plaintiff's attorney requested the following instructions:—

If the jury find that the persons in charge of the steamer saw the schooner in season to notify her of their approach, by ringing the bell or blowing the whistle, before the schooner saw the steamer, and, in consequence of neglecting to do so, the collision occurred, then they were in fault, and the defendants should pay the damage, unless they find the vessel in fault for some other cause.

But the presiding Judge declined to give the instruction requested, or to say any thing specifically about the duty of the steamer to blow her whistle or ring her bell.

To which rulings and failure to rule, the plaintiff excepted.

There was also a motion for a new trial, on the ground that the verdict was against the weight of evidence.

F. A. Pike, for plaintiff, on exceptions.

But a single point is presented by the exceptions, and that is, whether it is ever the duty of a steamer to blow her whistle or ring her bell in running through a thoroughfare in a fog.

The duty of vessels as to collisions in a harbor or a thoroughfare is very different from that in the open sea. They must use extraordinary care while going in the trackway of vessels in the fog. *Steamer Bay State*, 1 Abbott's Adm. R., 235; *Newton* v. *Stebbins*, 10 How., 587.

Vessels have always been obliged to use all means within their power to prevent collisions, such as showing lights, &c. The rule of showing lights has always been strictly enforced. *Indiana*, 1 Abbot's Adm. R., 330, and cases there cited.

The rules for avoiding collisions are based upon the principle that each vessel was bound to do what lay in her power.

The reason of the rule which obliges a vessel to show lights in the night, and of a vessel having the wind free, to avoid another with less advantages, applies *as well to using their means of notifying of their approach.*

There are three predicaments where collisions may occur:—

1. In meeting in the day time in clear weather, when the rule of going to the right, &c., applies, and is well understood.

2. In the dark, when the rule as to lights prevails.

3. In the fog, when neither the rule as to course nor as to lights is of any use, and when all that can be done is to make a noise.

This third cause of collision, on our coast, is more prolific than either of the others, and the rule is of more importance.

In such cases the Courts have established a rule as to speed. *Bullock* v. *Steamer Lamar*, 8 Law Rep., 275; *Northern Indiana*, 16 Law Rep., 433; *Acker* v. *Ship Rainbow*, 14 Law Rep., 451.

And they have further decided that it is the duty of the steamer to blow her whistle, &c. *Steamer Bay State*, 1 Abbot's Adm. R., 235.

Aaron Hayden, for defendants, on exceptions, on the several points raised by him, cited the following authorities:—*Copeland* v. *Wadleigh*, 7 Greenl. 141; *Pike* v. *Warren*, 15 Maine, 390; *Hathaway* v. *Crosby*, 17 Maine, 448; *Jewett* v. *Lincoln*, 14 Maine, 116; *Freeman* v. *Rankin*, 23 Maine, 289; *McCrillis* v. *Harris*, 38 Maine, 566; *Brown* v. *Osgood*, 25 Maine, 505; *Storer* v. *Gowen*, 18 Maine, 174; *Morton* v. *Fairbanks*, 11 Pick. 368.

The opinion of the Court was drawn up by

MAY, J.—This is an action on the case, founded upon a collision between the plaintiff's schooner Hiram, and the defendants' steamer Admiral, which occurred in a fog, upon Passamaquoddy Bay, in a thoroughfare leading into the harbor of Eastport.

It is not denied that the Courts of common law have a concurrent jurisdiction with Courts of Admiralty in cases of this kind. If, however, a party elects the common law remedy,

he thereby voluntarily submits to the legal principles and modes of proceeding which prevail in the Courts affording that remedy. By such election, both parties become entitled to have the common law administered as it exists, and also to a trial by jury.

In the case before us, the general instructions which were given, so far as they went, are such as, under the finding of the jury, the plaintiff has no ground to complain of, nor does his counsel now raise any exceptions thereto. It may, perhaps, be found that the rule laid down by the presiding Judge in cases of mutual fault or negligence is the rule of the maritime code, and not of the common law. It is said by Parsons, in his work on Mercantile Law, p. 383, note 1, that "in Courts of common law, if both parties are in fault, the loss rests where it falls;" and the cases, *Vennall* v. *Garner*, 1 Crompt. & Mees., 21, *Rathburn* v. *Payne*, 19 Wend. 399, *Barnes* v. *Cole*, 21 Wend. 188, *Simpson* v. *Hand*, 6 Whart., 311, and *Kelly* v. *Cunningham*, 1 Cal., 365, are there cited to sustain the doctrine. In addition to these cases, we refer to *Carsley & al.* v. *White*, 21 Pick., 254, in which SHAW, C. J., instructed the jury that, "in case of collision, either at sea or in a harbor, to enable the plaintiffs to recover, it must appear that the accident was not caused by any negligence or want of skill on their part," and the correctness of this instruction appears to have been affirmed by the full Court. If, however, the presiding Judge, in the case before us, was in error in supposing the common law rule to be the same as that which prevails in Courts of Admiralty, the verdict cannot be disturbed for this cause, inasmuch as such a rule is more favorable to the plaintiff than to the other side, and the jury, under such instruction, must have found that, whether the plaintiff was in fault or not, the defendants, and those for whose acts they were by law responsible, were not. Under such circumstances, there is no ground upon which the defendants can be held liable.

It appears, however, that the Judge was requested to instruct the jury, "if they should find that the persons in charge

of the steamer saw the schooner in season to notify her of their approach, by ringing the bell or blowing the whistle, before the schooner saw the steamer, and in consequence of neglecting to do so the collision occurred, then they were in fault, and the defendants should pay the damages, unless they should also find that the vessel was in fault for some other cause." This instruction was refused, and the Judge declined to say any thing specifically about the duty of the steamer to blow her whistle or ring her bell. It is now contended that this instruction, as matter of law, should have been given.

Our inquiry then is, is this requested instruction in accordance with the principles of the common law? It by no means follows that such is the common law, even if it should appear that Courts of Admiralty and maritime jurisdiction have decided that proper care and prudence require that, under similar or the same circumstances stated in the request, it was the duty of a steamer to blow her whistle or ring her bell. The law by which such courts are controlled may have its precise rules, by which to determine with accuracy a question of duty or fault, and by these rules the judgment of such courts may be bound. These rules may be such as commend themselves to judicial wisdom, and yet be no part of the common law. The rules of navigation and the usages of the sea, although they are important to be observed, and the neglect of them may go far to show a want of care or skill, are not regarded in this country, in our Courts of common law jurisdiction, so positive in their nature as to bind masters or owners, in all cases, with the force of law. Parsons' Mercantile Law, p. 384 and 385. These technical rules or usages of the sea as established or recognized by the maritime law, are important facts to be presented to a jury, without which it might be very difficult for them to determine whether due care and skill in most cases had been exercised, or not; but they are not rules of the common law, and cannot properly be given to the jury as such.

At common law, whether due care has been exercised or negligence exists is ordinarily a question of fact, depending

upon a great variety of circumstances. It is so in cases of collision of carriages traveling upon our highways; and the same principle applies to collisions upon navigable waters. The duty of the person driving the team, in one case, and of the master of the vessel, in the other, to exercise due care and skill, cannot be questioned as matter of law; and these cannot be exercised in cases where there is an unnecessary departure from the laws and the usages which prevail in the case. These laws, if they exist by statute or at common law, may be given by the Court to the jury as such, but if they are laws of another jurisdiction, whether foreign, maritime, or any such as do not prevail as law without proof in the jurisdiction where the cause is being tried, then the presiding Judge cannot properly be called upon to state them as rules absolutely existing for the guidance of the jury. If they are not admitted or conceded, they must be proved as other matters of fact.

It is the boast of the common law that questions of fact are for the jury, while the law only is for the Court. The common law scales by which the evidence is to be weighed, in cases like the one before us, is a jury of the vicinage, and their intelligence and honesty are to be the watchful guardians of the beam. Especially is the question for the jury in a case like that involved in the requested instruction before us. What common care and prudence required of the plaintiff, and of the defendants, at the time of the collision for which this suit was brought, and what amounted to negligence, depending, as it did, upon a great variety of facts and circumstances apparent in the case, was wholly for the jury. If the requested instruction had been given, the province of the jury would have been invaded. It is not the right of a party, in cases of this kind, to seize upon one, or two, or more of the facts bearing upon the question of fault, and ask the Court to rule upon their weight as evidence, or their effect. The question of fault in the persons having charge of the steamer depended, in some measure, upon many other circumstances disclosed in the evidence beside those stated in the request,

all which must necessarily be taken into consideration, in order to a just determination of the question involved. Among these circumstances may be mentioned the density of the fog, the speed of the steamboat, its position and proximity to the schooner, the bearing of the vessels toward each other, and the danger to be apprehended. To hold, as matter of law, as is now contended, that a steamboat which might first happen to see another vessel in season to do so, should, in all cases, by the blowing of her whistle or the ringing of her bell, notify such vessel of her approach before the other vessel should see the steamboat, or be chargeable with fault and the payment of damages unless the other vessel was in fault, and this, too, without any reference to the other existing circumstances in the case, would be, most manifestly, unjust. The common law has no such rule.

This case is not very much unlike the case of *Carsley & al.* v. *White*, before cited, 21 Pick. 254, in which it was held that whether common care and prudence required of the plaintiffs to have a light on their deck, and the omission to have it, amounted to negligence, must depend upon the darkness of the night, the number and situation of the vessels in the harbor, and all the other circumstances connected with the transaction, and that this was a question of fact within the province of the jury. The requested instruction was therefore rightly withheld.

Our next and only remaining inquiry is, whether the verdict is against evidence. Each party put in such evidence as was deemed desirable. The instructions to the jury were not unfavorable to the plaintiff, and none which were requested and could properly have been given were withheld. Able counsel upon both sides undoubtedly gave to the jury all the light which the rules and usages of the sea and the evidence before them could throw upon the case. The place of the collision, the deceptive nature and density of the fog at the time; the number and frequency of the vessels passing in the waters or thoroughfare where the steamer and schooner met; the speed with which each was moving, and their direction

with reference to each other; the force and direction of the wind; and all the facts and circumstances relating to the management and control of the steamboat, on the one side, and the schooner, on the other, together with evidence of all such usages of the sea as either party wished to put in, were presented to the jury; and they have come to the conclusion that the steamer was without fault, or that the collision was the result of inevitable accident. It is possible that a Court of Admiralty might have come to a different result. The cases cited by the plaintiff are most of them, if not all, cases in admiralty, and they show what degree of care was required by the maritime code, of steam and other vessels, under the circumstances of each particular case; and also, what, in the judgment of such Courts, amounts to negligence or fault. But none of these cases furnish an infallible rule for the case at bar. Every case must depend upon its own facts. It may be, too, that this Court, in view of all the facts in this case, would have come to a different conclusion than that to which the jury have arrived. But if this or any other Court would have decided differently in regard to the facts, still, if the jury have acted fairly, without bias or prejudice, passion or evident mistake, their verdict must stand. In view of all the evidence which the case presents, we are unable to discover any legal cause which authorizes us to deprive the defendants of the verdict which they have obtained. The plaintiff, having chosen his forum, must abide its result.

Exceptions and motion overruled.

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

COUNTY OF HANCOCK.

JOSEPH P. THOMAS *versus* GEO. W. SPOFFORD *& als.*

In replevin, the title and right of possession to the property are the matters to be determined; its *value* is not an issue to be tried.

In a suit upon a replevin bond, the plaintiff is not estopped from showing that the actual value of the property exceeded the sum inserted by the defendant in his writ and bond, as its value, if the plaintiff did not assent to the defendant's estimate of value. And the plaintiff is also entitled to damages for detention of the property.

Where the plaintiff in replevin became nonsuit, and a judgment was rendered for a return and restitution, if the clerk, in issuing the writ of restitution, inserted therein *the value* of the property as named in the replevin writ, this being unauthorized by the judgment, and a mere ministerial act, will be regarded as a nullity.

REPORTED by HATHAWAY, J., from October term, 1858.

THIS was an action of DEBT on a replevin bond. The plaintiff, as an officer, attached certain personal property on a writ against a person other than either of the defendants in this suit. The action was duly entered, and judgment and execution followed. The defendants replevied the attached property, entered their suit in Court, and became nonsuit. Thereupon the Court ordered a return of the property. The defendants paid, to be appropriated to their replevin bond, the sum of fifteen hundred dollars, and a sum for the costs of the defendants in said replevin action, as was set forth in the writ of restitution. It was admitted that, after the application of the money paid by the defendants, there remained the sum of three hundred dollars still due on the execution issued as before stated. The plaintiff, in this suit, claimed to recover the actual value of the property at the time of the attachment, over and above the $1500 paid.

The officer, in his return of attachment, made no valuation of the property. The *ad damnum* in the writ was a sum

larger than the amount for which judgment was rendered, or the actual value of the property attached. The value of the property was not stated in the bond of the defendants, but in the writ, to which the bond referred, the value was stated to be $1493, which sum was also named as the value of the property in the writ of restitution taken out by the plaintiff, a copy of which was put into the case, by the defendants.

The presiding Judge being of the opinion that the plaintiff was estopped from showing that the property was of a greater value than that stated in the writ of restitution, the parties agreed that this question be referred to the full Court, on report. If the action cannot be maintained, the plaintiff to become nonsuit; otherwise, the action to stand for trial.

In the case, introduced by the plaintiff, was a copy of the record of the action of replevin, from which it appeared that the judgment of the Court was, "that the defendant recover against the plaintiff a return and restitution of said property, and also his costs," &c.

This case was argued by *Peters & Hinckley*, for plaintiff, and by—

Spofford, for defendants.

The opinion of the Court was drawn up by

KENT, J.—In the action of replevin the question of value does not arise as an issue. The title and right of possession are the matters to be determined in the suit. The law will not, however, permit a person to take personal property from another by this process of replevin, until the officer serving the writ has taken a bond to the defendant, with sureties in double the value of the goods to be replevied, conditioned to pay the damages and costs, and also to return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment.

The value of the goods makes no part of the declaration necessarily. It is only important as fixing the amount of the penal sum in the bond, which the officer is to require.

In this case, such a bond was taken. In the writ of replevin the goods were stated to be of the value of $1493, and this bond is in double that sum. That sum was inserted by the plaintiff in replevin, without the knowledge or agency, or assent of the defendant in that suit.

The defendant in replevin is not concluded by the value of the property named in the bond or the writ. If he was to be thus estopped from denying that value, he would be at the mercy of his opponent, whose interest always is to fix as low a value as possible.

If the penal sum in the bond is less than the actual value of the goods, damages and costs, the defendant may, perhaps, have his action against the officer for taking an insufficient bond, or may plead such fact in abatement. *Greely* v. *Currier*, 39 Maine, 516.

The point here is, that the sum named as the true value of the goods is not conclusive on the defendant, the plaintiff in this suit not objecting to the penal sum or sureties in the bond. *Howe* v. *Handly*, 28 Maine, 251; *Swift* v. *Barnes*, 16 Pick. 194; *Parker* v. *Simonds*, 8 Met. 205.

In the replevin suit the plaintiff became nonsuit, and a judgment for a return and restitution and costs was entered up. No damages for detention were given in the judgment.

The clerk in issuing the writ of restitution, &c., after specifying the goods, added the words "all of the value of fourteen hundred and ninety-three dollars," following the value named in the writ.

The Judge was of opinion that the plaintiff was estopped from showing that said goods were of more than the value named in the bond and writ of restitution. This is the only matter of law presented to us. It seems clear on the authorities, and from reason, that the defendant in replevin is not concluded or estopped by the sum named in the bond as the actual value. And the insertion of the same in the execution by the inadvertence of the clerk cannot, in our judgment, estop the party from proving the actual value at the time of taking, or the time of demand. The value of the goods was not

stated in and makes no part of the judgment. The clerk had no authority to insert it in the execution, and the issuing of the writ of restitution is a mere ministerial act. If it does not follow the judgment, or contains matter not in the judgment, that portion which contains the extraneous matter may be regarded as mere error or nullity.

The plaintiff's right to recover on his bond depends upon the judgment of the Court in the replevin suit. That judgment he produces. The defendants introduce the writ of restitution. But this writ is a mere recital of the judgment, not the judgment itself, and is not essential to enable plaintiff to recover.

Another objection to the ruling is, that in this suit on the bond, the plaintiff may recover damages for detention, although not assessed in the judgment in the replevin suit. *Smith* v. *Dillingham*, 33 Maine, 384.

Case to stand for trial.

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

INHABITANTS OF MT. DESERT *versus* INHABITANTS OF CRANBERRY ISLES.

After writs of venire had been issued by the clerk for the county of Hancock, the town of Greenfield was set off from that county and annexed to Penobscot. A motion to set aside a verdict, for the reason that one of the jurors was from that town, was overruled; for notwithstanding the objection would have been sustained, if the juror had been challenged, yet after verdict, the party will be presumed to have had knowledge of the objection, and to have waived it.

EXCEPTIONS by the defendants to the ruling of CUTTING, J., upon their motion to set aside the verdict rendered for the plaintiffs at this term, "*because* Artemas Latham, &c., &c., was one of the panel of the second jury which tried said case and rendered said verdict, and that said Latham is, and

was at said time of commencement of said term and said trial and of rendering said verdict, and has been for a long time an inhabitant and resident of the town of Greenfield, which said town of Greenfield is not and was not at the time of the commencement of this term, of the 27th of April, 1858, or since, within this county of Hancock, but in the county of Penobscot, and said juror was not at either or any of said times a resident in, or an inhabitant of said county of Hancock, or of any town in said county, and not a legal or elegible juror to sit in the trial of said case and in rendering said verdict; and that neither the agent of said town of Cranberry Isles, or their counsel, or any inhabitant thereof had any knowledge or belief of said facts, but that they first learned them accidentally after said verdict was rendered and after the adjournment of this term to the 15th of June."

By an Act of the Legislature, approved March 15, 1858, the town of Greenfield was set off from the county of Hancock and annexed to the county of Penobscot. The Act took effect from its approval.

The writ of *venire facias* was issued before the passage of said Act, but the service of it was after the Act took effect.

Knowles, for defendants, contended that the juror was not competent to act as a juror of Hancock county, being at the time an inhabitant of another county. 4 Bl. Com. 352; R. S., c. 106, § § 7, 8 and 10; c. 82, § § 63, 67, 68 and 73.

If the juror was not a legal juror, the verdict was not a legal verdict.

We are not precluded from making the objection by the provisions of § 73 of c. 82 of R. S. There must be *actual* knowledge so that the objection may be made before the trial. The Act annexing the town of Greenfield to the county of Penobscot was not a *public* law, so that we should be held to have knowledge. Where a statute requires that a party should "know" a thing, it means real, actual, personal knowledge—not presumed, inferential or statute knowledge, which may in some cases be urged, even where no actual knowl-

edge exists. But where a right, before existing, is to be taken away from a party on account of his knowledge of the fact, the law requires not *statute* but actual knowledge.

The defendants had a right to presume and act upon the presumption that the jurors were legally drawn.

Wiswell, for plaintiffs.

Courts take judicial notice of the local divisions of the territory over which they exercise jurisdiction; as into States, counties, towns and local parishes. 1 Greenl. Ev., § 6.

The statute requires that alphabetical lists of the jurymen shall be prepared by the clerk; these lists are public and open to the inspection of all.

If, therefore, the town of Greenfield, at the time of the trial, was not within the county of Hancock, and that fact was unknown to the defendants, their agent, or attorney, such want of knowledge cannot avail them. They should have known it, and the law presumes that they did know it.

No objection was made to the juror on account of his being a resident of another county, and this must be regarded as a waiver of all objections on that account. R. S. c. 82, § 73.

Although it was a good ground of challenge to the juror, yet after verdict the objection was made too late. *Jeffries* v. *Randall*, 14 Mass., 205; *Walker* v. *Green*, 3 Greenl., 215; *State* v. *Fellows*, 5 Greenl., 333; *McLellan* v. *Crofton*, 6 Greenl. 304.

The opinion of the Court was drawn up by

TENNEY, C. J.—After the verdict for the plaintiffs was returned, the defendants filed a motion to set it aside, on the ground that a juror, who sat in the trial, was an inhabitant of the town of Greenfield, which had, prior to the trial, been taken from the county of Hancock and annexed to the county of Penobscot, the agent of defendants, and their counsel, being ignorant of the fact, that the juror resided out of the county of Hancock.

The cause for the motion is technical in its character. The juror was personally competent after the change of the county lines, as before. But if he had been challenged when called to sit, the objection must have prevailed. The case falls within the principle of the authorities cited by the plaintiffs. The case of *Walker* v. *Green*, 3 Greenl., 215, is in point. There a juror was returned as a talisman, by the sheriff, who was a deputy of the latter. A motion after verdict, to set it aside for this cause, was overruled. The Court say, "the fact on which the motion is founded appears on record; and, of course, the plaintiff must be presumed to have waived it." The venires were open to the inspection of the parties, before the jury was empanelled, and they were constructively notified of the objection to the juror in question, and they must be presumed to have waived it.

Exceptions overruled.

APPLETON, CUTTING, MAY, and DAVIS, J. J., concurred.

HENRY PARTRIDGE *versus* WILLIAM SWAZEY *& al.*

Parol evidence of an erroneous date, in a mortgage of personal property, not under seal, is admissible.

Where a mortgage and the note secured thereby are made and delivered at the same time, the mortgage is valid, though by mistake dated a year prior to the date of the note.

By the record of such a mortgage, third parties, proposing to purchase the property therein described, are at least constructively notified of the lien.

When a mortgagee has the right of immediate possession of personal property, no demand is necessary in order to sustain an action of replevin by the mortgagee against the subsequent vendee of the mortgager.

ON EXCEPTIONS.

THIS was an action of REPLEVIN for a horse. All the facts essential to an understanding of the questions in issue are stated in the opinion of the Court.

J. A. Peters, for plaintiff.

It has been conclusively settled that no demand is necessary in a case like this. *Stanley* v. *Gaylord,* 1 Cush., 536; *Riley* v. *Boston W. P. Co.,* 11 Cush., 11; *Galvin* v. *Bacon,* 2 Fairfield, 28.

The mortgage was admissible in evidence, although the note was misdescribed in its conditional clause, and a mistake in date. *Williams* v. *Hilton,* 35 Maine, 547; *Bourne* v. *Littlefield,* 29 Maine, 302.

T. C. Woodman, for defendant, cited *Stedman* v. *Perkins,* 42 Maine, 130; *Abbott* v. *Goodwin,* 20 Maine, 408; 1 Parsons on Contracts, 44; *Culver* v. *Ashley,* 19 Pick., 300; *Smith* v. *Hodson,* 4 Term R. 211; Paley on Agency, 145–6.

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiff asserts title to the property in question under a mortgage, purporting upon its face to be dated April 17, 1856, to secure a note of $150, of the same date, payable Nov. 15, next after the date.

It was not pretended by either party that the plaintiff held a note corresponding with that referred to in the mortgage; but the plaintiff asserted that the mortgage bore an erroneous date; that it was actually given on April 17, 1857, the date of the note, which was produced; and he offered to prove the mistake by parol evidence. This was allowed by the Judge, against the objection of the defendants.

Proof of an erroneous date of an instrument has been allowed in decided cases in this State. *Trafton* v. *Rogers,* 13 Maine, 315; *Bourne* v. *Littlefield,* 29 Maine, 302; *Sweetser* v. *Lowell,* 33 Maine, 446. *Williams* v. *Hilton,* 35 Maine, 547, was not in relation to a date, but another error was allowed to be corrected by proof. The mortgage was not under seal, and, we think, the evidence was admissible, and the instruction to the jury, that, if they believed from the evidence, that the mortgage was made and delivered at the same time with

the note, and dated by mistake a year previous, the mortgage would be valid, was correct.

The jury were further instructed, that if the mortgage was duly recorded, the record would be a sufficient notice to the defendants of the plaintiff's title, after it was recorded.

The mortgage produced at the trial was properly recorded on April 18, 1857, according to the certificate of the town clerk thereon, the counsel for the defendants raising no objection thereto.

But unless the mortgage as recorded was a legal notice to the defendants, of the plaintiff's claim, the instruction on this point was erroneous. By the record alone, the defendants were not advertised of an error in the date of one year, and are not affected by the finding of the jury, to the extent that the mortgager would be, if he were the party defending. And this finding, in this case, is important only as it shows that the mortgage, and the note produced, are parts of one transaction.

It does not appear that any question was made touching the identity of the mare. It seems not to have been controverted that the mare replevied was really the one mortgaged. The mortgage, as it appeared upon the record, was of a gray mare, seven years old, and a colt, one year old, the same mare and colt that the mortgager bought of the mortgagee, and was made to secure a note of $150, of the same date of the mortgage, and payable the 15th day of the November next following. When, therefore, the defendants were about to make a purchase of the mare, severally, they were constructively, at least, notified that she was under a mortgage to the plaintiff for the security of the note described. And it does not seem to be material whether the note and the mortgage were both dated April 17, 1856, or April 17, 1857. There being no suggestion that any note for the like amount, given by the mortgager to the plaintiff, had at that time been paid or partially paid, no man of ordinary prudence would have omitted to have made inquiry whether the note was

outstanding or not; and whether the grey mare described in the mortgage was identical with the one which he contemplated obtaining. On inquiry at the proper sources of information, he would find the facts probably as the jury have found them, including the one that when the mortgage was actually made and delivered to the plaintiff, the possession of the mare was in him, as it is stated in the mortgage.

This case is distinguished from that of *Stedman* v. *Perkins*, 42 Maine, 130. That was a mortgage of "all and singular the shipbuilding materials *now* in my shipyard in Calais, consisting of timber of various descriptions, and iron and tools of various kinds," without any other description, made on Nov. 29, 1854, and recorded as having been made on March 29, 1854, and it does not appear from the case, that the materials on Nov. 29, 1854, were in any respect the same as those which were eight months before.

The instructions, that it was competent for the plaintiff to authorize McKinney to dispose of the horse, or, if he disposed of him without authority, to ratify the trade afterwards, were certainly not unfavorable to the defendants, and were of themselves correct.

The remarks of the Judge, that, if the plaintiff received the payment of $45, with the knowledge of the facts of the exchange, and received it as the money paid by Atwood to McKinney, it would tend to prove a ratification of the bargain, contained no rule of law, and does not imply, as a rule of law, that, if the $45, paid by McKinney to the plaintiff, was not the money received from Atwood, the facts referred to by the Judge would have no tendency to prove a ratification of the bargain.

The instruction, that, if the trade of McKinney was ratified by the plaintiff, he would be precluded from setting up his mortgage; otherwise he would not be precluded, unless McKinney had been authorized to make the trade by the plaintiff, or the mortgage had been discharged by payment or otherwise, was so obviously correct, that discussion is useless.

It does not appear from the case that the Judge ruled, or

was requested to do so, whether a demand by the plaintiff of the property in controversy, before the action was commenced, was necessary to the maintenance of the action or not; and that question is not raised in the exceptions.

But if the horse in question was the property mortgaged on April 17, 1857, in the mortgage which makes a part of the case, for the security of the note introduced, the plaintiff had the right of immediate possession and no demand was necessary in order to sustain the action.

Exceptions overruled.

APPLETON, CUTTING, MAY, and DAVIS, J. J., concurred.

NEW HAVEN COPPER COMPANY *versus* CHARLES S. BROWN.

When two actions are in the same Court, at the same time, wherein the plaintiff in each is entitled to judgment, and wherein the creditor in one is the debtor in the other, and a motion is made to set one judgment off against the other, so far as one will extend towards the satisfaction of the other, the Court will order the set-off, if the rights of others do not interfere.

The Court has the power to withhold judgment until the defendant, as plaintiff in another action, using due diligence, shall obtain his judgment for damages; after which one judgment may be set off against the other, or one execution may balance the other.

Whenever a set-off of judgments can be made by the Court, before which the actions are pending, or by the officer having executions, the creditor in one being the debtor in the other, "the demands are of such a nature" as to be within the provisions of the Revised Statutes of 1841, c. 114, § 74.

A. and B. obtained judgments against each other, and B. moved for a set-off. C., as assignee of A., objected:—
Held, that the assignee, before he can successfully resist the set-off, must make it appear that the assignment was before B. became entitled to the sum due him from A.

ON EXCEPTIONS from the ruling of RICE, J.

In this case an application was made to the Court by the defendant to have the judgment herein, and the judgment to be rendered in the action, *Charles S. Brown* v. *New Haven*

Copper Company, pending in this Court, set off, the one against the other.

The application was resisted by Wm. W. Goddard, who claimed to be the plaintiff in interest in said action against Brown, under an assignment of the subject matter of said action to him by said company.

The Court ordered the judgments to be offset.

To which order and ruling the said Goddard excepted.

C. J. Abbott, for plaintiff in interest.

The claim against the company is a purchased claim, and is not one which Courts will offset under circumstances like the present. R. S. c. 82, § 46 and following; *Burnham* v. *Tucker*, 18 Maine, 179; *Peabody* v. *Peters*, 5 Pick., 1; *Holland* v. *Makepeace*, 8 Mass., 418; *Sargent* v. *Southgate*, 5 Pick. 312.

In *Peabody* v. *Peters*, the Court say, (the demand in suit having been assigned,) "they, the defendants, *cannot* have a cross action and set off their judgments or executions."

But if one under any circumstances can avail himself of a purchased demand in a set-off of judgments, against an assignee of his creditor, he can do so only in relation to demands, purchased before the title of the assignee accrued; and the burthen of proof is upon him to show when he purchased.

If it did not appear in this case *when* the company assigned the claim against Brown, before Brown would be permitted to show any thing in payment or set-off, he would be obliged to show the *time* of the assignment. *Smith* v. *Prescott*, 17 Maine, 277; *Webster* v. *Lee*, 5 Mass., 334; *Wilbour* v. *Turner*, 5 Pick., 526.

Much more is he bound to show here when the note, which he offers in payment, was obtained by him, a fact peculiarly within his own knowledge.

A set-off of judgments, as asked for here, would be in violation of the letter and spirit of our statute. In the case of *Ford* v. *Stuart*, a set-off of judgments was allowed, where the foundation of the judgment asked to be set off, was a

purchased claim. 19 Johns., 342. But, in delivering the opinion of the Court, in *Burnham* v. *Tucker*, 18 Maine, 179, SHEPLEY, C. J., says expressly, that, under our statute, no such set-off could take place.

That exceptions furnish a remedy in cases like this, is settled in *Bartlett* v *Pearson*, 29 Maine, 9.

J. A. Peters, for defendant.

The case does not show that Brown had any *notice* of an assignment at any time prior to getting his demand against the plaintiffs, whenever it might have been, and therefore the offset must be made. *Porter* v *Leach*, 13 Met., 482.

Where judgments in cross actions are obtained, the Court, on application, will set off one judgment against the other. 7 Mass., 140; 8 Mass., 451; 12 Mass., 195; 1 Pick., 211, 214, 215.

Where the demands are such that they cannot be filed in set-off, the Court will even delay judgment in one action, till judgment in a cross action can be obtained. *Adams* v. *Manning*, 17 Mass., 178, 180.

Courts permit judgments to be set off upon motion, when such set-off is equitable, even if parties are not the same, whether the statute expressly allows this, or not. 2 Parsons on Contracts, title "Set-off," p. 240, and numerous citations in the note.

The opinion of the Court was drawn up by

TENNEY, C. J.—By R. S., c. 81, § 68, and by R. S. of 1841, c. 114, § 74, it is provided that, when an action is brought in this State by any person not an inhabitant thereof, or who cannot be found therein, to be served with process, he shall be held to answer to any action brought against him by the defendant, if the demands are of such a nature that one judgment or execution can be set off against the other.

As between the parties upon the record, in the two cases in which the set-off is claimed by Charles S. Brown, the creditor in one and the debtor in the other, the provision of the statute quoted is applicable. But William W. Goddard in-

sists that the judgment against Brown was assigned to him, so that the set-off cannot be made, consistently with other provisions of the statute.

When an officer has in his hands executions, wherein the creditor in one is the debtor in the other, in the same capacity and trust, he shall cause one execution to satisfy the other, so far as it will extend; if one of such executions is in the hands of the officer, and the creditor in the other tenders his execution to him, and requests him so to do, he shall so set off one against the other. Executions shall not be so set off against each other, when the sum due on one of them has been lawfully and in good faith assigned to another person, before the creditor in the other execution became entitled to the sum due thereon. R. S., c. 84, § § 26 and 27.

When two actions, in the same Court and at the same time, wherein the plaintiffs in each are entitled to judgment, and wherein the creditor in one is the debtor in the other, and a motion is made to the Court to set one judgment off against the other, so far as one will extend towards the satisfaction of the other, the Court exercise the power to sustain such motion and make the set-off, if others' rights do not interfere. And, ordinarily, this may be done whenever the executions issued upon such judgments could be legally set off, one against the other, by the officer who may have them in his hands for service. *Makepeace* v. *Coates, and Coates* v. *Makepeace & al.*, 8 Mass., 451. And to enable a party to have the benefit of the exercise of such discretion in the Court, it has the power to withhold judgment, until the defendant, if he will use due diligence, shall obtain his judgment for damages; after which, one judgment may be set off against the other, or one execution may balance the other. *Adams & als.* v. *Manning & als.*, 17 Mass., 178.

It cannot be doubted that, whenever a set-off can be made by the Court before which the actions are pending, or by the officer having executions, the creditor in one being the debtor in the other, "the demands are of such nature" as to be within the provisions of the statutes first referred to.

Assuming that Goddard was the assignee of the demand in favor of the New Haven Copper Company against Brown, in law and in good faith, before he can resist successfully the set-off, it must appear that the assignment to him was before Brown became entitled to the sum due to him, in his action against the same company.

The note on which Brown's action was founded was dated January 4, 1857, nine months before the order by the treasurer of the company was drawn, and more than that before the order was accepted. The provision under which Goddard resists the set-off is an exception to the rule of the statute. In the case of *Porter* v. *Leach*, 13 Met., 482, where an officer, holding two executions, wherein the creditor in one was the debtor in the other, and refusing to make the set-off, as requested, was held liable in trespass, for taking the plaintiff's property to satisfy that part of the execution which would have been discharged by the application of the amount of that in his favor, WILDE, J., who delivered the opinion of the Court, says, "nor does it appear that the assignment was made before the plaintiff became entitled to the sum due on his execution, as the statute requires, in order to defeat his right of set-off." The statute, under which the case cited was decided, is substantially the same as that under which the motion for a set-off in the case which is under our consideration, was made.

To bring the case within the exception in favor of an assignee, the burden of proof is on him. It has not been shown, or attempted to be shown, at what time Brown became the owner of the note, by indorsement and negotiation, which is the foundation of his suit. Hence it does not appear that he was not entitled to the sum due on that note, before the assignment to Goddard.

The proceedings before the Probate Court in Connecticut have no application to the question before us. The rights of Brown were in no manner involved therein.

Exceptions overruled.

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

WINSLOW HINKS *versus* CHARLOTTE HINKS, *Appellant.*

Under the statutes in force in A. D. 1810, relating to roads, it may well be questioned whether the selectmen of towns had authority to do more than lay out roads; and the expression of an opinion in a report of the laying out of a road, that "two bars or gates may be kept up across the road," although the report was accepted by the town, confers upon the owner of the land, no authority thus to encumber the road.

But as a road may be established by user, the rights of the public will be according to the user. *Thus*, where a road had been encumbered for forty years with moveable bars or gates, the right to use the road still existed, subject to such limitation.

And if one passing over the road neglects to replace the bars he removes, he does not thereby become a trespasser; for this is a mere *nonfeasance*, which does not render him a trespasser *ab initio*.

When the right to enter upon the land of another exists, the remedy for an abuse of that right is by an action of the case.

REPORTED by RICE, J.

TRESPASS *quare clausum.* This action was submitted, on a report of the evidence at *Nisi Prius*, to the full Court, with jury powers.

The plaintiff alleges in his writ that the defendant broke and entered his close in Bucksport, on divers days and times between a certain day named, and the date of the writ, and threw down and left down the plaintiff's bars, exposing his field to damage, and subjecting him to loss of time, expense and inconvenience in repairing them, &c.

The action was originally brought before a justice of the peace, from whose judgment the defendant appealed to this Court.

From the report of the evidence, it appears there was evidence tending to show that, for many years, there had been a way or road leading from the county road to the shore of Penobscot river, passing over the plaintiff's land, which way was entered on the south side of the county road, near the plaintiff's barn. At the entrance of the way there had been kept up, except in winter, bars or a gate. The distance from the county road to the shore, where several families live, is

about one hundred rods, though persons live on the road side. The road has been used for hauling wood and lumber over it in winter.

The plaintiff, as highway surveyor, has worked upon and repaired the road.

Some of the persons using the road would neglect to replace the bars they had taken down, of which the plaintiff made no complaint until recently. The defendant resided in the vicinity of the plaintiff, and frequently passed over the road to visit her sister, who lived near the shore.

It appears, from a copy from the records of the town, that, on July 11th, 1810, "the selectmen laid out a road or way, beginning at the county road in front of Winslow Hinks' barn, at a post; thence, [here follow the courses and distances,] to low water mark; the said road to be three rods wide. The selectmen are of opinion that it is unnecessary that said road should be fenced out or kept constantly open, but that one or two gates or bars may be kept across the same. And that, as a compensation for the land of Winslow Hinks, through which the said road runs, he shall enjoy the privilege of the land allowed for a road on the north side of farm, from the county road to the river."

The road thus laid out was accepted by the town, Sept. 29, 1810.

Woodman, of counsel for plaintiff, argued,—

That, as the laying out of the road was an invasion of private rights, the report of the selectmen should be construed strictly; matters of doubtful construction should be determined favorably for the land owner.

What is now called a "town way" in our statutes was termed, in the statute in force when this road was laid out, "a particular way for the use of the town." Laws of Mass., vol. 1, p. 371, (Feb. 27, 1787.)

It nowhere appears that there is any limitation or restriction as to the *manner* of laying out, whether open or with bars or gates, and no distinction in the Act is made as to the

manner of laying out, or kind of road to be made, between ways laid out for the use of the town and those for private use.

It will hardly be contended that what we denominate private ways may not be encumbered with bars or gates. Then where is the distinction?

The laying out and acceptance must not be conditional. *Christ Church* v. *Woodward*, 26 Maine, 172. If the report in this case is to be construed as conditional, then the proceedings are simply void. But if *descriptive* merely, they may be good; but the road must be as described and taken, if at all, with the inconveniences which bars or gates impose; else a gross wrong and even fraud was committed upon the owner of the land. He had a right to insist that the burden of a road over his land should not be imposed upon him without compensation.

He has had such compensation as the selectmen recommended, but only for what they recommended. When compelled to throw open the road, he will receive damage for which he has no redress.

Besides; it is urged that the report of the selectmen, in its *entirety* and in *detail*, is but their *recommendation* to the town. They are its servants, whose duty it is, when applied to, to inquire and ascertain what the town had better do. The town is the ultimate tribunal. It is acting for itself when it "approves and allows" a road for the use of the town. And, when it adopts the recommendation of its servants, it cannot be permitted to say to a citizen that, what the report contains for *our* benefit is all right, but for *yours*, all wrong. It was the report of the selectmen which was accepted.

The evidence shows that the road has always been encumbered with bars or gates. It has been so used for fifty years, about, in accordance with the report of the selectmen and the undoubted understanding of all parties interested. Whatever conclusion the Court may adopt in regard to the recommendation of the selectmen, it is submitted that the plaintiff has by long usage acquired a right to keep up his bars

across the way, and that any easement which the public now has is subject thereto.

Taking the whole matter together, this was a laying out a road with a *limitation*, or a condition, and it results that it is either a road with such condition or no road at all.

It would be severe to say that such condition was no part of the road, and thus mislead the land owner, who takes such qualification to the use of the road as a compensation in lieu of damages.

Privileges may be reserved to owners of land through which a road passes. *Windsor* v. *Field*, 1 Conn., 279.

Knowles & Tuck, for defendant.

By the statute of Massachusetts, passed in 1787, the selectmen were empowered to lay out town ways. The authority was general, and, in the manner of exercising it, left them no discretion. The power conferred was identical with the authority of selectmen by our statute. Their duties are prescribed, and the town could not confer any additional authority. They may locate the road, fix the boundaries, estimate damages, &c., and make return of their doings, and there their power ceases. They derive their authority from the statute, and cannot exceed it.

The statute gives them no authority to make conditions, or to impose terms; or to lay out a road provisionally, or to express an opinion. They are to perform positive duties, and to do certain and positive acts. They lay out a road and give courses and distances, making it three rods wide. Having thus performed their duty, they volunteer an opinion not in any way connected with the performance of that duty. Nor is there any thing to indicate that the opinion they express influenced them in any manner in locating the road, or that the town, in accepting the road with such an expression of opinion, intended to sanction or adopt it.

Such a power as is claimed here, even if exercised with the intention of making the laying out conditional, might be the means of great abuse. The inhabitants of one part of a town,

who wished to use such a road commonly, might be subjected to bars and gates, or any other inconveniences, by others who had no use for it. The people of other towns, and the public generally, might be placed in the same situation, and by the mere expression of an opinion by the selectmen. A majority of the voters of a town would thus have the power and right to erect a perpetual nuisance upon a minority and upon the public.

If the plaintiff acquired the right of maintaining bars, it was an easement acquired against the public convenience and would be forfeited by abuse. *Doane* v. *Badger*, 12 Mass., 65; *Prescott* v. *White*, 21 Pick., 341.

The defendant would not be liable in trespass, if she used the bars as had been customary by those passing them and acquiesced in by the plaintiff.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of trespass *quare clausum.* The defendant justifies under a right of way over the premises.

It appears that a road was laid out over the *locus in quo* and accepted in 1810, which has been used by the public ever since. The selectmen, after describing the limits of the road, express an opinion that "two bars or gates may be kept up across the road." This purports only to be the expression of their opinion. It may well be questioned whether they had authority to do more than to lay out the road. If they had, it does not seem that they attempted to do it. If the road is to be regarded as laid out and accepted, and as without gates or bars, the erecting them would be a nuisance and their removal would be justified.

But a road may be established by user. The rights of the public may be more or less extensive according to the user shown. In the present case, the evidence of the plaintiff tends to show a road encumbered with moveable bars or gates, for a long period of time.

But if the right of passage was subject to the limitation of

bars or gates, still the right would exist. The defendant might, if she chose, pass over the premises in dispute. Her right of passage is indisputable. To do this, she must remove the bars; and she would not be liable in trespass for either their removal or her subsequent passage over the plaintiff's land.

Nor does she become a trespasser by omitting to replace the bars. This is a mere *nonfeasance*, which does not make one a trespasser *ab initio*. 8 Coke, 146; *Gardiner* v. *Campbell*, 15 Johns., 401; *Ferrin* v. *Symonds*, 11 N. H., 363. Where the right to enter upon the land of another exists, the abuse of it will not sustain an action of trespass. The remedy is case. *Edelman* v. *Yeakel*, 3 Casey, (Penn.,) 26. So one who has a license in fact to pass and repass over the land of another, and abuses it by leaving a bar-way open, whereby the cattle of others enter and do damage, is not liable in an action of trespass, but only in case, for a breach of his duty to keep the bar-way closed. *Stone* v. *Knapp*, 28 Verm., 502. *Plaintiff nonsuit.*

TENNEY, C. J., and CUTTING, MAY, DAVIS, and KENT, J. J., concurred.

SETH W. WHITMORE *versus* JACOB ALLEY.

A. and B. owned a horse in common. B. took it in possession, under an agreement to return the next week with the horse, and either buy A's half or sell A. his half, but failed to meet his agreement: —

Held, that A. cannot maintain an action of *assumpsit* against B. for the value of his interest in the horse: —

Held, that there was not a sale or purchase of one-half, but a mere verbal agreement to trade.

ON AGREED STATEMENT.

This was an action of ASSUMPSIT for one-half the alleged value of a certain horse.

Prior to January, 1853, one Samuel Lord got up a lottery, consisting of a variety of personal chattels, among which was the horse in question. The drawing of the lottery took place on Jan. 15, 1853. The defendant had two tickets in the lottery, one of which belonged to his daughter, and, in the first drawing, one of the tickets held by defendant drew the horse. Defendant at the time did not know whether it was his ticket or the one belonging to his daughter which drew the horse, and did not know until subsequently that the successful ticket was his daughter's. Immediately after it was announced that one of the tickets held by defendant had drawn the horse, defendant left the place of drawing and went to Mr. Lord's house, the horse being in Lord's barn. Before the drawing was completed, it was alleged that some error existed, and a new drawing was had. Plaintiff immediately went after the defendant to be present at the second drawing, but defendant declined to return. The second drawing was completed before plaintiff returned, and on his return he was informed that his ticket had drawn the horse. All of the articles drawn, excepting the horse, were delivered according to the second drawing.

The parties then went to the house of Mr. Lord, and it was then agreed by them that they should own the horse in common. Mr. Lord then delivered the horse to the plaintiff and defendant as their joint property. Defendant requested plaintiff to permit him to ride the horse home, and agreed to return with the horse the next week and would either buy the plaintiff's half or sell his half to the plaintiff. To this plaintiff assented, and the defendant then took the horse, but has since refused to return him, or pay plaintiff for the half claimed by him. Within a few days after the drawing, plaintiff called on the defendant to settle the matter, but defendant refused to deliver the horse and forbid plaintiff from taking him, saying that he had nothing to do with the horse and that it was his daughter's ticket which drew him.

S. Waterhouse, for plaintiff.

A. Wiswell, for defendant.

The opinion of the Court was drawn by

KENT, J.—*Assumpsit* for the value of one-half of a horse.

We may lay out of the question all in the case that relates to the lottery, and the drawing of the horse in question. It is not pretended by either party that any title passed by those transactions.

The case, as between these parties, stands upon the fact that Lord was the undisputed owner, and that he voluntarily, or for some reason satisfactory to himself, parted with his property, and delivered the horse to the plaintiff and defendant, who agreed that they should be joint owners, or owners in common, in equal parts, of the horse. At this stage, neither had the legal right to the exclusive possession, and but one could have such possession at the same time.

It was then agreed that the defendant might take possession of the horse for a time, with the agreement on his part that he would return *with* the horse the next week, and would either buy the plaintiff's half, *or* sell his half to the plaintiff. The case further finds that the defendant has since refused to return the horse, or pay the plaintiff for the half claimed by him.

This action is *Assumpsit.* The writ and declaration, which are made a part of the case, show a claim on account annexed, "for amount due for horse," the money counts, and a special count, which sets out the agreement to have been that defendant was to return the horse *to him,* the plaintiff, on a certain day, and that defendant would then either pay to the plaintiff the *value* of one-half of the horse, or the plaintiff might pay the defendant one half *of the value* of the horse. The allegation of a breach is that he did not return the horse at the day, or since, and has not paid the plaintiff the value of one-half of said horse, or any part; by reason whereof, the defendant *became the buyer* of the plaintiff's interest in said horse, to wit,

one-half, and became liable to pay the value, which is stated to be sixty-two dollars and fifty cents.

The case as stated in the declaration, and the case as it appears in the agreed statement, vary essentially. The allegation in the writ, that defendant was to return the horse *to plaintiff*, is not supported by the agreed statement that he was to return "with" the horse. Nor is the allegation, that, on the return, he was to pay or receive *the value* of one-half of the horse, sustained by the fact agreed, that he was either to buy or sell one-half of the horse. In any light that we can view the case, this action of *assumpsit* cannot be maintained, on the facts agreed. It is not based on the *non-return*. If the facts proved a wrongful conversion by one joint owner as against his co-tenant, then trover would have been the proper remedy. It is unnecessary to determine whether an action of trover could be maintained on the facts agreed. The case, *Dane* v. *Cowing*, 22 Maine, 347, seems to be an authority against such a suit, until a sale by a co-tenant.

The other portion of the agreed statement does not show a sale or purchase of one-half, and this action rests entirely upon a contract of sale and purchase. It was, at most, a verbal promise to trade, or bargain, when they should meet, and either to sell or buy. No sale was made, and none of the *indicia* or legal requirements to constitute a sale appear. No request was made by plaintiff to defendant to determine whether he would sell or buy, and no offer by plaintiff to buy and pay an agreed price, or to sell his part. No price was named, no writing signed, no delivery or acceptance. It is no stronger case in law than one would be where a man says to another, I will come to your house to-morrow and bring my oxen, and we will make a bargain, and I will either buy your oxen or sell you mine. No action could be maintained on such a verbal understanding, which simply looked forward to a possible contract, and left every thing undetermined. It would not be an executory contract, for no contract is made. It would, at most, be a negotiation preliminary to a contract,

of no binding force until legally completed. The fact that the defendant "refused to deliver the horse when requested, and forbade the plaintiff's taking him," cannot make a contract of sale. It might be important evidence of conversion, in an action of trover, where such action would be the proper remedy. *Plaintiff nonsuit.*

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

ARTHUR F. DRINKWATER, *Adm'r, versus* JOSHUA R. JORDAN *& al.*

Where one of two joint debtors has been discharged, by a release not under seal, from his share of the debt, though for a sufficient consideration, such discharge is no defence to either in an action against both.

If the debtor, thus discharged, should be afterwards molested on account of the debt, his remedy would be by an action founded upon a breach of the contract of discharge.

A technical release to one of several joint debtors, being under seal, may be pleaded in bar to a suit against both.

ON AGREED STATEMENT.

THIS was an action of ASSUMPSIT, commenced by Eben Morrison, to recover the sum of $604,32, balance of account, alleged to be due from defendants. The death of plaintiff was suggested and A. F. Drinkwater, his administrator, came in to prosecute his suit.

Defendants offered the following receipt, which, it is admitted, was given prior to the making of the writ:—

"Ellsworth, October 13, 1857.—Received of B. F. Austin three hundred and two dollars and sixteen cents, which I acknowledge in full satisfaction for one half the amount due me from B. F. Austin & J. R. Jordan, late partners, under the firm and style of Austin & Jordan. I also agree hereby to release and discharge said B. F. Austin, from any further

claim, which I have against said Austin & Jordan, for any sum due me either in law or equity."

(Signed) "Eben Morrison."

It was admitted that a settlement was made by plaintiff and defendant Austin, on the said 13th of October, and that, by defendants' books, it appeared that said sum of $604,32, was due plaintiff.

It was also admitted that said Austin paid said $302,16, and that this receipt was given in full discharge of Austin alone, but with no intention to discharge his co-partner Jordan.

A. F. Drinkwater, pro se.

A. Wiswell, for defendants.

The opinion of the Court was drawn up by

MAY, J.—On the 13th of October, 1857, the defendants were indebted as partners to the plaintiff's intestate in the sum of $604,32. On that day, the defendant Austin paid $302,16, and took the receipt which is now relied upon as a discharge of the whole debt. But the receipt, by its very terms, purports to be *a full satisfaction for only one-half of the debt.* It does, however, contain a stipulation to release and discharge the said Austin from any further claim due to the intestate. It is apparent upon the face of the receipt, as well as admitted in the facts as agreed by the parties, that the receipt was given in full discharge of Austin alone, with no intention to discharge his co-partner Jordan.

Upon these facts, this case cannot be distinguished in principle from that of *McAllister & al.* v. *Sprague & al.*, 34 Maine, 296. The receipt relied upon in that case was in its effect precisely like this; and this Court there held that, where one of two joint debtors had been discharged from *his share* of the debt by an instrument not under seal, even though made upon an adequate consideration, such discharge constituted no defence to either, in an action against both; and that the remedy of the discharged debtor, if he should

be afterwards molested on account of the debt, would be by an appropriate action founded upon a breach of the contract of discharge. Such an agreement to discharge, like a covenant not to sue one of two or more debtors, cannot be pleaded in bar of an action against all. That such a covenant cannot be so pleaded is well settled. *Walker* v. *McCullock*, 4 Maine, 421; *Catskill Bank* v. *Messinger*, 9 Cow., 37; *Brown* v. *Marsh*, 7 Verm., 327; *Shed* v. *Prince & al.*, 17 Mass., 623. The reason is, because it cannot be inferred from such a covenant that it was the intention of the parties to discharge the debt. The law is otherwise in the case of a technical release to one of several joint debtors. *Shaw* v. *Pratt*, 22 Pick., 305. But the receipt relied on in the present case, not being under seal, is not a technical release, and, therefore, is not a bar to this suit.

Nor can it be said that the facts in this case show an intention to settle the whole debt upon the payment of a part, and that the case, therefore, falls within the statute of 1851, c. 213, in force at the time when the receipt was given, and reënacted in the R. S. of 1857, c. 82, § 44. No such intention is apparent, or can properly be inferred from the agreement to discharge *in full* only one of the defendants. The contrary, as before stated, is admitted. The whole debt, therefore, was not settled, and the statute cited does not apply.

Whether there was any consideration for the contract to release and discharge the defendant Austin from any further claim upon him, is a question upon which we give no opinion. This action is well maintained.

Defendants defaulted.

TENNEY, C. J., and APPLETON, CUTTING, DAVIS, and KENT, J. J., concurred.

GEORGE G. BARTLETT *versus* JOHN HAMILTON.

If an agent, having money in his hands belonging to his principal, voluntarily intermingles it with money belonging to himself or to other persons, and, on being sued therefor, defends on the ground that the money was stolen from him without fault or negligence on his part, the burden of proof is on him to show that the identical money was stolen which belonged to his principal.

EXCEPTIONS from the ruling of DAVIS, J.

ASSUMPSIT upon an account annexed to the writ, which also contained a count for money had and received.

The defendant admitted the money sued for to have been in his hands, but alleged that it was stolen from him, and for that reason he was not liable to pay it to the plaintiff.

The facts appear in the testimony of the defendant, who testified that he was master of a schooner engaged in the ordinary coasting business between Bluehill and Boston; *that* the plaintiff shipped by him fifteen barrels of oil for Boston, with directions to sell the same, and, after purchasing some goods for plaintiff, a memorandum of which was given him, to bring back the balance of the proceeds to the plaintiff; *that* several other persons sent oil by him at same time, and had done so at other times; that he sold the oil in Boston, and, after purchasing the goods as directed, he brought back the balance of the proceeds; *that* he saw the plaintiff the day after he returned and told him his money was ready; *that* he was not at his vessel, where the money was, at the time, but was about one-fourth of a mile from it; *that* plaintiff said he could not call for it then, but would call some other time; *that* he, defendant, kept the money locked up in a drawer in the cabin; *that* he sold the oil of the plaintiff and that of other persons to the same man in Boston from whom he received the proceeds; *that* he did not keep the money belonging to the different shippers separate, but mixed it together and with his own money; *that* out of this common fund he paid the other shippers, and also paid wages to

his men; *that* in about a week afterwards the plaintiff called to settle, and when he went to his drawer for the money, he found that it had been broken open and between $260 and $270 stolen; *that* there was only a little more than $100 left; *that* he paid the plaintiff $100, and had not paid the remainder; *that* he charged the plaintiff and others for whom he carried oil 20 or 25 cents per barrel for doing the business, but made no distinct charge for bringing back the money.

Upon this testimony, the presiding Judge instructed the jury, with other instructions to which no exceptions were taken, that if the defendant voluntarily mixed the money of the plaintiff with his own money and the money of other persons in his hands, so far as the burden of proof rested upon him to show that the money was stolen, he must prove the money stolen to have been the identical money belonging to the plaintiff. To this the defendant excepted.

Exceptions overruled.

ALLEN ROGERS, *Pet'r for part'n, versus* W'M P. WINGATE *& al.*

The purchaser of a right in equity to redeem real estate, sold on execution, acquires no interest in the estate that can be attached or seized, until the year, allowed the debtor to redeem from the purchaser, has expired.

ON FACTS AGRERD.

PROCESS for PARTITION of a parcel of timber land.

Wingate claims nothing. John M. Lord, the other respondent, claims to be sole seized.

The claim of title, made by the respective parties, is fully set forth in the statement of the case by the parties. Only one of the several questions which were argued by the counsel is considered in the opinion of the Court. The facts admitted, bearing upon that point are, that one Crosby owned the right in equity to redeem one undivided half of the premises sought to be parted; that right was seized and sold on

execution, on the *twelfth* day of July, 1856, to W. W. Rogers and others. The right which said purchasers acquired by this sale was sold on execution against them on the *ninth* day of July, 1857, to the petitioner.

It was contended for the respondent that, at the time of the sale, on the 9th day of July, 1857, Crosby's right to redeem from Rogers and others had not become foreclosed; that, until the expiration of a year, Rogers and others had no interest under the sale to them that could be legally seized or attached, and, therefore, nothing passed to the petitioner by the attempted sale.

The case was argued at May term, 1858, by

Kent, for petitioner, and by

Peters, for Lord.

The opinion of the Court was drawn up by

TENNEY, C. J.—The petitioner claims to be the owner and seized of one undivided half of the right in equity of redemption from a mortgage, in land, of which he seeks partition. Wingate claims no interest in the premises; and the other respondent insists that the title to the equity of redemption is in himself solely.

On January 12, 1854, the petitioner and one Crosby were the owners of the right in equity of redeeming the land, in equal moieties, in common and undivided. On November 19, 1855, Crosby conveyed his interest to Lord, by deed of that date, which deed was not recorded till December 13, 1855.

The right of the petitioner is derived from the attempted sale of Crosby's right, made on July 12, 1856, to W. W. Rogers, Samuel Rogers, and Andrew P. Goodale, on an execution, issued upon a judgment in favor of Nathaniel J. Miller, against them and said Crosby, in season to save the attachment on the original writ, claimed to have been made on Dec. 6, 1855, and a sale of the purchasers' rights, so acquired, to him, made on an execution, issued upon another judgment in

favor of said Miller, against them and said Crosby, on July 9, 1857.

Unless Crosby's title passed to the purchasers, by the first sale attempted, and that title, if acquired, vested in the petitioner by the second sale, the process must fail.

The supposed sale of July 9, 1857, was while the right of Crosby to redeem from the first sale was in full force; and, at that time, W. W. Rogers, Samuel Rogers, and Andrew P. Goodale, had no right upon which the levy could be effectually made. *Kidder* v. *Orcutt*, 40 Maine, 589, is decisive upon this point.

Other questions have been discussed in argument, which are not important to the final disposition of this petition, as the matter stands in the statement of facts.

According to the agreement of parties, made April term, 1858, modified May, 1858, the entry is to be

"*Neither party without prejudice.*"

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

WILLLIAM STONE, *in Equity, versus* LEVI BARTLETT *& al.*

The statute providing for the sale on execution of an equity of redeeming mortgaged real estate, regards such equity as an entirety, and does not authorize the sale of numerous equities for one sum. The equities are several, and the sales must be several.

Parties taking conveyances from those in whom the records disclose the title to be, in good faith, without notice of fraud affecting prior transactions, and for a valuable consideration, are to be protected.

In proceedings to redeem mortgages, the mortgagee must include, in his account rendered, only such prior incumbrances as he has actually paid, and no others.

A mortgager, filing his bill to redeem, may bring before the Court all parties who might call for redemption, — second mortgagees, subsequent incumbrancers, and all interested.

But the owner of the equity may bring his bill against the last mortgagee, if he choose to incur the risk of a foreclosure by a prior mortgagee, during its pendency. The defendants have no right to require the complainant to redeem prior mortgages. If they have paid prior incumbrances, they hold them as a charge upon the estate.

It would seem, that a party attempting to foreclose a mortgage should give notice to all parties whose interests may thereby be affected.

In a bill to redeem real estate mortgaged, the mortgagee is properly called upon to account for what he has received or ought to have received of the proceeds of personal property mortgaged to him to secure the same demands, deducting all reasonable and necessary expenses incurred in and about it.

BILL IN EQUITY, to redeem lands mortgaged.

The facts sufficiently appear in the opinion of the Court.

Kent, for complainant.

Thomas, for respondents.

The opinion of the Court was delivered by

APPLETON, J. — It is in proof that Brown & Bunker, on October 27, 1849, having received a deed from Locke & Wheeler, conveying to them certain real estate therein described, and an interest in certain bonds for a conveyance of real estate from one Macomber and one Donnel, mortgaged the same to said Locke & Wheeler to secure the purchase money.

On Oct. 2, 1850, Brown & Bunker conveyed their equity of redemption to E. H. Swett.

On Nov. 4, 1850, E. H. Swett mortgaged the several parcels of land of which the equity of redeeming had been conveyed to him, with the exception of the tracts of which Macomber and Donnel had given bonds, to the defendants.

On Oct. 14, 1851, Swett released his equity of redeeming the last mentioned mortgage to this complainant and Charles Buck, and, on Jan. 26, 1853, Buck conveyed the interest thus acquired to the complainant.

Subsequently to the release of Swett to the complainant and Buck, the title to the Macomber and Donnel lands was

conveyed to Buck, by whom they were mortgaged to these defendants.

The complainant, having thus acquired the right of redeeming the lands mortgaged by Swett to these defendants, brings his bill to redeem the Swett mortgage.

The bill, after stating the title of the parties, alleges that the defendants entered upon and took possession of the mortgaged premises for the purpose of foreclosure, and have remained in possession, taking the rents and profits; that Swett, in addition to the security of the mortgaged premises, on Aug. 26, 1851, gave to the defendants and Charles Buck a mortgage of a large quantity of logs in the Shillah and Donnel ponds, of which they took possession in September, 1851; that Buck, on September 25, 1852, assigned his interest in the same to the defendants; that the defendants having manufactured these logs and sold the boards, hold the proceeds, after paying the debts secured by the mortgage, in trust for this complainant, to whom Swett had mortgaged the same by two subsequent mortgages, one dated Sept. 4, 1851, and the other dated April 3, 1852, to pay over the proceeds to him after paying the debts secured by the mortgage; that he has demanded an account of the rents and profits and of the proceeds of the logs mortgaged, and that he is ready and offers to pay whatever may be equitably due. The prayer of the bill is, that the defendants be required to render an account of the rents and profits received, and of the proceeds of the lumber, and to release and discharge their mortgage upon payment of what may be equitably due.

The defendants, in their answer, interpose various objections to the maintenance of the bill, which will be severally considered.

1. It is objected that the deed from Brown & Bunker to Swett, conveying the equity of redemption, was fraudulent as to creditors; that the defendants are such creditors; that the complainant took his conveyance with notice of the facts, and that, therefore, the bill cannot be maintained.

It was held, in *Stone* v. *Locke & al.*, that, as long as the

legal title remained in the complainant, the bill could be sustained in his name only, and that mere creditors, as such, without the intervention of legal process to divest such title, have no right to interfere.

2. The defendants allege further, that Jeremiah O. Nichols, a creditor of Brown & Bunker, commenced a suit against them, in which he caused their equity of redemption to be attached, and, judgment having been obtained, to be sold on execution, and that E. T. Farrington became the purchaser, and that, by these proceedings, the complainant was divested of his legal title.

Before considering this question it may be necessary to notice the dates of the deeds under which the complainant derives his title, and of the attachment on the writ in the suit, *Nichols* v. *Brown & Bunker*, and the sale of the equity on the execution upon which the defendants rely.

Brown & Bunker released their equity to Swett on October 2, 1850.

Swett mortgaged to these defendants on November 4, 1850.

Swett conveyed to Buck and complainant, on October 14, 1851.

The attachment in the suit, *Nichols* v. *Brown & Bunker*, is dated October 11, 1851, and the sale of the equity was made June 30, 1852.

It is apparent therefore, that if the deed of the sheriff conveyed Brown & Bunker's equity of redeeming their mortgage to Locke & Wheeler, that it must defeat the mortgage from Swett to them, under which they claim title, and for the redemption of which this bill is brought.

The sale of June 30, 1852, on the execution, *Nichols* v. *Brown & Bunker*, was of the equity of redeeming their mortgage to Locke & Wheeler and their mortgage to Nathan A. Swan for one entire sum. But the statute regards an equity of redemption as an entirety, and does not authorize the sales of numerous equities for one sum. The equities are several and the sales must be several. *Fletcher* v. *Stone*, 3 Pick. 250.

But upon other than technical grounds the deed of the sheriff cannot avail the defendants. The mortgage of Swett to these defendants was long prior to the attachment in the writ, *Nichols* v. *Brown & Bunker*. The defendants rely upon their mortgage from Swett, and say that it was upon good consideration and in good faith. If defeated, their security to that extent would be lost. There is neither allegation made nor proof offered that they were connusant of any fraud on the part of Swett or his grantors. Taking, then, without notice and in good faith, a conveyance from one, in whom the records of the county disclose the title to be, they are to be protected. The law on this subject is settled alike by reason and authority. The fraud between Brown & Bunker and Swett is immaterial, so far as the defendants are concerned, if they were purchasers in good faith without notice and for a valuable consideration. *Green* v. *Tanner*, 8 Met. 411. A purchaser of land for a full consideration, of one who has the recorded title, without knowledge of its being fraudulent, will be protected in his title against the creditors of the fraudulent grantor. *Erskine* v. *Decker*, 39 Maine, 467. The title having become vested in the defendants as mortgagees, it could not be divested by subsequent proceedings and nothing passed by the sale of the equity.

The conveyance from Brown & Bunker to Swett was dated October 2, 1850, and the mortgage from Swett to the defendants November 4, 1850. The defendants claim the conveyance to Swett to have been fraudulent, but the mortgage from Swett to them was to secure the entire indebtedness of Brown & Bunker to them as well as that of Swett. It is not easily to be perceived how, under such circumstances, they can have been defrauded, however it may be as to the other creditors.

3. It is immaterial to consider whether the conveyance from Swett to Buck and this complainant was fraudulent or not, inasmuch as no proceedings have been had to divest that title. Swett cannot redeem because he has parted with his title. His creditors cannot because they have not ac-

quired it. It has become vested in the complainant, who alone can maintain this bill.

4. It is insisted that the defendants, upon demand, have rendered a true account of the amount due, and that therefor a tender should have been made before bringing this bill. It is true no tender has been made. It is equally true that no such account as the statute requires has been rendered. The defendants in their answer say that, before the commencement of this bill, they had become the owners of two of the notes of Brown & Bunker, secured by the Locke & Wheeler mortgage. But, in their account rendered, they include all the Locke & Wheeler notes as due them. But they then owned but two of those notes and had a right to claim payment only of so much of the prior incumbrances as they had then paid. The other notes of Brown & Bunker belonged to Locke & Wheeler, to whom alone a valid payment could have been made. The account including sums the defendants had not *then* paid was erroneous.

5. It is next insisted that these are not the requisite parties to this bill. In *Stone* v. *Locke & al.*, the existence of the mortgage now sought to be redeemed was not disclosed in the bill, answer and proofs.

In the present case the mortgage of Brown & Bunker to Locke & Wheeler, and of Swett to the defendants, are both made a part of the case. It would seem that a party attempting to foreclose, should give notice to all parties whose interests may thereby be affected. *Downer* v. *Clement*, 11 N. H., 112. This rule extends to all existing incumbrances. So a mortgager, filing his bill to redeem, according to the course of proceedings in equity, may bring before the Court all parties, who might call for redemption, second mortgagees and subsequent incumbrances, and all interested. *Johnson* v. *Holdworth*, 1 Eng. Law & Eq., 144; *Weed* v. *Beebe*, 21 Verm. 495.

But the owner of the equity may bring his bill, unquestionably, against the last mortgagee, if he choose to incur the risk of a foreclosure during its pendency by a prior mortgagee.

The defendants have no right to require the complainant to redeem prior mortgages. It is sufficient for them that he seeks to redeem the one they hold. If they have paid prior incumbrances they hold them as a charge upon the estate, from the payment of which the complainant, if he would redeem, cannot be relieved.

The defendants, in their answer, say that, since the commencement of this bill, they have become the owners of all the notes secured by the mortgage to Locke & Wheeler. If so, any supposed necessity of making them parties has ceased.

6. It seems, that on the 26th of August, 1851, Swett mortgaged a large quantity of logs and lumber to Charles Buck and these defendants; and that Buck, on the 25th of September, 1852, assigned his interest in the same to these defendants.

If this mortgage were to be regarded as foreclosed, the defendants would be held to apply the value of the property, so far as a title passed, when foreclosed, to the payment of the debts thereby secured, according to the order of priority designated in the mortgage.

But the complainant claims, and the proof introduced, and the course of proceedings adopted by the defendants, and their accounts rendered, seem to show that the parties did not regard the mortgage of personal property as foreclosed, but that the defendants were to manufacture and sell the logs and account for what they may have received. From the amount of sales should be deducted all reasonable and necessary expenses incurred on and about the logs, their manufacturing and keeping, and in the sales of the lumber, and the net balance remaining, should be applied to the payment of the debts secured by the mortgage from Swett to defendants, according to its terms and conditions. In this way exact justice can be done between the parties. The defendants will only be charged for what they have, or should have received, and the complainant will be allowed for such balance as may remain, if any, after paying the debts secured by the mortgage of personal property, toward the discharge of the mortgage he seeks to redeem.

The complainant is entitled to redeem, and a master must be appointed to ascertain the amount due on the defendants' mortgage, the rents and profits received, &c.

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

WILLIAM STONE, *in Equity, versus* SARAH LOCKE *& al.*

It is no valid objection to the maintenance of a bill to redeem real estate mortgaged, that the complainant holds under conveyances fraudulent as against the respondents, creditors of the complainant's grantor, until the estate of the complainant has been divested upon due proceedings.

The assignment of a note secured by mortgage, is not an assignment of the mortgage.

The assignee, however, in such case, has an equitable interest in the mortgage, which a court of equity will uphold and protect; and, therefore, when a bill is brought to foreclose or redeem the mortgage, the assignee should be made a party to the suit.

The demand for an account, under R. S. of 1840, c. 125, § 16, must be made upon the party having the legal record title to the mortgage.

Compound interest cannot be allowed on a bill to redeem a mortgage, made to secure notes with annual interest; and an account rendered by a mortgagee, upon the statute demand, covering such interest, and so exceeding the notes and legal interest, cannot be regarded as such an account as the statute requires.

BILL IN EQUITY, to redeem lands of which the defendants are alleged to be mortgagees.

The facts appear very fully in the opinion of the Court.

The case was elaborately and ably argued by

Kent, for complainant, and

Thomas, for respondents.

The opinion of the Court was delivered by

APPLETON, J.—This is a bill in equity to redeem certain lands of which the defendants are alleged to be mortgagees.

The bill alleges that on the 27th of October, 1849, Brown & Bunker mortgaged the premises, sought to be redeemed, to the defendants, to secure their notes given for the same; that, on October 2, 1850, Brown & Bunker conveyed the equity of redemption to E. H. Swett; that, on October 14, 1851, Swett conveyed the same to the complainant and Charles Buck; that, on January 26, 1853, Buck conveyed his interest to the complainant, thus giving him the equity of redemption; that the defendants entered to foreclose on October 23, 1851, and have since remained in possession, taking the rents and profits; that the complainant, before the commencement of his bill, seasonably demanded an account of the rents and profits and of the amount due; that the defendants neglected to render such account; that he is ready and offers to pay such sum as may be found equitably due; and prays that the defendants be required to account, and, upon receiving payment of what may be due, to release and discharge their mortgage.

The defendants, answering severally, admit the conveyances, as set forth in the complainant's bill; allege the deed of Brown & Bunker to Swett, of the equity of redemption, to have been in fraud of their creditors, and that they were such creditors, of all which the complainant and Buck had due notice before receiving their deed from Swett; that on May 23, 1851, they sold and assigned to Levi Bartlett & Co., one fourth of their mortgage and of the debt thereby secured; that, on Oct. 23, 1851, they made an entry to foreclose and took possession of the mortgaged premises; that the possession thus taken was continued by and for said Bartlett & Co. and themselves; that after such entry they divided the mortgage notes, the defendant Locke taking two, and the defendant Wheeler taking one, which they hold in severalty; that a demand was made on them and Bartlett & Co., to render, and that Bartlett & Co. did render an account.

The defendant Locke says, that she referred the complainant to Levi Bartlett & Co., upon receiving his demand for an account, and she makes their account, which she avers to be true, a part of her answer.

The defendant Wheeler, says he has assigned his interest in the note belonging to him to Bartlett & Co., and disclaims all interest in the mortgaged estate.

It appears from the proof introduced, that the complainant has the equity of redemption of all the lands included in the mortgage from Brown & Bunker to the defendants, of which the mortgagees were then seized. The lands of which Donnel & Macomber had given bonds to convey are excluded, their lands having been conveyed to Charles Buck.

1. The first objection taken to the maintenance of this bill is, that the conveyance from Brown & Bunker to Swett was fraudulent as to creditors; that the defendants were such creditors and the complainant took his title with a full knowledge of all these facts.

If the conveyance to Swett was in good faith, the plaintiff's right to redeem is unquestioned. If fraudulent, the legal title is none the less conveyed to him. Brown & Bunker, upon their conveyance to Swett, ceased to have any legal interest in the estate. Their conveyance was binding upon them. They could neither redeem nor do any other act for the protection of the estate. As between grantor and grantee the legal title vests in the latter, however fraudulent the deed may be as to creditors. A creditor who holds a promissory note against a fraudulent grantor, cannot defeat a real action brought by the fraudulent grantee, by merely showing the conveyance fraudulent and that he was thereby defrauded. While he is a mere creditor he is in no condition to resist the legal title of the fraudulent grantee, in law or in equity. He has no legal interest in the estate conveyed. *Andrews* v. *Marshall*, 43 Maine, 272. Until the estate of the complainant is divested upon due proceedings, the right in equity to redeem is in him and he may well maintain this bill.

2. It is alleged in the answers of the defendants, that Bartlett & Co. were owners of one of the mortgaged notes and assignees of the mortgage, to the extent of their interest. But the proof fails to show these facts. The assign-

ment of a note is not an assignment of the mortgage by which its payment is secured. By the agreement of May 25, 1850, signed by the defendants, it seems they agreed to foreclose the mortgage for their own benefit and that of Bartlett & Co., to whom they then transferred one note, and, after its foreclosure, to quitclaim to them, their heirs and assigns such proportion of the said mortgaged lands as the said note bears to all the notes mentioned in and secured by said mortgage. The legal estate, by the very terms of the agreement, was to remain the defendants'. They were mortgagees of record. They were to take possession. They, having the record title, could alone release or discharge the mortgage, so that the registry of deeds would show a good title. The demand for an account was therefore properly made on them, the title being in them by record, and there being no proof of any assignment by them of the mortgage to Bartlett & Co. *Mitchell* v. *Burnham*, 44 Maine, 286.

3. The complainant has made no tender, but has offered to pay what may be equitably due. He seeks to excuse his want of a tender by reason of the defendants' not having rendered, upon demand, any account of what was due upon the mortgage. By R. S., 1840, c. 125, § 16, a bill to redeem may be brought without tender, when the mortgagee, upon request, neglects or refuses "to render a true account of the sum due, before the commencement of the suit." "The object of a demand in such cases," remarks WHITMAN, C. J., in *Cushing* v. *Ayer*, 25 Maine, 383, "must be believed to be to obtain a statement of the precise sum due, so that a tender could be made which would be accepted." In *Allen* v. *Clarke*, 17 Pick. 47, WILDE, J., in delivering the opinion of the Court, says, that "it was the intention of the Legislature that the mortgagee should, on request, furnish the mortgager, or the person having the right to redeem, with such information as would enable him to tender the sum justly due; and not to leave him exposed to the danger of tendering more, for want of knowledge of the facts." After request made, the mort-

gagee is to be the moving party in making up and rendering the required accounts. *Roby* v. *Skinner*, 34 Maine, 270.

Neither of the defendants have rendered any account. The defendant Locke, instead of rendering an account, referred the complainant to Bartlett & Co., who do not appear to have any legal interest in the mortgage.

It was decided, in *Kittridge* v. *McLaughlin*, 38 Maine, 513, that compound interest cannot be allowed on a bill to redeem a mortgage made to secure notes with annual interest. The amount given as due by Bartlett & Co., very much exceeds the notes and legal interest and cannot be regarded as such an account as the statute requires.

4. Bartlett & Co., by taking an assignment or transfer of one or more of the mortgage notes, thereby acquired an equitable interest, which a Court of Equity will uphold and protect. *Moore* v. *Ware*, 38 Maine, 496. When a bill is brought to foreclose or redeem a mortgage, all parties in interest should be made parties to the suit, whether their interests be legal or equitable. As it is apparent that Bartlett & Co. have an equitable interest in the mortgage, and are entitled to be heard in determining the amount due, they must be made parties, or else the bill must be dismissed.

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

JESSE HINCKLEY *versus* ROWLAND H. BRIDGHAM.

A., as creditor of B., requested the latter to secure him, to which he replied that "he owned a vessel, and was willing to transfer the same as security" to A. The vessel was of much greater value than the demand. B. shortly thereafter transferred the vessel by an absolute bill of sale, which was recorded at the Custom House, all of which was done without the knowledge of A. till sometime afterwards: —

Held, that the transaction, to have been consistent with the previous conversation, should have been in the form of a mortgage, and that there was not such a perfected sale of the vessel as was valid against subsequent attaching creditors.

The plaintiff, as an officer, having three writs against A. attached a vessel as the property of A., for which the defendant became receipter. Judgment and execution followed in one of the actions, and, on the refusal of the defendant to re-deliver the vessel, an action was instituted on his receipt. Pending the suit, judgments and executions were had in the other suits against A.: —

It was held, that no new demand on the defendant was required; and that the plaintiff was entitled to the amount of the three judgments against A. as damages, that amount being less than the value of the vessel.

ON REPORT.

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

B. W. Hinkley, for plaintiff.

1. A *delivery* of a vessel in port, at the time of sale, is as necessary to perfect the title, as it is when any other description of property is sold. *Richardson* v. *Kimball*, 28 Maine, 463; *Brinly* v. *Spring*, 7 Greenl., 241; *Ludwig* v. *Fuller*, 17 Maine, 162.

2. An absolute conveyance of personal property cannot be legally proved in a court of common law to have been made only to secure the purchaser for liabilities assumed, and be good against the creditors of the vendor. *Richardson* v. *Kimball*, 28 Maine, 463; *Gorham* v. *Herrick*, 2 Greenl., 87; *Coburn* v. *Pickering*, 3 N. H., 415; *Whitaker* v. *Sumner*, 20 Pick., 399.

3. A debtor, without the knowledge of his creditor, exe-

cuted, and caused to be recorded, a mortgage of personal property, to secure a debt, and appointed a third person to act in the mortgagee's behalf. The debtor's property was soon after assigned under the statute of 1838. After the assignment, he delivered the mortgage to the creditor:—Held, that the mortgaged property passed to the assignees. *Dole* v. *Bodman*, 3 Met. 139.

4. If held as security, it should have been recorded in the office of the town clerk of Castine. R. S., c. 91, § § 1 and 5, p. 569; *Greeley* v. *Waterhouse*, 19 Maine, 9.

Abbott, for the defendant, cited *Sawyer* v. *Mason*, 19 Maine, 49; *Moulton* v. *Chapin*, 28 Maine, 505; *Norris* v. *Bridgham*, 14 Maine, 429; *Bicknell* v. *Hill*, 33 Maine, 297; *Pearson* v. *Tinker*, 36 Maine, 385; *Gilmore* v. *McNeil*, 45 Maine, 599; 2 Parsons on Cont., 157, 168; *Fisher* v. *Bartlett*, 8 Greenl., 122; *Lathrop* v. *Cook*, 14 Maine, 414; 1 Greenl. Ev., § 498; *Kent* v. *Weld*, 11 Maine, 459; 7 Greenl., 181; *Vose* v. *Manly*, 19 Maine, 331; *Thayer* v. *Stark*, 6 Cush., 11; 2 Greenl. Ev., § 640; *Goodenow* v. *Dunn*, 21 Maine, 92; *Sawyer* v. *Pennell*, 19 Maine, 167; *Brooks* v. *Briggs*, 32 Maine, 447; *Forbes* v. *Parker*, 16 Pick. 462; 9 U. S. Laws, 440, c. 27; *Eastman* v. *Avery*, 23 Maine, 248.

The opinion of the Court was drawn up by

CUTTING, J.—It appears that the plaintiff, on March 19, 1856, then being a deputy sheriff, on three several writs against Joseph H. and B. F. Stearns in favor of J. N. Dennison & Co., Pierce, Clark & Co. and Pierce, Brothers & Flanders, attached, as the property of the defendants in those suits, the schooner Diana, her tackle, apparel and furniture, and on the same day delivered the same to the defendant, upon his written "promise safely to keep said property and re-deliver the same on demand to said Hinckley or whoever may be authorized to receive the same, it being valued at thirteen hundred and fifty dollars." That subsequently, on May 8, 1857, J. N. Dennison & Co. recovered judgment and

execution against Joseph H. Stearns for $301,29 debt and costs taxed at $13,42, which execution was seasonably placed in the hands of one *J. P. Thomas,* a deputy sheriff and successor of the plaintiff in that office, who testified that—"By direction of the plaintiff's attorney, I made a demand on Jesse Hinckley for the schooner Diana, as having been attached on the original writ served by him, and he gave me a receipt of Rowland H. Bridgham for said vessel as attached on the original writ, and told me to call on said Bridgham for said vessel. Afterwards, on the third day of June, I presented said receipt to said Bridgham, and requested him to deliver me the vessel for the purpose of being seized on said execution. He said he could not do it, for they had gone away with the vessel, and he said 'I don't consider myself bound by the receipt, as Stearns did not own the vessel.'"

It further appears that the writ in this case was issued on October 9, 1857, founded on the defendant's contract and alleging a breach of the same by a refusal to deliver the vessel to *Thomas* when demanded by him.

To this suit, as thus far disclosed, the defendant sets up no defence, except that shadowed forth in his reply to the officer, "I don't consider myself bound by the receipt as Stearns did not own the vessel." And in support of that declaration introduces in evidence a bill of sale of the schooner in due form from *Joseph H. Stearns* to one *Rowland A. Bridgham* of March 11, 1856, consideration eight hundred dollars. Indorsed thereon under date of March 12, 1856,—"Received at Custom House, Castine. Recorded, Book of Enrolments, Vol. 4, Page 111, By G. S. Vose, Dy. Coll."

It would seem that this transfer, being anterior to the attachment, if made in good faith and not in violation of any known principle of law, and was duly enrolled, would constitute a valid defence. But all of these prerequisite propositions are denied by the plaintiff's counsel, and that is the first issue presented to us, who, by agreement of the parties, are to exercise in our findings the functions both of a Court and jury.

And, *first*, a question is made as to the legality of the enrolment, and evidence has been produced, which, if admissible, might raise some doubts as to the truth of the deputy collector's certificate. We are inclined, however, to the opinion that the certificate must be conclusive; but, inasmuch as the defendant had the care, custody and control of the custom house records, and the entry was made in his favor, and since the case will not turn on that point, we forbear a more decisive expression.

Secondly, it is contended that the sale was made under such circumstances as to be void in law, because it was *ex parte*, without adequate consideration, without delivery of the property, and absolute when intended only as security.

It is not controverted that *Rowland A. Bridgham*, the vendee, is the son of the defendant, and had been a clerk in the store of *Joseph H. Stearns*, the vendor. The following is the substance of the evidence in relation to the sale, as detailed by the vendee himself, who testified—"I was formerly in the employ of *Joseph H. Stearns*, something over three years, cannot state exactly, at an agreed price for the first year of two hundred and fifty dollars, for subsequent years no price was named. I claimed three hundred dollars for the second, and four hundred and fifty dollars for the third year; never had a final settlement. Stearns was willing, subsequently, to allow those wages. He had an account against me of three hundred and fifty-odd dollars. Prior to March 11, 1856, I made an attempt to obtain of Stearns security for my claim. I think I was advised, prior to that time, to obtain security from him. I think I left for Boston the morning before March 11, 1856, or the same morning. Shortly before leaving, I had a conversation with Stearns about securing my claim; his reply to me was, '*I own the schooner Diana free and clear, and will give her to you to secure your claim, if you are afraid.*' Immediately on my return from Boston, which I think was in April, I first knew the bill of sale was made and lodged in the custom house. I have managed the schooner since."

Other testimony was introduced tending to show that the

charge for services was not unreasonable. Also as to the value of the vessel, the lowest estimate being $850, and the highest $1500, the latter supported by the declaration of the defendant.

Now, upon the foregoing evidence, the question arises whether there was a sale so perfected as to be valid against subsequent attaching creditors, who are authorized minutely to scrutinize the whole transaction, and detect and expose, if possible, any actual or constructive fraud, or any imperfections which may legally invalidate the sale, which right they now claim to exercise.

At the time of the departure of the vendee for Boston, on or before the morning of the eleventh of March, eight days before the attachment, we find to be due to him from the vendor a balance of only $650 for services, a request of the vendee to be secured, and the vendor's reply that he was the owner of the vessel and was willing to transfer the same as security, "if you (the vendee) are afraid." Upon this foundation *solely* rests the theory of the defendant that the bill of sale was subsequently made on that day, with the knowledge and approbation of the vendee, which, by its enrolment, constituted a legal delivery and acceptance, and consequently a valid sale. This theory is unsupported by some of the essential elements which constitute a contract, both in law and fact. A conversation about security is not an agreement to secure. The record of enrolment can only be *prima facie* evidence of a delivery, which is rebutted by the positive testimony of the vendee himself, that he did not know of the transaction until his return from Boston in the April following. The absolute sale was unnatural and inconsistent with the previous conversation. To have been consistent, it should have been a mortgage, to be void upon condition of payment, in which event the creditors of the vendor would have had an attachable interest of considerable amount. And, finally, the consideration named greatly exceeds the amount due. But, instead of a mortgage for security, the sale was absolute, which brings this case, in some particulars, within that of *Richardson* v.

Kimball, 28 Maine, 463, where SHEPLEY, C. J., remarks, — "The bills of sale purport to convey those shares of the vessels absolutely and not as security for liabilities assumed. There is no satisfactory proof of any payment made, *or the discharge of any claim.* An absolute conveyance of personal property cannot legally be proved, in a court of common law, to have been made only to secure the purchaser for liabilities assumed, and be good against the creditors of the vendor," citing *Gorham* v. *Herrick*, 2 Maine, 87; *Coburn* v. *Pickering*, 3 N. H., 415; *Whitaker* v. *Sumner*, 20 Pick., 399.

We are aware it has been settled, in this State, that a bill of sale under some of the circumstances disclosed in this case, although to be regarded "as strong evidence of fraudulent intention in the parties to it, yet that it was not conclusive," and that the true intention was a question of fact to be settled by the jury. See *Reed* v. *Jewett*, 5 Maine, 96. And that this doctrine has been sustained by subsequent decisions, although, perhaps, somewhat conflicting. But, in the present case, if it became necessary for us to settle a question of fact as to the real intent, we perceive no sufficient evidence to remove the legal inference; certainly not as to the vendor, and the vendee could have had no intention until he had knowledge of the sale, which we have seen was after the attachment.

In our opinion, therefore, the defence fails, and, according to the agreement of the parties, *a default is to be entered.*

But another question is presented, which more properly relates to the amount of damages the plaintiff may be entitled to recover. Heretofore we have referred only to the demand made by *Thomas*, on June 3, 1857, who then had the receipt and the execution recovered by the first attaching creditors in his possession, for the amount of which we have already decided the defendant is liable.

It appears further, that subsequently, on Nov. 18, 1857, *Pierce, Clark & Co.*, recovered judgment for $411,24 debt, and $13,72, costs, and *Pierce, Brothers & Co.*, for $149,68, debt, and $13,72, costs, on which executions issued and were

placed in the hands of one *Augustus Stevens*, another deputy sheriff, as early as Dec. 10, 1857, for collection, who states that on that day he demanded the vessel of the defendant. A question is made as to the validity of this demand. In our opinion it was inoperative. It was after suit brought, and, besides, it does not appear affirmatively that the officer had the receipt in his possession. *Gilmore* v. *McNeil*, 45 Maine, 599. But a subsequent demand was not necessary. On the defendant's refusal to surrender the vessel on the first request, his liability was fixed, and he became responsible by force of his contract. *Thomas*, if he had obtained possession of the vessel on his demand, in the regular discharge of his official duty, must have sold the property at public auction, and, after satisfying the execution in his hands, kept the balance of "the proceeds to be applied to the discharge of the several judgments in the order in which the writs of attachment were served." R. S. c. 84, § 21. The value of the vessel being, in our opinion, sufficient to satisfy all three executions, judgment must be rendered against the defendant, and damages assessed accordingly.

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

KENT, J., having been of counsel in the case, did not sit.

COUNTY OF WALDO.

LEWIS STURTEVANT *versus* INHABITANTS OF LIBERTY.

Town and district orders are not considered to be commercial paper in the hands of *bona fide* indorsees for value, so as to exclude evidence of the legality of their inception; and whoever receives them, does so subject to any legal defence, such as the want of authority in the drawers or acceptors, whose agency, antecedently given or subsequently adopted, is a fact to be proved in order to bind the principals.

ON AGREED STATEMENT OF FACTS.

THIS is an action of ASSUMPSIT brought to recover the amount due on a certain instrument of the tenor following: —

"No 2, Liberty, Dec. 2d, 1856.

"To Albert D. Matthews, Treasurer of the town of Liberty: — Pay to Albert C. Collins, or order, forty dollars, thirty-nine cents, out of the treasury of the town, on account of building a school-house in district No. 7, in Liberty.

"Aaron Collins,
"Elbridge Davis,
"Hosea Collins,
} Building Committee."

On the back of said instrument is written — "Accepted December 2, 1856, A. D. Matthews, Treasurer," and also "Albert C. Collins;" over which said last name plaintiff has written the words "Pay to Lewis Sturtevant."

It is agreed that the signatures to said instrument, and indorsements thereon are genuine; that it was drawn at the time, and for the purpose therein specified; that it was presented by said Collins, on the day of its date, to said Matthews, treasurer, for acceptance and payment; that said Matthews thereupon accepted it, in his official capacity, and that said Collins thereafterwards negotiated and transferred it, in the ordinary course of business, and for a valuable consideration to plaintiff.

Plaintiff puts into the case no records of said district, nor certified copies, nor any evidence, other than what appears upon the face of the above instrument, to prove the legality of the proceedings of said district, or that the persons signing said instrument had any legal authority so to do, or to act in the official capacity in which they assumed to act.

It is agreed that no legal evidence of the organization of said school district, or of any legal meetings therein for the transaction of any business relating to any matters that may be acted upon by school districts, can be produced.

It is also agreed that, since 1853, the existence of said school district has been recognized by the town of Liberty, and by the officers of said town; that there has been a summer and winter school kept in said district every year since the above date; that the expenses of said schools have been paid by money drawn from the treasury of the town on orders drawn in the usual manner; that a school-house was built in said district in 1856, being the same referred to in said instrument; that they have had a school agent in said district every year since 1853; that the clerk of said district certified, to the assessors of said town, that said district had voted to raise the sum of $225,00, for the purpose of defraying the expenses of building said school-house therein, and that said assessors made an assessment upon the strength of said certificate, within thirty days from the date thereof; that said assessment, to the amount aforesaid, was made on the polls and estates within the limits of said district; that said assessment was duly certified to the treasurer aforesaid; that lists thereof were duly committed to the collector of taxes for said town for collection; that he collected thereon, and paid over to the treasurer of the town, the sum of $90,71; that said treasurer has paid out the whole of said sum to persons in whose favor the committee before named had drawn orders, in payment for labor performed and materials furnished in building the school-house aforesaid; that there is now in the hands of said collector the further sum of $6,00, by him collected of said assessment, and that the individuals

named in said lists, who have not paid the tax assessed against them, utterly refuse so to do.

The case was argued by

R. L. Keene, for plaintiff, and by

J. W. Knowlton, for defendants.

The opinion of the Court was drawn up by

CUTTING, J.—Town and district orders are not considered to be commercial paper in the hands of *bona fide* indorsees for value, so as to exclude evidence as to the legality of their inception; and whoever receives them, does so subject to any legal defence, such as the want of authority in the drawers or acceptors, whose agency antecedently given or subsequently adopted is a fact to be proved in order to bind the principals.

Waiving the consideration as to the organization and proceedings of the district, the question presented would be whether, at the time the order was presented and payment demanded of the town treasurer, he was possessed of the district funds; for only such were at the disposal of the committee. *Vide* R. S. of 1840, c. 17, § 35, and of 1857, c. 11, § 41, which provide that "the money so raised and *paid* shall be at the disposal of the district committee," &c.

The evidence reported fails to prove that the treasurer was in receipt of funds belonging to the district when the demand was made; consequently his refusal to pay was justifiable, and his acceptance unauthorized. *Plaintiff nonsuit.*

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, J. J., concurred.

INHABITANTS OF BELFAST *versus* INHABITANTS OF WASHINGTON.

The depositing in the post office a notice to a town that one of its inhabitants has become chargeable as a pauper was not, by the statute, designed to be evidence of the *contents* of the letter, but only of *delivery*.

Parol evidence of the contents of such a letter is not admissible, without notice to the opposite party to produce it, or proof of inability on the part of the moving party to produce the original.

REPORTED by DAVIS, J.

ASSUMPSIT to recover the amount expended for the relief and support of a pauper.

The plaintiffs introduced evidence tending to prove that the pauper fell into distress in said Belfast, in January, 1857, and then and there stood in need of immediate relief, and that they expended the sum of $40,75 for that purpose.

The plaintiffs then called William Pitcher, the mayor of said Belfast, who testified that he wrote a letter to the overseers of the poor of said Washington, April 24th, 1857, and mailed it on the same day, directed to said overseers, but that he kept no copy of said letter. The counsel for the plaintiffs then proposed to ask the witness to state the substance of the contents of said letter. The evidence, being objected to, was excluded by the Court.

The plaintiffs then called James Burns, who testified that he was postmaster and one of the overseers of the poor of said Washington, in 1857; that they did not receive notice from Belfast, but that a letter was received by said overseers from William Pitcher of Belfast, in the spring of that year; that said letter was not (at the time of the trial) in his possession, and he did not know where it then was.

The counsel for the plaintiffs then proposed to ask said witness to state whether said letter related to the relief and support of Sarah E. Davis as a pauper, by the plaintiffs; but the evidence, being objected to, was excluded by the Court.

The counsel for the plaintiffs then called James Burns and Luther Law, overseers of the poor and agents of said Wash-

ington, and also the counsel for the defendants, and inquired of each if he had not been notified to produce the letter aforesaid at this trial, and each witness testified that he had received no such notice.

The counsel for the plaintiffs thereupon consented that a nonsuit should be entered in the case, subject to the opinion of the full Court, upon the correctness of the rulings aforesaid.

Abbott, for plaintiffs.

Gould, for defendants.

Nonsuit confirmed.

JAMES DUNNING *versus* NANCY S. PIKE.

Neither the present nor any former statutes give a married woman power to purchase real estate on credit, and give her own promissory notes in payment, with a mortgage as security.

In such a case, the notes and mortgage given by her, and the deed given to her, are all void, the whole being one transaction, though the conveyances were made at different times, and the parties are different, yet all done in pursuance of a mutual arrangement.

ON AN AGREED STATEMENT OF FACTS. Sept. 20, 1854, Geo. A. Pierce conveyed certain land in Waldo county to Theodosia Dunning by mortgage, which by mistake was recorded in Penobscot county. Before the mistake was rectified, Pierce assigned his property, including the demanded premises, to Robert Treat & Co., who subsequently conveyed the same premises to the tenant, the sole consideration being that the tenant, by arrangement with all the parties, gave her notes and a mortgage of the premises to the demandant, in lieu of the notes and mortgage of Pierce to Theodosia Dunning. The tenant was at the time a married woman, and living with her husband. This is a WRIT OF ENTRY, brought to foreclose the tenant's mortgage.

In Penobscot county, another suit is pending between the

same parties on one of the mortgage notes. The facts and arguments relate to both cases.

Hillard & Flagg, for the demandant, argued that the case of *Newbegin* v. *Langley*, 39 Maine, 200, should be reviewed by the Court; that the intent of the Legislature was to change the common law beneficially for married women; and that the power to be seized and possessed of property implies the power to sell, lease, mortgage and use it as any other owner could do. In this case, the premises were conveyed to the tenant with the express object of paying Pierce's debt to Theodosia Dunning. The new notes and mortgage were given to her son James by her consent. If the deed and mortgage are held to be one transaction, and both void, the premises revert to Treat & Co., who had no interest in them but as assignees of Pierce, and have long since settled with the parties to the assignment. The equity is with the demandant. The powers of married women are further enlarged by statutes subsequent to the decision in the case above cited.

N. H. Hubbard, for the tenant.

The note of a married woman is void. *Howe* v. *Wildes*, 34 Maine, 566; *Bates* v. *Enright*, 42 Maine, 105; *Brown* v. *Lunt*, 37 Maine, 423; *Fuller* v. *Bartlett*, 41 Maine, 241. The notes being void, the mortgage is also void. R. S., 1857, c. 61, § 1, does not give married women power to mortgage their property. The tenant did not derive her title from the demandant. The consideration for her notes was an exchange of Pierce's notes for hers; and Pierce's notes and the mortgage were payable to Theodosia Dunning.

The opinion of the Court was drawn up by

DAVIS, J. — This is a real action to recover certain premises situated in Frankfort, in the county of Waldo, formerly owned by George A. Pierce. In 1855, he failed, and assigned all his property to Robert Treat & Co. The demandant, acting for Theodosia Dunning, held certain notes against Pierce, and a prior mortgage upon the premises, which, by

mistake, had been recorded in the county of Penobscot, instead of Waldo, and was therefore void as against Treat & Co. But subsequently, by an arrangement made between all the parties interested, Treat & Co. conveyed the premises to the tenant, Nancy S. Pike, who, in consideration therefor, gave her own notes to the demandant, in lieu of the notes held by him against Pierce, with a mortgage of the premises to secure the payment of the notes. The controversy arises from the fact that the tenant was then a married woman, having a husband living at the time. The demandant claims under the mortgage; and it is insisted for the tenant that the notes and the mortgage are void.

Treat & Co. conveyed to the tenant, September 12, 1856; and she conveyed to the demandant, September 21st, 1857. But the case finds that the latter conveyance was the consideration of the former, and that the whole transaction was in execution of a prior mutual arrangement. It therefore constituted one transaction only, the same as if the parties to both the deeds had been the same, and both had been made and delivered at the same time. If we hold that the mortgage of the tenant is void, the conveyance of Treat & Co. to her must also be held to be void, and all the parties be remitted to their former rights.

Whatever change was made in revising the statutes of this State in 1857, the rights or powers of married women were not materially enlarged. They may convey real estate owned by them. Nor do we express the opinion that they may not mortgage such estate to secure debts contracted by them for which they are legally liable. But neither the present, nor any former statutes, were intended to confer upon a married woman the power to purchase real estate in her own name, on credit, and give her own promissory notes in payment, with a mortgage of the property as collateral security. *Newbegin* v. *Langley*, 39 Maine, 200.

We are of the opinion that Nancy S. Pike, being a married woman, with a husband then living, had no power to become a party to such an arrangement. The notes and mort-

gage given by her, and the deed given to her by Treat & Co., were all void.

But the demandant can recover only upon the strength of his own title. The tenant has no title which could avail her against the original mortgage, given by Pierce. As this was given to Theodosia Dunning, it cannot avail the demandant in this suit. Judgment must be entered for the tenant.

In the suit between the same parties, in the county of Penobscot, upon one of the mortgage notes, a nonsuit must be entered.

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

THOMAS L. SARGENT *versus* CHARLES H. WORDING *& als.*

A letter from an agent is not admissible to prove a contract made by him with a third person, in behalf of his principal.

The owners of a vessel are liable for the contracts of the master *de facto*, with seamen, until proof of a special contract exempting them.

ASSUMPSIT to recover the wages of plaintiff as a seaman on board a schooner owned by the defendants. The plaintiff shipped as mate, in Boston, with Oscar Rust, acting master of the schooner, and served from Sept. 8th to Dec. 12th, 1856, at thirty dollars a month. The defendants, part owners of the schooner, severally testified that they never employed the plaintiff. They offered to prove by D. Haraden, the managing owner, that Alonzo Rust, the former master, sailed the schooner on shares, stipulating to victual and man her, &c.; that, prior to the time when the plaintiff went on board, witness received a letter from Alonzo, which was produced and offered in evidence, proposing that Oscar Rust should sail the schooner on the same terms, unless Haraden otherwise directed by telegraph; and Haraden made no reply. The Court excluded this testimony. The other part

owners testified that they never contracted with Oscar Rust to sail the schooner. Verdict for the plaintiff, $81,93.

To various instructions given by the presiding Judge, the defendants filed exceptions, and also to his refusal to give other instructions requested. But these instructions and refusal become unimportant, in the decision of the case. The defendants moved for a new trial, on account of the exclusion of the evidence offered.

J. G. Dickerson, for the defendants, argued that Oscar Rust, if rightfully master of the schooner, was such only on the same terms that Alonzo had been. The owners had never contracted with Oscar. Alonzo could not bind the owners by employing seamen, nor could he confer such authority on another. The owners, having made the contract with Alonzo, are competent to show what it was. The letter of Alonzo was admissible to show the contract with Oscar, if any was made. A principal is competent to testify to information derived from his agent on the subject of his agency. In *Thompson* v. *Hamilton*, 12 Pick., 426, the former master was admitted to testify to his contracting with his brother to take the vessel on shares, by consent of the owners. Had the excluded testimony been admitted, it would have shown that Alonzo had no authority to contract with Oscar, or, if he had, it was only on terms that would exonerate the owners from liability in this case.

F. S. Nickerson, for the plaintiff, contended that the excluded testimony was unimportant. The letter of Alonzo was inadmissible. The proper evidence of the contract with Oscar was that of Alonzo in person; and it was the defendants' neglect that he was not called. Such evidence would have been in accordance with the case cited, 12 Pick., 426. The liability of the owners is *general*, and continues until relieved by some special contract. The evidence fails to show any such contract.

The opinion of the Court was drawn up by

DAVIS, J.—The exceptions to the instructions given, and to the refusals to give the instructions requested, are not urged in argument.

The action is for wages as a seaman. It was not questioned that the services were rendered by the plaintiff. But the defendants contended that the master, by whom the plaintiff was employed, was sailing the vessel on shares, and that he alone was liable. They undertook to prove this fact.

They did not claim that the master who employed the plaintiff had made any contract with them, personally, as owners, to sail the vessel on shares. They testified that he never had made any contract with them. But they contended that he did make such a contract with the previous master, acting in their behalf. And, to prove this, they called one of their number, Daniel Haraden, who offered to testify to the following statement of facts, viz.:—"That immediately prior to the time when plaintiff went on board said vessel, Alonzo Rust was master, sailing her on shares; that said Haraden then received a letter from said Alonzo Rust, which was produced and offered in evidence, stating that he wanted Oscar Rust to go master of said vessel upon the same terms, and that he should do so if said Haraden did not otherwise direct him by telegraph; and that said Haraden did not send any message to him."

The fact that Alonzo Rust sailed the vessel on shares, before Oscar Rust was employed, was *res inter alios.* It had no tendency to prove upon what terms Oscar Rust was sailing the vessel.

The counsel for the defendants now suggests that the fact that he was master prior to the service of the plaintiff, and that the owners, personally, never employed Oscar Rust, tended to prove that the latter usurped the command of the vessel. Such an inference could not properly have been drawn by the jury. But the evidence excluded was, that Alonzo Rust *sailed the vessel on shares,* and not merely that

he was master. And, although it is *now* claimed that this ought to have been admitted, as tending to prove that Oscar Rust *usurped* the command of the vessel, it was offered, with the rest of the statement, at the trial, to prove that Oscar Rust *was employed* by Alonzo Rust, in behalf of the owners.

If the letter of Alonzo Rust to Haraden had been written *after* he had given up the vessel to Oscar Rust, stating the terms of a contract already made, it would not have been competent evidence of the contract. It would have been but the declaration of the agent of the defendants, made out of Court, not under the sanctions of an oath. But the letter was written *before* any contract was made, and was merely a statement of what Alonzo Rust *intended* to do. It had no tendency to prove that such intention was carried into effect.

The defendants mistook the mode of proving the contract made with Oscar Rust. They might have done it by the testimony of Alonzo Rust, or of Oscar, or of any one else having personal knowledge of it. But the proof which they offered was clearly inadmissible.

Exceptions and motion overruled.

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

ORRIS H. KEEN *versus* SAMUEL BRIGGS.

Where an officer making a levy returns that he notified the debtor to be present at the time and place to select an appraiser, "which he utterly refused to do," this is sufficient evidence of the notice required by the statute.

Where the officer's return does not state specifically the items of his charges and fees, nor the gross amount, but that the land levied upon was appraised at a certain sum, "which is the amount of the execution, fees and charges," it is sufficient, as the execution and return, taken together, furnish data for ascertaining the amount of charges.

It seems, that the officer in such a case may amend his return, and supply the items and amount of his charges, although out of office.

THIS case was presented on an AGREED STATEMENT OF FACTS.

WRIT OF ENTRY to recover certain land in Freedom. October 23, 1850, Enos Briggs, jr., being then owner of the land, it was attached on a writ in favor of William Hussey against said Briggs, and, after judgment obtained, the land was levied upon and set off to Hussey, who afterwards conveyed it to the plaintiff, April 4, 1854.

Enos Briggs, jr., after the date of Hussey's attachment, and before the present action was commenced, conveyed the same land to the defendant, by deed duly acknowledged and recorded.

The officer's return of the levy sets forth, that on March 20, 1851, he caused three discreet and disinterested persons of said county to be sworn, one selected by the creditor's attorney, "and, after giving Enos Briggs, jr., the debtor, due notice to be present at the time and place to select one appraiser, which he utterly refused to do," the other two were appointed by the officer, and, after being sworn, they viewed the land shown to them by the creditor's attorney, &c.; and that he had extended the execution on the described land and appurtenances, appraised by the appraisers at $116,60, "which is the amount of this execution and fees and charges."

The return does not state the items or amount of fees and charges. The plaintiff offered an affidavit of the officer, Charles Elliot, setting forth the items omitted, in amendment of his return, and the Court was to determine whether the amendment was admissible.

Keen, pro se, cited *Fitch* v. *Tyler*, 34 Maine, 463, *Smith* v. *Keen*, 26 Maine, 411, as to the sufficiency of the notice to the debtor; and argued that the omission of the specific charges of levy was unimportant, and the return of the officer sufficient, as the Court has before it, in the execution, ample data to make the amount certain. *Rawson* v. *Clark*, 38 Maine, 223. It is competent for the officer to amend his re-

turn, although out of office, and the interest of third parties had intervened. *Fitch* v. *Tyler*, before cited. A slight error in the officer's charges does not render the levy void. Statute of 1856, c. 278. Nor the charges of levy being stated in a gross sum. *Tibbetts* v. *Merrill*, 12 Maine, 122. Nor the taxation of illegal costs. *Sturdivant* v. *Frothingham*, 10 Maine, 100. The return states all that is required by R. S., c. 94, § 24.

Abbott, for defendant, argued that the title of the plaintiff was imperfect by his own showing.

The opinion of the Court was drawn up by

KENT, J.—The return of the officer shows that he gave the debtor notice to be present at the time and place, to select an appraiser, which he utterly refused to do. This is sufficient evidence of notice as required by the statute. *Smith* v. *Keen*, 26 Maine, 411; *Fitch* v. *Tyler*, 34 Maine, 463.

The officer did not state the items of his charges and fees, nor the gross amount, in distinct terms. But he and the appraisers say that the land was appraised at a certain sum, "which is the amount of this execution, and fees and charges." We have the amount of the debt and cost in the execution, and, adding a month's interest thereon, we have a sum which, taken from the appraised value, leaves a balance which must have been the officer's fees and charges. "What may be made certain is certain" in the eye of the law. *Rawson* v. *Clark*, 38 Maine, 223.

It has been settled that it is not necessary for the officer to state the items of his charges. *Tibbetts* v. *Merrill*, 12 Maine, 122. Nor will a charge of illegal fees vitiate the levy. *Sturdivant* v. *Frothingham*, 10 Maine, 100.

The fact that more land was taken than was necessary to satisfy debt and costs as taxed, must distinctly and affirmatively appear. *Rawson* v. *Clark*, 38 Maine, 223; 23 Maine, 498.

This does not appear on the return as it stands. It only

appears that enough was taken to pay the amount of the execution and fees and charges. It does not appear that any land was taken beyond the quantity needed for that purpose. The charge for fees by the officer can be determined as satisfactorily as if he had stated them in a gross sum; and we have seen that whether that sum was strictly a legal charge or not could not affect the levy.

We have no doubt that, within the principles of the case of *Fitch* v. *Tyler*, 34 Maine, 463, the officer may amend his return, according to the facts stated in his affidavit, although he may now be out of office. The rule seems to be, that the debtor should stand chargeable with all the facts, the existence of which is indicated by what is stated on the record, and can be satisfactorily shown to the Court.

But, without amendment, the plaintiff is entitled to judgment for possession, and damages for mesne profits.

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

JOSIAH WALKER, *Executor of Geo. W. Sanborn, versus* EZRA T. SANBORN.

In an action commenced by the executor of A. against B., the plaintiff called the widow of the former, to testify to an agreement made in her presence by A. and B., to the introduction of which testimony B. objected: —

Held, that as, the facts to which she was called to testify, did not come to her knowledge through any communication from her husband, but by her happening to be present at the time, she was a competent witness.

The law recognizes all confidential communications, and whatever has come to the knowledge of either husband or wife by means of the confidence which the marriage relation inspires, as sacred, and not to be divulged in testimony after death, by the survivor.

ON EXCEPTIONS, from the ruling of MAY, J.

THIS was an action upon a note given by defendant to said George W. in his lifetime.

The plaintiff read the note in evidence. The defendant proved that he, in the fall of 1855, sent to the said George W., two checks from Calais Bank on Globe Bank, Boston, one for two hundred dollars, and the other for one hundred dollars, and that the same were received by said George W. at Monroe.

The plaintiff offered Elizabeth F. Sanborn, the widow of the said George W., to prove that her husband and said defendant, in August, 1855, were together in her presence, and made an arrangement or agreement, whereby said checks were to be sent to her husband in payment of *other liabilities* than the note in suit.

The defendant's counsel objected to the competency of said widow to prove said fact, and the Court overruled the objection, and admitted her to testify, and she did testify, that she heard her husband and the defendant make such agreement.

The verdict was for the plaintiff, and the defendant excepted to the ruling of the Court in admitting said widow to prove said facts.

N. H. Hubbard, for plaintiff.

N. Abbott, for defendant.

The opinion of the Court was drawn up by

KENT, J.—The rule of the common law, by which a husband and wife were excluded from being witnesses for or against each other, was founded on two distinct grounds. The first ground was that they were one in the eye of the law, and in their legal rights and interests, and, therefore, they were both parties in fact, where only one was named in the record. The established rule, that a party to the record must be excluded as a witness, whether nominal or actually interested, would thus exclude a wife, where the husband was a party.

This ground of objection is now removed by c. 82, § 78,

which provides that no person shall be excluded by reason of his interest as a party.

But the second ground of exclusion is based upon principles of public policy. It has been deemed essential to preserve the peace of domestic life, and to prevent family broils, that the confidence existing between husband and wife should be protected, and that they should be restrained, (except in a few specified cases of necessity,) even if willing, from divulging, in a court of justice, what has been confided to them by the other party, or come to their knowledge during the existence of the relation. In short, they could not, for these reasons, be witnesses for or against each other.

Our statute does not reach and remove this ground of exception. It touches only the interests *as a party of record or otherwise.* The recent statute of 1859 authorizes the husband or wife to testify by consent of the other party in the marriage relation. But that statute does not apply to this case, as it was enacted subsequently to the trial, and also because the husband is not living to give consent.

The question remains, whether the widow of the person, whose executor brings this action, was rightly admitted to prove certain facts. The case, as presented, discloses the testimony objected to. It does not raise the general question as to the admissibility of the widow to testify as to *confidential* communications of the husband during life. There seems to be a distinction between the testimony of a wife and a widow, based on the different relations that exist. The fundamental reason for the rejection of the wife's testimony is the promotion of domestic harmony and the danger that it may be disturbed between husband and wife, if they are allowed to testify. This reason ceases on the death of one of the parties.

But there is another reason, which the law recognizes, and it arises from the intimate and confidential relations subsisting between the parties. It treats all confidential communications, and whatever has come to the knowledge of either by means of the confidence which the relation inspires,

as sacred, and not to be divulged in testimony even after death. It regards such disclosures and such facts as sacred, and like communications from client to counsel, which cannot be divulged but by express consent of the other party.

The exclusion, on this latter ground, rests not upon the nature of the evidence, but upon the source or mode in which the knowledge is obtained by the husband or wife. If obtained from any other sources, and not by reason of the existing relation, or from confidential communications, then this reason also ceases;—and, after the death of the husband, the wife may testify as to the knowledge of facts thus acquired. The test is to be applied to the manner of acquiring information, rather than to the nature of the facts disclosed by the witness. *Coffin* v. *Jones*, 13 Pick., 445; *Williams* v. *Baldwin*, 7 Verm., 506.

The fact testified to by the witness in this case is, that the defendant and her husband were together in her presence, and made an arrangement, or agreement, as to the disposition of certain checks; which agreement she stated in her testimony. This fact did not come to her knowledge through any communication by her husband to her, confidential or otherwise. It did not come to her knowledge by reason of her relation as a wife. She happened to be present, as any other person might have been, but the fact testified to was equally in the knowledge of the other party, who could contradict it if it was not true. We think it was rightly admitted on this ground.

It has in some cases been contended that a widow, if interested in the estate, and all other interested witnesses, are necessarily excluded when the suit is by or against an executor or administrator, by the provisions of the 83d § of c. 82. It is true that, by that section, the general provision for the admission of all persons, whether parties or otherwise interested, is not to be applied to any "*cases*" where either party is an executor or administrator.

If by the word "cases" we are to understand *suits* in court, then the language is broad enough to exclude all interested

witnesses in such suits, and to restore the old law of exclusion as to such witnesses. But when we look at the prior legislation, we are satisfied that a more limited construction of the term must be given, to carry out the intention of the Legislature.

The Legislature first passed an Act, in 1855, c. 181, by which no witness was to be excluded on the ground of *interest* in any case. In 1856, c. 266, the restriction on parties was removed, and both provisions were incorporated into the new Act, which has been transferred to the R. S. c. 82, § 78 to 84. The restriction in the 83d section was manifestly intended to restrict *parties* in testifying, and not witnesses otherwise interested. The purpose was to place parties on an equality; in case of the death of one of them, that the other should not have the benefit of his own testimony, when his opponent could not be heard. This intent is shown in the provision that a deposition of a deceased party may be used; and, if used, the other party may be a witness. The legislation on this subject had been progressive, and it was not the intention to retrace or retract the steps taken, so far as interested witnesses, not parties, were concerned.

The construction contended for would limit the first law of 1855, to cases where the record did not show that a personal representative was a party. What reason is there, why a person, who is not a party, should be excluded on the ground of pecuniary interest, when the action is brought or prosecuted after the death of one of the parties, that does not apply to his exclusion when parties are living? In this matter both parties are on an equality. The witness is not a party; and, under the law of 1855, would be admitted. His interest may be very small, indirect, and scarcely appreciable; and it could not have been the purpose, by this provision, to exclude him.

The construction we give to the word "cases," in the 83d section, is, that it does not mean suits or causes in court, but that the meaning is better expressed by the word *instances;* and the provision is to be limited to the case, or instance, where the plaintiff or defendant offers himself as a witness.

The exclusion does not embrace, in a general designation, all causes or suits, and all the witnesses in them where the record shows an executor or administrator as a party; but only reaches the case where, in such suits, one of the parties to the original cause of action is dead, and the other attempts to give what may be called *ex parte* testimony. This point was decided in the case of *Bent* v. *Goddard*, in Penobscot county, not reported. *Exceptions overruled, and Judgment on the verdict.*

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

JOSEPH YOUNG, *petitioner for partition, versus* ROBERT GREGORY.

A. owns lot 4, and A. and B. own lot 3, in common. A. and B. divide lot 3, assigning A. the easterly half, adjoining lot 4. They occupy it accordingly, and maintain a division fence. Fifteen years afterwards, the wife of A. obtains a divorce, and, by written agreement of all the parties, a committee is appointed to assign dower to her in lot 4, and an undivided half of lot 3. They assign her fifty acres "of the *south-westerly side* of said lots," and she records the assignment. She places a house on the easterly half of lot 3, and lives there forty years:—

Held, that there is no ambiguity in the terms of the assignment, and parol evidence is inadmissible to show that all the parties understood the part assigned to be the *easterly half of lot* 3.

THE petitioner claimed to be tenant in common, with Robert Gregory, of a lot of land in Camden, each owning one undivided half of the described lot, being the easterly half of lot No. 3, shore range, by Fales' survey. After entry in Court, Hanson Gregory was allowed to come in and defend as to a part of the described premises; Robert Gregory, the original respondent, pleading that he is sole seized in fee of all the premises, except a small portion at the end furthest from the shore; and Hanson Gregory pleading that he is sole seized of about three acres at the back end of the lot.

The case presents the following facts:—

William Gregory, sen., was the owner of lots 1, 2, 3 and 4, in Camden, and by deeds conveyed lot 3, to his sons William, jr., and John, Feb. 22, 1799, and lot 4, to William jr., April 6, 1807. William, jr., and John, in 1799, divided lot 3, lengthwise, after which John and those claiming under him always occupied the westerly half, and William the easterly half, adjoining lot 4. Milla Gregory, wife of William, jr., sued for and obtained a divorce in 1809; and, having demanded her dower in her husband's lands, a committee was appointed, by an instrument under seal executed by William Gregory, jr., John Gregory, Job Ingraham, attorney for Milla Gregory, and others, to assign her dower in lot 4, and an undivided half of lot 3. They assigned to her "fifty and a third acres of land of the south-westerly side of said lots, running parallel lines," &c. Both the agreement and assignment were dated April 6, 1814. Subsequently, Milla Gregory moved a house upon the easterly half of lot 3, and lived there till she died, about 1856.

Besides the two deeds of William Gregory, sen., above mentioned, the petitioner introduced deeds of William Gregory, jr., to W. Spear, A. G. Coombs, C. Tolman and John Gregory, conveying to them lot 4, and an undivided fourth part of lot 3, dated April 6, 1813; Spear, Coombs, Tolman and J. Gregory to Joseph Young, conveying an undivided fourth part of lot 3, dated June 6, 1814; and Joseph Young to Joseph Young, jr., (the petitioner,) conveying the same, dated August 29, 1830.

There was some evidence as to a deed from William Gregory, jr., to Milla Gregory, subsequent to the alleged assignment of dower; but the deed was not produced, and the evidence was excluded.

The petitioner offered parol testimony, to prove that the land mentioned in the agreement for the assignment of dower, and in the committee's report, out of which dower was set out, was lot 4 and the easterly half of lot 3, and was so understood by all the parties; and that the land actually assigned to Milla Gregory, as her dower, was the easterly half

of lot 3, and was so understood by all the parties, being the same premises described in the petition for partition. This evidence was excluded by the Court.

The Court further ruled that it did not appear, from the evidence adduced, that the land described by the committee as set out for dower was the easterly half of lot 3, but some other land.

The case was then taken from the jury and submitted to the full Court, on report of the evidence; and if they are of opinion that it does not appear from the testimony that the land set out as dower was the easterly half of lot 3, and if the evidence offered was properly excluded, the petitioner is to become nonsuit; otherwise the case is to stand for trial.

L. W. Howes, for the petitioner.

The facts, that William Gregory, jr., claimed and occupied the easterly half of lot 3, with the adjoining lot 4, and John claimed and occupied the westerly half of lot 3, maintaining a division fence between the two; that these two parcels together contained about 150 acres, of which 50 and a third acres, set out for dower to Milla Gregory, would be a just proportion; and that, directly after the set-off, she moved a house upon the easterly half of lot 3, and lived in it, on the same land, for more than 40 years, show that the committee, by the words "fifty and a third acres of the south-westerly side of said lots," meant the south-westerly part of the two parcels claimed and occupied by the husband, which would be the easterly half of lot 3. If lot 3 was really undivided, how could they set off a distinct portion of it as dower?

As to the admissibility of the evidence excluded, the counsel cited 1 Greenl. on Ev., § § 287, 290; Chitty on Cont., 101. Written instruments are to be read by the light of surrounding circumstances. In this case, the acts of all the parties concerned, for forty years, show how they understood the assignment of dower; and, however irregular the proceedings or ambiguous the language used, it is too late to set up such

irregularity or ambiguity in opposition to those acts so long continued.

A. P. Gould, for respondents, said they derived their title from Milla Gregory, who had a deed from William Gregory, jr., subsequent to the alleged assignment of dower, conveying to her the easterly half of lot 3. The deed from Milla to respondents has not been produced, the petitioner having failed to make out a case. The assignment of dower under written agreement of the parties, accepted and recorded by the dowress, if valid, does not embrace the premises of which partition is sought, but assigns to the widow the "southwesterly side" of lots 3 and 4, the lots described in the agreement. Verbal testimony is inadmissible to contradict the language of the award; to substitute, for the plain terms of a written document, something altogether different, depending on the recollections of witnesses of a transaction nearly fifty years ago, and that too where the title to real estate is pending. Counsel would hardly contend that a deed conveying lot A., could be controlled by parol testimony that the grantor meant to convey lot B. The "east half" is as distinct from the "west half" as A from B.

William and John Gregory were tenants in common of lot 3, when dower was assigned. They had made a verbal division, but had not occupied accordingly for twenty years.

Milla Gregory obtained title to the premises by disseizin, *unless* she was tenant in dower.

The opinion of the Court was drawn up by

TENNEY, C. J.—A parcel of land is described in the petition, which, it is agreed by the parties, is the easterly half of lot No. 3, shore range, by Fales' survey, in the town of Camden. It is alleged that the petitioner is seized in fee of an undivided half of the same in common, and prays judgment for partition thereof. Robert Gregory, the respondent, pleads that he is sole seized of all the land described in the petition, excepting a small parcel on the end thereof furthest from the

shore, of which he alleges that one Hanson Gregory is sole seized and holds the same in severalty. Hanson Gregory, who was admitted to defend, alleges the same facts stated in the plea of Robert Gregory.

The petitioner introduced deeds, under which he claimed title to the premises; and also the record of divorce of Milla Gregory from the bonds of matrimony with her former husband, William Gregory, jr., in the year 1809, the assignment of dower to her afterwards, and her subsequent death. He contended that the land assigned as dower to Milla Gregory was identical with that described in his petition; and he introduced parol evidence that it was so, which, being objected to by the respondent, was excluded.

The case was taken from the jury, and, from the evidence reported, the whole Court are to decide the case as follows: — If it does not appear, from the evidence in the case, that the easterly half of said lot No. 3, is the portion set off as dower to Milla Gregory, and that the evidence offered by the petitioner, and excluded by the Judge, was properly excluded, the petitioner is to become nonsuit; otherwise the case is to stand for trial.

On April 6, 1814, William Spear, Archibald G. Coombs, Curtis Tolman and John Gregory executed an instrument under their several hands and seals, and, after stating therein that Milla Gregory, formerly the wife of William Gregory, jr., obtained a divorce from him, and has made demand of her right of dower in lot No. 4, in the shore range, and also the undivided half part of lot No. 3, in the same range, by Fales' survey, containing one hundred acres each; — they further state, "therefore we, the said Spear, Tolman, Coombs and Gregory, and Job Ingraham, the attorney of Milla Gregory, have appointed Ephraim Gay, Robert Jameson and Elkanah Spear, to set off and make a division of said real estate, to said Milla Gregory, as her right of dower in said estate."

On the same day, the said Gay, Jameson and Elkanah Spear, made their return, that they met on the premises, and made the following division to the best of their judgment,

viz.:—That Mrs. Milla Gregory shall have fifty and a third acres of land off of the south-westerly side of said lots, running parallel lines, &c.

It is not disputed that, by the terms used by the persons who set off the land as dower, it is very clear what part of the two lots was set off; but it is contended, by the petitioner, that the land actually assigned was the easterly half of lot No. 3.

It is very manifest by a comparison of the description of the land in this assignment, and in the petition, that they are not identical. The land set off is the western part instead of the eastern part of No. 3. The language is unequivocal, and free from ambiguity. It does not appear that any part of the land assigned was on the eastern half of lot No. 3.

The parol evidence offered tended to contradict and qualify the language of the return, and was inadmissible.

According to the agreement of the parties, the petitioner must become *Nonsuit.*

APPLETON, CUTTING, DAVIS and KENT, J. J., concurred.

MARTIN L. BRETT *& al. versus* TOBIAS O. THOMPSON.

The obligee of a bond for the conveyance of real estate, who has forfeited his right thereto by a non-performance of a condition precedent, has no claim or interest in the estate which can be attached on mesne process; and if, after such attachment is made, the obligee should, without fraud, procure a renewal of the bond, and sell and assign the renewed bond, his assignee's rights would not be affected by the attachment.

ON AGREED STATEMENT.

THIS was a WRIT OF ENTRY upon the demandant's own seizin. In the fall of 1852, the plaintiffs had a claim against C. H. Merrill of Frankfort, and commenced a suit against him and caused an attachment to be made and returned of real estate, in the usual form, on the 16th day of December, 1852. Said

action was kept in Court till the May term, 1856, when judgment was taken in same and execution issued, which execution was levied upon the premises demanded in this action.

On the 22d day of September, 1851, said Merrill took, from Tisdale Dean of Frankfort, a bond of that date, to convey to him, upon certain conditions therein named, a certain lot of land in Frankfort, of which the demanded premises are a part. The first note described in the bond was paid at maturity, but the second and third notes were not paid at maturity, nor had they been at the date of the attachment.

On the 10th day of March, 1853, after all of said three last named notes had become due and were unpaid, Dean, at the request of Merrill, extended the bond. On the 20th day of June, 1853, Merrill, for a good and sufficient consideration, and *bona fide*, assigned the bond, as extended, to Elisha Chick.

The fee in the premises described in said bond was never in said Tisdale Dean, but was in Mary Dean, his wife, in her own right, she having inherited the same from her father's estate.

Chick, on the 27th day of October, 1853, paid said last three notes, and, at Tisdale's request, his wife conveyed said premises, described in the bond, to Chick, in her own right.

N. H. Hubbard, for plaintiff.

A. Merrill, for defendant, cited *Shaw* v. *Wise*, 10 Maine, 113; *Stevens* v. *Legrow*, 19 Maine, 95; *Jameson* v. *Head*, 14 Maine, 34; *French* v. *Sturdivant*, 8 Maine, 246; *Crocker* v. *Pierce*, 31 Maine, 177; *Houston* v. *Jordan*, 35 Maine, 520.

The opinion of the Court was drawn up by

CUTTING, J.—By R. S. of 1840, c. 114, § 73, "the right, title and interest which any person has, by virtue of a bond or contract, to a deed of conveyance of real estate on specific conditions, may be attached on mesne process." This statute was a reënactment of the original statute of 1829, c. 431, under which this Court have decided, in *Shaw* v. *Wise*, 10

Maine, 113, that such bond is a contract merely *personal*, and the right, title and interest accruing under it is merely a *personal* right. If so, there is much force in the counsel's position, for the defence, that the attachment was not sufficiently specific. In *Stevens* v. *Legrow*, 19 Maine, 95, an attachment of "all the right, title, interest, estate, claim and demands of every name and nature," &c., was held sufficient; Chief Justice WESTON remarking that, "the plaintiff having caused to be attached every claim or demand which Varney had in the county of Cumberland, those terms are broad enough to embrace his right under the contract, in virtue of the statute of 1829, c. 431." But on this point we express no opinion, for there are further and more insuperable objections to the maintenance of this action.

It seems that the bond was given by the husband, obligating himself, upon the performance of certain conditions, to convey an estate, of which his wife in her own right was seized in fee simple. And further, that the obligee, before and at the time of the attachment, had forfeited his interest in the bond by a non-compliance with a condition precedent. Under such circumstances, in the absence of any pretended fraud, it can hardly be presumed or contended that the obligee had any attachable interest at the time of the attachment, which he could enforce. And long before the levy on the execution, he had, for a valuable consideration and *bona fide*, assigned the bond, after its renewal by an extension. If the assignee's interest had been attached by *his* creditor, and the levy made on the land after the conveyance to him, the statute of 1847, § 1, cited by the demandant's counsel, might apply. That statute has relation to the several and respective interests of the assignor and assignee; for it is "the right, title and interest which *any person* has by virtue of a bond," that is attachable. After the transfer, the purchaser becomes the "*person*" interested. It was enacted, probably, in order to obviate the objections raised in *Aiken* v. *Medex*, 15 Maine, 157, where it was held that a sale and not a levy was the appropriate and only mode pointed out by the former statute, notwithstanding,

after the attachment, the conditions of the bond had been performed. According to the agreement of the parties, the

Demandants nonsuit.

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, J. J., concurred.

SARAH DICKEY *versus* MAINE TELEGRAPH COMPANY.

By the legal laying out of a highway, and after all the requirements of the statute have been complied with, the public acquire an easement, as against the owners of the land, to every portion of the road.

The law does not require the town, in preparing a highway for travel, ordinarily, to make the traveled path the whole width of the road.

Towns are not liable for obstructions on the portions of a highway not constituting the traveled path, and not so connected with it as to affect the safety of the traveled portion.

A traveler on a highway may go out of the beaten track, at his own risk as between himself and the town; but so doing he is entitled to protection against the unlawful acts of other persons or corporations.

No private person or corporation has the right to place or cause any obstruction, which interferes with the right of others, on any part of the highway, within its exterior limits. For such obstruction, the extent of a town's liability is not the measure of the liability of a private person.

Upon a motion for a new trial, it was contended that a witness at a previous trial of the same issue had given evidence contradictory to his later testimony, but which was not made to appear in the report upon which the motion was based: — *Held*, that the Court can only act upon the evidence as reported: — *Held* that, if the moving party intended to avail themselves of such alleged contradiction, they should have proved it at the last trial.

ON EXCEPTIONS and MOTION FOR NEW TRIAL.

THIS was an action to recover damages for an alleged injury to the person of the plaintiff. The main facts are as follows: — The stage, running between Belfast and Northport, in which the plaintiff was at the time of the accident a passenger, on arriving at the latter town, turned off from the usual traveled part of the highway towards the post office, to

exchange letter bags. A telegraphic wire of the defendant corporation, hanging too low, caught the upper part of the stage, and was the cause of its being upset, whereby the plaintiff was damaged.

The Judge presiding instructed the jury that highways are made to accommodate the public travel, and any person, having occasion to travel upon them, is not necessarily confined to the usually traveled path, but may rightfully travel upon any part of a highway which is within its limits, or side lines, for the purpose of calling at post offices, stores or dwelling-houses along the line of the road, as convenience or necessity may require, whenever such person can do so without any want of ordinary care, and without interfering with the rights of other persons in and upon the highway.

Also, that the defendants had no right by their charter to incommode the public travel by their erections; and, if they did so, or if, having made erections within the limits of the highway, in conformity with their charter, they suffered the same to get down or out of repair, and to remain so after reasonable notice and opportunity to repair them, so as to obstruct the public travel, and endanger the safety of travelers rightfully traveling within the limits of the highway, and thereby rendered such highway unsafe and inconvenient, then, if the plaintiff, while rightfully traveling within any portion of the highway, sustained injury to her person in manner as alleged, solely by reason of such obstruction being within the highway, the defendants were liable for the damages occasioned thereby, provided she has shown affirmatively all the other facts which are necessary to entitle her to recover.

A verdict was rendered for plaintiff.

To the above instructions the defendants excepted. They also moved for a new trial.

N. Abbott, for plaintiff.

A. W. Paine, for defendants.

The opinion of the Court was drawn up by

KENT, J.—The application of a few well established principles, to the facts in this case, will aid in testing the correctness of the rulings to which exceptions are taken.

When a highway is laid out and opened, all persons have a right to pass upon it. By the legal laying out, and after all the requirements of the statute have been complied with, the public acquires an easement, as against the owners of the land, which extends to every portion of the road; and any person has a right to pass or re-pass, at his own risk, over any part, after it is opened, and before any work is done, or any traveled path made, and before the liability of the town to make it exists. When laid out and accepted it becomes a public highway. *State* v. *Kittery*, 5 Greenl., 259; *Johnson* v. *Whitefield*, 18 Maine, 286.

The duties of the town in relation to preparing the way for travel are distinct from and subsequent to the laying out. The law requires the town to make and keep in repair a traveled path, of suitable and sufficient width. It does not require the town, ordinarily, to make that traveled path the whole width of the road, and towns will not be liable for obstructions on the portion of the highway not constituting the traveled path, and not so connected with it as to affect the safety of the traveled portion. *Bryant* v. *Biddeford*, 39 Maine, 193.

But the right of travelers to use any part of a highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk, as between himself and the town, and yet be entitled to protection against the unlawful acts of other persons or corporations. Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste. *Stinson* v. *Gardiner*, 42 Maine, 248.

No private person has a right to place or cause any obstruction which interferes with this right on any part of the highway, within its exterior limits. The extent of the lia-

bility of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit, or stretch a cord, or place a pile of stones on the highway near the outer limit, and at a considerable distance from the traveled way, and a traveler passing, using due care, should be injured thereby, it would be no sufficient answer, to his claim for damages, to aver and prove that, under the circumstances, the town was not liable. The duty of the town is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the town has left it.

It may be true that in many cases the same principles will be applied both to towns and individuals, in determining whether a given state of facts, in relation to a particular incumbrance, constitutes a defect within the meaning of the law. But admitting the defect, the question of liability, for creating or allowing it, may require for its solution the application of very different principles, in a case against a private person, from those which would apply to a town.

We think that the instructions of the presiding Judge, in relation to the rights of all persons to travel on any part of the highway, and to leave the usually traveled path, for the purpose indicated, were entirely correct, as applied to this case between an individual and a corporation other than a town. Any other construction would deprive a traveler of a legal right to turn out of the beaten track, to avoid defects, or to call at houses, stores or fields. If he has not such legal right, then, as against the owner of the fee in the land over which the highway is located, he would be a trespasser. The only right, which the public has, is to pass and re-pass. A horseman cannot stop to allow his horse to graze, without being a trespasser. *Stinson* v. *Gardiner*, 42 Maine, 254. If, when he has turned from the usual traveled path, he is not rightfully traveling over the spot, he can claim no damages

against an individual, who has wilfully placed obstructions or impediments on that part of the highway. If he has a legal right to be there, then the individual wrongdoer may be responsible, although the town may not be.

2. The defendants invoke the provisions of their charter, and contend that, by its terms, they are exempted from all liability for any defect or neglect outside of the traveled way, and that they stand in the same condition as the town. The charter, § 2, authorizes the company to "locate and construct its line along and upon any highway * * * by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the wires or conductors of such line, but the same shall not be so constructed as to incommode the public use of said roads or highways."

The defendants contend that the "public use of the highway is the right which the great public owns, in distinction from the private rights which individuals have of passing out of the traveled path." We cannot concur in this view. The public use of the highway is the right which has been before defined, viz., the right of any and all persons to use the highway, to pass and re-pass, at their pleasure, on any part. It is not confined to that portion which the town is by law compelled to make and keep in repair.

It is very clear that this company could not legally erect posts a foot only in height, and extend the wires at that distance from the ground, on the exterior limits and outside of the traveled path, if, by so doing, the use of any part of the highway was obstructed or rendered inconvenient and dangerous, or the traveler incommoded. If any injury should arise to any such legal traveler by such erection, he using due care, the company would be liable to him. The same rule will apply, when, after erections properly made, they suffer the same to fall down, or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveler and endanger his safety.

The instructions on this point were clear and distinct, and, in our view, correct. *Exceptions overruled.*

MOTION FOR NEW TRIAL.

It is stated, although it does not appear in the report before us, that this case has been twice tried, with the same result. We are referred to the case in the 43d volume of Maine Reports. It would seem, from that report, that certain evidence was introduced, which, in the opinion of the Court, *upon that report*, did not justify the jury in finding their verdict. But what that evidence was does not appear in this case.

We can only judge upon the evidence now reported. It does not appear that any evidence was introduced on the last trial to show that the driver testified differently on the first trial, although it is now contended he did. If the defendants intended to avail themselves of the fact that there was such discrepancy or contradiction, they should have proved it in the last trial.

The only question is whether the jury, with this evidence before them, clearly erred in their conclusions on the point of due care on the part of the driver. The jury had all the circumstances before them; the testimony of the driver, who said he did not design or intend to break the wire, or to drive against it, and that he had told the operator that, if he did not take it out of the way, he would *cut* it off. They had, also, the testimony of the operator as to this declaration. He testified in chief that the declaration of the driver to him was that, if he (the operator) did not fix it, he would *break* it down. In his cross-examination, he could not say "but that Harding said he would *cut* the wire." They had before them all the probabilities and improbabilities, the arguments and the theories, and, under the charge of the Court, which on this point is not excepted to, they found no want of due care.

We see no sufficient reason to satisfy us that the verdict was so manifestly against the evidence, that the Court is called upon to set it aside. *Motion overruled, and*

Judgment on the verdict.

TENNEY, C. J., concurred in the result. APPLETON, CUTTING, MAY, and DAVIS, J. J. concurred.

GEORGE KNOWLTON, *App't, versus* STEPHEN C. JOHNSON, *Adm'r.*

The assignee of one of the heirs of a deceased person is not entitled to a decree that the distributive share of the assignor shall be paid to him, by the administrator; otherwise, a Judge of Probate would exercise common law jurisdiction in matters between contesting parties, not relating to acts of the intestate, but to contracts of the heirs after his decease.

EXCEPTIONS from the ruling of DAVIS, J.

THE DECREE of the Judge of Probate of the county of Waldo, from which an appeal was taken by said Knowlton, was one directing the administrator of the estate of William Johnson, deceased, to divide among the heirs of said deceased a surplus remaining in his hands upon the settlement of his final account of administration of said deceased's estate. One of the heirs of said deceased was one Joshua L. Johnson.

The surplus ordered to be divided as aforesaid was part of the proceeds of the sale of the real estate of said deceased, consisting of his homestead farm, which had been sold by said administrator, by virtue of a license from the Judge of Probate. The said Joshua L. Johnson, by his deed, dated and recorded on the 2d day of October, 1852, quit-claimed his interest in the aforesaid real estate to the petitioner, before said sale under said license.

The petitioner claims that the decree should have directed said administrator to pay the amount due said Joshua L. Johnson to him, as assignee, and not to said Johnson.

The decree of the Probate Court was affirmed by DAVIS, J., at *Nisi Prius.* To which ruling the said Knowlton excepted.

J. W. Knowlton, in support of the exceptions.

White, contra.

76 me. 43
80 " 61
82 " 297

The opinion, concurred in by a majority of the members of the Court, was drawn up by

DAVIS, J.—One of the heirs of the estate sold his interest therein to the petitioner. A surplus remained in the hands of the administrator to be distributed. The petitioner claimed that the distributive share of the heir who had sold to him should be decreed to be paid to him by the administrator. But the Judge of Probate disregarded the assignment, and ordered it to be paid to the heir. The petitioner appealed; at *Nisi Prius*, the decree was affirmed; and the petitioner excepted. The decree was correctly made. To hold otherwise would give the Judge of Probate common law jurisdiction, in matters between contesting parties, not relating to acts of the *intestate*, but to contracts of the *heirs*, after his decease. He has no such jurisdiction. The decree must be made to the heir. If he has assigned his interest, the assignee may notify the administrator of the assignment; or, if the money is paid to the heir, proceed against him at common law. So it has been recently held in New Hampshire, in a similar case. *Wood* v. *Stone*, Law Reporter, Jan., 1860.

The exceptions must be overruled.

BARZILLAI BROWN, *in Equity, versus* CHARLES H. SNELL.

Where the right in equity to redeem mortgaged premises is attached and sold on execution, if the mortgage debt was paid before the sale, there being no mortgage subsisting, nothing passed by the sale.

If a mortgage be fraudulent, a creditor may levy on the land as unincumbered; but if he treat the mortgage as valid, sell the right of redemption and purchase it in, he cannot then claim that the mortgage be deemed void, and hold the land discharged from it.

Although the Court has, by statute, power "to hear and determine as a court of equity" "all suits for the redemption or foreclosure of mortgaged estates," its powers are limited and restricted to the modes of redemption prescribed by law, and, where a party fails to comply with the statute provisions, the Court can afford him no relief under its general powers as a court of equity.

BILL IN EQUITY.

THE plaintiff alleged that Thomas Snell, Oct. 8, 1851, was seized in fee of certain premises in Unity, and mortgaged them to D. L. Milliken for $2500, and, on Feb. 19, 1853, conveyed his interest in the premises to the respondent; that, on September 20, 1853, Milliken entered on the premises to foreclose the mortgage, and, on August 21, 1855, assigned his interest therein to the respondent, for a consideration expressed of $425,34; that, on March 29, 1852, the Waterville Bank attached Thomas Snell's interest in real estate in Waldo county, on a suit against him, on which judgment was rendered, March 29, 1855, and, after due proceedings, Thomas Snell's right in equity in the premises was sold on execution to D. H. Brown. May 17, 1856, D. H. Brown conveyed his right to the plaintiff. That the defendant has resided out of the State, and has had no agent or attorney in the State, since the plaintiff acquired title, and the plaintiff has had no opportunity to demand of him an account of the amount due under the mortgage. That the plaintiff had been informed and believed the mortgage to be fraudulent, and that but a small sum was due to Milliken from the mortgager when it was made, if any thing; that whatever indebtedness there was had been paid, in whole or in part, prior to the assignment; that the defendant paid for the mortgage only what was due Milliken, and knew all the circumstances and all the equities between the original parties; or, that the mortgage was made for the purpose of preventing attachments, with the knowledge of both parties, and was fraudulent and void. The plaintiff, therefore, being without remedy at law, filed this bill to obtain relief, and paid into Court $500, to be applied to redeem the mortgage or otherwise as the Court should order; and prayed that the mortgage might be declared satisfied or void, or the respondent ordered to release to the plaintiff, or enjoined from setting up title under the mortgage, as the facts may appear.

The defendant, in his answer, admitted the seizin of Thomas Snell, the mortgage, foreclosure and assignment; but de-

nied any knowledge of fraud in the transaction. He alleged that he paid Milliken about $420, for his interest in the note and mortgage, $2079,66 having been previously indorsed on the note as paid August 31, 1855; that the foreclosure was perfected September 30, 1856; that he had been in possession ever since, and that there was no longer any right of redemption.

The testimony on the part of the plaintiff was of great length, particularly that of D. L. Milliken, who explained the dealings between Snell and himself prior to the giving of the mortgage, and stated that the mortgage was given to secure him for his liability as indorser on a draft for $600, drawn by Snell on P. R. Southwick of Boston, then unpaid, and for balance due on account. On settlement of accounts, Aug. 31, 1855, he indorsed on Snell's note $2079,66, leaving unpaid only the balance found due on account. Milliken had paid the $600 draft, and charged it in his account with Snell before this settlement. He was unable to state the amount due from Snell, Oct. 8, 1851, but thought it was $1000 or $2000, exclusive of their dealings in hides. Charles H. Snell paid for the assignment $420,34.

The plaintiff testified to several conversations he had had with Thomas Snell, in which Snell told him the note and mortgage to Milliken were "bogus," and he was ashamed and sorry, and would endeavor to have it set straight. This the plaintiff said he had stated to the defendant, who replied, "I shall look out for that," or "take care of that."

Rowe & Bartlett, for the plaintiff.

The mortgage was fraudulent; it did not secure, nor purport to secure the actual indebtedness of Thomas Snell to Milliken. The note and mortgage were without consideration. Milliken could have indorsed it to a third party, and yet have collected of Snell the whole amount due from him on account, and what he had to pay on the $600 draft. The defendant took the note after its dishonor, with notice from Brown of the want of consideration. A bill in equity is the proper

remedy. 1 Sumn. 505; *Marston* v. *Brackett*, 9 N. H., 537. If the mortgage was valid, the debt was all paid before the assignment, and the plaintiff is entitled to a decree for a release. R. S., 1841, c. 125, § § 17, 18; 1857, c. 90, § 14. The plaintiff has done all in his power to ascertain the sum due. The absence of the defendant, without an agent in the State, prevented a demand on him to account. By paying to the clerk the sum due and more, the plaintiff has brought himself within the spirit of the statute. If not, it shows a *casus omissus* in the statute, and the Court can grant relief under its general equity powers. The statute on the redemption of mortgages is binding on the Court only in those cases where the mode of proceeding is prescribed. In cases where no mode is prescribed, a party is entitled to relief in the general course of equity proceedings. This case is within R. S., 1857, c. 90, § 15.

A. W. Paine, for the defendant.

1. The plaintiff does not bring himself within the statute. R. S., 1841, c. 125, and Act of amendment, § 23. Section 16 of c. 125 requires a previous tender by the mortgager, or a refusal or neglect to account by the mortgagee. Here has been no tender nor demand for an account. Section 19, as amended, applies only to a suit brought before entry to foreclose. The bill cannot, therefore, be maintained. *Putnam* v. *Putnam*, 13 Pick. 129. The deposit of money with the clerk is unauthorized by the statute, and can avail nothing.

2. If the deposit was authorized, it has only the effect of a tender before suit commenced. A tender must be unconditional. *Brown* v. *Gilmore*, 8 Greenl., 107. But in this case the money was deposited to be paid only on the order of Court. The condition was inconsistent with the rights of the defendant.

3. But if the bill can be sustained, what is the result? The plaintiff's title to the right of redemption is under the officer's sale on execution, May 17, 1856, of all the right the debtor had to redeem the mortgaged premises. If there was

no mortgage at that time, there was no equity of redemption, and nothing passed by the sale. If, as alleged, the mortgage was fraudulent, it was void; or, if paid, there was no mortgage.

4. The evidence adduced does not sustain the charge of fraud. But if there was fraud, the defendant cannot be affected by it. There is no evidence that he knew of any fraud. The declarations of Thomas Snell are not admissible to affect the mortgage in the hands of Milliken or his assignee. The defendant paid Milliken just what was due on the mortgage, $420,34.

5. The $420,34, paid by the defendant, August 31, 1855, with subsequent interest, $94,16, make $514,50. The deposit, if otherwise sufficient, is not enough to pay what is due.

6. The defendant, being in no fault, is entitled to costs. *Brown* v. *Littlefield*, 29 Maine, 302.

In reply to the plaintiff. The Court has no equity powers except those given by statute. Section 16 of c. 125 exactly meets the case of the plaintiff, except that he did not comply with the preliminary steps required. The defendant being out of the State does not affect the case. A tender or demand for account may as well be made out of as in the State.

The opinion of the Court was drawn up by

APPLETON, J.—The bill in this case alleges that Thomas Snell, on the 8th of October, 1851, mortgaged the premises sought to be redeemed to one Milliken, who having entered to foreclose, on the 21st of August, 1855, assigned his interest in the same to the respondent, describing him in the assignment as of Prescott, in the State of Wisconsin; that, on the 29th of March, 1855, the President, Directors & Co. of the Waterville Bank sued out a writ of attachment against said Thomas, on which his right to redeem was attached; that, having entered their action and obtained judgment therein, they caused his right to be seized and sold on execution, on the 24th of April, 1855, to one Daniel H. Brown, who conveyed his title, thus acquired, to the plaintiff.

The bill further alleges, that the mortgage was fraudulent; that the mortgage debt was paid before the pretended assignment to this defendant; that these facts were well known to him; that, at the time of the assignment, he was not a resident of this State; that he has not since been; that he has had no agent; and, that the plaintiff could neither make a demand upon the defendant to account, nor could he tender to him the amount due; and therefore that, being ready and offering to pay what might be due, he filed this bill, and deposited with the clerk the sum of five hundred dollars, subject to the order of the Court.

The prayer of the bill is for an account; for a decree determining whether any, and, if any, what sum is due, and that the plaintiff may redeem upon payment of what may be found due; or, if nothing be found due, or, if the mortgage be fraudulent, that defendant deliver up the mortgage to be cancelled, and be ordered to release all interest under the same to the plaintiff, and that he be perpetually enjoined from setting up the title thus acquired.

The answer admits the record title as stated in the bill; sets forth an entry to foreclose under the provision of R. S., c. 125, § 3, by entering peaceably, &c., in the presence of two witnesses, &c.; denies any knowledge or belief that the mortgage was fraudulent, or that the debt had been paid; and alleges that he was and is ready and willing to receive the amount deposited and give a release, but that, upon his tendering such release, he was refused the money, &c.

The plaintiff claims the mortgage debt was fully paid before the assignment thereof to the defendant, and, therefore, that he is entitled to a discharge of the mortgage and to a release. But, if so, the mortgage debt was paid before the attachment and sale of the equity of redemption. If so, there was no subsisting mortgage, consequently no equity. If no equity of redemption, then nothing passed by the sale, and the plaintiff has no other or greater rights than any other stranger to interfere.

If the mortgage was fraudulent, creditors might disregard

it, and levy upon the land as unencumbered. But if a creditor, regarding the mortgage as subsisting, choose to sell the equity and purchase it in, it is not for him, after treating it as valid, to claim that it be decreed as null and void, and to hold the land discharged therefrom, and thus acquire the fee at the price of the equity. *Bullard* v. *Hinckley*, 8 Greenl., 289; *Russell* v. *Dudley*, 3 Met., 147.

It remains to be seen whether, if the mortgage be regarded as outstanding, this bill can be maintained.

By R. S., 1841, c. 96, § 10, this Court has "power to hear and determine, as a Court of equity," "all suits for the redemption or foreclosure of mortgaged estates." The modes of foreclosure and the proceedings for redemption are prescribed by R. S., 1841, c. 125. The modes of redemption then established embrace all the authority conferred upon this Court in reference to this subject matter. It would be absurd to hold that the Legislature specially determined the proceedings to be had for the foreclosure and redemption of mortgaged estates, and yet by a general clause established not merely those thus designated, but the whole course of procedure as existing in a court of general equity jurisdiction. It has been repeatedly held that the powers of this Court are limited and restricted by the statute, under and through which alone it derives its authority in reference to the redemption of mortgages. "As to suits for redemption," remarks WHITMAN, C. J., in *Shaw* v. *Gray*, 23 Maine, 174, "the power delegated must have reference to the modes of proceeding particularly prescribed for the purpose." *French* v. *Sturtevant*, 8 Greenl. 246; *Chase* v. *Palmer*, 25 Maine, 341.

The plaintiff, therefore, to entitle himself to maintain his bill, must bring his case within the provisions of R. S., 1841, c. 125.

His case is not within section 16, because there has been no tender on the part of the mortgager, nor refusal on the part of the mortgagee to render an account upon request, nor any negligence nor delay in accounting.

The plaintiff does not bring himself within section 19, because the bill is brought *after* "an actual entry for breach of

the condition," when, by that section, it should be brought *before* such entry.

The amendment to section 19, R. S., 1841, p. 769, affords no aid to the plaintiff, because that is limited to a foreclosure without taking possession, according to the mode provided by c. 125, § 5.

This bill was commenced in 1856, and, therefore, the plaintiff cannot invoke the provisions of R. S., 1857, c. 90, § 15.

The plaintiff having failed to show a compliance with the provisions of R. S., c. 125, and this Court having limited jurisdiction, within which the plaintiff has not brought his case, the bill cannot be maintained. *Bill dismissed.—*

Costs for defendant.

TENNEY, C. J., and CUTTING, MAY, DAVIS, and KENT, J. J., concurred.

SAMUEL CONY, *Treasurer, versus* STEPHEN BARROWS *& als.*

The statute prerequisites, to enable a party to maintain a suit upon a sheriff's official bond, are an injury suffered by the neglect or misdoings of the sheriff, and damages ascertained by a suit against him, and the rendition of judgment thereon.

No notice to his sureties of his default, or of the judgment against him, is necessary.

A delay of several years in bringing a suit on his bond, after judgment against him, will be no legal bar to the action, if there has been no contract, consideration or motive for the delay.

No legal presumption will arise from a lapse of time, less than twenty years, that the judgment has been satisfied.

ON FACTS AGREED.

THIS was an action of DEBT, upon the official bond of Jacob Trafton, deceased, as sheriff of the county of Waldo. The facts, in the statement of the case by the parties, sufficiently appear from the opinion of the Court.

Gould, for plaintiffs in interest.

Abbott, for defendants.

The opinion of the Court was drawn up by

CUTTING, J.—This case is presented on facts agreed, in substance as follows; viz., Jacob Trafton, on Feb. 5, 1834, having been duly appointed sheriff of Waldo county, gave his official bond, (now in suit,) of that date, to Mark Harris, then treasurer of the State. At the May term of this Court, held at Wiscasset in 1843, Samuel D. Bradford & al., (the present plaintiffs in interest,) recovered judgment for $73,76, damages, and $85,99, costs, against Trafton, for his alleged default in not serving and returning a writ issued in their behalf in 1835. On this judgment an execution was duly issued, and returned unsatisfied. At the time of the rendition of judgment, and for some seven or eight years afterwards, Trafton resided in the county of Waldo, and was the visible and real owner of a large amount of real and personal estates subject to attachment. None of his sureties were called upon to satisfy the judgment until after the decease of Trafton, which was ten or twelve years after its rendition. The writ in this case is dated Dec. 28, 1853.

The remedy of an aggrieved party on a sheriff's bond is prescribed by R. S. of 1857, c. 80, § 12, which does not vary essentially from that of R. S. of 1821, c. 91, § 6, and R. S. of 1841, c. 104, § § 13, 14. At present, "any person, injured by the neglect or misdoings of a sheriff, who has first ascertained the amount of his damages by judgment in a suit against him, &c., may, at his own expense, in the name of the treasurer, institute a suit on his official bond," &c.

The only statute prerequisites, to the maintenance of such a suit, are an injury suffered by the neglect or misdoings of the sheriff, and the damages ascertained by a suit against him and the rendition of judgment thereon. And the case finds that these requirements have been performed. It was not necessary to issue an execution, or to notify the sureties

of the default or of the judgment. Neither was the long delay in bringing this action any legal bar to its maintenance, for the case discloses no contract, consideration or motive for such neglect. *Leavitt* v. *Sawyer*, 16 Maine, 72, and the cases there cited, contain much law upon this subject, to which those particularly interested are referred. No time short of twenty years can raise the legal presumption that the judgment has been satisfied.

Defendants defaulted.

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, J. J., concurred.

ALBERT G. BENNETT *versus* JOSEPH GREEN, *App't.*

Where an appeal from a justice of the peace is entered in this Court, and afterwards dismissed for want of recognizance, the appellee is entitled to costs in this Court.

The *appellant* should recognize to prosecute, even if the opposite party waive his right to *sureties*.

ON EXCEPTIONS from the ruling of GOODENOW, J.

THE action was commenced before a justice of the peace, who rendered judgment for the plaintiff. The defendant claimed an appeal. The plaintiff waived his right to sureties. No recognizance was entered into to prosecute the appeal. The defendant entered the action in this Court; and, at a subsequent term, on motion of plaintiff, the action was dismissed for want of recognizance. The presiding Judge ruled that the plaintiff was not entitled to costs after judgment of the justice, to which the plaintiff excepted.

It was held, that plaintiff was entitled to costs as the prevailing party. *Exceptions sustained.*

Levi Bartlett *versus* Union Mutual Fire Insurance Co.

The conditions in policies of insurance, requiring an account of the loss incurred under the policy, are to be construed liberally in favor of the assured.

If notice of a loss is given, as required by a policy, and it is defective, the company should object to it in season to allow the assured to remedy the defect; otherwise they will be considered as waiving exceptions for that cause.

The Act of incorporation and by-laws of an Insurance Company in the State of New Hampshire provided that, upon notice of loss, "the directors shall proceed as soon as may be to ascertain and determine the amount thereof, and shall pay the same within three months after such notice; but if the assured shall not acquiesce in their determination, his claim may be submitted to referees, or he may, within three months after such determination, but not after that time, bring an action at law against said company for such loss; which action shall be brought at a proper Court in the county of Merrimack," State of New Hampshire. A., having insured in said company, notified them of a loss, but the directors neglected to "ascertain and determine the amount thereof:" —

Held that, the directors having neglected or refused to do their duty, A. might maintain an action against the company for the loss, after the time limited in the by-laws: —

Held that, after a contract has been broken, the remedy is regulated by law, and must be governed by the law of the forum where redress is sought, and that A. was not bound by the provision that any suit should be brought in the county where the company is established.

On Report.

This was an action upon a policy of insurance. It was referred to the full bench for its decision, with authority to draw such inferences from the testimony as a jury might, and render such judgment as, in its opinion, law and justice require.

The points in controversy will sufficiently appear in the opinion of the Court.

N. Abbott, for plaintiff.

J. G. Dickerson, for defendant.

The opinion of the Court was drawn up by

APPLETON, J.—The defendants were incorporated by the Legislature of New Hampshire. By section 8 of their charter, it is enacted that, "in case of any loss or damage by fire, happening to any member, upon any property insured in and with said company, of either class, the said member shall give notice thereof in writing, to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss or damage may have happened, under oath," &c.

By the by-laws of the defendant corporation, art. 15, the insured is required, within thirty days, "to deliver to the secretary of said company a particular account, on oath, of the property lost or damaged, and the value thereof at the time of the loss, and shall state whether he was the sole owner of the same at the time of the loss; and, if it is now, was at the time of its insurance, or has since been incumbered by mortgage or otherwise; and whether any insurance has subsisted in any other office upon the same, since insurance was effected at this office; the cause or occasion of the fire, as far as it is known, and the value of such parts as remain; until which shall be done, the amount of such loss, or any part thereof, shall not be payable," &c.

Within thirty days after the loss, a notice thereof, sworn to by the plaintiff, was forwarded by mail to the defendants, and received by them. The notice thus forwarded is not produced, nor does it distinctly appear whether or not it fulfills all the requirements of art. 14.

The preliminary notice of the loss is in compliance with the by-laws of the company or it is not.

If the notice given was in accordance with the by-laws, the defendants have no cause of complaint.

If it fails to contain all the facts required, and is deficient in some particulars, the defendants have not notified the plaintiff of such deficiencies so that they could be corrected. After receiving the notice, they have negotiated with the plaintiff for the adjustment of the loss, without disclosing any defects

in the notice, or giving an intimation of an intention of taking advantage of any, if any there be. The technicalities of special pleading are not to be expected and should not be required in matters of this description.

The conditions in policies of insurance, requiring an account of the loss, should, in such cases, be construed liberally in favor of the assured. *McLaughlin* v. *Washington County M. Ins. Co.*, 23 Wend., 525; *Etna Fire Ins. Co.* v. *Tyler*, 16 Wend., 385. "Good faith," remarks RUGGLES, J., in *O'Neil* v. *the Buffalo Fire Ins. Co.*, 3 Coms., 122, "on the part of the underwriters, requires that, if they mean to insist upon a merely formal defect in the preliminary proofs, they should apprize the assured of the nature of the objection, so as to give him an opportunity of supplying the defect, and, if they neglect to do so, their silence should be held a waiver of the defect." The same views were affirmed in *Bumstead* v. *the Dividend Mut. Ins. Co.*, 2 Kernan, 81. In *Clark* v. *N. E. Mut. Fire Ins. Co.*, 6 Cush., 343, the notice given was deficient in some particulars, but as the refusal to pay the loss was not put on the ground of any defect or insufficiency in the notice, the company were regarded as having waived any further or different notice. In *Underhill* v. *Agawam Mut. Fire Ins. Co.*, 6 Cush., 440, the by-law is identical with that of the defendant corporation. In that case it was urged that the notice was insufficient, "but," says DEWEY, J., "the Court are satisfied that it is a good and sufficient answer to the objection now urged to this notice, that no such objection was taken to the form of the notice, when it was given, or any further or more particular information requested; but the refusal to pay the sum stipulated in the policy, by the insurers, was upon other grounds, and thereby the want of more full and particular statements in the notice must be taken to have been waived."

If the notice was defective, which, as it is in the defendants' hands, might easily have been shown, the defendants have waived any exceptions for that cause.

By § 8 of the Act of incorporation and by article 15 of

the by-laws, it is provided that, upon notice of the loss, "the directors shall proceed as soon as may be to ascertain and determine the amount thereof, and shall settle and pay the same *within three months* after such notice; but if the assured shall not acquiesce in their determination, his claim may be submitted to referees, or he may, *within three* months after such determination, *but not after that time*, bring an action at law against said company for such loss; which action shall be brought at a proper Court *in the county of Merrimack*," *&c.*

Having received notice of the loss, the defendants should have objected if it was not sufficiently formal, or was deficient in the information required by the by-laws. If they were satisfied with the notice received, they should have proceeded to ascertain and determine the amount of the loss. No reasons are given for not doing this. It was in no respect the fault of the plaintiff that it was not done, and he should not suffer therefrom. The directors, by neglecting or refusing to do their duty, cannot deprive the plaintiff of his right of action. *Boynton* v. *Middlesex Mut. Fire Ins. Co.*, 4 Met., 212. These provisions contemplate a case when a loss has been admitted, and the amount fixed by the directors, and the only question is whether the insured is entitled to recover more. In *Nevins* v. *Rockingham Fire Ins. Co.*, 5 Foster, 22, this question arose, and the Court held the action was maintainable after the time limited in the by-laws, when the directors had for any cause omitted to ascertain and determine the loss within the time limited for that purpose. "The defendants," says PERLEY, J., in the case last cited, "are within the immunity and privilege of the charter, which requires them to be sued in a particular Court, and within a certain time, *only* when they have determined the question of loss according to the Act, and their implied undertaking with the plaintiff."

In *Amesbury* v. *Bowditch Mut. Fire Ins. Co.*, 6 Gray, 596, the directors determined the amount of the loss and notified the plaintiff of their determination. In *Nute* v. *Hamilton Ins. Co.*, 6 Gray, 171, the action was seasonably commenced,

but it was insisted that it was brought in the wrong county. The cases cited for the defence, it will be perceived, do not sustain the position that the present action was brought too late.

After a contract has been broken, the remedy is regulated by law, and must be governed by that of the forum where redress is sought. The provision, therefore, that any suit should be brought in the county where the company is established is not binding on the assured. *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray, 174; *Hall* v. *Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169; *Amesbury* v. *Bowditch Mut. Fire Ins. Co.* 6 Gray, 596. And most certainly the defendants are not entitled to this privilege, when they have entirely failed to perform those duties, upon the performance of which alone they can pretend to any claim for such an exemption as they rely upon in this case. *Nevins* v. *Rockingham Fire Ins. Co.*, 5 Foster, 22. *Defendants defaulted.*

TENNEY, C. J., and RICE, CUTTING, MAY, and KENT, J. J., concurred.

COUNTY OF PISCATAQUIS.

WILLIAM R. WEBB *versus* JOHN GODDARD *& al.*

Statutes, prescribing the counties in which transitory actions may be brought and tried, do not, in the least, change their legal character; but over such the Court has jurisdiction, in any county in which they are commenced. Otherwise, if the actions are local in their nature.

Where a transitory action was erroneously brought in a county in which neither of the parties resided, and the defendant appeared and neglected to file a plea in abatement, or a motion to dismiss the same, within the time prescribed by the Rules of Court for pleading in abatement, he will be regarded as having waived the irregularity.

EXCEPTIONS from the ruling of HATHAWAY, J.

THIS was an action of ASSUMPSIT, on an account against the defendants as partners, and was entered at the term of the Court for the county of Piscataquis held in Sept., 1856.

The writ describes the plaintiff as of Ottaway in Canada, the defendant Goddard as of Portland, in the county of Cumberland, and the defendant Russell as of Houlton, in the county of Aroostook in this State.

At the February term, 1857, defendant Russell was defaulted, and defendant Goddard moved the Court to abate the writ and dismiss the action, on the ground that it was not brought in a county where either party resided; which motion the presiding Judge overruled.

The case was thence continued from term to term to the September term, 1858, when a default was entered on the first day of the term.

On the 7th day of the term, said Goddard moved, that the default be taken off, that he might make a motion to have this action abated. That motion was denied. He then filed a motion in arrest of judgment, and showed the Court, by inspection of the writ, that the plaintiff lives in Ottaway,

Canada, and not in this State, and that one of the defendants lives in Cumberland county and one in Aroostook county, and neither of them in this county. Which motion being also overruled, the said Goddard excepted.

Rowe & Bartlett, in support of the exceptions.

This case was not legally brought before the Court in Piscataquis. It was brought in violation of the Act of 1856, c. 228, which was enacted to supply an omission in § 2 of c. 114 of R. S. of 1841.

The failure to plead in abatement cannot give the Court jurisdiction.

The object of the law is not to confer a personal privilege on a defendant, but to regulate the distribution of the burdens of litigation among the several counties; exempting each county from the burden of litigation in cases where no party is a citizen of such county.

The defect is a matter of substance, and not of form. The Act of 1856 is a positive prohibition of this suit being brought in Piscataquis county. It makes a class of actions, otherwise transitory, local; and is certainly as binding on the Court as would be a rule of common law making it so. If it were local by common law, it would be dismissed at any time, on motion. 1 Maine, 245; 13 Maine, 134.

This defect appearing on the face of the writ, no motion or plea is necessary, but the action should be dismissed at any stage, on the Court discovering it. *Bailey* v. *Smith*, 12 Maine, 196; *Tebbetts* v. *Shaw*, 19 Maine, 204; *Maine Bank* v. *Harvey*, 21 Maine, 38; *Eames* v. *Carlyle*, 3 N. H., 130; *Sackett* v. *Kellog*, 2 Cush., 88; *Thrale* v. *Cornwall*, 1 Wils., 165; *Dockminique* v. *Davenant*, 1 Salk., 200.

"If it shall appear to be a local action by statute, plaintiff will be nonsuited on the opening." Lord MANSFIELD, in *Bucksfield* v. *Hopkins*, Cowp., 409–10; *Doulson* v. *Mathews*, 4 T. R., 503.

In *Parker* v. *Elden*, 1 East, 352, Lord KENYON says that, in such cases, the Courts are bound to notice and enforce the statute.

The presiding Judge, at September term, 1858, erred in not dismissing or abating the action, when the defect was shown to him. R. S. of 1857, c. 81, § 2, in its terms applies to this case.

Neglect of defendant to plead in abatement, at most, can be but a waiver of personal privilege. It cannot be a waiver of the rights of the county of Piscataquis. The case was there in Court, in violation of law. The Judge, at any time, could have abated it on inspection, and exceptions to such abating as illegal could not have been sustained. The plaintiff acquired no right to save his action in the repealing clause of the statute.

A. Sanborn, contra.

The opinion of the Court was drawn up by

TENNEY, C. J.—Neither of the parties to this suit had his residence in the county of Piscataquis, and the plaintiff resided out of the State, as appears by the writ, which was returnable therein. The action was entered at the September term, 1856, and at a subsequent term, the defendant Russell was defaulted, and Goddard, the other defendant, moved that the writ abate and the action be dismissed, on the ground that it was brought in the wrong county. The motion was overruled, and the action continued from term to term, till September term, 1858, when Goddard was defaulted, on the first day thereof, and, on the seventh day of the same term, he moved that the default be taken off, in order that he might file a motion that the action abate, which motion was denied. Thereupon a motion in arrest of judgment for the same cause was filed and overruled. To these rulings and refusals, exceptions were taken by the defendant Goddard.

The action was erroneously brought in the county of Piscataquis. Statute of 1856, c. 228, § 1, requires that, when the plaintiff is not an inhabitant of the State, all personal and transitory actions, excepting process of foreign attachment, shall be brought in the county where the defendants, or

one of them, resides. The same provision is found in R. S. of 1857, c. 81, § 2, and when not so brought, on motion or inspection of the Court, they shall be abated, and the defendant allowed double costs.

It is not insisted, in defence, that a general appearance for the defendant Goddard was not entered at the first term; and, from the fact that the action was continued for several terms, we infer that an unqualified appearance was entered for him upon the docket at that time. No plea in abatement was filed, and no motion to abate the writ and dismiss the action, till the second term, was made. It is hence insisted, by the plaintiff, that the irregularity was waived. On the other hand, the defendant contends that there was a total want of jurisdiction in the Court, sitting in the county of Piscataquis, of the suit, and that the objection may be taken at any time before judgment.

Transitory actions are broadly distinguished from those which are local in their nature; and statutes, prescribing the counties in which the former may be brought and tried, do not in the least change their legal character; but over such the Court has jurisdiction in any county in which they are commenced. *Martyn* v. *Fabrigas*, Cowper, 161 and 176; *Brown* v. *Webber*, 6 Cush., 560. But it is otherwise in those, which are in their nature local. *Robinson* v. *Mead*, 7 Mass., 353; *Hathorne* v. *Haines*, 1 Greenl., 238; *Blake* v. *Freeman*, 13 Maine, 130.

"Where the objection is that the Court never had any authority to issue any process, or any jurisdiction over the subject or the parties, the proceeding is void." *Elder* v. *Dwight Man. Co.*, 4 Gray, 201. "But matters of form, which do not affect the merits of the controversy, nor the regular and fair administration of justice, are held to be waived, if not excepted to at an early stage of the case." *Richardson* v. *Welcome*, 6 Cush., 331.

By the statute of Massachusetts, c. 28, § 13, passed Oct. 30, 1784, it is provided that, "when the plaintiff and defendant both live within the Commonwealth, all personal or

transitory actions shall be brought within the county where one of the parties lives. And when an action shall be commenced in any other county, than as above directed, the writ shall abate, and the defendant be allowed double costs." In the case of *Cleaveland* v. *Welch*, 4 Mass., 591, the Court, referring to this provision, say, "This remedy was given to the defendant. He may, consequently, waive it. And he must be considered as waiving it, unless he seek it by plea in abatement to the writ. For the exception is not to the jurisdiction, &c., but is to the writ, as sued out and returned in the wrong county."

In the case of *Brown* v. *Webber and trustee*, 6 Cush. 560, after a review of authorities upon the subject, which is similar in principle to the question now before us, SHAW, C. J., says, "The result is, that where the Court has a jurisdiction of the cause and subject, as in transitory actions, where the jurisdiction is not limited by statute; and where they hold also jurisdiction of the persons, either by being rightly served with process, returned in the right county, as designated by the statutes, or where they have taken jurisdiction of the persons, by their submission to the jurisdiction, no exception can be taken to the rendering of a valid judgment; and that a defendant does waive all exceptions to irregularity, including the fact that the process is made returnable in the wrong county, by a general appearance and plea or answer to the merits." An omission to make a motion to dismiss the action at an early stage, in such case, is regarded as a waiver of the objection. *Jayner* v. *Third School District in Egremont*, 3 Cush., 574.

The suit before us is assumpsit, and is a transitory action. The writ was made in the wrong county. The defendant omitted to plead in abatement, or to move a dismissal of the action, till the time prescribed by the rules of this Court had elapsed. Rules of Court, 37 Maine, 569. He thereby waived the privilege conferred by the statute.

Exceptions overruled.

APPLETON, CUTTING, MAY, DAVIS and KENT, J. J., concurred.

INHABITANTS OF ATKINSON *versus* INHABITANTS OF MEDFORD.

A party contesting the legality of a marriage, because of the alleged insanity of the husband at the time, has no cause for exception to the instruction of the presiding Judge to the jury, that the same degree of mind sufficient to enable him to enter into a valid contract, or to make a valid deed or will, would be sufficient to enable him to contract matrimony.

EXCEPTIONS from the ruling of CUTTING, J.

THIS was an action of ASSUMPSIT for supplies furnished to *Adeline Tewksbury,* whose legal settlement is alleged to be in the defendant town. If the said Adeline was the lawful wife of *Lorenzo D. Tewksbury,* the defendants admitted their liability. They contended that, at the time of the marriage, the said Lorenzo was insane, and incapable of making a binding contract of marriage.

The presiding Judge instructed the jury, that the same degree of mind sufficient to enable him to enter into a valid contract, or make a valid deed or will, would be sufficient to enable him to contract matrimony. To this instruction the defendants excepted, the verdict being for the plaintiffs.

Everett, in support of the exception.

Robinson, contra.

THE COURT *held,* that the instruction excepted to was sufficiently favorable for the defendants, and directed an entry of— *Exceptions overruled.*

COUNTY OF PENOBSCOT.

ELHANAN GARLAND *versus* MOSES HODSDON *& al.*

Where a right to use water for a specific purpose is granted, without being appurtenant to a grant of land, the presumption is strong that the grant is intended to be limited to the purpose named.

But if the grant is appurtenant to land conveyed by the same deed, unless the contrary intention is clear, the use designated will be taken merely as the *measure* of the water granted, which the grantee may use for that or for other purposes.

Where the right to use water from a dam and stream is granted, with a proviso that the grant shall "in no case extend so far as to take water when the same shall be wanted for the grist-mill," which is or may be erected on or near the dam, this is an *exception*, rather than a reservation, and is to be construed most strictly against the grantor; and the grantor and his representatives have no right to use the water so excepted for any but the specified purpose.

THIS was an ACTION OF THE CASE for diverting water from the plaintiff's mills and pond.

The plaintiff owned and occupied a grist-mill, saw-mills and other machinery, on the east side of Kenduskeag stream, in Kenduskeag village. The defendant owned and occupied a mill on the west side of the same stream, in which he had a carding and other machines, and also saw-mills. Both drew water from the same dam. Both derive their title from the same original grantor. It is admitted that the defendants have all the right and title conveyed in a deed to Simeon Parsons, dated Oct. 27, 1829, which is made a part of the case; and that the plaintiff has all the estate and power not embraced in that deed. The substance of the deed is given in the opinion of the Court. The land on which the dam stands belongs to the plaintiff, the lot conveyed in Parsons' deed lying wholly below the dam.

In times of low water, there was not sufficient water for all the mills, and the plaintiff introduced evidence to show that

there was not more than enough to run two sets of stones in the grist-mill, and claimed the right at such times to use that quantity of water for his saw-mill or other machinery, when not wanted for the grist-mill.

The defendants contended that, when the water was not wanted for the grist-mill, they had a right to use, for sawing or any other purpose, water sufficient for a fulling-mill and four single carding machines, prior to the plaintiff's right to use water for any other purpose than to run his grist-mill.

It was proved that, when the Parsons deed was given, the grantors had a grist-mill and a saw-mill on the privilege; and, that, since that time, the water in the stream has greatly diminished.

The Court, Judge CUTTING, instructed the jury, that the plaintiff had the prior right to use the water in the stream, sufficient to run two runs of stones in the grist-mill, but could not use this quantity of water for any other purpose; that the defendants had a right to use what water was not wanted to run the two runs of stones, next after the right of the plaintiff; and that the defendants might use the quantity of water specified in the deed to Parsons for any other machinery, and the plaintiff had the right to all the remainder of the water. To these instructions, the plaintiff filed exceptions.

A. W. Paine, in support of the exceptions, argued that the language of the deed is as strong in favor of the plaintiff as of the defendant, and cited the words used to show that the defendant is limited to as rigid a rule as the plaintiff in the *use* of the water, and has no right to divert his quota of water to any other use than the one specified in the deed.

The grantors to Parsons owned the whole privilege, and had already occupied it for a grist-mill and saw-mill. Is it reasonable to construe their grant to Parsons as intended to authorize him to establish a rival saw or grist-mill? On the other hand, a new mill of a different kind might bring business to their mills. *Dearborn* v. *Porter*, 38 Maine, 289.

The business of fulling cloth and carding was one which re-

quired but a small and not a constant supply of water. This negatives the idea that they intended to grant a certain quantity of water to be used at all times and for any purpose.

By the terms of the deed, the carding machines could be connected only to the fulling-mill. If not so connected, no water can be taken for their use or for any other purpose, except for the fulling-mill. This condition shows the intention of the parties to limit the use. The measure expressed is contingent and uncertain, and therefore no measure at all. *Ashley* v. *Pease*, 18 Pick., 277; *Deshon* v. *Porter*, 38 Maine, 294.

The defendant owned no part of the land under the dam. The deed to Parsons gave him no right to the dam, but only to draw water from it. This shows that his right was to be subservient to that of the grantor, and weighs strongly in favor of the plaintiff's construction. *Tourtillot* v. *Phelps*, 4 Gray, 373.

The words in the deed, "the right and privilege in the dam and stream for the aforesaid purposes," limit the use of the water to the purposes expressed. *Libbey* v. *Hoar*, 4 Gray, 222; *Dewitt* v. *Harvey*, 4 Gray, 486.

2. The reservation in the deed was of a specified quantity of water sufficient for two runs of stones. This reservation was absolute, and the plaintiff had a right to so much water at all events. Otherwise the defendant might draw off the water when the grist-mill was not in operation, and when the plaintiff had occasion to start it again, he would have no water. The defendant is but a conditional grantee, and has no estate until the plaintiff's is at an end. The water reserved by the plaintiff remains his, and although expressed to be for a certain purpose, he had a right to use it for other purposes not injurious to the defendant. *Boab* v. *Empire*, 1 Selden, 33; *Crowell* v. *Selden*, 3 Comstock, 253; *Shed* v. *Leslie*, 22 Vt. (7 Washb.,) 498.

J. A. Peters and *Hodsdon*, for the defendants, cited *Ashley* v. *Pease*, 18 Pick., 268; *Farrar* v. *Wyman*, 35 Maine, 64.

The opinion of the Court was drawn up by

DAVIS, J.—Moses Patten, and certain co-tenants, formerly owned a mill privilege, and lands, on both sides of the Kenduskeag stream, situated in Levant, in the county of Penobscot. In 1829, they owned and carried on a grist-mill and also a saw-mill, on the privilege, both mills being on the east side of the stream.

October 27th, 1829, they conveyed to one Simeon Parsons a parcel of land on the west side of the stream, including a part of the dam and mill privilege, with such part of the water power as is embraced in the following clause contained in the deed:—

"Together with the right and privilege in the dam and stream, to take and use water sufficient for one fulling-mill, and the necessary machinery for dressing cloth, and, also, for such carding machines as may be connected with said fulling-mill, not exceeding four single machines, or two double ones.

"Provided, however, that the right and privilege in the dam and stream, for the aforesaid purposes, shall in no case extend so far as to take the water when the same shall be wanted for the grist-mill now erected on or near said dam, or such other grist-mill as may hereafter be erected instead of the present one, on or near said dam; meaning and intending to reserve for the use of said grist-mill, the right at all times to take water sufficient for two runs of stones," &c.

The plaintiff, who claims under the grantors, contends that the reservation in the deed is of a quantity of water equal to what would be necessary for such a grist-mill, and that he may use it for other purposes; and that the grant was for the specific purpose of a fulling-mill and carding machines, and available for no other.

The defendants, who derived their title from Parsons, claim the right to use the water for any purpose; and they contend that the reservation to the grantors was for the use of the grist-mill only, and that it cannot be held for any other purpose. The questions are independent, and must be determined separately.

Did the grant limit the use to the purposes of a fulling-mill? Or was the purpose named, in order to fix the volume of water conveyed by the deed?

When the intention of a grantor is clearly expressed in the deed, either way, courts will always give effect to it. *Tourtillot* v. *Phelps*, 4 Gray, 370. But, if the intention is left doubtful, the tendency of courts is to construe such grants most favorably to the grantee.

If one conveys only an incorporeal hereditament, a right to use the water for a particular purpose, with no grant of land to which it is appurtenant, the presumption is strong that the right in the water is intended to be restricted to the specific purpose named.

But, if the grant of water is appurtenant to a parcel of land, conveyed by the same deed, the beneficial use of the land, under the changes of business which occur from time to time, may require the use of the water for other purposes than those which are specified. And, for this reason, unless the contrary intention is clear, the use designated will be taken by the courts merely as the measure of water granted, which the grantee may use for that, or for other purposes.

Applying these principles to the case at bar, we are satisfied that the defendants may use the water for other machinery, the quantity not exceeding what would be required for a fulling-mill and carding machines.

The plaintiff, however, contends that the reservation should receive the same construction as the grant; that water enough for a grist-mill is at all times reserved for him, which he may use for that purpose, or for any other. And, if such had been the intention of the grantors, clearly expressed, the right so reserved would be sustained by the Court.

But the terms of the reservation are entirely different from those of the grant. It is not a reservation of "water sufficient for" a grist-mill, but a limitation of the grant "*when* the water shall be wanted *for the grist-mill.*" The restriction to the particular use could hardly be more clearly expressed.

Besides, what is here called a "reservation" is, strictly

speaking, an "exception." It does not apply when there is water enough for both parties. It is a part of the thing granted, deducting so much from it. A *reservation* is always external to the grant, and may be good or bad, without diminishing it. 7 Petersdorf, 675, 679. An *exception*, if valid, reduces the grant; if void, the entire grant is good, unaffected by it. 4 Comyn, title Fait. If doubtful, or uncertain, it is void; and the grant shall be held free of it. And, whether valid or void, it is in all cases to be construed most strictly against the grantor. 10 Coke, 106, b.

The deed, in this case, contains a grant of water sufficient for a fulling-mill and four single carding machines. The volume of water so granted is subject to be diminished by the exception, when wanted by the grantors for the grist-mill. We do not think the exception so doubtful as to be void. But we are of opinion that the grantors, or those claiming under them, have no right, under the exception, to use the water for any purpose except that which is specified. Beyond this, the entire grant must be upheld, according to its terms. *Exceptions overruled.*

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

WILLIAM ADAMS *versus* SAMUEL LARRABEE.

Where the State has conveyed to A. 5000 acres of the south-west corner of a township of land, and to B. the remainder, 9000 acres, which last tract was afterwards divided amongst several owners, the assessment of a State tax, describing the township in two parts, as "S. W. 1-4 range 4, No. 6," and "3-4 range 4, No. 6," is void for uncertainty.

An assessment of the township *in solido*, designating the number and range, would have been good, *it seems*.

The description of real estate assessed must be definite and certain, or refer to something by which it can be made certain.

WRIT OF ENTRY to recover a tract of land in township No. 6, in range 4, north of the Lottery lands, described by metes and bounds, with a count for mesne profits.

The facts were reported by APPLETON, J. Under a resolve of the Legislature of Massachusetts, passed Feb. 26, 1808, the agents named therein conveyed to George Ulmer and others a square tract of land in the south-west corner of township 6, containing 5760 acres, which said grantees and those claiming under them have since held.

In 1831, the State conveyed the remainder of the township, containing 9992 acres, to Waterston & Pray; and from them, through various conveyances, the demandant, in 1836, acquired title to one-eighth in common of said remainder. Partition has been made, and, since 1849, the demandant has held his share in severalty, and this is the land described in his writ.

The township was assessed for State taxes in 1854 and 1855, and the taxes partially paid by sundry persons; and, on Sept. 24, 1856, a portion of the tract, including the demanded premises, was sold, after being duly advertised, to pay the balance of the taxes for those years, and conveyed to G. W. Larrabee, who conveyed to the tenant, Nov. 10, 1857.

The case turned upon the validity of the tax, the description in the tax Act being as follows:—"S. W. 1-4 No. 6, R. 4, N. Bingham purchase." "3-4 No. 6, R. 4, N. Bingham purchase."

W. C. Crosby, for demandant, cited *Smith* v. *Bodfish*, 27 Maine, 394; 40 Maine, 160; 25 Maine, 359. Tax officers are to be held to a strict compliance with the law. The tax sale is void for uncertainty in the description in the assessment. "3-4 of No. 6, R. 4," may or may not include the premises demanded. If designed to refer to the land sold to Waterston & Pray, it is erroneous in including too large a proportion of the township. They purchased less than two-thirds; to tax it as three-fourths is a bad assessment. *Barker* v. *Blake*, 36 Maine, 433.

Rowe & Bartlett, for the tenant, argued that the demandant had forfeited his title by non-payment of the tax of 1854. Stat. 1849, c. 133, § § 4–6; *Hodgdon* v. *Wight,* 36 Maine, 326. It is too late to object to the inaccuracy of the description, after the demandant and all the other owners have assented to its correctness, by paying taxes assessed on the same land with the same description, from 1841 to 1854.

The opinion of the Court was drawn up by

DAVIS, J.—Pursuant to a Resolve passed by the Legislature of Massachusetts in 1808, a square tract of land, in the south-west corner of township number 6, in range 4, north of the Bingham purchase, containing 5760 acres, was conveyed to the Duck Trap Bridge Corporation.

In 1831, this State sold the remainder of the township, containing 9992 acres to Waterston & Pray; and the demandant subsequently acquired a title to one-eighth part of it, which was set off to him in severalty by his co-tenants.

In 1856, the whole of the 9992 acres, excepting three public lots reserved, was sold by the State treasurer to the tenant, as having been forfeited to the State on account of the non-payment of the State tax for the year 1854. There were also unpaid taxes for the county of Penobscot; nor had the State tax for 1855 been paid.

But the only question material to the present case is that of the validity of the assessment of the State tax for 1854. For that tax remained unpaid more than "two years next after the date of the assessment." If it was legally assessed, the whole tract became forfeited, and the State acquired a title thereto, "perfect and indefeasible," on the fifteenth day of April, 1856. Laws of 1849, c. 133, § 6. If so, whether the sale to the tenant was valid, or invalid, the demandant cannot recover. For he is not entitled to recover, unless the title and right of entry is in himself.

On the other hand, if the assessment was invalid, there was no forfeiture to the State; the sale to the tenant was illegal; and the demandant is entitled to recover.

Prior to 1841, the township was assessed as follows:—

"Part of No. 6, range 4, north of the Bingham Purchase, granted to Duck Trap Bridge Corporation, $———." "Part of No. 6, range 4, north of the Bingham Purchase, other than that granted to Duck Trap Bridge Corporation, $———."

After 1841, and in 1854 and 1855, the assessment was as follows:—

"S. W. 1-4, range 4, No. 6, north of the Bingham Purchase, $———." "3-4, range 4, No. 6, north of the Bingham Purchase, $———."

Is this description sufficient? If the assessment had been upon the whole township *in solido*, designating the number and range, it would have been good. In such case each owner could have computed the amount due from him for his part. But one-fourth part was less than that granted to the Duck Trap Bridge Corporation. Was it all embraced in that? Or was a portion of it included in the other part? And where was the dividing line? The two portions were taxed different sums per acre. How could any one owner ascertain whether his part was in the *one-fourth*, or in the *three-fourths*? And, if not, how could he ascertain the amount of his tax? And, in case of sale, how could the State Treasurer determine what part to sell, or the purchaser ascertain what portion he had bought?

It is obvious that an assessment so made is uncertain on the face of it; it refers to nothing by which it can be made certain. It leaves the State Treasurer without power to enforce the tax against the several owners, or even to inform them of the amount. Such an assessment, and all the proceedings under it, are invalid. According to the agreement of the parties, the tenant must be defaulted.

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

THOMAS MORTON *versus* DANIEL GLOSTER.

The contract by which a horse is let on the Lord's day is void, and a court of law will not enforce it, nor give compensation or damages for a breach of it.

But if the person hiring the horse, having completed the distance agreed upon, undertakes a new and independent journey, not within the terms of the illegal contract, the illegality of the contract furnishes no defence for his subsequent acts.

Trover may be maintained for a wrongful conversion of the horse, unless the owner, to establish his claim, invokes aid from the unlawful agreement.

A. let a horse to B. on the Lord's day, to go three miles; B. went with him six miles further, and over drove him so that he died;—*Held*, that an action of trover lies for damages.

ON FACTS AGREED UPON.

TROVER for the value of a horse. The plaintiff kept a livery stable at Frankfort Marsh, and owned a certain horse, which, on Sunday, May 2, 1858, he let to the defendant to go to Frankfort Village, distant three miles. The defendant drove the horse to Hampden, six miles further, and, by over driving and ill-usage, so injured him, that on the return from Hampden he fell exhausted in the road and died. The hiring was not for a work of necessity or charity.

T. H. Garnsey, for the plaintiff, cited *Woodman* v. *Hubbard*, 5 Foster's N. H. R., 67.

F. A. Wilson, for the defendant, cited *Gregg* v. *Wyman*, 4 Cushing, 322.

The opinion of the Court was drawn up by

KENT, J.—Upon the agreed statement, the plaintiff would unquestionably be entitled to judgment, if the facts had transpired on any other day than Sunday. *Wheelock* v. *Wheelwright*, 5 Mass., 104: *Homer* v. *Thwing*, 3 Pick. 492.

The question is, whether the fact that the contract of hiring, by which defendant came into possession of the horse, for a limited time and to perform a limited journey, was made on

Sunday, will defeat this action of trover, for a conversion by driving beyond the place named in the contract.

The contract was in violation of the statute, and therefore, undoubtedly, was void. This is well settled. A court of law will not enforce such a contract, or give compensation or damages for a breach of it. But, if executed, it will not interfere to restore the parties to their former rights, or declare the title thus perfected void.

There is a limit to the consequences of such illegal contract on Sunday. A party who delivers property to another to be used temporarily, under a contract made on Sunday, does not thereby lose his property in the article thus bailed. He forfeits a right to claim any thing under that contract, but he does not forfeit all his right or title to the property. That title remains; and, for any injury to that property, unconnected with the illegal contract, he may recover damages.

If a man lets his horse on Sunday, in violation of the statute, the hirer certainly acquires no absolute ownership in the animal. No other person thereby becomes the owner. The horse is not forfeited to the State, for the transgression of its master. The animal is not *derelict*, so that whoever finds it may either slay it, or appropriate it to his own use, against the will of the original owner. If the hirer, after driving the horse beyond the agreed distance, should sell it or leave it with another person, would it be any answer to the claim of the owner, for such purchaser or keeper to show that a contract for hiring, by which possession was obtained, was made on Sunday? Might not the owner maintain trover, after demand and refusal?

The plaintiff in this case cites and relies upon the case of *Woodman* v. *Hubbard*, 5 Foster's (N. H.) R., 67. The defendant, with equal confidence, relies upon the case of *Gregg* v. *Wyman*, 4 Cush. 322. The cases, upon examination, appear to be opposed to each other in the conclusion to which the same facts, in substance, as in this case, lead the learned Judges of the two Courts. There is, however, but little difference in the opinions, except upon a single point. The

Court in Massachusetts bases its denial of the claim of the plaintiff to recover, on the ground that, in order to *make out his case*, "it was necessary for him to show his own illegal conduct in letting the horse." In another part of the opinion the principle is stated thus:—"A party cannot maintain an action when his own illegal act must be shown as *a part of his case*, and *to make out his claim.*"

A question naturally arises, whether the illegal act of letting on Sunday does make any part, in fact, of this case, and is necessary to make out the claim. The claim in this action of trover is for an illegal conversion of the horse, arising, not from any act done in pursuance of or under the contract, but from wrongful acts outside of and beyond the terms and conditions of the contract. All rights under the contract, if any existed, were ended when the defendant, after he had arrived at the *terminus*, placed himself in a new relation to plaintiff and his horse, by undertaking a new and independent journey, not in any respect within the terms of the contract.

This latter act was not, properly, a violation of the contract. If it were only this, there would be force in the objection that the plaintiff could not recover for any mere violation of the illegal contract. The action is not for such violation. It is trover for a subsequent act, distinct from the hiring. In fact, as distinct as if the defendant had returned the horse to the plaintiff at his stable, and had then wrongfully taken him and converted him to his own use. The plaintiff sets up no claim under the contract, nor for its violation; he does not rely upon it. It is true that, as introductory to the case, the fact appears that there was such letting on Sunday. This is an agreed statement, and it does not appear which party claimed that fact as important; and, in this respect, the case differs from those where the plaintiff proves the fact, as a part of his case. But, if it had been put in by plaintiff, does that fact alone give the defendant a right to go out of the contract and convert the horse to his own use, or to kill him, or to hold him forever against the owner? The contract makes no part of this case; that is—

the plaintiff, by proving the contract, establishes no fact essential to be proved to make out a wrongful conversion; and the defendant finds in the fact no matter of defence in this action for a tort. The wrong was outside of the contract. *Lewis* v. *Littlefield*, 15 Maine, 236.

The opinion delivered by Judge PERLEY, in the case cited from the New Hampshire Reports, seems to us satisfactory, and its reasonings sound; and we refer to it for a full discussion of the subject. We think that a man is not deprived of property in his horse, if he does let him unlawfully on Sunday. He may vindicate his right, and the Court will sustain him, unless, in so doing, he is obliged to invoke aid from an illegal contract to *establish* his claim. If he must rely upon an unlawful agreement as the basis, or to support his case, he must fail. "But the plaintiff is not to be placed without the protection of the law, because he may, at some previous time, have made a contract, which it refuses to lend its aid to enforce. If the contract is void, no rights could be acquired under it. But here, it is contended, a void contract is to be so far regarded as subsisting, that its very invalidity is to be made to constitute a valid defence to parties in the wrong. Such a proposition is as devoid of law as it is destitute of logical consistency." *Bryant* v. *Biddeford*, 39 Maine, 193.

Defendant defaulted.

Damages to be assessed by Judge at Nisi Prius.

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

MELINDA BENT, *Executrix, versus* LEVI R. WEEKS *& al.*

Where the reversionary interest, in lands assigned to a widow as dower, is sold by the administrator by license of Court for the payment of debts of the deceased, the heirs of the deceased, continuing in possession more than six years, do not hold *adversely* to the owner of the reversion, nor acquire a right to compensation for betterments.

THE facts in this case fully appear in the case of *Bent* v. *Weeks*, 44 Maine, 45. The title of the demandant having been sustained by the Court in that case, the tenants applied for compensation for the improvements they made during their occupancy. The case was submitted without argument.

Rowe & Bartlett, for the demandant.

N. Wilson, for the tenants.

The opinion of the Court was drawn up by

CUTTING, J.—On facts agreed, the Court having heretofore adjudged that the legal title was in the demandant, the tenants now claim compensation for their improvements. It appears from the agreed statement now before us, as touching the question of betterments, that both parties claim under one Henry Sleeper, who died in 1836, leaving a widow and three children, of whom one is tenant and wife of the other tenant, both of whom, since 1844, have been in the open, peaceable, notorious and adverse possession, claiming title in right of the wife as heir of Sleeper. The premises were duly assigned to the widow in dower on September 5, 1842, and the reversion duly sold to the plaintiff's testator, and conveyed by deed dated Nov. 4, 1842. The widow died in July, 1856, and possession was demanded of the tenants by the testator in February following.

Upon the foregoing facts, the question presented is whether the possession has been of such a character as to entitle the tenants to betterments as against the demandant. The tenants do not claim under the widow, or as assignees or grantees

of one holding a life estate, and, consequently, cannot invoke § 23 of R. S., c. 104, which is a reënactment of the statute of 1843, c. 6, § 1. *Bent* v. *Weeks*, 44 Maine, 45. Nor § 20, for they did not hold *adversely* to the reversioner, who could not enter during the continuance of the particular estate. And, as the tenants could gain no title to the fee by such a possession twenty years continued, "so neither could they acquire the lesser right of compensation for betterments." *Pratt* v. *Churchill*, 42 Maine, 471.

According to the agreement of the parties, *the default is to stand*, and judgment for possession and $6, as mesne profits.

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, J. J., concurred.

JOHN WALL, JR., *versus* HENRY B. FARNHAM *& als.*

A complaint and warrant, in due form, are a sufficient justification for an officer and his aids for seizing spirituous liquors under the statute, 1851, c. 211.

ON REPORT of the facts by HATHAWAY, J.

TRESPASS for seizing liquors of the plaintiff, stored in the cellar of F. Adams's store in Bangor, July 10, 1853. The defendant Farnham justified as city marshal, acting under a warrant duly issued by the police court of Bangor, and the other defendants as his servants or aids. The complaint, warrant and return were in the case. The case was submitted to the Court, to be determined according to the legal rights of the parties.

A. Knowles, for the plaintiff, argued that it should appear affirmatively that the liquors seized were intended for sale in the State, but there is no such evidence.

W. C. Crosby, for the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—To this action of trespass, for taking certain spirituous liquors, the defendants plead the general issue, which is joined; and file a brief statement, in which Henry B. Farnham, one of the defendants, justifies the taking as city marshal of the city of Bangor, under a warrant issued by the judge of the police court of that city on May 27, 1853; and the other defendants justify as the servants of said Farnham.

From the pleadings and the evidence it appears that the taking by defendants was the original seizure under the warrant; and the plaintiff did not present his case, as claiming a right to recover, by reason of any irregularity in the proceedings of the city marshal afterwards.

The complaint and the warrant were a justification to the city marshal, and the other defendants, who aided him in the seizure. According to the agreement of the parties the plaintiff must become *Nonsuit.*

APPLETON, CUTTING, DAVIS, and KENT, J. J., concurred.

JOHN M. BARNARD *& als., versus* SAMUEL B. FIELD.

An action may be maintained for the price of intoxicating liquors sold in Boston, in conformity with the laws of Massachusetts, to a citizen of Maine, if the vendor had no knowledge that the liquors were intended for sale in this State in violation of law. The maintenance of such an action is not prohibited by the statute of 1856, c. 255, § 18.

ON REPORT by CUTTING, J.

ASSUMPSIT for the amount of a bill of intoxicating liquors purchased by the defendant of the plaintiffs in Boston in 1856. The plaintiffs had a license from the city of Boston for the manufacture and sale of spirituous liquors. Defendant testified that the plaintiffs, at the time he purchased the liquors,

knew that he was selling liquors at retail in Bangor. He had purchased liquors of them for two years. He had no license to sell.

One of the plaintiffs was a witness, and testified that neither he nor his partners knew that the defendant intended to violate the laws of this State.

W. C. Crosby, for the plaintiffs.

The burthen of proof was on the defendant to show that the sale in Massachusetts was illegal, which he has not done. The testimony on the part of the plaintiffs shows the sale strictly legal. If valid where made, it is valid where sought to be enforced. *Dutee* v. *Earl*, 3 Gray, 482; 2 Parsons on Contracts, 82; *Cornigie* v. *Morison*, 2 Metc. 397.

C. P. Brown, for the defendant, contended that the action could not be maintained under the statute of 1856, c. 255, then in force.

The opinion of the Court was drawn up by

May, J.—This is an action of assumpsit, upon an account annexed to the writ, for certain spirituous and intoxicating liquors, sold and delivered to the defendant at Boston, in Nov. 1856. The sale was made in conformity with the laws of Massachusetts; the plaintiffs being duly authorized to manufacture and sell such liquors in quantities not less than thirty gallons. The defence is, that the liquors were sold with the expectation and intention on the part of the plaintiffs that the defendant would sell them within the limits of this State, and in violation of the laws thereof. But the testimony in the case wholly fails to show any such intention or expectation, or even knowledge that the defendant intended to sell them in violation of law.

It is further objected, that certain depositions taken in defence are inadmissible because they were taken before a justice of the peace for the Commonwealth of Massachusetts, upon interrogatories and cross-interrogatories, filed by the parties, upon a commission issued by this Court at a *Nisi*

Prius term, holden in the county of Penobscot, where this action was pending. The commission is not among the papers in the case, and it does not appear that it did not run to the magistrate before whom the depositions were taken. This objection therefore fails, and the testimony of the deponents is properly in the case.

It is also contended that the statute of 1856, § 18, in force when the liquors sued for were sold, prohibits the maintenance of this suit. But that section only applies to the sale of intoxicating liquors sold in violation of the provisions of that Act. These liquors were not so sold. The contract of sale was lawful, and the plaintiffs may well maintain their suit for the amount declared for, with interest from the date of the writ. *Dolan* v. *Buzzell*, 41 Maine, 473.

Defendant defaulted.

TENNEY, C. J., and APPLETON, CUTTING, DAVIS, and KENT, J. J., concurred.

FRANCIS GARLAND *versus* PELEG SPENCER.

A creditor who had been induced, by the fraud and deceit of his debtor, to take a certain article in payment and discharge of his account, having afterwards discovered the fraud, brought an action on the account, without returning or offering to return the article named; — *and it was held*, that the action could not be maintained, the property having been received in *payment* of the demand, and not for an indefinite sum thereafter to be ascertained.

The remedy, in such case, there being no rescission of the contract, is by an action on the defendant's warranty, if any was made, or by an action on the case for damages sustained by reason of the defendant's fraudulent misrepresentations.

EXCEPTIONS from the ruling of KENT, J.

ASSUMPSIT on an account. The case was referred to the Court, reserving the right to except. The plaintiff proved his account of $62, against the defendant.

The defendant produced a receipt given to him by plaintiff, which was as follows:—

"Bangor, Jan. 2d, 1859.

"Received of Peleg Spencer his two horse wagon in payment of all demands to date."

The bill of sale of said wagon was as follows:—

"Bangor, Dec. 31, 1858.

"I have this day sold F. Garland & Co., my two horse wagon, the same I had of Parlin, for the sum of seventy-five dollars, and I agree to deliver the same wagon to Luther Mariner in Milford. "Received pay, Peleg Spencer."

The defendant delivered a wagon he bought of Parlin to Mariner on the 1st day of January, and Mariner, in writing, on the same day, notified the plaintiff that it had been thus delivered to him.

The evidence in the case established the fact of such fraudulent and deceitful acts on the part of the defendant as authorized the plaintiff to rescind the contract *in toto*.

But the plaintiff did not, when he discovered the fraud and the facts, return the wagon thus left with Mariner, as the defendant contended he should have done, in order to the maintenance of this action, nor did he notify the defendant of his intent to rescind the contract; but the wagon has remained at the same place where it was delivered, and in Mariner's possession.

On this finding of the facts, the presiding Judge ruled, as matter of law, that the plaintiff could not rescind the contract *in toto*, without returning the wagon, but that he should be held to account only for the actual value of the wagon, at the time of the delivery, which was found to be $40, and recover the balance between that value and the amount of debt and interest due from the defendant, which balance is $24,55, and the Court gave judgment for the plaintiff accordingly.

The defendant excepted.

J. H. Hillard, in support of the exceptions.

Blake & Garnsey, contra.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiff, having an account against the defendant, received from him a wagon in payment of the same, and gave a receipt in full for the amount due. He now alleges there was fraud and misrepresentation in reference to the wagon, and, claiming the right to rescind the settlement, brings this action upon his original demand. This he does without returning, or offering to return, the wagon received in discharge of his claim.

The law is well settled that, if a party would rescind a contract on the ground of fraud, he must return, or offer to return, what may have been received under such fraudulent contract. The rescission, if made, must be for the whole. If the party defrauded does not choose to rescind the contract, he may recover in an action upon the defendant's warranty, if one was made, or, in case, for damages sustained by reason of the defendant's fraudulent misrepresentations. Neither the defendant delivered, nor the plaintiff received, the wagon, but as in payment of the demand in suit. It was no part of the contract that it was to be in payment for an indefinite sum, thereafter to be determined. The plaintiff, still retaining the wagon and not offering to return the same, cannot maintain his action upon the demand in discharge of which he received it. *Tisdale* v. *Buckmore*, 33 Maine, 461; *Coolidge* v. *Bridgham*, 1 Met. 547. The same doctrine is affirmed in *Cook* v. *Gilman*, 34 N. H., 557, in a case almost identical in its facts with the one before us, and in which the law is fully considered in the learned opinion of Mr. Ch. Jus. PERLEY.

Such, too, is the law in England. In *Clark* v. *Auchmuty*, 1 Ell. Black. & Ell., 148, (96 E. C. L., 148,) it was recently held that a person induced by fraud to enter into a contract, under which he pays money, may, at his option, rescind the contract and recover back the price, as money had and received, if he can return what he has received under it. But when he can no longer place the parties *in statu quo*, as if he has become unable to return what he has received in the same

plight as that in which he received it, the right to rescind no longer exists; and his remedy must be by an action for deceit, and not for money had and received. In delivering his opinion, CROMPTON, J., says, "when once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract. * * * The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition." *Exceptions sustained.*

TENNEY, C. J., and CUTTING, MAY, GOODENOW, DAVIS, and KENT, J. J., concurred.

STATE *versus* MERRILL S. BUCK.

Where an indictment for larceny states only the collective value of the articles alleged to have been stolen, if the defendant is convicted of stealing only a part of them, and the jury find, and, in their verdict, return the value of the part so stolen, judgment may be legally rendered upon the verdict.

THIS was an indictment for stealing two robes, alleged to be of the value of thirty-six dollars. The defendant was convicted of stealing one of the robes named in the indictment, and the jury found and stated in their verdict that the robe stolen by the defendant was of the value of twenty dollars.

THE COURT *held*, that, notwithstanding only the collective value of the property alleged to have been stolen is stated in the indictment, yet, if the jury find the defendant guilty of stealing a part only of the property, and, in their verdict,

state the value of the articles so stolen by him, judgment may be well rendered upon such verdict.

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

CHARLES D. GILMORE *versus* ANDREW MCNEIL *& al.*

A receipter for goods attached, is bound to deliver, when properly demanded, the identical articles receipted for, and all of them.

Whether it would be otherwise if each article was separately valued in the receipt, *quære*.

If a demand is made on a receipter at any other place than his residence, he is entitled to a reasonable time and opportunity to make the delivery.

But if the receipter had previously disposed of a valuable part of the goods, a demand made in the street is sufficient, though no time and place of delivery is agreed upon, for it would be idle to fix a time and place to do what cannot be done.

ON EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action on a receipt given by the defendants for property of McNeil, valued at $400, attached by the plaintiff, as sheriff of Penobscot county, in an action, John A. Wallis against McNeil, on which judgment was recovered by Wallis, July 31, 1857. Execution was issued, and placed in the hands of Gilmore, the sheriff, who testified that soon afterwards he made a demand on each of the defendants for the goods receipted for. The officer saw McNeil riding in the street, and made the demand upon him when he stopped. No time or place was agreed upon for the delivery.

The defendants both testified, that no such demand had been made upon them; that, on the 18th of August, 1857, they had all the property receipted for in their possession, except a lot of candy, a lot of cigars, a sleigh pung, and part of a harness; that they collected it together, with another sleigh pung of equal value, and a like quantity of cigars as

described in the receipt; that, on that day, they called Gilmore into an office in Bangor, and offered him the property, and also a fresh lot of candy of equal value, or the value of the candy in cash; that Gilmore admitted no demand had been made, made no objection on account of the whole not being the same, but said he would take it at a future time.

There was evidence tending to prove the property offered to be worth $400, and evidence to the reverse on all these points.

On this and the other testimony in the case, the presiding Judge instructed the jury, that it was incumbent on the plaintiff to prove a demand on one or both of the receipters, made by an officer having the execution with him, within thirty days after the rendition of judgment, for the delivery of the property to be taken upon execution; that a demand was good, although made in the street, and no time or place agreed upon for the delivery of the property, as the receipters were bound to have it in readiness; that the receipters were bound to deliver the identical articles named in the receipt; that the plaintiff was not obliged to receive the property if any one article receipted for was missing, and another substituted for it, though of equal value; and that offering the value of missing articles in money would not relieve the receipters from liability.

The verdict was for the plaintiff. The defendants filed exceptions.

A. Knowles and *C. S. Crosby*, in support of the exceptions, argued that the demand on McNeil, when he was riding in the street, was not made in a proper place, the articles demanded being too bulky to be carried about the person. It is not reasonable to demand such articles, and fix no time or place for their delivery. Colby's Practice, 18.

A tender of like articles, made in the street, would not be good. 2 Parsons on Contracts, 161, 162. So of a demand, for the same reasons.

It is sufficient if the value in money is offered for a missing

article embraced in the receipt. The receipter is to deliver the property on demand, or to indemnify the officer. If he pays the value of a missing article, it is all he agrees to do. *Phillips* v. *Bridge*, 11 Mass., 242. The candy was a perishable article. It is unreasonable to require a receipter to keep perishable articles to be returned after a lapse of years.

The defendants had a right to deliver enough of the property to satisfy the debt and costs, and keep the rest. The officer could hold no more. The balance belonged to the defendants. If they tendered enough to pay the bills, the officer cannot maintain an action for the balance.

J. E. Godfrey and *C. P. Brown*, for the plaintiff.

A demand on a receipter is good wherever made. *Higgins* v. *Emery*, 5 Conn., 76; Chitty on Contracts, 727, 728. When no place is appointed for the delivery of specific articles, the obligor must ascertain from the obligee where he will receive them. *Bixby* v. *Whitney*, 5 Maine, 195; *Bean* v. *Sampson*, 16 Maine, 49. The same property receipted for must be delivered. The obligee was not bound to receive less than the whole, nor goods of the same quality and put up in the same manner as those receipted for. *Smith* v. *Mitchell*, 16 Maine, 49; *Scott* v. *Whittemore*, 7 Foster's N. H. R., 309; *Roberts* v. *Beatty*, 2 Penn., 63; Chitty on Contracts, 446.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiff having, as sheriff, attached "one horse, one wagon, two sleigh pungs, one harness, two hundred pounds of candy and five thousand Spanish cigars, and all of the value of four hundred dollars," entrusted the same to the defendants, taking from them a receipt in which they promised to deliver the same to him on demand. The testimony of the defendants shows that the cigars, and most of the other articles, had been sold or exchanged before judgment was rendered in the suit on which they had been attached. There was evidence tending to show that, after the issu-

ing of the execution, and within thirty days from the rendition of judgment, the plaintiff demanded of the defendant McNeil, in the street, the property attached, who told him to see Thaxter, the other defendant, of whom he likewise made a demand. Subsequently, on the 18th of August, and within thirty days from the rendition of judgment, the defendants made a tender of some of the articles for which they had given their receipt, and of a different sleigh pung, and cigars of equal value, but other than those attached, and offered to supply the same quantity of fresh candy, or to pay its value in cash.

In the case of a nominal receipt, the receipter is precluded from defending on the ground that no such property as is specified in his receipt was attached. *Morrison* v. *Blodgett*, 8 N. H., 255.

But, in the case before us, there was an actual attachment of specific property. The lien of the officer is upon the property attached. The receipters are the bailees of the sheriff. Their contract is to return the "said property,"—that is, the articles attached. The contract is not to deliver goods of a certain description, which might be satisfied by the delivery of any goods of the character described. It is an agreement to deliver, on demand, the identical goods attached, and it can only be performed by so delivering them. Its performance may be excused by inevitable accident or the act of God. The receipters do not perform their contract by delivering a portion of the identical articles attached, and a portion of substituted articles of the same description and value. *Scott* v. *Whittemore*, 7 Foster, 309. Had each article been separately valued, it might, perhaps, have been different; but here the value of all the articles attached was fixed, and the plaintiff was under no obligation to receive a portion of the identical articles attached, when no excuse was offered or pretended for not delivering the remainder. *Drown* v. *Smith*, 3 N. H., 299.

It was immaterial to the rights of the defendant whether the fact that the articles tendered were other and different

from those attached was known to the plaintiff or not. If a demand had been made, it was the duty of the defendants to comply with it. This they were unable to do, for much the more valuable portion of the property attached had long before been sold. It was for the defendants, if they undertook to make a tender, to see that it was legal. But this, in consequence of their own fault, they could not do.

The demand, under the circumstances, was sufficient, though made in the street. It was held in *Whittemore* v. *Scott*, 7 Foster, 319, that the liability of a receipter upon his contract for property attached is fixed, by not delivering the property when it is demanded. A refusal to deliver is not necessary. "A demand, in whatever words," says SHEPLEY, J., in *Hapgood* v. *Hill*, 20 Maine, 373, "which would inform the plaintiff that the sheriff, having the execution, desired to obtain from him the property attached, would be sufficient." But, undoubtedly, no reasonable construction can require the depositary to have the property ready to deliver wherever he may happen to be when demand is made. If demand be made at any other place than his residence, he is entitled to have a reasonable time and opportunity in which to make the delivery. *Phelps* v. *Gilchrist*, 8 Foster, 266. But the difficulty of the defendants' position is, that, long before judgment was rendered, they had parted with a very considerable portion of the property attached, and were not in a condition to comply with or perform the terms of their contract. In *Drown* v. *Smith*, 3 N. H. 299, the attachment was of books, a portion of which had been sold, and the residue were tendered to the officer having the receipt, and refused by him. "Indeed," remarks RICHARDSON, C. J., "it was admitted that the defendant had sold a considerable portion of the books, and as he had thus voluntarily disabled himself to return a part of the books, we are of opinion that the officer ought not to be compelled to take the residue."

The demand, therefore, under the state of facts disclosed by the defendants, was sufficient to fix their liability. The demand might be sufficient, though no time nor place of de-

livery was agreed upon. If the defendants had shown that they had the property, and required a reasonable time in which to deliver it, the case would have been different. But, if the property did not exist so that it could be tendered, any agreement fixing the time and place of delivery of what had ceased to exist, would be an idle and useless ceremony. *Gordon* v. *Wilkins*, 20 Maine, 134. The defendants, if their own statements were to be believed, were unable at any time after judgment to perform their contract. The five thousand Spanish cigars were sold; each had accomplished its destiny,

"*tenuesque recessit,*
Consumpta in ventos."

The candy was not forthcoming. Substitution would not answer the contract. Performance of their contract by the defendants, by their own acts, was out of their power. Their liability was fixed upon the demand made and the neglect to deliver.

The defendants have no just ground of complaint of the instructions given. *Exceptions overruled.*

TENNEY, C. J., and CUTTING, MAY, DAVIS, and KENT, J. J., concurred.

JOHN E. GODFREY, *Judge of Probate, versus* WALTER GETCHELL *& als.*

Where a Judge of Probate has decreed an allowance to a widow from the personal estate of her deceased husband, and the administrator has paid a part of it, taking receipts for his payments, he is bound to pay the balance when demanded, on tender of a receipt therefor, and is not authorized to refuse payment until he obtains a discharge or receipt in full. The several receipts for part payments, making up the whole sum when taken together, constitute a receipt in full, and would be perfect vouchers before the Judge of Probate.

Godfrey *v.* Getchell.

THIS was an action of DEBT on the bond given by Walter Getchell, administrator on the estate of Greenville Flint, brought in the name of the Judge of Probate, for an alleged breach by refusing to pay the allowance made by the Judge to the widow, Augusta S. Flint, out of the personal estate of the deceased. By consent of parties, it was referred to the Court, HATHAWAY, J., presiding, with the right to except.

It appeared that the Judge of Probate had made an allowance to the widow of $800, with directions to the administrator to return the order, "with a proper receipt and discharge thereon," on rendering his account of administration. The administrator had made payments to her from time to time, and had taken receipts, so that the balance due her on the allowance was $87,38. In July, 1857, the widow's attorney demanded payment of this balance; the administrator offered to pay it, on receiving a discharge in full; the attorney refused to receive the balance on those terms, but offered to take it and give a receipt for the specific sum. This offer the administrator refused; and this suit is brought for the balance due the widow.

The presiding Judge ruled, that the administrator was not bound to pay without receiving a discharge or receipt in full; and that the widow was bound to give such a discharge on receiving her full pay; and he ordered a nonsuit. The plaintiff filed exceptions.

J. A. Peters and *L. Barker*, for the plaintiff.

Rowe & Bartlett, for the defendants.

The opinion of the Court was drawn up by

KENT, J.—The question in this case is, whether the ruling of the Judge, to whom the case was referred, with right to except, was correct in the matter of law. The case finds, in brief, that there was due in money, from the administrator to the widow, $87,38; that all of the eight hundred dollars except the above amount, ordered to be paid to her, had been paid at different times, and separate receipts given therefor;

that a demand was made on the administrator by the attorney for the widow, for the amount due; that the administrator was ready and offered to pay said sum, upon receiving a discharge in full; that the attorney for the widow offered to take said sum and receipt therefor, but refused to give a discharge in full; that the administrator refused to pay without a receipt in full, or a discharge. It does not appear that the administrator offered to give up the former receipts.

On these facts, the Judge decided, as matter of law, that the widow was bound to give a discharge in full upon receiving her pay in full, and the administrator was not bound to pay without receiving such discharge or receipt in full, and thereupon ordered a nonsuit.

There is no doubt that, as a general principle, a person who undertakes to discharge an obligation or contract, by a tender or offer to pay, must make the tender absolute, unaccompanied by any condition. He cannot require a receipt or a release, and, if he does, the tender is invalid. *Thayer* v. *Brackett*, 12 Mass. 450; *Loring* v. *Cook*, 3 Pick., 48.

But this is not a case of a contract. The obligation to pay rests upon the decree and order of the Judge of Probate, making an allowance to the widow, and ordering the administrator to pay or deliver to her a certain amount of the personal property. That order, for a non-compliance with which this action is brought, was based on the statute as found in R. S. of 1857, c. 65, § 13. Both parties are bound by the decree and order. And it appears in the order, made part of the case, that the administrator was directed to take a proper receipt and discharge thereon, and to present the same on settlement, as evidence of the payment.

The intent and purpose of this order is manifest. It is that the widow should have the property or money, but should, on receipt, give the administrator written evidence of his having performed his duty, that he might exhibit the same on settlement. No particular form was required. The essential thing was such a receipt or discharge given into the possession and control of the administrator.

It appears that the administrator paid portions from time to time, and took receipts for the same. On the last demand or request, he was ready to pay, and the widow was ready to receive the sum which he alleged, and which the case finds, was due. The attorney for the widow, not probably knowing the exact amount due, or for some other reason, was unwilling to give a receipt in full discharge, but was ready to give one for the sum offered. If the defendant had paid him, and taken such receipt, that receipt, with the other receipts in his possession before given, and the amount of which he knew, would have exactly covered the $800 ordered to be paid, and would have been perfect vouchers for him before the Judge of Probate.

The law looks to the substance and not to the form. The decision of the Judge may, perhaps, be regarded as essentially correct in principle, that the administrator had a right to require receipts, and such receipts as would show that he had paid in full. The question is, were not such receipts as he had, with the one offered, when taken together, receipts in full, and sufficient evidence to protect him? We think they were, and that he ought to have paid over the money.

Exceptions sustained, and—

Nonsuit taken off.

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

WILLIAM ROUNDS *versus* CITY OF BANGOR.

Where the statute requires a public officer to give a bond, to be approved before he acts, he cannot justify as an officer *de jure*, until such a bond has been given and approved.

A person who has been duly elected as pound keeper, and has taken the oath of office, has no power to act, until he has filed his official bond, and it has been approved.

A city or town is not responsible in damages for the acts of a person claiming to be pound keeper, done before the approval of his official bond.

ON FACTS AGREED UPON.

THIS was an action of the CASE to recover damages for the illegal doings of Thomas N. Mansfield, alleged to be pound keeper of the city for the year 1853.

Mansfield was legally chosen pound keeper, and took the proper oath, June 6, 1853. His bond was dated June 7, 1853, but was not approved by the aldermen until August 9. Between the date of the bond and of its approval, sundry swine of the plaintiff were taken up, impounded and sold by Mansfield, as pound keeper. The plaintiff brought an action of trover against Mansfield, for illegally taking the swine and converting them to his own use. The city of Bangor, by its city solicitor, defended the action; but the plaintiff recovered judgment against Mansfield, October term, 1857, for $165 damages, and $33,45 costs. This judgment is in force and unsatisfied, Mansfield having no attachable property.

The Court is to order a nonsuit or default, as the facts and law of the case may require.

A. Sanborn, for the plaintiff, argued that Mansfield, having been duly elected and sworn, was pound keeper *de jure*. The city, having assumed the defence of the action against Mansfield, was estopped to deny that he was pound keeper.

G. W. Ingersoll, for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—It appears that Thomas N. Mansfield was legally chosen pound keeper of the city of Bangor, and took the oath prescribed by the statute on June 6th, 1853; and that he furnished a bond, which was not approved until the 9th of Aug., 1853. Between these dates, claiming to act as an officer, he impounded thirteen swine of the plaintiff's, for which an action of trover was commenced, in which judgment was rendered against him, on the ground that he could not justify as pound keeper, without showing that his bond had been approved before the acts complained of were done. *Rounds* v. *Mansfield*, 38 Maine, 586.

When a public officer is required to give a bond, which is to be approved before he can act, he cannot justify as an officer *de jure*, until the statutory bond has been filed and approved. It is not enough that he has been chosen. He may have taken the oaths which the statute prescribed. Yet he may never be able to furnish the requisite bond. He is not an officer by the mere fact of his choice. This has been uniformly held to be the law, as well in regard to public officers, as to those holding private trusts under the provisions of our public statutes. Where a suit is brought against individuals, who justify as public officers, they must show themselves officers *de jure*, and that they were qualified by taking the oath required by law. A record that they were sworn is insufficient. *Blake* v. *Sturtevant*, 12 N. H., 569. So in case of trustees under a will, who have omitted to give the bond required by statute. *Williams* v. *Cushing*, 34 Maine, 372. The refusal by a collector of taxes to furnish the sureties required by statute, is held a non-acceptance, though he may have taken the oath of office. *Morrell* v. *Sylvester*, 1 Greenl., 248. The right of the pound keeper to act depends upon first giving a bond, and its approval. *Rounds* v. *Mansfield*, 38 Maine, 586.

This action is brought under the provisions of statute 1853, c. 17, § 4, reënacted substantially in the R. S., 1857,

c. 23, § 6, which is in these words:—"Each city or town shall be responsible in damages to the party injured, for all *illegal doings or defaults of its pound keeper,* in any appropriate action to recover such damages; and such pound keeper shall give a bond with sufficient surety or sureties, to be approved by the aldermen or selectmen, for the faithful performance of the duties of *his office, before he shall be entitled to act as such pound keeper.*"

The acts for which the city or town is to be made liable, under this statute, are such as are done by "its pound keeper," not those done by a stranger or by one who may afterwards become a pound keeper. Until the bond was approved, Mansfield was not the pound keeper of the city. The bond might never be approved. Whether it would, or would not be, was in the future. When the injury complained of was done, Mansfield was acting as a private citizen, and the plaintiff is no more entitled to remuneration from the city for his wrongful acts, than for those of any other individual, who, without right, might have converted his property to his own use. The plaintiff entirely fails to bring his case within the provisions of the statute upon which he relies.

The fact that the defence of Mansfield was conducted by the city solicitor cannot enlarge the rights of the plaintiff. The mere assumption by the city, of the defence, will no more render it liable for the unauthorized acts of Mansfield, when not "its pound keeper," than for those of any other of its inhabitants. *Plaintiff nonsuit.*

TENNEY, C. J., and CUTTING, MAY, DAVIS, and KENT, J. J., concurred.

DAVID PINGREE *versus* CHARLES H. SNELL.

Where an offer to be defaulted is made at the first term and accepted at a subsequent term, the plaintiff is entitled to costs up to the time of the default.

If, after the defendant is defaulted, he reserves the right to a subsequent hearing as to damages or costs, the plaintiff may recover costs until final judgment.

ON EXCEPTIONS from the ruling of APPLETON, J.

THIS is the same case reported in 42 Maine Reports, 53. After the opinion there reported was delivered, a special judgment was rendered in July, 1858, upon the docket of April term, 1858.

The action was entered October term, 1855, on the first day of which term the defendant filed an offer to be defaulted for a sum stated. The action was continued from term to term, and, at April term, 1856, the plaintiff accepted the defendant's offer, and a default was entered for the sum offered. Costs were allowed to the plaintiff until the default; to which the defendant excepted, and, in May, 1858, the Court affirmed the award of costs to the plaintiff, except for witness' fees.

The plaintiff then claimed costs from the default up to final judgment, and the Court allowed the claim. The defendant claimed costs from the time the offer was made, and the Court disallowed it. The defendant excepted.

A. W. Paine, in support of the exceptions, argued at length that an offer to be defaulted is analogous to a tender, and that, from the time of making the offer, it having been afterwards accepted, the defendant is the prevailing party, and therefore entitled to costs. *Fogg* v. *Hill*, 21 Maine, 529; *Boynton* v. *Frye*, 33 Maine, 216, 220; *Gowdy* v. *Farrow*, 39 Maine, 474; *Call* v. *Lothrop*, 39 Maine, 434; *Mudgett* v. *Emery*, 38 Maine, 255. After default, the defendant is out of Court, and has no day or place therein. If he has any right to be heard at all, it is only by the rules of Court, and not

under the statute. Hence, no costs should be awarded against him for proceedings after default.

Rowe & Bartlett, for the plaintiff.

The opinion of the Court was drawn up by

CUTTING, J.—It was decided in the case between these same parties, (42 Maine, 53,) that, under the R. S., c. 115, § 22, an offer to be defaulted for a specific sum, filed at the first and accepted at the second term, and before proceeding to trial, did not entitle the defendant to his costs accruing after such offer; and by a subsequent decision (not reported) that the plaintiff could recover his costs up to the time of the default. As to the correctness of those decisions we entertain no doubt.

It is now contended that, in the revision of the statutes in 1857, and before judgment on the default, the former law, existing at the time of the previous decisions, has been materially changed, and that costs are taxable by the law in force at the rendition of judgment; and we are referred to c. 82, § 21. But the repealing Act of the prior statutes fully reserves and protects the parties' rights in this particular.

But it is further contended that, at all events, costs should not be allowed after the default, because, says the counsel, the defendant is then out of Court, and consequently has no further control of the action. This conclusion is not always correct, for, after a default, the defendant has a right in certain cases to be heard before the Court or jury in damages, and much time may elapse and expenses accrue by such intervention; and so long as questions are pending in relation to the amount of damages or costs before the Court, especially on exceptions, it becomes necessary to retain the action upon the docket, to save, perhaps, an attachment or a seasonable record; and we perceive no reason why one party, under such circumstances, should thus delay the other with impunity.

Exceptions overruled.

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, J. J., concurred.

SOLOMON DUNNING *versus* THOMAS FINSON.

Review of the various enactments relative to the action of forcible entry and detainer.

In a complaint for forcible entry and detainer against a tenant at will, it is not necessary to allege or prove that the relation of landlord and tenant existed between the parties at the time of the service of notice to quit.

Such a tenancy at will as c. 94, § 2, R. S. of 1857, contemplates, may exist, where there is no such relation as would authorize a suit for rent, or confer the respective rights of landlord and tenant.

A. bargained for a house, but had it conveyed to B. as security for a loan, taking a bond from B. to convey to him in payment. The bond expired. C. rented the house of A., and afterwards took a quitclaim of his right, at the same time agreeing orally with B. for a deed from him at a price named. *Held*, that C. was tenant at will, under B., although he had overpaid rent to A.

ON REPORT by KENT, J., April term, 1859.

THIS was an action of FORCIBLE ENTRY AND DETAINER, commenced in the police court for the city of Bangor, and brought into this Court on the pleadings, the defendant pleading the general issue, with a brief statement claiming title in himself.

Jefferson Crocker, being the owner of the premises in question, bargained with Alfred Stetson to sell them to him for $500. Stetson obtained a part of the purchase money, about $300, of the plaintiff, and, by agreement of parties, Crocker conveyed to the plaintiff, March 4, 1854; and, on the same day, the plaintiff gave a writing to Stetson, binding himself to convey the premises to him or his representatives, on payment of the sum borrowed and interest in one year. On Nov. 22, 1856, Stetson quitclaimed his right in the premises to the defendant, who lived upon the premises until April, 1858, when Dunning served upon him notice in due form to quit the premises, and commenced this action, July 16, 1858.

The defendant testified that he held the premises under his deed from Stetson, and had never been tenant at will under Dunning; that he knew when he purchased that Dunning had a deed of the premises, but did not know whether the bond

he gave to Stetson was in force or not; that he took a quitclaim deed only, and "stood in Stetson's shoes;" that he had paid about $225, for Stetson's interest, and expended about $150, in repairs; that, before he bought of Stetson, he talked with Dunning about it, when Dunning said he only wanted his interest, and it was arranged between them that he should pay Dunning ten per cent. interest on $600, then due, and pay the principal when he chose; that Dunning promised to make writings, but did not; that the understanding was, that when the debt was paid to Dunning, witness was to have a deed from him; and that Dunning never called for rent until about the time he gave witness notice to quit, when he said he must have interest or rent.

There was evidence that before Finson bargained with Stetson, he hired the house of him, and was to pay the rent in making repairs; that $90 a year was talked of as rent; and that the value of the property was estimated at about $900. Most of the other testimony was in corroboration of the foregoing.

On all the facts in the case, the Court was to render judgment according to the legal rights of the parties.

Godfrey & Shaw, for the plaintiff.

The decision in *Woodman* v. *Ranger*, 30 Maine, 180, that a similar process could not be maintained, because there was no allegation in the complaint that the relation of landlord and tenant subsisted between the parties, does not apply to this case, being controlled by subsequent legislation. R. S., c. 94, § 2. The statute making it unnecessary to prove the relation, it is equally unnecessary to allege it. But, if such an allegation is requisite, it is substantially contained in the present complaint.

The deed of Crocker to the plaintiff, together with the notice to quit, constitutes a *prima facie* case. The quitclaim deed of Stetson to Finson furnishes no defence, as no title is shown in Stetson. Dunning's obligation to Stetson to convey to him, on certain payments being made, in one year, is inad-

missible, because no consideration is shown; because it is not a negotiable instrument under which the defendant can claim any rights; because it is not in force, and was not when the defendant bargained with Stetson; and because there is no privity between the plaintiff and the defendant.

Stetson, after the expiration of Dunning's obligation, was only a tenant at sufferance. He had but a naked possession, and no estate which he could transmit. Co. Lit., 57; 4 Kent, 110. He could not place his grantee in any better position than he occupied himself. It was at the election of Dunning, whether to treat the defendant as a tenant at sufferance or at will.

The defendant's tenancy terminated after thirty days notice, and his refusal to deliver possession was unreasonable, and equivalent to a forcible detainer. *Clapp* v. *Paine*, 18 Maine, 264; *Smith* v. *Rowe*, 31 Maine, 212.

This process being designed to restore to owners their property wrongfully withheld, the statute is remedial, and should be construed liberally. 5 Burr., 2694; 4 Kent, 464.

A. L. Simpson, for the defendant.

The complaint is defective, in not alleging that the relation of landlord and tenant existed between the parties. *Woodman* v. *Ranger*, 30 Maine, 180; *Sanders* v. *Robinson*, 5 Met., 343; *Howard* v. *Merriam*, 5 Cush., 567, 568. In order to be sustained, the complaint should allege by what tenure the defendant held, and by what right the plaintiff claimed. This it fails to do.

The evidence does not show the relation of landlord and tenant, but that Dunning took a deed for collateral security for his loan, and Stetson held an equitable interest in the premises. It does not appear that either party intended to create a tenancy at will, or subject Stetson or his assignees to be ousted by this summary process, or to a liability to pay rent.

This case is parallel with that of *Dakin* v. *Allen*, 8 Cush., 33. The parties there bore the same relations to each other

as in this case. The Court decided that, although the bond was forfeited, forcible entry and detainer could not be maintained, and that the relation of the parties was similar to that of mortgager and mortgagee. Our Court has determined that this form of action will not lie between mortgager and mortgagee. *Sawyer* v. *Hanson*, 24 Maine, 542. In the case of *Larrabee* v. *Lumbert*, 34 Maine, 79, it was held that a conditional sale for security, although absolute on its face, did not create the relation of landlord and tenant, when the grantor was permitted to remain in possession. Here the deed was absolute on its face, but made only to secure Dunning for money he had loaned to Stetson.

The plaintiff has misconceived his action. He should have brought a writ of possession or ejectment. He would then have got possession of the premises, if his title is good, and the defendant would have had the use and occupation, to repay him in part for his outlay. If this action is maintained, the defendant is further liable to the plaintiff in an action for use and occupation for the whole time. The plaintiff wins all, and the defendant loses all.

If, however, the Court is of opinion that the relation of landlord and tenant existed between the parties, the defendant had occupied them less than a year and a half, and had made repairs which inured to the benefit of the plaintiff, in value beyond the amount of rent which had accrued. The notice to quit, therefore, having been given long before rent became due and unpaid, the action was prematurely brought, and cannot be maintained.

The opinion of the Court was drawn up by

KENT, J. — The questions arising in this case, which, to some extent, require a construction of the provisions of the Act in relation to "forcible entry and detainer and tenancies," (c. 94, R. S.) will be better understood and determined by a brief statement of the various Acts of the Legislature, which preceded the enactment of the Revised Statutes, and which were consolidated and condensed in the chapter first named.

Whatever of doubt or obscurity arises or appears, upon a cursory reading of these provisions, may perhaps be removed, to a considerable extent, by the examination of this prior legislation, thus embodied.

The process of forcible entry and detainer was originally exactly what the words mean; viz.,—a *forcible* entry, or a *forcible* detainer. This remedy was authorized only where the entry or holding was by force and violence, or threats of violence, sufficient to deter the owner from entering. This was the law of Massachusetts at the time of the separation. *Commonwealth* v. *Dudley*, 10 Mass. 403.

In practice, this statute, under the construction given to it, was found to be insufficient to give a peaceable and speedy remedy to the owner to recover possession of premises unlawfully detained by tenants whose estate had been determined. It required, not merely that such estate should be determined, and the holding over unlawful, but that the owner should attempt to take actual possession against the will of the tenant, and that he should be assaulted, or threatened with such violence as would deter a reasonably firm man from proceeding in his attempt.

When this State was organized, the first Legislature, in reënacting the statute of Massachusetts, added a provision that, when *any tenant* held over unlawfully, and refused to quit, after thirty days notice in writing, he should be liable to this process of forcible entry and detainer, provided he had not been in quiet possession three whole years together, next before the notice. Statutes of 1821, c. 89. This proviso, as to three years possession, was repealed in 1847, c. 4. The form of the writ and summons, as given in c. 63 of the statutes, remained the same as under the old statute of Massachusetts, — containing only the allegation of force and a strong hand. But the intention of the Legislature was clear, to give this remedy where the holding over was unlawful, and due notice had been given, without allegation or proof of any attempt to take actual possession, or of force used or threatened.

This provision was reënacted in the statute of 1824, c. 268, which only changed the form of proceeding before the justices who had cognizance. The same was incorporated into the Revised Statutes of 1841, c. 128, § 5.

A question arose whether, under a process following the forms before referred to, and which alleged a forcible entry or detainer only, the plaintiff could prove a case within the section giving remedies against a tenant who held over where no force was used. This Court, in the case of *Woodman* v. *Ranger*, 30 Maine, 180, decided that he could not, and nonsuited the plaintiff, because in his complaint he had not set out a tenancy, and a holding over and notice to quit, and that he was landlord and the defendant his tenant.

The Legislature, the same year, and probably after the decision in the above case, passed an Act providing that this process may be maintained, "although the relation of landlord and tenant does not exist between the parties." The Act does not define what cases it intended to include. It is not, in its terms, limited to the fifth section, or to cases of holding over by a tenant, whether at will or by written lease. It covers the whole chapter, and gives the remedy without limitation. The fair construction, however, doubtless is, that when a tenant wrongfully holds over, the process may be applied, although the relation of landlord and tenant, strictly speaking, does not exist. This point will be considered hereafter more fully.

The next statute was in 1850, c. 160, and provided, in substance, that in all cases where a lessee was in under a written lease, and a time fixed therein for its termination, or when the term had been forfeited by breach of condition, this process might be used at once, without any notice to quit. It also introduced the entirely new provision that this process may be used "against a disseizor of lands," without any such notice.

In 1853, another statute was passed on this prolific subject, which in the first section makes provision for the case of a tenancy at will, that one notice should be sufficient, and

should fix a time for the termination of the tenancy, to be served thirty days before that time; unless the tenant should have paid rent which accrued after the termination of his tenancy, or no rent was due when notice is given, and in the latter case the tenancy should not be terminated "until rent shall be due." The remainder of this Act has relation to proceedings in Court, after process has been duly commenced.

In the revision of the statutes, in 1857, these various Acts were consolidated and condensed in c. 94; and that Act contains the law now in force, and under which the process in this case was instituted. The Legislature in this chapter has incorporated the substance of the various Acts before referred to, and has extended the application of this summary process, from the original limitation to cases of actual force, to the following cases, which can be sustained without proof of such actual or threatened force.

1. Against a disseizor, who has not acquired any claim by possession and improvement. This qualifies the general provision in the Act of 1853, which gave the process against any disseizor, whether he had any claims for improvement or not. With this single qualification, this provision seems to include all cases of actual disseizin where a writ of entry would lie. But it is unnecessary to consider or decide upon the construction of this provision, if there can be any doubts raised.

2. Against a tenant, or sub-tenant, holding under a written lease or contract, at the expiration or forfeiture of the term, without notice, if instituted in seven days after the expiration or forfeiture.

3. Against a tenant at will, whose tenancy has been terminated *in the manner set forth in the second section.*

This section applies to all tenancies at will, and contemplates that such tenancy may exist where the relation of landlord and tenant, strictly speaking, does not exist. This is evident from the language used in reference to rent,—"if no rent is due, when *a* rent is payable,"—thus distinguishing the cases of tenancy at will where rent is reserved or due, and those where no rent is reserved or ever payable. The pro-

vision then follows, that, in case of a tenancy at will, (for the whole section applies only to such tenancies,) this process may be maintained "without proof of any relation of landlord and tenant." This language is taken from the Act of 1849, before referred to, and is here applied to cases of tenancies at will. In the first Act, as before stated, it was not limited to such cases.

The collocation of the words of the last sentence, in the second section, is unfortunate. The words above quoted, in relation to landlord and tenant, should precede the words that relate to notice. The change would make the sentence read, "when terminated, the tenant shall be liable to the process aforesaid, without proof of any relation of landlord and tenant, and without any further notice, unless he has paid after service," &c. The qualification applies to the notice, and not to the relation of landlord and tenant.

The fair construction of the section leads to the conclusion that it is not absolutely essential to allege or prove that the relation of landlord and tenant existed at the time of the notice. If the tenancy is at will, that tenancy may be terminated by a written notice. Such a tenancy the statute contemplates when no such relation exists as would authorize a suit for rent, or as would impose the respective rights of such a relation. The Legislature probably used the words "landlord and tenant" in their restricted sense, as applicable only to the case where rent is payable, either by an express or implied agreement. The language, however, is very broad, "without proof of *any* relation" of landlord and tenant. The case of mortgager and mortgagee rests upon the peculiar provisions of the statute as to the mode of entry, and the Legislature did not probably contemplate that this process should apply ordinarily to such a case, either under the provision in relation to disseizin or that in relation to tenants at will.

There are cases where the law seems to hold that such a tenancy at will may exist, where no contract or relation of landlord and tenant as above defined exists. In *Bryant* v. *Tucker,* 19 Maine, 386, it was held, that, where a debtor re-

mains in possession of land levied upon, he becomes the tenant at will of the creditor who levied. "If he resists his entry, he may treat the tenant as a disseizor at his election." In *Dakin* v. *Allen*, 8 Cush., 34, SHAW, C. J., says—"It is sometimes said that one who is in under a contract of sale is a tenant at will to the owner. In a certain sense he is a tenant at will. He is like a mortgager in relation to a mortgagee, because he is under no obligation to pay rent."

The case of *Proprietors of No.* 6 v. *McFarland*, 12 Mass. 325, is a case somewhat resembling the case at bar, where there was an agreement to sell, and the party proposing to purchase was in possession. The Court held that the relation was that of tenant at will—being at the will of both parties. The case of *Bennock* v. *Whipple*, 12 Maine, 346, is to the same effect.

The cases cited by the counsel for the defendant, from the Reports of the decisions in Massachusetts, will be found, on examination, to be based on the language of the statutes of that Commonwealth; and that language is more restricted than that used in our statutes. In Massachusetts, the process in question is limited to cases where *lessees* of land hold possession of the *demised* premises without right, after the determination of the lease. See *Larned* v. *Clark*, 8 Cushing, 31, where the section is quoted. The remedy there is applicable only where the relation of landlord and tenant exists, and is clearly established. It is based on that relation entirely.

In the case before cited from the 8th of Cushing, (*Dakin* v. *Allen*,) and which is relied upon by defendant as similar in its facts to the case at bar, the Court admit that, in a certain sense, the respondent held as tenant at will; but, because it did not appear that he held as *lessee* of the *demised* premises, it was adjudged that his defence did not come within the language of the statute. The relation of landlord and tenant must be proved.

In the case of *Howard* v. *Merriam*, 5 Cushing, 564, SHAW, C. J., reviews all the statutes of Massachusetts on this vexed

subject, and traces the changes by which the original provision, giving the remedy to *any person* who had the right of possession, against *any* party in possession without right, whether the relation of landlord and tenant had existed or not, as decided in *Sackett* v. *Wheaton*, 17 Pick., 103,—had been restricted to the case of a lessee where the relation of landlord and tenant existed.

The opinion in that case is clear and discriminating, and exhausts the subject. Indeed, we may truly say of that eminent jurist, that, whether discussing the refined and subtle doctrines touching the realty, or the more liberal and expansive principles of commercial law—or those arising in the broad field of equity jurisprudence—or great controverted questions of Constitutional law—or coming, as in this case, to the minute dissection, comparison and construction of statutes on a single subject—"*Nullum quod tetigit non ornavit.*"

The cases in Massachusetts cannot control the plain language of our statute on this subject. Wherever a case of a tenancy at will existed, however created, and whether the relation of landlord and tenant existed or not, and this tenancy has been terminated by the written notice specified, this process will lie for the owner to obtain possession. It will not lie, under this section, unless the tenancy is terminated in the mode pointed out, viz.—by a written notice fixing the time for the termination of the tenancy. If terminated in any other way, as it may be, the party must resort to the original mode, involving the allegation of force, or to his writ of entry—or to the first mode specified in this statute, if he can sustain the allegation of disseizin against the person holding over.

The statute does not include, in terms, a tenant at sufferance, and probably for the reason given by SHAW, C. J., in 5 Cushing, 571;—"If one in possession of land is a mere tenant at sufferance, he is bound to go out without notice on the entry of the landlord. If the landlord *permits him to remain*, and especially if he receives rent of him, then he becomes a tenant at will, and his rights and liabilities are regulated

accordingly, by the provisions of the statute." A tenant at sufferance can hardly be called a tenant at all, as his holding is without right of any kind. When the occupancy is merely permissive, the tenancy is at will. *Doe* v. *Wood*, 14 M. & W. 682.

We now come to the application of these principles to the case before us. The facts, in brief, are that Crocker owned the premises—he agreed with Stetson to sell them to him—Stetson arranged with the plaintiff Dunning, to advance some money to enable him to pay Crocker—by agreement Crocker made an absolute deed to plaintiff Dunning—and Dunning, on the same day that Crocker deeded to him, gave a writing to Stetson, agreeing therein to give Stetson a deed of release of the premises if he paid him a certain sum and interest, in one year from date. Stetson went into possession under agreement or understanding with Dunning, not in writing, that he should have such possession, with the privilege of letting—and, if he could sell for more than he owed Dunning, he could have all over. After the expiration of the year named, Stetson let the defendant in, to pay as rent ninety dollars per year in repairs, or that sum was talked of. After this, Finson, the defendant, made most of the repairs, and then went into posssession, and soon after, Finson and Stetson negotiated for a sale; which resulted in a bargain at a certain rate, and a quitclaim deed from Stetson to Finson of his interest in the premises. All parties knew that Dunning had the title, and the idea was entertained that he only wanted his money and interest. Finson, the defendant, saw Dunning before he concluded the bargain, and consulted with him as owner—understood all he wanted was his money—but no writing passed between them.

The question here is, what was the relation existing at the time this process was instituted? The writing given to Stetson by Dunning was not a defeasance and could not operate as a mortgage, because it was not under seal, and because it was not given to Crocker, the grantor in the deed, but to Stetson, a third party. At the end of the year all

claim in law, under that writing, was ended, and the plaintiff became, if he was not before, absolute owner of the premises, clear from all legal or equitable claims. Even during the year, according to the cases cited, in reference to agreements to purchase, Stetson, being in by assent, was tenant at will of Dunning—and thus continued until the defendant took possession.

What was the relation of defendant to Dunning? He was not in adversely to Dunning. His deed from Stetson was but a quitclaim of any interest in law or equity which Stetson might have, and he knew of Dunning's title, and recognized it, and negotiated with him about it. It was not a case of adverse possession, as in *Larrabee* v. *Lumbert*, cited by defendant—but a case where, with a full understanding of all the facts, Finson, as he himself expresses it, "stood in Stetson's shoes." He also says, that the talk he had with Dunning was to the effect that he was to reduce the debt due to exactly six hundred dollars, and pay him ten per cent. interest on the sum, and "*have it as long as I paid that.*" He says Dunning agreed to put it in writing, in form of a bond, but afterwards declined to do it. He also says that Dunning "said nothing about rent, *until about the time* he warned me out, and then he said he must have his interest or some rent."

The substance of all this seems to be, that Finson entered, so far as Dunning is concerned, under a new verbal agreement to purchase, with the right to remain as long as he paid interest—thus recognizing Dunning's title, and going in under him. The verbal agreement could have no greater effect than a tenancy at will. It is clear that there was *some* existing relation,—it was not adverse, amounting to a disseizin—not a written lease—but was a tenancy at will, and not merely at sufferance.

It is true that Finson says, in his testimony, that he was never tenant at will under Dunning, but claimed under his deed. But the law must determine his relation, from all the facts,—and his opinion of his legal relation cannot alter the facts or the law.

The defendant objected to the complaint and warrant, because it was not therein alleged that the relation of landlord and tenant had existed, nor that the entry and detainer were forcible. The considerations and authorities, before referred to, show that, under our statute, neither of these allegations need be made or proved in a case of a tenancy at will.

The complaint alleges that the premises belonged to plaintiff—that defendant had a lawful entry—that his estate was determined on a certain day—and that a written notice, required by statute, was given in due time, notifying defendant that his *tenancy* would end and determine on the day named, and that he refuses to quit.

Under this process we think the plaintiff might prove the facts which establish a tenancy at will, terminated according to the statute,—and that he has proved them.

Judgment for plaintiff, for possession of the premises described in his complaint.

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

CITY OF BANGOR *versus* INHABITANTS OF FAIRFIELD.

If, after notice duly given to the overseers of the poor of a town, that a person having a settlement therein has become chargeable as a pauper in another town, the town receiving the notice makes payment for all supplies thus far furnished, a new notice is necessary in order to charge the same town for further supplies to the pauper.

Where the officers of a town have committed an insane pauper belonging to another town to the Hospital, although the town making the commitment is responsible to the Hospital for the board and expenses, a right of action to recover such expenses of the town where the pauper belongs does not accrue until the sums due to the Hospital are paid.

ON AN AGREED STATEMENT OF FACTS.

Eliza A. Holway had her legal settlement in Fairfield from

Jan. 1, 1856, to the commencement of this action. In January, 1856, she was committed to the Insane Hospital by the city authorities of Bangor. On Feb. 20, 1856, the overseers of the poor of Bangor duly notified the overseers of the poor of Fairfield, that she, being an inhabitant of Fairfield, had become chargeable in Bangor as a pauper, had been committed to the Hospital as insane, and the expenses of her support would be charged to Fairfield. The overseers of Fairfield, in March, 1857, paid to those of Bangor a bill of $16,17, for the expenses of her commitment, being the only charge up to that date, and a receipt in full was returned. In May, 1857, and at different times between that date and July 31, 1858, sundry bills were paid by the overseers of Bangor to the Insane Hospital for the board and support of the insane pauper, amounting to nearly $300. It did not appear that any notice was given by the overseers of Bangor to those of Fairfield, after Feb. 20, 1856. The city of Bangor brought this action to recover compensation for supplies furnished subsequent to the settlement made in March, 1857. The Court was to render such judgment as the law requires.

The case was argued at length, and several points insisted upon by the counsel, but the decision turned upon a question relating to notice.

G. W. Ingersoll, for the plaintiffs, argued that the notice to the defendants was sufficient, and no subsequent notice was necessary, and cited *Worcester* v. *Milford*, 18 Pick., 379.

J. H. Drummond and *E. W. McFadden*, for the defendants, said it was well settled that when a town receives notice of supplies to one of its paupers, and settles the bills, and afterwards the other town incurs further expenses, a new notice must be given. *Sidney* v. *Augusta*, 12 Mass., 316; *Hallowell* v. *Harwich*, 14 Mass., 188; *Walpole* v. *Hopkinton*, 4 Pick., 358; *Palmer* v. *Dana*, 9 Met., 587; *Greene* v. *Taunton*, 1 Maine, 228; *Cunningham* v. *Wareham*, 9 Cush., 585; *Eastport* v. *East Machias*, 40 Maine, 280; *Gross* v. *Jay*, 37 Maine, 9.

The opinion of the Court was drawn up by

DAVIS, J. — This is an action of assumpsit for expenses incurred for the support of Eliza A. Holway, in the Insane Hospital. The settlement of the pauper is admitted to have been in the defendant town. The right to reimbursement is purely a statutory right, depending upon no equitable considerations, but arising solely from positive provisions of law. These provisions are doubtless designed, so far as is practicable, to distribute such burdens equitably among the towns. But one town cannot recover of another, unless strictly within the terms of the statute.

This right to reimbursement is given by the statute only for "expenses incurred within three months next before written notice given to the town to be charged." Such notice was given in this case, February 20th, 1856. The expenses incurred before that time, amounting to $16,17, were subsequently paid by the defendants. Afterwards, during the years 1856, 1857, and 1858, the plaintiffs paid various sums for the support of the pauper in the Hospital; but no other notice was given to the defendants. The right of action did not accrue until the sums due to the Hospital were paid. And the defendants having paid all that was due at the time of the notice, February 20th, 1856, the plaintiffs should have given a new notice of the expenses subsequently incurred and paid by them. Not having done so, they cannot recover. *Palmer* v. *Dana*, 9 Met., 585; *Eastport* v. *East Machias*, 40 Maine, 280.

It is unnecessary for us to consider the other points raised in the case. According to the agreement of the parties, a nonsuit must be entered.

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

APPENDIX.

OPINIONS

OF THE

JUSTICES OF THE S. J. COURT,

ON THE CONSTITUTIONALITY OF THE

PERSONAL LIBERTY LAWS

OF THE

STATE OF MAINE.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
February 13, 1861.

ORDERED, That the Justices of the Supreme Judicial Court be requested to communicate forthwith, to the House of Representatives, their opinion, in writing, upon the following question: —

Are section twenty of chapter seventy-nine; sections thirty-seven and fifty-three of chapter eighty; and section four of chapter one hundred and thirty-two of the Revised Statutes of the State of Maine, or either of them, repugnant to the constitution of the United States, or in contravention of any law of the United States made in pursuance thereof?

Read and passed.

CHARLES A. MILLER, *Clerk.*

NOTE. — The following are the sections of the Revised Statutes referred to in the foregoing order: —

Section 20, *Chapter* 79. When he (the County Attorney) is informed that any person has been arrested in his county and is claimed as a fugitive slave under the provisions of any Act of Congress, he shall immediately repair to the place of his custody; render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor; and their fees and all other necessary legal expenses therein shall be paid by the State.

Section 37, *Chapter* 80. The keepers of the several jails in this State shall receive and safely keep all prisoners committed under the authority of the United States, except persons claimed as fugitive slaves, until discharged by law, under the penalties provided by law for the safe keeping of prisoners under the laws of this State.

Section 53, *Chapter* 80. No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or building belonging to this State, or to any county or town, any person on account of a claim on him as a fugitive slave. Any of said officers violating any of the aforesaid provisions, or aiding and abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or be imprisoned less than one year in the county jail.

Section 4, *Chapter* 132. They (Judges of Municipal and Police Courts and Justices of the Peace) shall have jurisdiction of assaults and batteries, breaches of the peace and violations of any statute or by-laws of a town where the offence is not of a high and aggravated nature, and offences and misdemeanors, jurisdiction of which is conferred by law; and may cause affrayers, rioters, breakers of the peace and violators of law to be arrested; and may try and punish by fine not exceeding ten dollars, and may require them to find

sureties for keeping the peace; but they shall not take cognizance of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars, or imprisonment less than one year.

[*Section* 53, *Chapter* 80, is the provision usually referred to as the Personal Liberty Law.]

OPINION OF TENNEY, C. J. AND CUTTING, J.

Hon. JAMES G. BLAINE,

Speaker of the House of Representatives:—

To the foregoing question, we, the undersigned, submit the following as our answer thereto:—

No person held to service or labor, in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service, but shall be delivered up on claim of the party to whom such service or labor may be due. Const. U. S., art. 4, § 2, divis. 2.

It has been decided by judicial tribunals of the highest character, that it was the appropriate business, not of the Legislatures of the several States, each for itself, but of the Congress of the United States, by suitable legislation, to render the foregoing provision practically effectual, where cases should require it;—and the Acts of Congress, approved February 12, 1793, c. 51, and September 18, 1850, c. 60, are not repugnant to the constitution of the United States;—and, by authority, in our judgment, are to be treated as valid and as paramount to the laws of individual States of this Union.

In the Act last referred to above, in section 5, after pointing out the duty of marshals and deputy marshals, touching the service of legal process for the apprehension and detention of fugitives, it is provided that all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required for that purpose.

Section 53 of chapter 80 of the Revised Statutes of this State, provides that no sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or

building belonging to this State, or any county or town, any person, on account of a claim on him as a fugitive slave. Any of said officers violating any of the aforesaid provisions, *or* aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit, &c.

Section 4 of chapter 132 of the Revised Statutes of this State treats of the jurisdiction of justices of the peace, and provides that they shall not take cognizance of any case relating to a person claimed as a fugitive slave; *nor* aid in his arrest, detention or surrender, under a penalty, &c.

It is the right of the Legislature of the State to define the powers of those who hold office under it, in the exercise of its sovereignty, with such qualifications and exceptions as it shall deem proper; and it is beyond the right of Congress to extend or limit this power, in any officer of the State.

The acts, which are forbidden in the first part of section 53 aforesaid, are those which it was contemplated might be attempted, in connection with the imprisonment of a fugitive slave in any building named, over which the United States had no control; and, by the issuing of legal process, and the execution thereof; and the provision of section 4 aforesaid, prohibiting justices of the peace from taking cognizance of any case relating to a fugitive slave, is simply a denial of jurisdiction of these officers, in cases of the kind, and are not obnoxious to the charge of being in violation of the laws of the United States, before mentioned.

But the latter portion of said section 53 prohibits the officers referred to, from "aiding or abetting" a person who is discharging his duty, under the laws of the United States, when such acts, if done, are not understood to be of an official character, but independent of any thing which would appertain to the respective officers referred to. The fact that persons hold such offices makes it criminal in them to do the acts, which have no relation to the duties connected therewith, according to the last part of said section.

The provision in the 4th section of chapter 132, forbidding justices of the peace to aid in the arrest, detention and sur-

render of a fugitive slave, is not a restraint of the exercise of official power in these magistrates. When they are prohibited from taking *cognizance* of the cases named, their judicial authority therein was exhausted, and the action afterwards referred to was in no respect different from that in one who had no such office.

By section 5, of the laws of United States, chapter 60, "all good citizens" are commanded to aid and assist in the prompt and efficient execution of that law. This embraces persons who hold the offices specified, under State authority, and they are not exempt from obedience to this law, when no act of an official character is required or commanded. And, from the view which we have taken, the laws of the United States and those of this State are not in harmony.

The conclusion to which we come is, that the part of section 53 of chapter 80 of the Revised Statutes of this State, making it criminal, in any of the officers named or referred to in that section, to aid and abet any person claiming, arresting, or detaining any person as a fugitive slave; and the part of section 4 of chapter 132 of the Revised Statutes of this State, forbidding justices of the peace to aid in the arrest, detention, or surrender of a fugitive slave, are in contravention of the law of the United States, made in pursuance of the constitution of the same, in chapter 60, section 5, approved September 18, 1850; and that the other parts of the two sections last named, and section 20 of chapter 79, and section 37 of chapter 80 of the Revised Statutes of this State, are not in contravention of any law of the United States, or the constitution thereof.

JOHN S. TENNEY.
JONAS CUTTING.

FEBRUARY, 1861.

OPINION OF JUDGE RICE.

To Hon. James G. Blaine,

Speaker of the House of Representatives:—

The undersigned, one of the Justices of the Supreme Judicial Court, in response to the order of the House of Representatives, passed February 13th, 1861, would remark that the order in its terms is exceedingly broad and comprehensive, and would necessarily involve such an amount of labor as to preclude the possibility of its being performed "forthwith." Looking, however, at the provisions of our statutes referred to in the order, I presume that it was not the intention of the House that the examination should extend further than to that provision of the constitution having reference to the return of fugitives from service or labor, and the statutes passed by Congress to carry it into operation. Thus far only will my examination extend.

The constitution of the United States, art. 4, § 2, clause 3, provides that "no person held to service or labor in any State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Historically, it is well known that the "persons" referred to in the above provision were slaves.

Under this provision of the constitution, the Congress of the United States, on the 12th of February 1793, passed an Act providing, among other things, that, "in case of the escape of such 'person,' the person to whom such service or labor may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any Judge of the Circuit or District Court of the United States, residing or being within the State, or before

any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made; and, upon proof to the satisfaction of such Judge or magistrate, either by oral testimony or affidavit, taken before and certified by a magistrate of any such State or territory, that the person so seized doth, under the laws of the State or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such Judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State or territory from which he or she fled."

It will be observed that, under this statute, the only State officers who are authorized to act are magistrates of a county, city or town corporate, and that those magistrates are only authorized to grant a certificate on certain proofs being made before them. This statute continued in force, without modification, until 1850.

In 1842, the constitutionality of certain statutes of the State of Pennsylvania, designed to facilitate the restoration of fugitives from service, came under the examination of the Supreme Court of the United States, in the case of *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet. 539. In that examination, the Act of 1793, for the rendition of fugitives from service, was also made the subject of careful consideration by the Court. In delivering the opinion of the Court, Mr. Justice STORY, speaking of this statute, said, "we hold the Act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority conferred upon State magistrates, while a difference of opinion has existed, and may still exist, on the point, in different States, whether State magistrates are bound to act under it, none is entertained by this Court, that such State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

This view of the constitutionality of the Act of 1793 has been distinctly affirmed by the Supreme Courts of Pennsylvania, New York and Massachusetts, and reaffirmed by the Supreme Court of the United States; and has been acquiesced in by all departments of the national government, and has long been deemed settled law both by courts and jurists.

The Court also express the opinion, in the case of *Prigg*, above cited, that the jurisdiction of the United States, under that clause of the constitution, is exclusive; and that the States have no constitutional authority to legislate upon the subject.

In 1847, Pennsylvania revised her legislation upon this subject, and (manifestly in view of the suggestion of the Court, in *Prigg's case*,) provided that "no Judge, alderman or justice of the peace, in the State, should have jurisdiction, or take cognizance of a case of a fugitive from labor, or grant any certificate or warrant of removal of any such fugitive from labor, under the Act of 1793."

In 1850, September 18, Congress passed an Act to amend, and supplementary to, the Act of February 12, 1793. By this statute, the whole subject of the former Act is revised. Commissioners, appointed by the United States Courts, are substituted for magistrates, and marshals and their deputies; are made ministerial officers for the execution of the law; and detailed and specific provisions are made to carry into practical operation the article in the constitution for the rendition of fugitives from labor.

Is this Act constitutional? Though more full, minute and particular in its details, and also more harsh and highly penal in some of its provisions than the statute of 1793, its general character is substantially the same.

Objection has been made that the Act of 1850 does not provide for trial by jury, and that it denies the privilege of the writ of *habeas corpus*, and is therefore, in those respects, unconstitutional.

These objections, in my opinion, rest upon a misapprehension of the object and design of the provision of the consti-

tution referred to, and of the office or function of the writ of *habeas corpus*.

One of the most prominent and important elements of that invaluable common law right, trial by jury, is, that the party shall be entitled to a trial by a jury of his vicinage; that his rights shall not be determined by strangers, but by men of his own county, in his own neighborhood.

Citizens and slaves are amenable to the laws of the States in which they live, and the questions, whether a citizen has committed a crime, in one instance, or a person is a slave, in the other, can only be determined by the laws of the State in which the parties live. By a principle of comity, civil contracts, entered into in one State or nation, are ordinarily enforced by the judicial tribunals of other States or nations. This principle, however, does not extend to the enforcement of the penal laws of other States, nor to the determination of the *status* of persons therein, whether bond or free. Such questions are determined by each State or nation for itself, within its own jurisdiction.

But it sometimes happens that persons charged with crimes, or claimed as slaves, flee or escape from the jurisdiction in which they are thus charged or claimed. To meet this contingency, on the formation of our constitution, the provisions for the rendition of fugitives from justice, and from service, were inserted in that instrument. These provisions are found side by side in the constitution, and present the same general characteristics. The fugitive from justice is to be delivered up on demand of the executive authority of the State from which he fled. But how is he to be demanded? On this point, the constitution is silent, its terms being general. But the answer is found in the statute enacted to carry into effect that provision of the constitution.

So, too, the fugitive from service or labor, is to be given up on claim of the party to whom the service or labor may be due. But how claimed? Here again the constitution is silent, its terms, as in the other case, being general. But here, also, the statute, made in pursuance of the constitution,

answers, and points out in detail the manner in which the claim must be made.

The object of the constitution, and of the laws designed to carry it into effect, is not to try and determine the question of guilt or innocence in one case, or of freedom or slavery in the other, but simply to arrest and bring within the jurisdiction parties who had fled or escaped therefrom, to the end that they may be disposed of according to the laws of that jurisdiction. In other words, these provisions of the constitution, and the laws made to carry them into operation, were designed to afford process for the arrest of parties demanded or claimed, which should not, like ordinary State process, be confined to State or county lines, but which should extend over the whole territory of the United States. The process is in its character preliminary. Just as reasonable would it be for a party arrested on a warrant, within the limits of a State, to demand a trial by jury at the place of his arrest, to determine the question whether he was legally arrested. Such a course would paralyze the arm of the best organized and most efficient civil government existing.

The law for the return of fugitives from service, like the law for the return of fugitives from justice between the States, and like the treaty stipulations between this country and England and France for the return of fugitives from justice, does not provide for the manner in which the parties returned shall be disposed of after they have been restored to the State or nation from which they escaped or fled. Each and all of these laws and treaty stipulations have a common object, which is to return the fugitive to the jurisdiction from which he may have fled or escaped, and there leave him subject to the local law.

Nor is the provision in the constitution for the return of fugitives from service new. In the articles of confederation between the "United Colonies of New England," adopted September 5th, 1672, was the following provision:—"It is also agreed that if any servant run away from his master into any other of these confederated jurisdictions, that in such

case, upon certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof." Ancient Charters, 724.

This ancient New England fugitive slave law contains no provision for trial by jury, but leaves the returned fugitive to be dealt with according to the laws of the jurisdiction from which he fled. Like the fugitive slave law under the constitution, and for which it furnished a copy, it simply provided for a return of the fugitive.

It is not easy to perceive wherein the failure to provide for trial by jury constitutes a stronger objection to the law for the return of fugitives from service under the constitution, than in the other cases already referred to. It cannot, unless we impugn the integrity of the governments to which the fugitives are returned, and charge them with failing to provide laws by which their condition can be determined and their rights protected.

Then as to the denial of the writ of *habeas corpus*. The protection against unlawful restraint afforded by this prerogative writ is justly deemed of the highest importance. Its character, however, is not always fully understood. Its office is to examine and determine whether parties under arrest are unlawfully detained. On it the principal question of guilt or innocence, bond or free, is not determined; but whether the process by which the party is held has been issued by competent authority, in conformity with law, and is sufficient in form.

There is no provision in the Act of 1850 which contravenes this right. The statute points out the manner in which the claim for the return of a fugitive shall be made; the proofs required to establish the claim, and the form of the certificate which shall be given; and then provides that such certificate shall be conclusive of the right of the person or persons, in whose favor it is granted, to remove the fugitive to the State or territory from which he escaped, and shall prevent all

molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whatever.

A person, therefore, who is held lawfully for the purpose of being returned, could not have been discharged on *habeas corpus*, if the law had been silent upon the subject. The only question to be settled on this writ is, has the person claiming to hold the alleged fugitive such process as the law prescribes, as matter of fact. That question may be examined in this class of cases, by the State Courts, in the same manner as other cases, where parties are claimed to be held under process issued by the United States. If, on examination of the return to the writ, it appears that he has not the certificate prescribed by the Act, the fugitive must be discharged, because he would then be unlawfully held; if, on the other hand, the process is found to be in conformity with law, the fugitive must be remanded to custody, as in other cases.

It is not, however, my purpose to examine the constitutionality of the statute in detail. The general features of the law of 1850, as has already been remarked, are similar to those of the Act of 1793. The constitutionality of the latter statute has been settled beyond all doubt. This fact would, of itself, so far as the statutes are in legal effect the same, settle the constitutionality of the Act of 1850. In addition to this, however, its constitutionality has been distinctly affirmed by the highest judicial authority. 7 Cush. 285; 5 McLean's C. C. R. 469; 1 Blatchford's C. C. R. 635; 21 Howard's U. S. R. 506.

Assuming, then, that the Act of 1850, c. 60, for the rendition of fugitives from service is constitutional, I propose to compare some of the provisions of this Act, with those provisions in our statute to which the order of the House has called the attention of the Court.

The Act of the United States, of September 18, 1850, authorizes the Courts of the United States to appoint commissioners with authority to take cognizance of cases arising under that statute. In the fifth section of the Act of 1850 is found the following provision: — "and the better to enable the said commissioners when thus appointed to execute their

duties faithfully and efficiently, in conformity with the constitution of the United States and of this Act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus*, of the proper county, when necessary to ensure a faithful observance of the clause of the constitution referred to, in conformity with the provisions of this Act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law whenever their services may be required, as aforesaid, for that purpose."

The duty of a citizen to aid the civil officer, when necessary for the execution of legal process, is neither novel nor unreasonable, but is as old as civil government, and, in many cases, absolutely necessary to preserve the public peace and maintain the supremacy of the laws. The statutes of all civilized nations are full of such requirements.

Article 6, § 2, of the constitution of the United States, provides that "this constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the constitution or laws of the State to the contrary notwithstanding."

The allegiance which every American citizen owes to government is duplex — being due to the government of the United States and to some particular State. Within its jurisdiction his allegiance to the United States is paramount and absolute. From his obligation to obey all laws, made in pursuance of the constitution of the United States, no State can absolve him, and, for rendering obedience to such laws, no State can rightfully subject him to punishment. When any

law of the United States, made in pursuance of the constitution, commands, it is his duty to obey; and any law of any State, which commands to the contrary, is repugnant to the constitution, and of no binding effect.

Outside of the jurisdiction which the constitution confers upon the government of the United States, the allegiance of the citizen is due to the government of his particular State. Between these jurisdictions, theoretically at least, there can be no conflict.

Section 53 of chapter 80 of the Revised Statutes of this State reads as follows:—

"No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or building belonging to this State, or to any county or town, any person on account of any claim on him as a fugitive slave. Any of said officers violating any of the aforesaid provisions, or aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or to be imprisoned not less than one year in the county jail."

Thus it will be perceived that while good citizens are, in certain contingencies, commanded to aid and assist in the execution of the law of the United States, in the section of our own statute above cited, whole classes of citizens—all the officers of this State, without distinction or exemption, are forbidden, under severe penalties, to do the very acts which the law of the United States commands them to do. In terms, these laws are in direct and irreconcilable conflict.

But it has been suggested that the provisions of our statute, above cited, were originally based upon the suggestion of Judge STORY, in *Prigg's* case, that it was competent for the Legislature of States to prohibit their own officers from discharging the duties assigned them by the law of the United States of February 12, 1793, and that the prohibition in the 53d section of chapter 80 of the Revised Statutes refers to

the action of our State officers "in their official capacity" only, and not to them as private citizens.

In my opinion, the Act of this State cannot properly receive such a construction.

The Act of Congress of 1793 authorized one class only of State officers to participate in its execution, to wit: magistrates of a county, city or town corporate. By the amendatory Act of 1850, the Act of 1793 was wholly revised, as has been already stated, and commissioners substituted for the magistrates of counties, cities and towns.

A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as in reason and common sense, operate to repeal the former.—7 Mass. 142; 12 Mass. 536; 10 Pick. 39.

There was, then, when our Revised Statutes were enacted, no existing law of the United States which authorized the officers of this State, in their official capacity, to take cognizance of, or in any way to aid or assist in the execution of the law for the restoration of fugitive slaves. Nor had the Legislature of this State ever conferred upon the officers of the State such authority.

In such a state of things, to prohibit our State officers, under severe penalties, from doing what they had no authority to do, and what I am not aware they had manifested any particular desire voluntarily to do, without authority, would certainly be a work of supererogation on the part of the Legislature.

It is undoubtedly competent for the Legislature to limit and define the jurisdiction of the officers of the State. But the language of section 53, chapter 80, Revised Statutes, unlike that of Pennsylvania before cited, is not appropriate for that purpose, but is appropriate language when applied to individual citizens and designed to prohibit them from performing, or participating in, acts deemed improper and criminal. To speak of a ministerial or judicial officer as *abetting*

in his official capacity, be a gross and palpable misapplication of terms; while to speak of an individual as abetting the commission of crime would be a legitimate and appropriate use of language.

But the prohibition in the 53d section is not limited to judicial and executive officers, such as judges and magistrates, sheriffs and marshals, but includes all other officers of the State, whatever may be their functions. As applied to judicial and executive officers, the construction contended for, as I have already shown, is wholly inappropriate. But when applied, as this statute would require, to all other officers of the State, the impropriety of the language becomes still more glaring. Thus, to say that, in addition to the officers specifically named in the statute, any minister of the gospel duly appointed and commissioned to solemnize marriages; any selectman or assessor; any inspector of beef and pork, lime and lime casks, and the like, aiding and abetting "in his official capacity" any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding a thousand dollars, &c., would present an incongruity of language and of ideas so strong as to repel any such construction as is contended for.

But should it be said that the words "or other officer of this State" should be stricken out, or construed to mean other officers whose official functions are similar to those specifically named in the statute, the objection already named is not obviated, as, with these additional amendments, by construction, the section would be simply insensible and aimless; while, without such constructive amendments, it has a plain and obvious meaning.

That such is not the true construction of § 53, c. 80, is still further apparent from the fact that the Act of 1855, c. 182, of which the 53d section is a revision, contained in express terms the precise qualifications which are now sought to be engrafted upon this section by construction; and also a distinct additional section, providing that nothing in the Act should be construed to hinder or obstruct the marshal of the United States, his deputy, or any officer of the United States

from executing or enforcing the law of the United States of September 18, 1850.

Those qualifying terms were most material, and rendered that Act innoxious at least. They were wholly omitted in the revision.

It is a well settled rule that, when any statute is revised, or one Act framed from another, some parts being omitted, the parts omitted are not revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance; which is altogether inadmissible. 1 Pick. 43.

The prohibitory and penal provisions in section 53 of chapter 80 of the Revised Statutes, and more especially those in the last clause of the section, applying as they do to a class of persons in their individual, and not in their official capacity, are, in my opinion, clearly in contravention of the provisions of the Act of Congress of September 18, 1850, c. 60. The section referred to (§ 53, c. 80) contains no provision for the prevention of kidnapping, or to secure the rights of freemen, but was manifestly intended to obstruct and hinder the restoration of fugitive slaves, and is, in both its letter and spirit, repugnant to art. 4, § 2, clause 3, of the constitution of the United States.

As to sect. 20 of chap. 79, and sect. 37 of chap. 80, of the Rev. Stat., I perceive nothing therein which renders them obnoxious to the charge of being in contravention of any law of Congress, or repugnant to the constitution of the United States.

The last clause of § 4, c. 132 of the Revised Statutes, so far as it relates to the jurisdiction of justices of the peace, in cases relating to persons claimed as fugitive slaves, is simply nugatory, there being no existing statute which gives them such jurisdiction, and it being a well settled principle of law that nothing is to be presumed in favor of the jurisdiction of justices of the peace. So far as it prohibits them from rendering aid as private citizens, it is open to the same objections which exist against the provisions of § 53, c. 80.

RICHARD D. RICE.

AUGUSTA, FEBRUARY 20, 1861.

OPINION OF JUDGES APPLETON AND KENT.

HON. JAMES G. BLAINE,

Speaker of the House of Representatives:—

THE questions proposed, by the House of Representatives, involve the inquiry whether certain sections of the Revised Statutes of this State are in conflict with the Acts of Congress of 12th February, 1793, and of 18th September, 1850, commonly called the fugitive slave laws. Inasmuch as, for the purposes of the present examination, the constitutionality of those laws is not questioned, we have deemed all investigations as to their origin, all defence of their provisions, all laudation of their humanity, and all denunciation of their harshness as alike unnecessary and supererogatory.

The several sections, as to the constitutionality of which the opinion of the Court is desired, will be examined in the order in which they are presented for our consideration.

1. It is enacted by R. S., 1857, c. 79, § 20, that when the county attorney "is informed that any person has been arrested in his county and is claimed as a fugitive slave under the provisions of any Act of Congress, he shall immediately repair to his place of custody; render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor; and their fees and all other necessary legal expenses therein shall be paid by the State."

It will hardly be questioned that one alleged to be or even being a fugitive slave, may not, in a free State, employ counsel to appear and contest the validity of the process against him. The person claimed may be free, or the person claiming may have no right, or the proceedings may be fatally defective. In Virginia and in many of the Southern States, in suits for freedom, "the person conceiving himself unlawfully detained as a slave" may petition the Circuit Court of the State, and

have counsel assigned by the Court to aid him, "without reward," and "to have, free of cost, all needful process, services of officers and attendance of witnesses." Such is the praiseworthy solicitude of Virginia for the protection of her free colored inhabitants.

The same spirit of humanity unquestionably prompted the legislation, the constitutionality of which is the subject of the present inquiry. In the free States, "every man, black or white," says Mr. Justice McLEAN, in *Prigg* v. *Pennsylvania*, 16 Peters, 671, "is presumed free, and this is the unquestioned law of all the free States."

By the fugitive slave law, a resident of this State, and by its law presumed to be free, may be taken before a commissioner, and upon *ex parte* affidavits be surrendered to a claimant and forcibly carried without its jurisdiction. The Legislature deemed it their duty that all within the limits of the State should receive the protection which the law affords. For this purpose it makes use of the services of its officers. If one attorney may render his professional aid to the alleged fugitive, so may another. Equally so may the attorney for the county in which the prisoner is arrested. The design of this section is to guard against the abuses incident to the fugitive slave law, and, as far as may be, to prevent those who are free from being carried into slavery. This neither hinders nor obstructs action under the law of the United States, nor is it in contravention of any of its provisions.

2. It is enacted by R. S., 1857, c. 80, § 37, that "the keepers of the several jails in this State shall receive and safely keep all prisoners committed under the authority of the United States, *except persons claimed as fugitive slaves*, until discharged by law, under the penalties provided by law for the safe keeping of prisoners under the law of this State."

The jails of the State are the property of the several counties at whose expense they are erected. They are built for State objects. The government of the United States have no more right, without the assent of the State, to use them, than they have to use any other property of the State for purposes

of its own. Still less can it claim that they should be used for the safe keeping of the personal chattels of the citizens of other States. As all right to their use is derived from the State, it may prescribe the terms and conditions upon which, and the purposes for which it will concede their use. If the terms are not satisfactory, the United States have the obvious right of refusal. The Legislature might have entirely denied their use. If the United States accept jails upon the terms of the State, it is not for them to complain that more was not given, when all might have been withheld.

The legislation of Congress upon this subject has been in accordance with these views. On the 23d September, 1789, Congress recommended to the Legislatures of the several States to pass a law making it expressly the duty of the keepers of these jails, to receive and safely keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, &c.

It appears, from the subsequent Acts of Congress, that its recommendations had been only in part complied with. Some of the States peremptorily refusing to comply therewith and others revoking the permission previously given, so that Congress was compelled to authorize the marshal to "hire a convenient place to serve as a temporary jail," &c. 3 Stat. of U. S., 646; 4 Stat. of U. S., 634.

It is manifest, therefore, that the State may deny the use of its jails for the safe keeping of fugitive slaves — that not being one of the objects of their erection, and the permission of their use by the government of the United States, or the denial thereof, being a matter solely for the determination of the State.

3. The Revised Statute of 1857, c. 80, § 53, is in the following words: — "No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or building belonging to this State, or to any county or town, any person on account of a claim on him as a fugitive slave.

Any of said officers violating any of the aforesaid provisions, or aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or be imprisoned less than one year in the county jail."

The marginal reference is to the Act of March 17, 1855, which consists of four sections, and is in these words:—

"SECT. 1. No Judge of any Court in this State, and no justice of the peace, shall hereafter take cognizance of or grant a certificate in cases arising under the Act of Congress passed September 18, 1850, or the Act to which that was additional, entitled 'an Act respecting fugitives from labor,' to any person who claims any other person as a fugitive slave, within the jurisdiction of this State.

"SECT. 2. No sheriff, deputy sheriff, coroner, constable, jailer or other officer of this State, *in his official capacity*, shall hereafter arrest or detain, or aid in arresting or detaining, in any prison or building belonging to this State, or any county, city, or town thereof, any person, by reason of his being claimed as a fugitive slave.

"SECT. 3. Any justice of the peace, sheriff, deputy sheriff, coroner, constable, or jailer, who shall, *in his official capacity*, directly or indirectly offend against the provisions of this Act, or *aid and abet* any person claiming any other person as a fugitive slave, in the arrest and detention of such person, so claimed as a fugitive, shall forfeit a sum not exceeding one thousand dollars for every such offence, to the use of the county where said offence is committed, or shall be subject to imprisonment not exceeding one year in the county jail.

"SECT. 4. Nothing in this Act shall be construed to hinder or obstruct the marshal of the United States, his deputy, or any officer of the United States, from executing or enforcing the laws of the United States referred to in the first section of this Act."

It is first to determine whether the Act of 1855 is constitutional, and, if so, whether its character, as a constitutional

amendment, has been changed in the revision, which, being reported by Mr. Chief Justice SHEPLEY, was enacted in 1857.

By § § 2 and 3 of the Act of March 17, 1855, the doing of the acts therein enumerated, by certain officers of the State, are prohibited, under the penalties therein set forth. The sheriffs, deputy sheriffs, coroners, constables, jailers, &c., are forbidden, in their *official capacity*, to arrest or detain, or aid in so doing, in any prison or building belonging to the State, or to any county, city or town thereof, any person by reason of his being claimed as a fugitive slave.

Had the sheriffs, deputy sheriffs, coroners, &c., any right legally, and were they bound constitutionally, *as officers of the State*, to do the several acts, the doing of which is interdicted by the sections under consideration? If they were under no constitutional obligation, in their official capacity, to perform the acts so interdicted, then their performance might constitutionally be inhibited.

The statutes of this State define the duties required of the various officers created by and under its constitution. It is nowhere made their official duty, or that of any of them, to arrest or detain, or aid in so doing, any person on account of a claim against him as a fugitive slave, in any prison or building belonging to any county in the State. And, if it had been so made his duty, the statute creating such duty might at any time be repealed by the power which imposed it.

The statute of the United States, passed September 18, 1850, called the fugitive slave law, provides that all action under its provision should be by and through the officers of the United States. No authority is therein or thereby conferred upon any officers of the State to act in the matter of the rendition of fugitive slaves. The sheriffs, deputy sheriffs, coroners, &c., (magistrates excepted, which exception will be considered in the answer to another section,) have, neither as State officers, nor as derived from the Act of Congress, of 18th September, 1850, nor from its previous Act, on the same subject, of 12th February, 1793, any authority to act officially in the premises. Having no authority to act, if they acted

under color of their offices, such action would be illegal. No justification, therefore, could be found under the statutes of Maine or of the United States.

As the Acts of Congress confer no authority on State officers, (magistrates excepted,) had these sections (2 and 3) been mandatory, requiring and commanding the several sheriffs, deputy sheriffs, coroners, &c., to do what, by the existing law, they are inhibited from doing, the statute containing them, it would seem, would be in direct contravention of the Acts of Congress before referred to, and of the construction of the constitution of the United States as enunciated by its highest judicial tribunal, in *Prigg* v. *Pennsylvania*, in which it was held by the majority of the Court that the legislation of Congress upon the provisions in the second section of the fourth article of the constitution, relative to fugitives from service or labor, "excludes all State legislation upon the same subject; that the power of legislation by Congress upon the provision is exclusive; and that no State can pass any law as a remedy upon the subject, whether Congress had or had not legislated upon it."

Congress cannot compulsorily require new and onerous duties of State officers, to be by them performed. It seems, that such officers may, if they choose, perform these new duties; and it is clear that the Legislature may prohibit their exercise of the powers thus conferred. "As to the authority so conferred on State magistrates," says Mr. Justice STORY, in the case before referred to, "while a difference of opinion exists, and may exist, on this point, none is entertained by the Court, that State magistrates may, if they choose, exercise authority, *unless prohibited by State legislation*." Upon the same subject, Mr. Chief Justice TANEY says, "*the State officers mentioned in the law are not bound to execute the duties imposed upon them by Congress, unless they choose to do so,* or are required to do so by a law of the State; and the *State Legislature has the power, if it thinks proper, to prohibit them.*"

It is manifest, therefore, if the acts, the doing of which is prohibited by § § 2 and 3 of the Act of the Legislature of

Maine, passed March 17, 1855, had been required by existing Acts of Congress, of the designated State officers as such, that the State might have constitutionally prohibited their performance.

As no Acts of Congress have required of the officers of this State mentioned in § § 2 and 3, the doing of the acts inhibited by those sections, such acts, without the inhibition, would have been illegal. All, therefore, that the Legislature has done, is to prohibit the doing of that, which, if done, would have been contrary to law, as the officers of the State (magistrates excepted) have no authority from Congress to act in the matter of the rendition of fugitive slaves, and the State has not conferred, and could not confer, such authority upon them.

It may be said that, as the State officers named could not legally do the acts prohibited to be done, that the prohibition was unnecessary. But legislation by prohibiting what cannot legally be done is nothing unusual. An individual without commission cannot legally act as a sheriff or as a justice of the peace, and, if he assumes thus to act, his doings will be void, yet such assumption of non-existent authority is created an offence and is punishable by R. S., c. 122, § 18. So a sheriff can by virtue of his office take only the legal fees, but by color thereof he may take more, and, taking more, he is punishable therefor. The officer may, under color of office, do what he is not legally authorized to do, and his so doing may be created an offence. That is precisely what is done by § § 2 and 3. Although the officers named in those sections cannot by virtue of their offices perform the acts therein set forth and forbidden, they may do them under color of office. Hence originated the statute. Whether it was necessary or expedient is not the question, but is it constitutional?

The Act of March 17, 1855, c. 182, referring only to acts done by certain officers in *their official* capacity, and prohibiting them, its constitutionality is not a matter of doubt. It conflicts with no Act of Congress. It is at variance with no decision of the Supreme Court of the United States. It is clearly constitutional.

It remains to consider whether § § 2 and 3 of the Act of March 17, 1855, which, it has been seen, are constitutional, and which, in the revision, were condensed in § 53 of c. 80 R. S., 1857, have been transformed to a section which is unconstitutional. In other words, is R. S., 1857, in conflict with the fugitive slave law and the constitution of the United States?

In this aspect, the question at once assumes a grave importance. It is neither more nor less than whether this State, by its legislative action, has violated its constitutional obligations. In determining this, it may be important to refer to certain general principles, which have been established by the highest judicial tribunals with the most entire and perfect unanimity of opinion. In *Fletcher* v. *Peck*, 6 Cranch, 87, where the constitutionality of an Act of Georgia was in issue, Mr. Chief Justice MARSHALL says, that "it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void. The opposition between the constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other." The discreditable technicalities, by which, in criminal proceedings, felons are permitted to escape, are not to be transferred to the construction of a statute, to induce the Court, by nice criticisms, hair breadth distinctions, and forced constructions, to decide that a statute is unconstitutional. "All Acts of the Legislature," says Mr. Chief Justice MELLEN, in *Lunt's* case, 6 Greenl. 141–2, "are presumed to be constitutional; and the Court will never pronounce the statute to be otherwise, unless in a case where the point is free *from all doubt.*" If the meaning of the language is doubtful, that construction should be given to it, by which the constitutionality of the Act will be affirmed, rather than the reverse." Where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed *with irresistible clearness,* to induce a court of justice to suppose a design to effect such objects. *U. S.* v. *Assignees of Blight,* 2 Cranch, 358. So an Act of Congress ought never

to be construed to violate the law of nations, *if any other possible construction remains. Murray* v. *the Charming Betsey,* 2 Cranch, 64. No Court ought, unless the terms of an Act *render it unavoidable,* to give a construction to an Act which will involve a violation of the constitution. *Parsons* v. *Bedford,* 3 Peters, 414.

The ground of unconstitutionality urged is, that the officers mentioned in R. S., 1857, c. 80, § 53, are citizens of the State, and, as such, are required to obey all constitutional enactments of Congress, and that, *as citizens,* they are, by this section, prohibited from obeying the requirements of § 7 of the Act of Congress of September, 1850, by which "all *good citizens* are hereby commanded to aid in the prompt and efficient execution of the law, whenever their services may be required."

The first sentence of § 53 is a revision of § 2 of the Act of 1855, and is in these words:—"No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or building belonging to this State, or of any county, city or town thereof, any person by reason of his being claimed as a fugitive slave."

The only difference between this section and the corresponding portion of the Act of 1855 consists in the omission of the words, "*in his official capacity.*" But when a statute in its terms directs certain officers, by designation of their office only, to do, or abstain from doing, certain acts, it must be held to apply to acts which may be done officially or by color of office.

If the words sheriff, deputy sheriff, &c., in the section, refer to them as officers and as citizens—then the same words must have the same meaning elsewhere—and, when the command is to the sheriff to arrest or *not* to arrest, and the jailer to detain or *not* to detain in prison, it must alike refer to them with this *double* meaning attached. The consequence will be that, when a sheriff is commanded to arrest, &c., he may arrest as an officer *or* as a citizen, at his election. This

is so,—or else the meaning must be held to vary accordingly as the statute is affirmative or negative in its mandates. This, at any rate, would be "duplicity" of language.

If the words sheriff, deputy sheriff, &c., refer to them *only* as individuals, then it must, whether the command be to arrest or *not* to arrest, have such reference, and consequently the command to officers to arrest or not to arrest would be to them as individuals, not as officers, unless a distinction be made as the enactment commands or prohibits.

Neither of these constructions is admissible.

The section is found in the chapter which is "of sheriffs, coroners and constables," and under "the provisions relating to sheriffs, constables and jailers." The language of the clause, in its ordinary use, applies only to action in an official capacity. When the sheriff is commanded not to arrest, or the jailer not to detain in prison, the prohibition is to each in his official capacity. It is official action, or action under color of office, which is prohibited. It is upon "*any of the said officers violating any of the aforesaid provisions,*" in the next clause, that the penalty for disobedience is imposed. If any of said officers were indicted, they must, in the indictment, be described as officers. Had the statute, instead of being prohibitory, been mandatory, requiring that "every sheriff, deputy sheriff, coroner, &c., shall arrest," &c., would any one construe a statute so commanding the officer to arrest, as referring to individual and not official action, and as directing him as an individual to arrest, &c. Does it mean official action when commanding, and individual action when prohibiting? Most assuredly not. This clause most obviously refers to action as an officer, or under color of office, and not as a citizen, and is constitutional. Thus far, as we understand, the majority of the Court concur.

The second sentence in § 53 corresponds to § 3 of the Act of 1855, and provides that "any of the *said officers* violating any of the aforesaid provisions, *or aiding or abetting* any person, claiming, arresting or detaining any person as a fugitive slave, shall forfeit," &c.

It has been seen that the Act of March 17, 1855, was constitutional, because it was limited to action in an official capacity. The Acts specified in the first clause of § 53, are likewise so limited. It is said that the words *aid and abet* cannot refer to acts done in an official capacity, and consequently that the Act is so far unconstitutional because it is a prohibition upon them as citizens.

But this construction is not admissible. Statutes in *pari materia* are to be construed together. If the word officers applies to them as such in the first clause, equally so does it in the last. It in each case is a prohibition upon them as *such*, and against their doing the acts prohibited.

But cannot the officer *aid* the person claiming? Does not the sheriff aid the person claiming, by arresting the fugitive? To abet means to assist. Does not the jailer abet — does he not assist the claimant by detaining the fugitive in jail? Technical precision of language is frequently disregarded in statutes. To construe a statute with the nicety applicable to a plea in abatement, for the purpose of finding something unconstitutional therein, would, at any rate, have the merit of novelty. But according to such a construction the statute would read thus: — any of the said officers violating any of the aforesaid provisions, or (*as private citizens*) aiding or abetting any person claiming, &c. The first clause, "any of the said officers violating any of said provisions," is made to refer to action in an official capacity, and is conceded to be constitutional by a majority of the Court, and the latter to action as a citizen. But if the first part has this meaning, does not the word "*or*" carry the idea of official action or action by color of office to the residue of the sentence, and is not the word officers to be used in the same sense throughout? Are words to be foisted in and the ordinary meaning of language abandoned, so that thereby a statute may be declared unconstitutional? Such a construction, for such purpose, would be at variance with the uniform current of authorities.

The limitation to action in an official capacity is alike in both parts of § 53.

It has been said that the words "any other officer of the State" includes all officers, and that the fish wardens and moose wardens, the inspectors of lime and lime casks, and the inspectors of pot and pearl ashes, and the innumerable list of officers of every description are included in this phrase, and are thus forbidden to act as citizens in accordance with the command in § 7 of the fugitive slave law of 1850; and the fear is expressed lest all citizens should be made office holders, and thus the marshal be left without a possible *posse comitatus* to aid him in the enforcement of the law. The fear expressed is as ill founded as the construction is absurd. Among the rules of construction of universal application is that found in the adage "*nosciter a sociis*"; that is to say, the meaning of a word may be ascertained by reference to the meaning of words associated with it. The intention of the Legislature is to be ascertained by considering whether the word in question and the surrounding words are, in fact, *suidem generis*, and referable to the same subject matter. Broom's Legal Maxims, 456. "Any other officer," refers most obviously to any other of the same class, as marshals of cities or their deputies, by whom arrests may be made, or police or municipal judges, by whom precepts may be issued. If the words had been directory instead of prohibitory, would any one have construed them as commanding the Governor of the State to arrest, or a Justice of this Court to detain in jail, because they are officers of the State and are therefore to be included in the expression, "any other officer of the State?"

By the natural and obvious meaning of the language of § 53, the prohibition is of action in an official capacity, as in § § 2 and 3 of the Act of 1855.

It was made the duty of those to whom the revision of the statutes was intrusted to "revise, collate and arrange all the public laws of the State," and "to execute and complete said revision in such a manner as in their opinion will make said laws most plain, *concise* and intelligible." They were to condense, not to alter or change. Hence § § 2 and 3 of the Act of 1855 became, in the revision, c. 80, § 53—two sections be-

ing changed into one—the words "in his official capacity," which are found in the original Act, in both sections, being omitted in the corresponding clauses of § 53. Hence, too, the words "in his official capacity" were in both cases stricken out as superfluous—the statute in which the section is found, referring to the duties of officers, and defining what they may do by virtue of, and prohibiting what they shall not do, by color of office.

The view thus taken by the revisers was correct. In *Hughes* v. *Farrar*, 45 Maine, 73, Mr. Justice CUTTING affirms the law to be, that the mere change of language is not to be deemed a change of the law, unless such phraseology evidently purports an *intention* in the Legislature to work a change. Upon the revision of statutes, the construction is not changed by such alterations as were designed to render the provisions *more concise*. *Mooers* v. *Bunker*, 9 Foster, N. H., 420. An alteration in the phraseology of, or the *omission* or *addition* of words in the revision of statutes, does not necessarily alter the construction of the Act or imply an intention to alter the law. The intent of the Legislature must be evident, or the change in the language must *palpably require a different construction*, before the courts will hold the law changed. *Croswell* v. *Crane*, 7 Barb. S. C., 191.

The principle of condensation led to the omission of § 4 of the Act of 1855, as unnecessary. The design of the section was to exclude a conclusion. But the meaning was regarded as too plain to require its continuance and, we think, properly.

After the first revision, by the resolve of April 1, 1856, the late Chief Justice SHEPLEY was appointed to make such further revision "of the laws as may be necessary to present them in the most complete form for the consideration of the Legislature;" and he was further "instructed to consider and recommend such *alterations* in the general laws as he may deem suitable and necessary, and to incorporate them with *distinguishing marks*, or notes, to the revised code, to be by him reported." By his report, it appears that this was done. In doing it, his design "was to make the enactment in lan-

guage *so concise*," &c., as to avoid frequent and expensive litigation. It does not appear, by the report of the commissioners, by whom the first, or in that of Judge SHEPLEY, by whom the second revision was made, that in either revision any change had been made in the Act of March, 1855. If any had been made it should, in each revision, have been noted with distinguishing marks.

Now, the last revision was made by one who has held the highest judicial position, with distinguished honor to himself and usefulness to the State, and whose opinions, as a jurist, would be entitled to the greatest respect in every State of the Union. It cannot be supposed that he would have been so negligent as to have sanctioned the conversion of a statute in all respects constitutional into one which is the reverse; nor that such a change should have been made and escaped his accurate observation and acute intellect.

It would be a reproach to the Legislature to suppose that a statute, legal and constitutional in its origin, could have changed by revision into one unconstitutional, and that this metamorphosis should have received their sanction.

It is therefore apparent that there was no intention by the change of language to change the meaning.

Now, in determining the meaning of a statute, the intention must govern, and the manifest intention will be carried into effect, though *apt* words are not used. *Crocker* v. *Crane*, 21 Wend. 212. The construction is to be adopted "which carries into effect the true intent and object of the Legislature in the enactment." *Minor* v. *Bank of Alexandria*, 2 Peters.

The intention of the Legislature is to be gathered from the language used, taken in connection with the preceding legislation on the same subject.

Having regard to the well settled principles of construction, both as to the intention of the Legislature and the meaning and constitutionality of statutes, we have arrived at the conclusion that there is nothing in R. S., 1857, c. 80, § 53, which is in conflict with the constitution of the United States or with any Act of Congress passed in conformity therewith.

The officers named in § 53 are, as citizens of the United States, bound to obey all the requirements of the Acts of Congress in question. The prohibition refers only to acts done by virtue or under color of office.

That such was the intention of those by whom the revision was made, and of the Legislature by whom the revision was adopted, we cannot doubt. And it is an universal rule that the intention, when ascertained, must govern.

4. By R. S. 1857, c. 132, § 4, it is enacted that magistrates "*shall not take cognizance* of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars or imprisonment less than one year."

The Act of Congress of 12th February, 1793, relating to the rendition of slaves, is not repealed by the Act of September 18, 1850, which in its terms is amendatory of and supplementary thereto.

It has been decided, as before stated, in *Prigg* v. *Pennsylvania*, that the State Legislature may prohibit its magistrates exercising jurisdiction conferred upon them by Act of Congress. It is conceded by a majority of the Court that the clause, that magistrates "*shall not take cognizance of any case relating to a person claimed as a fugitive slave*," is constitutional.

It is urged that the latter clause of the same section, "nor aid in his arrest, detention," &c., must be referred to action as an individual, and hence that it is unconstitutional.

But cannot the magistrate *aid in his* (the fugitive's) *arrest* by issuing his certificate, and is it not very efficient aid when, in the language of the Act of Congress, such certificate "shall be a sufficient warrant for removing said fugitive from labor, to the State or territory from which he or she fled."

If it be urged that this construction makes the last clause superfluous, what then? It is nothing more than that the Legislature has used superfluous language; that it has used words which might have been spared, and were either unnecessary or tautological. "Now, I believe," says Mr. Jus-

tice STORY, in *U. S.* v. *Bassel*, 2 Story, 404, "that there are few Acts of legislation in the statute book, either of the State or of the National government, or of the British parliament, which do not fall in the same predicament, and are not open to the same objection, or, if you please, to the same reproach." But, because the same idea may be repeated and unnecessary language used, the Act is not unconstitutional.

It is very common to insert in an Act a sweeping clause, the object of which is to guard against any accidental omission. Such general words are never allowed to extend further than was clearly intended by the Legislature. The expression, "nor aid in his arrest, detention or surrender," was used to guard against any and all action by magistrates, by virtue or under color of office. So far as they might act officially in any way, they are prohibited from so acting. If there was any official action which had not been prohibited by what precedes, these words were inserted to supply the omission. This construction is strictly in analogy with that adopted by the Court in *Preston* v. *Drew*, 33 Maine, 558, in which the generality of the statute, that "no action of any kind shall be had or maintained in any Court, for the recovery or possession of intoxicating liquor or the value thereof," was restricted to actions for such liquors as were intended for unlawful sale.

The same reasoning is equally applicable to the similar prohibition, R. S., c. 80, § 53, which has already been considered.

The judicial construction which makes the Legislature prohibit official action in the first part of the sentence, and individual action in the last—by which the same word, in the same section, shifts its meaning, would, at any rate, be a remarkable one. It would illustrate the "shifting uses" of words.

As thus explained, the statute would read:—"But *they* (magistrates) shall not take cognizance of any case relating to a person claimed as a fugitive, nor (as private citizens shall *they*) aid in his arrest, detention or surrender," &c.

It is due from the judiciary to itself, and to the Legislature, that it should not resort to special pleading nor to strained constructions of the language of a statute, when thereby, and thereby alone, it is to be rendered unconstitutional. To alter the meaning of one and the same word, in the same sentence, as it precedes or follows a conjunction, *may be* in conformity with the intention of the Legislature, which it is our duty to ascertain, and according to which, when ascertained, to decide; but, to us, a construction which requires it seems equally adverse to the rules of grammar and of law.

After a careful examination of the several sections of the different chapters of the Revised Statutes of 1857, to which the inquiry of the Legislature relates, we are of opinion that none of them are repugnant to the constitution of the United States, nor in contravention of any law of the United States made in pursuance thereof.

JOHN APPLETON,
EDWARD KENT.

BANGOR, FEBRUARY 25, 1861.

NOTE BY JUDGE KENT,

SUPPLEMENTARY TO THE OPINION SIGNED BY HIM.

I concur in the result, and in the reasons therefor, stated in Judge APPLETON'S opinion. I wish simply to add a note in reference to section 53, c. 80.

It seems that a majority of the Court agree that the first sentence, and part of the second sentence, of § 53, are strictly constitutional. The difference of opinion arises from different views as to the effect of the words "any of said officers *aiding or abetting* any person claiming, arresting or detaining any person as a fugitive slave."

Did the Legislature design to make that section *duplex* in its intent and effect? I think not. In my view, the whole purpose was to prohibit the officers named from using their offices, or their official position or power, in arresting, seizing or detaining a fugitive slave, or doing it under color or pretence of office; but not to prohibit them from doing, in their private capacity, whatever any private citizen might or should do.

I draw this conclusion from a consideration of the former legislation on this subject; from the well established rules of construction and inference, stated in the opinion before referred to; from the safe and just rule that the intention of the Legislature is to be ascertained, and is to govern, and that all presumptions are against the supposition that the Legislature intended to violate the constitution in its enactments; and that no such construction is to be given to any Act, unless the language absolutely requires it, and cannot be reconciled with any other intention.

I do not see why the language used cannot have a constitutional meaning, without rejecting any part, or without giving to it a forced and unnatural construction. A critical examination of section 53 will show that the first prohibition refers

to an "arrest." This clearly contemplates an official act, by executing or aiding in the execution of a formal warrant. The next prohibition relates to detaining *in a particular place*, not to detaining generally, or in any other place than a jail, or a building which is public property. A majority of the Court agree that these prohibitions are manifestly official in their nature, and unobjectionable.

But the Legislature seems to have contemplated that these two negations might not reach all the cases in which the officers named might interfere officially, or under color or pretence of office, to aid a claimant of an alleged fugitive slave. They knew that the law of Congress gave authority to such claimant to act without warrant, by providing that "when a person held to service, &c., shall escape, the person or persons to whom such service and labor may be due may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the Courts, Judges, or commissioners before named, *or by seizing and arresting such fugitive, when the same can be done without process.* Section 6 of Act of 1850.

The last provision in our statute, against aiding or abetting, was therefore inserted to cover the acts of the claimant in seizing and detaining the person claimed by him without any warrant, or process of any kind. Such seizure, by the claimant himself, is not technically an arrest, and would not be so considered by any court, when construing a penal statute like this. Yet this private person might seize and detain in other places than a prison named in the first sentence. A deputy sheriff or constable might give him most essential aid, and abet him most efficiently by his presence as a known officer of the law — officiously proclaiming his character as an officer, and pretending to be in the exercise of his authority — although he might not "arrest," nor aid in arresting or detaining in any jail, or do any act which could be construed into a breach of the provisions of the first sentence. In the same way, he might "aid and abet" the private claimant in his detention, without arrest or warrant, in a hotel or private

house, by pretending that he had the fugitive in his care, and in various ways that might be suggested.

The fugitive slave law having given a private person the right to seize and detain another person without the semblance of legal process, this statute of our State was passed to prohibit any of the officers named from aiding him in their official capacity, or under color of their office, however strongly tempted to aid in such way, by pecuniary or other considerations. This, I think, is the purpose and the extent of the prohibition. If this construction is correct, all difficulty would seem to be removed, as I understand all the members of the Court to agree that the prohibition of official action is constitutional.

I have examined the question, without considering at all the expediency of continuing the Act upon the statute book; but with single reference to the question proposed, the constitutionality of the statutes named.

EDWARD KENT.

To the Hon. Speaker of the House of Representatives, Augusta, Me.

OPINION OF JUDGES MAY AND GOODENOW.

To the Hon. JAMES G. BLAINE,

Speaker of the House of Representatives:—

IN compliance with the order of the House, passed February 13th, 1861, we submit the following as our answer to the question proposed:—

In order to a correct determination of the question, as stated, it is necessary to understand the relation which subsists between the Federal and State governments, and the constitutional powers and rights of each, so far as they are connected with the specific duties required by the Acts of Congress, and the particular official or personal acts prohibited in the several sections of the statutes of this State, which are referred to in the question submitted. We will therefore first proceed to state, as succinctly as possible, the general powers and rights of each government bearing upon the question, that we may more fully understand the relation subsisting between them, and the obligations and duties of citizens, as such, to each.

The constitutions of the United States and of this State were designed to be independent of, and yet in harmony with each other. They provide for two separate governments, each an absolute sovereignty within its proper sphere. So far as the people have conferred power upon the general government, that government is supreme; and the residue of the power inherent in the people is reserved to the States. Each of these governments may therefore act within its appropriate sphere, and adopt such legislation for the accomplishment of its own ends as is required or authorized by its own constitution. The allegiance of every citizen is therefore twofold; and his aid and assistance may be required by each

government, in a constitutional manner, for its own protection and for the execution and enforcement of its own laws.

The right of each government to command the services of its citizens, for its own ends, is to be exercised in such a manner as to produce no collision between the two. The one cannot rightfully throw any impediments in the way of the constitutional action of the other. Each government having equal constitutional claims upon its citizens when acting within its own appropriate sphere, any citizen whose services are required by both at the same time, and who is therefore unable to serve them both, may properly render his service to that government which first commands it. While he is either officially or actually serving the one in pursuance of its lawful commands, he cannot be withdrawn, for the time being, from such service, for the purpose of rendering aid to the other. Thus, the citizen of a State, when called upon by the sheriff to aid in the arrest of an offender against the laws of the State, cannot be required, while he is upon the track of a murderer or other felon amenable to such laws, to render similar services to the general government at the bidding of its marshal. So, too, if he is actually in the service of the general government, he cannot be withdrawn from such service by the sheriff of the county. Nor can a judicial or other officer of a State, who is required by any constitutional law to perform official duties at certain fixed times and places, and who is actually engaged in the performance of such duties, be required by any officer of the United States to lay aside his official functions, to assist him in the arrest of a fugitive from justice or slavery. In such and similar cases, the government which first begins to be served acquires a jurisdiction over the services of the citizen, which cannot be defeated by the command of the other. In all cases, however, where the citizen is not in the actual service of one government at the time when he is required by the other to aid in the enforcement of its laws, he is bound, whatever may be his official station or rank, to render such service in good faith and without cavil; and when he is so required by the United States,

no State can by its laws, or its constitution even, absolve him from the duty of such performance. The constitution of the United States and all the federal statutes which are authorized by it are paramount, not only to the statutes, but to the constitution of every State; and when the latter are found to be in conflict with the former, or are directly calculated to impede or obstruct their execution, they are manifestly void.

No State is required by the federal constitution, or can be required by any law of Congress, to furnish judicial courts, ministerial officers or prisons, for the use of the general government; and whenever a State does so it is as matter of courtesy and not of right. The State may, if it sees fit, prohibit the courts which it creates, the ministerial officers it appoints, and the prisons and other buildings which it erects or owns, from being used for the enforcement of the federal statutes, or for the detention or punishment of persons charged with or convicted in the federal courts of offences against the general government. A statute of the State, therefore, which merely prohibits the official action of its officers, and the use of its prisons and other buildings belonging to it, from being applied to the execution and enforcement of the federal laws, or the detention and punishment of offenders against such laws, is constitutional. The Legislature of the State, as well as Congress, may exercise all the power necessary for the enforcement of its constitutional enactments and the protection or security of the rights of its citizens, including all such persons as are temporarily resident within its borders. But when either government goes beyond the pale of its constitutionally prescribed limits, and invades the rights granted to the one, or belonging to the other, such action is wholly unauthorized by the constitution of either.

In view of the general principles which have been stated, we will proceed to examine the several sections of the Revised Statutes referred to in the question propounded. The first, (section 20 of chapter 79,) provides that the county attorney, "when he is informed that any person has been arrested in his county and is claimed as a fugitive slave, under

the provisions of any Act of Congress, shall immediately repair to the place of his custody, render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor; and their fees, and all other necessary legal expenses therein, shall be paid by the State." Unlike the fugitive slave Acts, referred to in the question, this section is a statute of humanity, and was intended solely for the protection of personal liberty. In its appropriation of money, and in its spirit, it is not unlike another statute found in the same volume, c. 134, § 14, by which all persons indicted for a crime punishable by death, or imprisonment in the State prison for life, are aided by the State in making their defence. Such legislation is not confined to our State alone. The slave State of Virginia has a statute by which, whenever the title to the freedom of one claimed as a slave is to be tried in her courts, legal protection and counsel are to be furnished at the expense of the State. We are not aware of any provision in the constitution of the United States, or of this State, or in the laws of either, which restrains the Legislature from providing "legal assistance" to any person whose life or liberty is in issue, or at stake.

The next section of our statutes referred to in the question is that of chapter 80, section 37, which provides that "the keepers of the several jails in this State shall receive, and safely keep, all prisoners committed under the authority of the United States, except persons claimed as fugitive slaves, until discharged by law, under the penalties provided by law for the safe keeping of prisoners under the laws of this State." The law of comity only impelled to the passage of this section, and the same constitutional and legal rights which would have justified the Legislature in refusing a passage to the entire section justifies the exception which it contains. Because the Legislature thought proper to incorporate this single exception, relating to fugitive slaves, the general government has no ground of complaint. This section, notwithstanding this exception, is constitutional.

In regard to section 53, of the same chapter 80, there is

more doubt; but, before proceeding to an examination of this section, we will examine the only other section referred to in the question submitted, viz.:—section 4 of chapter 132. This section provides that judges of municipal and police courts and justices of the peace "shall not take cognizance of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars or imprisonment less than one year." The only doubt in regard to the constitutionality of this section arises from the words "nor aid in his arrest, detention or surrender," as used therein. Were these words intended to apply to the official action of such magistrates, and do they so apply; or were they designed to prohibit all other action?

The chapter containing this provision is entitled "election of municipal and police judges, and proceedings of magistrates in criminal cases," and the section cited relates to the jurisdiction of such magistrates. Magistrates may be said, in one sense, to aid in the arrest, detention or surrender of a fugitive slave, when they issue a warrant therefor, or sit in the trial of the case, or give a certificate for such surrender. If the present Acts of Congress do not require such official action of these magistrates, still Congress may pass an Act conferring such jurisdiction at any time; and it was competent for the State Legislature to guard against such action. The words following, as they do, in the same sentence, a direct prohibition on the part of the magistrates named, of any cognizance of any case relating to a person claimed as a fugitive slave, may properly be regarded only as an amplification of what is before stated, by a further reference to the particular effect which would result from an assumption of such prohibited jurisdiction. The whole prohibited action may, for the reason stated, be regarded as referring only to official acts, and especially so, since, as we have seen, an entire prohibition of all private personal action would be clearly unconstitutional. When a statute is, from its language, fairly susceptible of two meanings, the one constitutional and the other not,

that which is consistent with the constitution must be preferred. No part of the section under examination necessarily applies to the unofficial, individual acts of the magistrates therein named, and it cannot therefore be said to be repugnant to, or in contravention of, the constitution of the United States, or to the Acts of Congress which have been referred to. It is therefore constitutional.

In relation to section 53, chapter 80, before mentioned, there can be no doubt that, when taken in its literal sense, it is in direct conflict with the Acts of Congress passed in 1850, commonly known as the fugitive slave Act.

The latter expressly makes it the duty of all persons, when required by a United States marshal, under circumstances which authorize him to call for it, to render personal aid in the execution and enforcement of that Act. The section of our own statute now before us, in words, expressly prohibits such aid. It provides that "no sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace or other officer of this State shall arrest or detain, or aid in so doing, *in any prison or building belonging to this State*, or to any county or town, any person on account of any claim on him as a fugitive slave." If the section stopped here, perhaps it might be regarded as applying only to the official acts of such officers as are particularly named in it, and other State officers. But it proceeds further, and, in a distinct and separate sentence, provides that "any of said officers violating any of the aforesaid provisions, *or aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave*, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or be imprisoned less than one year in the county jail." This part of the section directly prohibits the very acts which the persons holding the offices therein named or referred to, as well as all other citizens, are required as individuals to perform when called upon by virtue of the federal statutes just cited. Is there not, then, a necessary and real conflict between the two statutes, or is it only apparent? To decide this question

we must, first, ascertain whether the federal statute is constitutional, and if it is, secondly, whether it is fairly susceptible of any construction which is in harmony with that statute.

In regard to the fugitive slave Act, when we consider that the question of its constitutionality appropriately belongs to the federal courts, whatever might have been our own individual opinions as an original undecided question, we are bound by the authoritative decisions of the Supreme Court of the United States to regard that question as settled. That this Act in all its details is constitutional, has now become the well established law of the federal courts. See 21 Howard's U. S. Sup. Court Rep., p. 506. However much we may feel humbled as citizens, when we perceive that under the harsh provisions of that statute a man or a woman and her posterity may, in effect, be made slaves forever with less legal protection and ceremony than is permitted under our State laws to establish the title to the smallest article of property; and however much we may regret the existence of such provisions in the federal constitution as constrain the highest judicial tribunal in the nation to decide that such a statute, with all its harshness, is constitutional; still, sitting as we do, only to declare the law as it is, we are not authorized to disregard the weight of judicial authority, especially when such authority comes from the tribunal to which the decision of the question, in the last resort, belongs. We must, therefore, in the discussion of the question before us, assume that the fugitive slave Act is constitutional.

Our next inquiry, then, is, can our own statute, in the section under consideration, fairly receive a construction in harmony with the requirements of the fugitive slave Act? Does it leave the citizens of this State and the general government, who are designated therein, when not acting officially, free and unrestrained in the performance of such duties as may be legally and constitutionally required of them in the execution of that statute? If it does not, and its proper construction or effect is to prevent or obstruct the execution and enforcement of that Act, or to prohibit certain particular persons

from the performance of such duties under all circumstances, then our statute must be declared unconstitutional. It is said that this entire section may be regarded as prohibiting only official acts. The first clause of this section, if it apply only to official acts, so fully covers all the acts which any of the officers mentioned therein can be expected to perform, that it is difficult to perceive what other official acts are left to fall within the special application of the second clause. And when we consider, that some of the officers named in this section are elsewhere prohibited from acting officially in any case relating to a fugitive slave, and that others cannot legally be called upon under the federal statutes to perform any such acts; and further, that the statute of 1855, chapter 182, sections 2 and 3, from which the section in question was copied, contained, immediately following the designation of the various officers upon whom the statute was to operate, the words "*in his official capacity*," and that these words, so direct and necessary to describe the nature of the acts prohibited, are entirely omitted in both parts of the section as it now stands, we do not see how it can reasonably be inferred that the statute as amended was not designed to prevent all such persons, as hold the official positions mentioned therein, from rendering any aid as individuals or private citizens in the execution or enforcement of the fugitive slave Act. We also suggest that the words "any person arresting or detaining any person as a fugitive slave," as used in the last clause of the section now under consideration, naturally refer to the claim, arrest and detention mentioned or referred to in the first clause; and the words "aiding or abetting," as applied to the person claiming, arresting or detaining such fugitive, are such as usually relate to the commission of some crime, rather than to any official action. It may therefore be presumed that the Legislature intended to prohibit some action to which the first clause did not apply. The principal purpose of the first clause seems to be the protection of our prisons and buildings against the use prohibited; and of the

latter to prevent aid of any kind to the claimant or person arresting or detaining the alleged fugitive slave.

For the reasons stated, and others which might be mentioned and are referred to by other members of the Court, we deem the language of this statute too plain and unequivocal in its meaning to authorize us fairly to come to any other conclusion than that the section, at least in its latter clause, does prohibit, under all circumstances, not only the official but the individual action of the persons holding the offices which it refers to, and thereby makes the individual or private acts of such persons, performed for the enforcement of the Acts of Congress relating to fugitive slaves, a crime. We are therefore unavoidably and irresistibly brought to the conclusion that this section is repugnant to, and in contravention of the fugitive slave Act of 1850, and is unconstitutional.

SETH MAY,
DANIEL GOODENOW.

FEBRUARY 21, 1861.

OPINION OF JUDGE DAVIS.

HON. JAMES G. BLAINE,

Speaker of the House of Representatives:—

I have the honor herewith to present my opinion, as one of the Justices of the Supreme Judicial Court, in answer to the question submitted to us by the order of February 13, 1861.

If the statutes of this State referred to, in the question propounded to us, are not in conflict with the laws of the United States for the rendition of fugitives from service or labor, then it is not necessary for us to express any opinion in regard to the constitutionality of those laws. But, as some of my associates entertain opinions on this question to which I cannot assent, I have thought it proper to state the reasons which bring my mind to a different conclusion.

I assume that every man is presumed to be free, and that slavery nowhere exists except by positive provisions of statute. The law of slavery is therefore bounded by the territorial jurisdiction of the State governments by which it is established. If the master voluntarily carries a slave into a free State, or permits him to go there, the slave thereby becomes free. These propositions are familiar, and are supported by numerous authorities.

It follows that, if a slave *escapes* into a free State, without the consent of his master, he also thereby becomes free while remaining there, and the master has no right to recapture him, unless there is some provision in the constitution of the United States for that purpose. Before the American revolution, when slavery existed in the colonies, they had laws for the mutual surrender of slaves. But slavery was so glaringly inconsistent with the principles upon which they became independent, that it was abolished, or laws were passed for that purpose, in nearly half the colonies, before the constitution of

the United States was adopted. And it is undeniable, as a historical fact, that the general expectation then was, that the other colonies would soon do the same. The feeling against its continuance was strong, in the south, as well as in the north. Under these circumstances, was any provision made in the constitution of the United States, for the capture of fugitive slaves?

It is not pretended that there is any provision of the kind, except the following:—"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Art. 4, § 2.

If the question were new, I should be clearly of the opinion that this provision could not be applied to *slaves*.

All provisions of law which are subversive of natural rights are to be construed strictly. The language here used describes various classes of *free persons*, and has been applied to apprentices and to seamen. That such is the proper application of it, no one will deny.

But it does not describe a *slave*. A slave is not held to *service* or *labor* under the laws of a slave State. Those laws make him an article of property, to be *bought* and *sold*, like other chattels. They do not require him to *labor*. No service or labor is "due" from him "under those laws." They take no cognizance whatever of the *purpose* for which he is owned. If killed by another, the master can recover, not for the *loss of service*, but for the *market value*. The language of the constitution, therefore, describes *free persons*,—but *not slaves*.

And though it is said, and I have no doubt truly, that the framers of the constitution *meant* to apply this *language* to slaves, they did not mean to use language that could *properly* be applied to slaves. There was no inadvertence or mistake. They *meant* to use language that *could not* be applied to slaves,

because they believed that slavery was speedily to be abolished.

The original proposition, as reported in the convention, was—"no person held to *servitude* or labor," &c. But, on motion of Governor Randolph of Virginia, the word "service" was substituted for "servitude" by a unanimous vote,—"the latter being thought to express the condition of slaves, and the former the obligations of free persons." Madison Papers. And this was in accordance with the principle, laid down by Mr. Madison in the convention, "that it was wrong to admit into the constitution the idea that there could be property in man."

If they deliberately excluded the *idea*, they thereby excluded the *fact*. The proposition that the former could be excluded, and the latter retained, is manifestly absurd. A claim under a statute, as well as under a deed, must be restricted to its terms. It is our duty to take the language *actually used*, according to its *proper and ordinary signification*, and apply it to the persons described by it, *and to no others*. A rule quite as strict as this has often been applied to uphold some great wrong. It ought not to be thought improper to invoke it in behalf of the greatest of rights—a man's right to himself.

But, if this provision of the constitution is to be applied to slaves, I am of the opinion that its only force is to make the local law of the slave States extra-territorial as to the fugitive slave, for the purpose of his capture, so that he shall carry his *status* with him, wherever he may escape. This places that species of property in precisely the same condition as that of other property, as to the right of recapture. The owner of a fugitive slave from Virginia, and the owner of a stray horse from New Hampshire, would come into this State with precisely the same right to *retake* their property. The owner of the horse could *remain* here, and hold his property under *our laws*. But the owner of the slave, finding no law *here* by which he could hold him in bondage, would have

to carry him into a slave State. And if we concede that the constitutional provision applies to slaves, its whole force is exhausted in this right of capture and extradition, which the free States are prohibited from annulling "by any law or regulation therein."

But, though the owners of these two kinds of property come into this State with precisely the same right of capture, the *property itself* is within the jurisdiction of *our laws*. And, by our laws, the slave and the horse are by no means regarded as in the same condition.

The *horse* is presumed to be *property*, without any proof; and the owner may take him, without legal process, wherever he can find him. If another man claims him, he may have to bring his suit therefor. This he may do in the State Courts. He might have been authorized by Congress to bring such suit in the Courts of the United States; but, under our present laws, he cannot do this, unless the horse is worth more than five hundred dollars.

The *slave* is *not* presumed to be *property*, without proof. He is *prima facie* free, and is a *citizen*, until adjudged to be a *slave*. Being *a person*, he may claim *for himself* the protection of our law; and the master must litigate the case, not with some *other* claimant, but *with him*. In the absence of any provision made by Congress, this question would have to be determined in our State Courts. As "between citizens of different States," it was competent for Congress to provide for its trial in the Courts of the United States. Const. art. 3, § 2. And, if Congress undertakes to provide for the case at all, I affirm that a person, so claimed, has a right to *a trial*, according to the rules of the common law, in some *Court* of the United States. And any law that subjects him to the loss of his liberty without such a trial is, in my opinion, unconstitutional and void.

There are several ways in which Congress could have done this.

They might have provided that the claimant should bring

his suit in the Circuit Court, or the District Court of the United States, in the circuit or district within which the alleged slave should be found. As this would give him a jury trial, according to the course of the common law, in the vicinity of the place of capture, there would be little danger that the citizens of the free States would be kidnapped and enslaved under its provisions. Or Congress might have provided that, on proof before some court of competent jurisdiction in a slave State, that a person claimed as a slave has escaped into a free State, the Governor of the former State might require the Governor of the latter to cause such person to be arrested and delivered up to the authorities of the State from which he is alleged to have escaped, *there* to have the claim against him *tried and determined* by due course of law. This would be objectionable to the people of the free States, as they would be liable, under its provisions, to be carried away to a distant State for trial. But, as they would not be deprived of liberty without an *actual trial*, before *a court*, according to the established principles of the common law, they could not complain of any violation of the constitution. The proceedings would be analogous to those for the rendition of fugitives from justice.

But though the provisions of the *constitution* for the surrender of fugitives from labor, and fugitives from justice, are similar, the *statutes* for the two cases are widely different.

The fugitive slave, and the fugitive from justice, are both "delivered up." But the *latter* is delivered up *for a trial;* the former is delivered up *without any trial*, either before or afterwards. The *criminal* is delivered *to the court* of the State where the crime is alleged to have been committed, to have his case determined by due process of law; the alleged *slave* is delivered *to a private claimant*, who may sell him at auction the moment he crosses the line of a slave State. In the former case, the hearing is merely *preliminary*, for the purpose of holding the accused *to answer to the charge*. In the latter case, the hearing and decision before the magistrate are *final*,

from which no appeal can be taken, and which cannot be revised, even on a writ of *habeas corpus*. 7 Cush. 285. To say, therefore, that because the *constitutional* provisions are alike, the *statutes* must *both* be constitutional, is a manifest *non sequitur*.

By the statutes of the United States, the person claimed as a fugitive slave has *no trial*, before *any court*. If delivered up, it is in fact *without any trial*.

By the constitution of the United States, the judicial power is vested in the Supreme Court, and in such inferior courts as may be established by Congress, "the judges of which shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." Art. 3, § 1. Congress can establish no court with judicial power finally to try causes between citizens of the United States, except in conformity with this provision.

A citizen of this State, if claimed as a fugitive slave, instead of being carried before such a court, may be carried before a "commissioner" appointed by the Circuit Court, who, upon proofs taken *ex parte*, without notice, perhaps months or years before, may determine the case, "in a summary manner," and give a "certificate" to the claimant, which "shall prevent all molestation by any process issued by any court, judge, magistrate, or other person whomsoever." Statute of 1850, § 6. And this commissioner, instead of being a "judge," "holding his office during good behavior," and having a "stated" salary, not liable to be "diminished," so that he may be independent of pecuniary influences, is liable at all times to be removed from his office, and receives for his services "a fee of five dollars," which *is doubled* in case he orders the person so claimed to be delivered up to the claimant. One would suppose that a court, so careful of the *rights of property* as to declare a law like ours for the seizure of intoxicating liquors to be unconstitutional and void, might find it difficult to reconcile such provisions with the constitutional *rights of*

citizens. But, whatever may be the opinions of the courts of other States, I cannot believe that such a tribunal is a court having judicial power under the constitution of the United States to determine such a question, nor that such proceedings are all the trial which a citizen may claim before he shall be deprived of his liberty. Constitution, Amendments, Articles IV, V and VII.

I am aware that the Supreme Court of the United States have decided that the statutes are not repugnant to the constitution. As that is the proper tribunal to determine that question, *in all our official relations,* we are bound by their decision, until it shall be reversed. If it were not so, there would be a conflict of authority within the same jurisdiction. But while, in regard to the constitutionality of the laws of the United States, we yield to the authority of the Supreme Court, if we believe the decisions of that court to be wrong, it is our privilege, if not our duty, so to declare, in order that such decisions may be overruled, or that the laws may be repealed. No weight of authority, and no lapse of time, can establish that which is wrong, or prevent it from ultimately being overthrown.

Conceding, then, that, *for the present,* we must govern our official conduct by the laws of the United States relating to fugitives from labor, as if they were constitutional, and applied to fugitive slaves, the question remains whether our own statutes are in conflict therewith.

The statute of 1793 provides that the alleged fugitive may be taken before any Judge of the Circuit or District Courts, "or before any magistrate of a county, city, or town corporate." As such magistrates are or may be officers of the State, section 53 of chapter 80 of our Revised Statutes undoubtedly prohibits them from exercising any such jurisdiction. The language used renders it apparent that this section was not originally drawn by one acquainted with technical terms of law. But, in its popular sense, it would be understood as an injunction upon all such magistrates not to take official cog-

nizance of any case under the Act of 1793. So understood, no one pretends that it is unconstitutional. *Prigg* v. *Pennsylvania*, 16 Peters, 539.

But some of my associates are of the opinion that the prohibition is *personal*, and not merely *official*, because such magistrates have no *official* authority under the Act of 1850; and they think the Act of 1850 *repeals* the Act of 1793. I am of a different opinion.

The Act of 1850 is *not entitled* an Act *to repeal* the statute of 1793, but an Act to *amend* it, and "supplemental to it." This indicates no intention to repeal, — but the contrary.

The Act of 1850 contains *no repealing clause.* Nor does the one cover the whole ground of the other, so as to repeal it by implication. The *claim* to recapture the fugitive depends not upon any statute, but entirely upon the constitution. The Act of 1793 gives a *remedy*, before certain magistrates. The Act of 1850 gives another and entirely different remedy, before other and entirely different magistrates. The one is "supplemental" to the other, and, in these provisions, is not inconsistent therewith to any extent. Both may stand; and in those States, where the magistrates designated by the statute of 1793 are not prohibited, they may still act.

The Act of 1793 was, however, amended. That made the person who should "obstruct or hinder" the claimant, or knowingly "conceal the slave," liable for a certain penalty. The Act of 1850 imposes a different penalty for the same offence, much more severe. The latter being inconsistent with the *fourth section* of the former, thereby repeals *that section*. *Norris* v. *Crocker & al.*, 13 Howard, 429. In this case, the question was distinctly raised, and neither the eminent counsel, nor the Court, intimated any opinion that any *other part* of the statute of 1793 was repealed by the Act of September 18, 1850.

The statute of 1793, so far as it gave jurisdiction to certain State magistrates to act in the rendition of fugitive slaves, being still in force, the statutes of this State were, in my

opinion, intended only to prohibit them from taking any *official* cognizance of any such cases. As to their construction, I concur entirely in the opinion submitted by my associates, Judges APPLETON and KENT. And, therefore, I do not think either of the provisions referred to is repugnant to the constitution of the United States, or in contravention of any law of the United States made in pursuance thereof.

WOODBURY DAVIS.

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ACTION.

1. Under the Revised Statutes of 1841, an action cannot be sustained, which was brought by an *administrator* against one for aiding a debtor of the plaintiff's intestate, in the fraudulent transfer of his property, contrary to the statute in that behalf provided, as the cause of action does not survive.
Smith v. *Estes*, 158.

2. If an agent makes a purchase of a quantity of lumber for his principal, without disclosing his agency, taking a bill of sale to himself, and paying therefor according to the bill, if the lumber falls short in quantity on delivery, the principal may recover back the excess of payment by an action in his own name. *Cushing* v. *Rice*, 303.

3. In such an action, evidence that the purchase was for the principal, is admissible, notwithstanding the agent took the bill of sale to himself, and then gave another bill of sale of the same lumber from himself to his principal.
Ib.

4. Evidence is also admissible that the vendors warranted the lumber, in quantity and quality, though the bill of sale contains no such warranty. *Ib.*

5. Evidence of false and fraudulent representations is also admissible, though contradictory to the bill of sale. *Ib.*

6. In an action to recover back a part of the consideration paid for a quantity of lumber, on the ground that it fell short of the quantity agreed to be delivered, it is not necessary for the plaintiff, first to offer to rescind the contract, or to restore that which has been delivered. *Ib.*

7. A person who has the rightful possession of logs for the purpose of driving them under a contract, has such a qualified interest in the logs, that the timber may be regarded as his, for all purposes connected with the driving, within the meaning of the R. S. of 1857, c. 42, § 6, and sufficient to enable him to maintain an action against the owners of logs which have become intermixed with the logs he has driven under such contract.
Tibbets v. *Tibbets*, 365.

8. Statutes, prescribing the counties in which transitory actions may be brought and tried, do not, in the least, change their legal character; but over such the Court has jurisdiction, in any county in which they are commenced. Otherwise, if the actions are local in their nature. *Webb* v. *Goddard*, 505.

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CONSTITUTIONAL LAW.

1. That part of chapter 80 of the Revised Statutes of 1857, § 53, making it criminal for a sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace or other officer of this State, to aid and abet any person, claiming, arresting or detaining any alleged fugitive slave, cannot be fairly construed to refer only to acts performed in their official capacity by the officers named, and is in contravention of the Acts of Congress, approved Feb. 12, 1793, chapter 51, and Sept. 18, 1850, chapter 60, which are to be treated as valid and constitutional, and as paramount to the laws of individual States. *Opinions of Tenney, C. J., and Rice, Cutting, May and Goodenow, J. J.*, 561.
2. The remaining part of § 53 of chapter 80, and also § 37 of chapter 80, authorizing keepers of jails to receive and keep prisoners committed under the authority of the United States, except persons claimed as fugitive slaves; and § 20 of chapter 79, requiring County Attorneys to render to any person claimed as a fugitive slave all necessary legal assistance for his defence, and to summon witnesses therefor, the fees and expenses to be paid by the State; are not in contravention of any law of the United States, or of the Constitution thereof. *Opinions of the Justices*, 561.
3. Chapter 132, § 4, defining the jurisdiction of municipal and police judges and justices of the peace as to criminal offences, and forbidding them to take cognizance of any case relating to a person claimed as a fugitive slave, or aid in his arrest, detention or surrender, does not necessarily apply to unofficial, individual acts of the magistrates named, and is not repugnant to the Constitution of the United States or the Acts of Congress of 1793, c. 51, and 1850, c. 60.

Opinions of Appleton, Kent, May, Goodenow and Davis, J. J., 597.

See RAILROADS, 4, 9. SCHOOL DISTRICT, 1.

CONTRACT.

1. If the defendant in a suit at law, at the request of a third person, permits him to assume the defence, upon a promise of such third person to indemnify him and pay all costs recovered against him, such a promise is not void for want of consideration. *Goodspeed* v. *Fuller*, 141.
2. Nor is such a promise within the statute of frauds, as being a promise to pay the debt of another person. *Ib.*
3. Nor can it be avoided on the ground of maintenance. *Ib.*
4. A parol contract to support one during life, is not within the statute of frauds. Such a contract is a sufficient consideration for a deed of real estate. And, if the grantee in such deed, give his promissory notes for the value of the property, to be held as collateral security for the performance of his contract,

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Where a Judge of Probate has decreed an allowance to a widow from the personal estate of her deceased husband, and the administrator has paid a part of it, taking receipts for his payments, he is bound to pay the balance when demanded, on tender of a receipt therefor, and is not authorized to refuse payment until he obtains a discharge or receipt in full. The several receipts for part payments, making up the whole sum when taken together, constitute a receipt in full, and would be perfect vouchers before the Judge of Probate. *Godfrey* v. *Getchell*, 537.

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See MILLS, 1, 2.

FORCIBLE ENTRY AND DETAINER.

1. The process of forcible entry and detainer, as provided by c. 94, of R. S. of 1857, does not seem to be adapted to a case where the relation of mortgager and mortgagee exists; for the person in possession, with right to redeem, should not be regarded as a disseizor, within the true sense of the statute. *Reed* v. *Elwell*, 270.

2. Review of the various enactments relative to the action of forcible entry and detainer. *Dunning* v. *Finson*, 546.

3. In a complaint for forcible entry and detainer against a tenant at will, it is not necessary to allege or prove that the relation of landlord and tenant existed between the parties at the time of the service of notice to quit. *Ib.*

4. Such a tenancy at will as c. 94, § 2, R. S. of 1857, contemplates, may exist, where there is no such relation as would authorize a suit for rent, or confer the respective rights of landlord and tenant. *Ib.*

5. A. bargained for a house, but had it conveyed to B. as security for a loan, taking a bond from B. to convey to him on payment. The bond expired. C. rented the house of A., and afterwards took a quitclaim of his right, at the same time agreeing orally with B. for a deed from him at a price named. *Held*, that C. was tenant at will, under B., although he had overpaid rent to A. *Ib.*

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See BILLS AND NOTES, 5, 6.

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See ACTION, 1. EVIDENCE, 4. INDICTMENT, 1.

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After writs of venire had been issued by the clerk for the county of Hancock, the town of Greenfield was set off from that county and annexed to Penobscot. A motion to set aside a verdict, for the reason that one of the jurors was from that town, was overruled; for notwithstanding the objection would have been sustained, if the juror had been challenged, yet after verdict, the party will be presumed to have had knowledge of the objection, and to have waived it. *Mt. Desert* v. *Cranberry Isles*, 411.

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LIQUORS, SPIRITUOUS AND INTOXICATING.

1. A complaint and warrant, in due form, are a sufficient justification for an officer and his aids for seizing spirituous liquors under the statute, 1851, c. 211. *Wall* v. *Farnham*, 525.

2. An action may be maintained for the price of intoxicating liquors sold in Boston, in conformity with the laws of Massachusetts, to a citizen of Maine, if the vendor had no knowledge that the liquors were intended for sale in this State in violation of law. The maintenance of such an action is not prohibited by the statute of 1856, c. 255, § 18. *Barnard* v. *Field*, 526.

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See ACTION, 7.

LORD'S DAY.

1. The contract by which a horse is let on the Lord's day is void, and a court of law will not enforce it, nor give compensation or damages for a breach of it. *Morton* v. *Gloster*, 520.

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See ACTION, 2, 3, 7.

MARRIAGE.

A party contesting the legality of a marriage, because of the alleged insanity of the husband at the time, has no cause for exception to the instruction of the presiding Judge to the jury, that the same degree of mind sufficient to enable him to enter into a valid contract, or to make a valid deed or will, would be sufficient to enable him to contract matrimony.
Atkinson v. *Medford*, 510.

MARRIED WOMEN.

1. Neither the present nor any former statutes give a married woman power to purchase real estate on credit, and give her own promissory notes in payment, with a mortgage as security. *Dunning* v. *Pike*, 461.

2. In such a case, the notes and mortgage given by her, and the deed given to her, are all void, the whole being one transaction, though the conveyances were made at different times, and the parties are different, yet all done in pursuance of a mutual arrangement. *Ib.*

MILLS.

1. In a complaint under the statute, for flowing land, to establish a prescriptive right of the mill owner to flow, it must appear that he and his grantors have been accustomed to flow the land, without interruption, for twenty years or more, prior to the date of the complaint, thereby causing, during that period, actual damage. *Gleason* v. *Tuttle*, 288.

2. A voluntary omission to flow in such a manner as to occasion annual damage, when such omission is accompanied by no acts indicative of an intention to resume the right, will afford no evidence of a continued adverse claim to exercise such right. *Ib.*

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WITNESS.

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