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.,
HON. SETH MAY,
HON. DANIEL GOODENOW,
HON. WOODBURY DAVIS,
HON. EDWARD KENT, LL. D.,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. JOSIAH H. DRUMMOND.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT.

1859.

COUNTY OF PENOBSCOT.

HENRY GOOGINS *versus* CHARLES D. GILMORE.

A mortgage to secure an existing debt, and also advances to be made subsequently, is valid.

The fact that goods mortgaged were partly perishable does not necessarily avoid the mortgage; but the character and condition of the goods are matters properly to be considered by the jury, in determining whether a mortgage is fraudulent.

A stipulation in a mortgage of chattels that the mortgager may retain possession of the chattels for a time, is only such proof of fraud, as to go to the jury, with the other evidence in the case, for them to determine whether the mortgage is fraudulent or not.

Where the jury have, on the evidence before them, decided against the alleged fraud in a mortgage, the Court will not, except in very glaring cases, grant a new trial.

The mortgagee of personal property may bring an action for damages to his reversionary interest, although he has not a right to immediate possession.

If such mortgagee sues in *trover*, his writ may be amended by adding a count in *case;* but if no objection is made to the form of action, until after the judgment, it is too late for the defendant to take advantage of the defect.

ON REPORT by APPLETON, J.

THIS was an action of TRESPASS against the defendant for taking certain merchandize as an officer, on a writ in favor of James Pratt, against Warren R. Boynton, Nov. 10, 1857.

On the 22d day of October, 1857, Boynton mortgaged to the plaintiff all the goods in his store in Bangor, consisting of groceries, meats, fruits and vegetables, to secure two notes of $500 each, payable in six and twelve months. The mortgage was duly recorded, October 23, 1857. The mortgage contained a proviso, that Boynton should continue in possession "without denial or interruption of the said Googins, until the expiration of the said twelve months."

It was in evidence that, in May, 1857, Googins loaned Boynton $500, and took the note of one Higgins therefor, with another note of Higgins for $100 as collateral security. In October, without giving up the old notes, Googins took two new notes from Boynton, for $500 each, and the mortgage before mentioned as security. Googins testified that he retained the old notes on advice, and only "as evidence that he let Boynton have the money;" that when the mortgage was given, Boynton owed him $500, and interest from May 22, 1857, and also $22 or $23 for wages of his son then in Boynton's employ, and Boynton had $150 worth of fish belonging to Googins on sale; and Googins was to make up the balance of $1000, as Boynton wanted it. It was agreed verbally between Googins and Boynton, that the latter should go on with his business as before the mortgage, buying and selling, charging and paying as he had done. Googins testified that there was no intention to defraud creditors. Googins made no further advances to Boynton after the mortgage.

The defendant, after the plaintiff's testimony was before the Court, moved a nonsuit, on the grounds, *first*, because taking a mortgage for $1000, when the debt was but $500, was fraudulent as against creditors; *second*, because the goods were partly perishable, and of a character making it apparent that *bona fide* security could not be intended; and *third*, because taking the mortgage with a clause allowing the mortgager to remain in possession for a year undisturbed, with an understanding that the mortgager was to go on as before and control the business, was fraudulent as against creditors.

The Court declined to order a nonsuit. The cause pro-

ceeded to trial, but a verdict was rendered for the plaintiff, with the agreement, that if, in the opinion of the full Court, a nonsuit should have been ordered for the reasons given, the verdict was to be set aside and a nonsuit to be entered; and a new trial was to be granted, if the rulings of the Judge were erroneous and materially injurious to the defendant. The whole evidence was reported, on a motion by the defendant to set aside the verdict as against evidence.

J. A. Peters, for the plaintiff.

The clause in the mortgage giving the mortgager possession for a time, and the fact that it purports to secure $1000, when the debt was $500, may be evidence of fraud, but are not conclusive. Whether the mortgage was fraudulent as against creditors, is a question, not for the Court, but for the jury, on the proof adduced.

The clause giving the mortgager temporary possession, is a very common one. In this State and Massachusetts, such a clause is not *per se* fraudulent, nor even *prima facie*. Our statute allows mortgaged goods to remain with the mortgager, provided the mortgage is recorded. Why, then, may there not be a stipulation to that effect? It is also provided that a mortgagee may enter before breach, if there is no agreement to the contrary; so there may be such an agreement. Such a clause is valid and unexceptionable. *Abbott* v. *Goodwin*, 20 Maine, 408; *Briggs* v. *Parkman*, 2 Met., 258; *Holbrook* v. *Baker*, 5 Greenl., 309.

It is true that the defendant admits that the mortgager was to go on and sell as before. But he also states that there was no intention to defraud. Such testimony is admissible from a party. *Edwards* v. *Currier*, 43 Maine, 474.

It is said some of the goods were perishable. All property mortgaged is liable to depreciation more or less. Such considerations are not conclusive as to fraud, although they may have weight with the jury. 2 Met., 258, before cited; 1 Hill, 438, 473.

As to the objection to the mortgage being made to secure

more than the debt then due, what legal objection is there to a mortgage to cover subsequent liabilities? What difference whether the whole sum is due at the making of the mortgage, or is made up at a convenient time afterwards? Such a transaction may be fraudulent, but is not so *per se*, or of necessity. It is no objection that a mortgage is made to secure future advances, if it also secures an existing debt. 5 Greenl., 309, before cited.

The motion of the defendant for a nonsuit, was asking the Court to settle a matter of fact, which the jury should decide.

Blake and *Garnsey*, for the defendant.

1. The stipulation that the mortgager should retain possession of the goods, especially in view of their perishable character, was fraudulent. *Robbins* v. *Parker*, 3 Met., 120; *Griswold* v. *Sheldon*, 4 Cum., 582. The mortgage could only have been intended to ward off creditors. Possession of $1000 worth of such goods for twelve months, with the right to sell and use and pay other debts, would leave no security for two notes of $500 each on six and twelve months.

It is held in Ohio, that a distinction is to be made between a stock of goods, and specific articles, as a horse, when mortgaged. In the former case, there may be sale and re-supply, with identity preserved under the word "stock." But it is not held any where that a mortgage of a horse or other specific thing, with possession and power of disposition in the mortgager, is valid. *Collins* v. *Myres*, 16 Ohio, 554; *Freeman* v. *Rawson*, 5 Ohio, 1.

The prevailing tendency to cloak property under the form of mortgage, should lead the Court to uphold the law with firmness. In England, the law would not formerly allow of possession by the mortgager. Now the law is the same as in Ohio and New York. *Gale* v. *Burnett*, 53 Eng. Com. Law Rep., (7 A. & E.,) 850.

There are several cases in this State and Massachusetts, where the Court, in maintaining that possession by the mortgager might be stipulated for, used language broader than re-

quired, and which should be restricted. *Briggs* v. *Parkman*, 2 Met., 264, is the strongest of these; but in that case the stipulation was materially different from that in the case at bar. And the case, 3 Met., 120, before cited, is more recent, and the opinion was given by the same Judge.

2. The mortgage did not disclose the true state of the case. The note of May 22d was not due when the mortgage was given, and no interest had accrued on it. The amount due Googins was less than $500. Yet two notes, of $500 each, were given. Such a mortgage should not be sustained. *North* v. *Belden*, 13 Conn., 376; *Irwin* v. *Talb*, 17 Penn., (S. & R.,) 423; *Spadee* v. *Lawler*, 17 Ohio, 383; *Belknap* v. *Wendell*, 11 Foster's N. H., 101.

3. The plaintiff's witnesses show the mortgage to have been fraudulent. In this connection, the counsel reviewed the evidence, and contended that it proved the mortgage to be only intended to cover Boynton's goods as against his creditors. The taint of fraud rendered the mortgage void. *Crowninshield* v. *Kittredge*, 7 Met., 520.

4. This action was prematurely brought. *Ingraham* v. *Martin*, 15 Maine, 375; *Skiff* v. *Solace*, 23 Vt., 279.

The opinion of the Court was drawn up by

APPLETON, J. — The plaintiff, as mortgagee, seeks to recover damages for certain mortgaged property, the taking of which the defendant justifies as an officer, under certain precepts against the mortgager.

After the evidence on the part of the plaintiff was closed, the counsel for the defendant moved a nonsuit on three several grounds.

1. It appeared in evidence that the mortgage was given to secure a note of one thousand dollars; that the mortgagee had advanced five hundred dollars and had agreed to advance the balance; and that the mortgage was given as well to secure the sum already advanced as what might thereafter be advanced. Whether the testimony of the plaintiff, asserting these facts, was true, it was for the jury to determine. It is

not for the Court to assume the testimony of a witness as false, and order a nonsuit. The credibility of testimony is for the jury. *Merritt* v. *Lyon*, 3 Barb., Sup. Ct., 110.

Assuming its truth, the question of law arises, whether it fails to disclose a legal cause of action.

It was early determined in the jurisprudence of this State, that a mortgage made to secure an existing debt and to cover future advances is valid. *Holbrook* v. *Baker*, 5 Greenl., 309.

"There are numerous cases," says WALWORTH, Ch., in *Bank of Utica* v. *Finch*, 3 Barb., Ch., 303, "in our own courts, showing that a mortgage or a judgment may be given to secure future advances; or as a general security for balances which may be due from time to time from the mortgager or judgment debtor. And this security may be taken in the form of a mortgage or judgment for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured thereby." In such cases, where the mortgage is in good faith, the mortgagee is secure to the extent of all advances. If a mortgage be made to secure an existing debt, the fact that it was also intended to secure future advances will not avoid it. *North* v. *Crowell*, 11 N. H., 251.

The case of *Belknap* v. *Wendell*, 11 Foster, 92, cited by the learned counsel for the defence, was determined upon the special language of the statute of New Hampshire, in reference to mortgages. In delivering the opinion of the Court, BELL, J., says, "a note given as an indemnity or security is valid, and a recovery may be had upon it for the amount, which may be equitably due between the parties, *Hazeltine* v. *Guild*, 11 N. H., 390, even as against subsequent attaching creditors."

2. It was insisted that a nonsuit should be ordered, because the goods were *partly* perishable, and of such a character that from the evidence it was apparent a *bona fide* security could not have been intended by the parties.

How far and to what extent the goods mortgaged were of a perishable nature does not appear. The fact that they were *partly perishable*, would not, as matter of law, necessarily avoid

the mortgage. The character and condition of the mortgaged goods were matters properly to be considered in determining whether the mortgage was fraudulent or not. There is no doubt that articles subject in their nature to be consumed in their use, may be mortgaged without any imputation of fraud; whether they are so mortgaged, will depend in each case upon its peculiar circumstances.

3. The third ground for a nonsuit urged by the counsel for the defendant, was because the taking the mortgage with a clause allowing the mortgager to remain in possession for a year, with an understanding that the business should go on as before, under the control of the mortgager, was of itself fraudulent and void as to creditors.

It has been repeatedly held in this State, that the possession by the mortgager of a personal chattel is not inconsistent with the mortgage, and that it is not conclusive proof of fraud. *Holbrook* v. *Baker*, 5 Greenl., 309; *Gleason* v. *Drew*, 9 Greenl., 79; *Melody* v. *Chandler*, 3 Fairf., 282; *Pierce* v. *Stevens*, 30 Maine, 184. Indeed, the provisions of the statute by which the right of the mortgagee, when out of possession, are protected, if the mortgage has been recorded, are conclusive as to this question.

In *Briggs* v. *Parkman*, 2 Met., 258, it was held, that a mortgage by a trader of his stock in trade, was not fraudulent *per se*, though it was provided therein, that until condition broken, he should retain possession and use the mortgaged property without hindrance or interruption from the mortgagee; and that he might sell and dispose of the mortgaged property, and apply the proceeds to his own use, he promising if he made large sales to secure the mortgagee by other property. The presumption of fraud arising from a mortgage of this description, may be repelled. The same question arose in *Jones* v. *Huggeford*, 2 Met., 515, and the Court, after a reëxamination of the question, reäffirmed the law as laid down in *Briggs* v. *Parkman*. In *Hunter* v. *Corbett*, 7 Upper Canada, Q. B. 75, it was decided, in an elaborate opinion by ROBERTSON, C. J., that the fact that a bill of sale, while pur-

porting on its face to be an absolute bill of sale, is in truth only a mortgage, and the further fact, that the vendor is allowed to remain in possession of the goods, are both badges of fraud to be weighed by the jury; not proofs of fraud so conclusive as to leave the jury no alternative but to find fraud, whether they believe it to exist or not. The decisions in this State have been in accordance with those of Massachusetts on this subject.

It is undoubtedly true, that a mortgage attended with circumstances like those developed in the case at bar, would be adjudged fraudulent in law in New York. *Edgell* v. *Hart*, 5 Selden, 213. But the uniform current of authorities with us has been in favor of submitting the question of fraud to the jury.

4. The defendant's counsel moves that the verdict be set aside because it is against the evidence and the law of the case.

It is not alleged that erroneous instructions were given to the jury. After a careful consideration of the facts, the tribunal to which the determination of facts is referred, affirmed the validity of the mortgage. The conclusion to which the jury arrived, may have been different from that of the Court, had the case been submitted to them. But that furnishes no reason for granting a new trial. The jury are the judges of fact. "Where the question of fact for the jury to decide is a question of fraud, and they have decided against the fraud, the Court will not, except in very glaring cases, grant a new trial." *Hunter* v. *Corbett*, 7 Up. Can., 75.

5. It is urged that this action is prematurely brought.

It is well settled law, that an action will lie for damages to a reversionary interest in personal property. *Forbes* v. *Parker*, 16 Pick., 462. If the writ is originally in trover, it may be amended, and a count in case be added. *Ayer* v. *Bartlett*, 9 Pick., 156. Trespass on the case may be maintained by the mortgagee for an injury to his reversionary interest, where he has not the right to immediate possession. *Welch* v. *Whittemore*, 25 Maine, 86.

The time when the mortgagee, by the terms of his mortgage,

was entitled to possession, was known to the counsel at the trial. Had the objection then been raised, that the action was prematurely brought, an amendment might have been allowed, which would have obviated the exception now taken. After voluntarily proceeding to trial, it is too late for the defendant to take advantage of this defect, even if it were conceded to be one of which he might have availed himself had it been made in season.

In *Rank* v. *Rank*, 5 Barr., 211, which was an action of the case, it appeared that the plaintiff and defendant were joint owners, but, at the trial on the merits, this objection was not taken. In giving the opinion of the Court, BURNSIDE, J., says, "But as this exception to the form of the action is purely technical, and not taken on the trial of the cause, but after a full trial on the merits, we will not permit it to be now taken, and avail the defendants here. The action was case, and, if made on the trial, it is possible the Court would have permitted the plaintiff to withdraw his declaration, and file another, on the payment of the costs of the trial, to meet the justice of the cause." *Exceptions and motion overruled, and judgment on the verdict.*

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

THOMAS MASON *versus* DENNIS SPRAGUE.

A permit from the Land Agent to cut timber on the State lands is valid, although it does not appear whether the holder gave the bond required by the statute. The bond is a matter subsequent to, and independent of, the permit.

But if the permit has been void, and the holder a trespasser, his creditor, attaching lumber cut under color of it, would have no better title than his assignee or vendee.

A permit to cut timber generally, authorizes the holder to cut spruce timber, although the price of such timber is not stipulated in the instrument, but is stated on another page in the handwriting of the Land Agent.

Such a permit may be assigned as security for supplies already advanced, or to be furnished at a subsequent time.

Where the holder assigned the permit and the logs he had cut under its authority, and his assignee assigned the same to a third person, who took and retained for two months undisturbed possession of the logs cut before the first assignment, such possession was sufficient to perfect the title of the second assignee, although there had been no formal delivery in either case.

REPLEVIN. On report by HATHAWAY, J.

Rufus B. Philbrick, Nov. 17, 1855, received a permit from the Land Agent to enter on township B, range 10, with one four ox team, and to cut and remove timber therefrom until May following. The prices of spruce timber were minuted on the permit, but not set forth in it. January 12, 1856, Philbrick assigned the permit to S. E. Crocker, together with the lumber cut and to be cut under it. May 13, 1857, Crocker assigned the permit and lumber cut under it to the plaintiff. Mason testified that when he took the latter assignment, he advanced $500, and paid about $15 boomage and stumpage; the logs were then in the river, and were daily expected in the boom; they came into the boom early in June, and he employed persons to take care of them, and had them in possession about two months before the defendant attached them.

The defendant introduced an agreement between Crocker and Philbrick, made at the time when Philbrick assigned to Crocker, by which Crocker bound himself, in consideration of

the assignment, to furnish Philbrick with supplies and money to pay his employees.

He also introduced Philbrick, who testified that, when he assigned the permit to Crocker, he had about 735 spruce and 50 pine logs cut; that he never delivered the logs formally to Mason, and was never on the logs at the same time with Mason; that he employed a man to take care of them, but afterwards told him when he wanted money to go to Mason; that Mason furnished witness with some money, and Crocker paid him $150 and more; that the logs were driven about three miles the first year, and laid over till the next spring, and reached the boom in June, 1857; that the workmen were mostly paid by money furnished as aforesaid; that there were 2442 or 2542 logs, including about 300 pine, all of the same mark, and those cut before and after assignment mixed together. Witness held the logs subject to Crocker's title, always intending he should have his pay out of them. The wages of the men in the woods amounted to $700 or $800, mostly paid by Crocker. Witness sold the logs, by consent of the plaintiff.

The plaintiff introduced Crocker, who testified that Mason's account with the logs, Dr. $1509,91, Cr. $1403,04, balance $106,87, was correct; that he had advanced $2400 or $2500 to Philbrick on account of the logs.

Mason was recalled and testified that his account with the logs was drawn from his books, and the balance was still due him.

The defendant was a deputy sheriff, and attached the logs on several writs as the property of Philbrick. On some of the writs, judgment had been obtained, and executions issued and seasonably put in the hands of the officer.

The plaintiff in this action claims 267 pine and 2113 spruce logs of the logs attached.

The case was submitted to the Court on the facts as reported, a nonsuit or default to be entered as the Court should determine.

Rowe and *Bartlett*, for the plaintiff, argued that the plaintiff owned the logs, subject to the State's claim for stumpage, with the right to immediate and exclusive possession, and may therefore maintain this action. 2 Greenl. Ev., 561, and cases cited.

The logs cut after the assignment were cut by Philbrick as the servant of Crocker. Philbrick had but a special property in those cut before the assignment, which passed by the assignment, and no formal delivery was necessary. But the fact that Philbrick intermingled them with those cut afterwards, of the same description and marks, made them all alike the property of Crocker. *Loomis* v. *Green*, 7 Greenl., 386. But if the logs cut before the assignment were the property of Philbrick, it would not aid the defendant. He does not show that he attached those logs. He did not sever them from the others, and does not pretend to identify them. The number replevied is 162 less than the number cut, a difference more than equal to all those cut before the assignment.

Another question must trouble the defendant. How many logs did he attach? He returns a certain number attached on each writ, but nothing shows that those attached on one writ are not the same returned on the other; so that he can claim only the largest number named in any one return.

The defendant returns that he has attached the logs, not as the property of Philbrick or any other person, but to enforce a lien for labor. But his writs do not authorize any such attachment. *Redington* v. *Frye*, 43 Maine, 578. There can, therefore, be no judgment for a return of the property; nor is a return prayed for in the pleadings.

C. A. Everett, for the defendant.

1. The assignment of the permit, without delivery, could not be effectual to convey title in logs already cut, as against attaching creditors without notice. In *Fiske* v. *Small*, 25 Maine, 453, the assignment was made before any lumber had been cut. Here 50 pine and 735 spruce logs had been cut before the assignment, and, being severed from the soil, could

not pass without actual delivery. *Cook* v. *Howard*, 13 Johns., 276. The defendant, having as an officer attached these logs under proper writs, can hold all those cut before the assignment.

2. The permit authorizes the cutting of pine timber only, as it does not fix the rate of payment for any other; and, although it licenses the holder to "cut and remove the timber" from the lot described, this general description is limited by what follows, and by the fact that no other timber than pine is mentioned in the permit. The price fixed for pine is the statute price, and the same statute provides that the Land Agent shall fix the price of spruce, which he has not done in the permit. The memorandum in the margin is not signed nor authenticated. The spruce logs were, therefore, cut without permission, and were the property of Philbrick, and subject to attachment, unless they passed by assignment.

3. The permit is not a legal one, because the statute of 1843, c. 31, § 6, requires persons obtaining permits to file a bond with sureties for the payment of the stumpage. No such bond appears to have been given. An agent cannot bind his principal unless he follows his instructions. *Cowan* v. *Adams*, 10 Maine, 374. The Land Agent not having followed the statute, the permit is void. Neither was it made good by Mason's payment of the stumpage to the State. Being illegal, nothing could give it effect except a statute. Philbrick, having no right to cut the timber, was a trespasser, and the logs liable to attachment, unless they passed to the plaintiff by a sale legally perfected.

4. The transfer from Philbrick to Crocker was illegal, not having been shown to be made to secure Crocker for supplies. It does not appear that Crocker had furnished any supplies up to the date of the transfer. The statute requires the security to be for supplies "advanced," which precludes the idea of subsequent supplies being embraced. Philbrick's conveyance purports to be an absolute sale, and refers to no advances made by Crocker. No advances having been made, the conveyance was void, and, by the statute, Philbrick for-

feited his rights under the permit. Statute of 1843, c. 31, § 2. Neither Philbrick nor Crocker having any right to the logs, and the defendant being in possession, the plaintiff cannot recover in this action, having no better title than Philbrick and Crocker, under whom he claims.

5. Crocker's transfer to the plaintiff conveys his interest in the permit and the logs cut under it, excluding by implication those cut before Crocker received a transfer from Philbrick. But if the permit was illegal, or made void by an illegal attempt to transfer it, as before argued, Mason could derive no title under the assignment from Crocker. If, however, the permit and transfer are both held to be legal, Mason's title was a mortgage, and ineffectual without being recorded, unless possession was taken and retained of the mortgaged property. The fact is, the intention of the parties was to give Crocker, and afterwards Mason, a lien only, and neither of them deemed a delivery necessary, nor was there any delivery made or possession taken under the transfer. The property remained in Philbrick. The transfer of Philbrick to Crocker provided that the latter might control and manufacture the lumber on terms to be afterwards agreed upon; but no such agreement was ever made. Consequently the right of control remained in Philbrick.

6. The attachments and returns made by the defendant were in form, or, if not, are amendable. The plaintiff's writ admits that the logs were in the defendant's possession, and, the executions being in his hands, the inference is that he held them for the purpose of enforcing the attachments. The defendant's returns on different writs embrace 2113 spruce and 267 pine logs. The presumption is that these were different logs, and not that the same logs were attached on 19 different writs. If the permit and transfers were all valid, and Mason's title good, still the defendant must hold the logs cut by Philbrick before the first transfer, as there is no pretence of actual delivery by Philbrick to Crocker, by Crocker to Mason, or by Philbrick to Mason, and the evidence of Ma-

son's taking the logs into possession and retaining them is far from satisfactory.

It appears that the logs cut before and after the transfer from Philbrick to Crocker were mingled together so that they could not be distinguished; in which case, the defendant is entitled at least to the number of logs cut before that transfer, 50 pine and 735 spruce, it appearing that the logs so intermingled were of equal value. *Hasseltine* v. *Stockwell*, 30 Maine, 237.

The opinion of the Court was drawn up by

KENT, J. — In this action of replevin the plaintiff claims title and the right of possession in 267 pine and 2113 spruce mill logs. The defendant claims that, at the time when this writ was executed, he had a right to hold these logs, against the plaintiff, by virtue of an attachment he had made on sundry writs against Rufus B. Philbrick.

The plaintiff claims title from the same Rufus B. Philbrick, who had a permit from the Land Agent of the State, which he assigned to Samuel E. Crocker, conveying to him, also, "all the timber he had cut and which he might cut under said permit." Crocker assigned the permit to Mason, the plaintiff, and the lumber cut under the same. At the time of the assignment to Crocker, he gave Philbrick a written agreement to furnish him with supplies and money to carry on the operation.

1. The first objection of the defendant to the plaintiff's title, is that the original permit from the State to Philbrick is void, because it has not been shown that a bond, with sureties, for the payment of the stumpage, was given as required in § 6 of chap. 31, of the laws of 1843, under which the permit was granted.

Whether this requirement is to be regarded as absolutely essential to the validity of the permit, or as directory only, may be a matter of doubt. The provision is, that "all persons *obtaining* permits shall be required to give a bond for the payment of the stumpage, and performance of all the conditions

of the contract." The statute does not, in terms, declare the permit void unless such bond is given; as it does in reference to an assignment, hereafter to be considered.

The permit is evidence of a license to cut, from the authorized agent of the State; and, in the absence of all evidence to the contrary, we may presume that that officer has done his duty, and has taken the bond which the law requires. The bond is a matter subsequent to, and independent of the permit.

There is another ground on which the plaintiff may rest. If the permit was not strictly according to the statute, Philbrick might be a trespasser as against the State, and the State might seize all the timber, whether in his hands or in that of his vendee. But, until the State interfered, he might hold and sell the logs thus cut. His vendee would take his right and title, subject to the right of the State. In this case *both* parties claimed under Philbrick. If his title in the logs was absolutely void, it was void against the defendant as well as the plaintiff. The State has not interposed, but, as it appears, has by its agent received payment in full. We see no objection to the title of Philbrick, so far as these parties are concerned.

This reasoning applies, also, to the objection that the permit does not fix a price for spruce, even if the fact is established. This is denied by the plaintiff, and on inspection it appears that the permit is general for "timber thereon;" and the price of spruce is stated on the opposite page of the same sheet, in the handwriting of the Land Agent.

2. The defendant objects to the validity of the assignment, and invokes the second section of the Act of 1843, before cited. That section provides that no transfer of such permit shall be made by the person obtaining it, except for the purpose of securing payment for supplies advanced for operations under the same, and that any attempt at transfer, except for said purpose, shall operate to render void the rights attempted to be transferred." It is in evidence, and not denied, that Crocker did, on the day he took the assignment, agree to

furnish supplies for the operation; and that he and Mason did furnish them. But the defendant insists that such assignment could only be legally made to secure supplies already advanced, and could not cover advances to be made in the future. The objection rests upon the tense of the word "advanced." We cannot hesitate to reject this construction, which would defeat the manifest purpose of the enactment. The Legislature did not intend to prevent operators from obtaining supplies during the season, by assignment of the permit; but did intend to prevent the issuing of licenses to irresponsible, nominal or fictitious parties, who might, according to preconcerted arrangements, immediately transfer the permit to another party. The usual course of business was well known to the Legislature; and it would require the most certain and positive language to induce the Court to believe that it was the purpose to interfere with or reverse that long established usage. An assignment to secure payment for supplies advanced, is an assignment which has for its object the obtaining of supplies for the operation as needed, and the security of the payment for such supplies. It is an assignment to secure advances, and when they are made it secures payment for supplies advanced.

3. The next objection is, that there was no sufficient delivery from Philbrick to Crocker, at least of a part of the timber. In the case of *Fiske* v. *Small*, 25 Maine, 453, it was decided, where a permit to cut timber has been assigned, that all the timber afterwards cut under it was the property of the assignees, and no delivery was necessary as against subsequently attaching creditors of the assignor. This authority covers all the timber, in this case, except about 735 spruce and about 50 pine logs, which had been cut before the assignment to Crocker. But the defendant insists that as to the logs cut before the assignment, the case cited, and the law as there explained, does not apply; that as to these logs the title could not pass, as against an attaching creditor, until a delivery, or what is equivalent thereto, is proved.

There is, doubtless, a distinction in this respect, between

the two lots of logs. It is now well settled that a delivery of the thing sold is necessary as against every one but the vendee. As to him, the title passes without delivery, where all the other requisites to make a valid sale are proved. *Vining* v. *Gilbert*, 39 Maine, 496. This rule does not, of course, apply to cases arising under the statute of frauds, where a sale is set up by proof of delivery, without any memorandum in writing, or payment of the price. In such a case, delivery is the essential thing. *Ludwig* v. *Fuller*, 17 Maine, 167. In this case, the sale was in writing.

If the title, as between Philbrick and Crocker, passed without delivery, then delivery is not an element in this sale, but is required for some other reason. This reason is, that the law regards the purchaser as acting unfairly and fraudulently in not taking delivery and possession, and allowing the seller to hold out the appearance of being the owner, and thereby inducing third parties to purchase or give credit to their injury. *Ludwig* v. *Fuller*, before cited.

The common law, as formerly expounded, and as still maintained in some states, regarded a continual possession in the vendor as *ipso facto* fraudulent, and as rendering void a sale otherwise perfect, as against subsequent purchasers or attaching creditors. In this State this principle is modified, so far as to regard this fact of possession as one of the *indicia* of fraud only; which may be explained consistently with the honesty of the transaction.

But no cases have gone so far as to dispense entirely with proof of a delivery, actual or symbolical, or proof of something equivalent. But as that delivery may give only a momentary possession, or be symbolical, or of a part for the whole, the actual knowledge of a transfer may thus be communicated to very few, if to any, except the parties. The object of delivery, as of change of possession, being to give notice that another person has a claim or title to the property, it has been decided, in analogy to cases of livery of seizin, or of actual notice of a deed not recorded in real actions, that proof of actual notice of a sale or transfer is equivalent to

delivery. *Ibid.; Pratt* v. *Parkman*, 24 Pick., 42. And, before the recent statute, possession alone was notice. *McKecknie* v. *Hoskins*, 23 Maine, 230.

In this case it appears that the assignment to Crocker was made on the township, but there is no evidence that any formal delivery was made to him of the logs then cut, but they were of the same mark, and mingled with the others cut afterwards. Crocker sells and assigns to Mason, and he takes possession of all the logs, and they were under his control about two months before they were attached by defendant.

The sale from Crocker to Mason was good between themselves without delivery. This possession of Mason, who claimed under Crocker, was notice to all the world of a change of title and possession, so far as Philbrick was concerned. The fact that it was by Mason, a vendee under Crocker, cannot affect the question of notice. It was sufficient to put all persons on inquiry; and, under the circumstances, is equivalent to, if it is not in fact, a delivery, so far as this defendant is concerned.

Possession by a purchaser, with assent of the vendor, express or implied, is equivalent to a formal delivery. *Buckman* v. *Nash*, 12 Maine, 476. As delivery was not essential to pass the title, the possession, which is its equivalent as notice, may be by or under the title of the first purchaser. It is sufficient if the change of possession is perfected before attachment. *Kendall* v. *Sampson*, 12 Verm., 515.

The decision of this point renders it unnecessary to discuss other points, in reference to the attachments being only to secure liens, which have failed, and in relation to intermixture or confusion of goods, and the difficulty of selecting those cut before from those cut after the assignment, and some other questions which are not without difficulties for the defendant to overcome. *Judgment for plaintiff;—*

one cent damages and costs.

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

SAMUEL H. BLAKE *versus* HIRAM BRACKETT *& others.*

The statute of 1856, c. 213, by repealing c. 148, § 46, R. S. of 1841, repealed the statute of 1844, c. 88, amendatory of § 46.

After the passage of the statute of 1856, c. 213, there was no provision of law requiring the justices selected for taking the disclosure of a poor debtor to reside in the town where the disclosure is made, or an adjoining town.

A poor debtor having cited his creditor to attend his disclosure, and selected one of the justices, the creditor appointed a justice not residing in the town where the disclosure was to be made, nor in an adjoining town; the debtor objected, and refused to disclose, but after an adjournment by the first justice another was selected by a proper officer, and the debtor made disclosure and took the oath: — *Held*, that as the justice selected by the creditor had a right to act, the subsequent proceedings were a nullity, and in a suit on the bond full damages were awarded.

BLAKE, having obtained judgment in February, 1857, against Brackett, for $174,14 and costs, execution was issued Feb. 9, the debtor arrested, and on the 21st he gave a poor debtor's bond, with the other defendants in this action, as sureties. On the 23d April, at ten o'clock in the forenoon, at Presque Isle, the creditor having been duly notified, the debtor selected Bradford Cummings as one of the justices to hear his disclosure, and the creditor's attorney selected C. M. Herrin, of Houlton, as the other. The debtor's attorney objected to Herrin acting, on the ground that he did not live in the place where the disclosure was to be made, nor in an adjoining town, and the debtor refused to submit himself to examination unless another justice was selected in place of Herrin. The creditor's attorney declined making any other selection, and, the debtor still objecting to be examined, Herrin, at about 12 o'clock, returned home. Cummings, as one of the justices, adjourned until afternoon, and then until ten o'clock the next forenoon, when a second justice was selected by an officer duly authorized to serve the precept on which the debtor was arrested; the two justices, thus selected, examined the debtor, administered the oath, and gave him a certificate of discharge.

The case was submitted on a statement of facts, the Court

to render judgment thereon as the law requires, and to assess damages if any, on evidence to be introduced by the parties.

Blake and *Garnsey*, for the plaintiff.

Justice Cummings could adjourn but once to enable another justice to be selected. Statute, 1846, c. 215. The proceedings on the 24th were therefore null, if the record by Cummings of his action on the 23d was admissible. Such a record was admitted in *Barker* v. *Porter*, 39 Maine, 504.

The statute of 1844, c. 88, required both justices to reside in the town where disclosure is made, or an adjoining town; but was repealed by statute 1856, c. 213, § 2, leaving no limitation as to residence. It is true that the repealing statute, in referring to the Act of 1844, describes it as c. 88, of 1845; but there being no c. 88, of that year, this is clearly a clerical error. The statute of 1844, c. 88, amends and alters the provisions of c. 148, § 46, R. S., of 1841; and, as this section is repealed by the statute of 1856, the clerical error becomes of no importance.

Justice Herrin was therefore competent to act, and as the debtor refused to disclose on the 23d, when the justices were together, any subsequent proceedings, without a new notice to the creditor, were a nullity.

As to damages, since the statute of 1856, c. 263, now incorporated into R. S. of 1857, there must be a general default, and full damages.

Waterhouse, for defendants.

The Act of 1856 repeals c. 88, of the statutes of 1845. This does not affect the Act of 1844. The Act of 1856 omits to state where the justices shall reside, otherwise it is similar to the previous Act. Not being inconsistent with the Act of 1844, it does not repeal it by implication. Bouv. Law Dict., "Repeal"; 1 Kent's Com., 462.

If the Legislature made a blunder, the Court has no power to correct it. *Rex* v. *Mabe*, 30 Eng. Com. Law Rep., 145, (3 A. & E., 531;) *Lawton* v. *Hickman*, 58 C. L. R., 561, (9 Q. B., 563.) The erroneous reference is not cured, as might

have been done, by the insertion of the title of the Act of 1844, in that of 1856. Although the R. S. of 1841, c. 148, § 46, was doubtless repealed, the Act of 1844 remained in force.

But if the Court determines otherwise, the damages are to be assessed by a jury, or at all events, are to be only the actual damages. R. S., 1857, c. 113, § 48.

The opinion of the Court was drawn up by

KENT, J. — The condition in the bond in suit has been broken, unless the debtor has complied with the requirements in reference to a disclosure and oath. He produces a copy of a record signed by two justices of the peace and quorum of Aroostook County, setting forth that after due and legal proceedings and adjudication, they administered to the debtor the oath required by law.

The plaintiff objects to this record as a discharge, because, as he says, the two justices who acted were not authorized to act, and therefore the discharge was invalid and not a compliance with the conditions of the bond. The facts proved are, that the creditor was present by attorney at the time and place named in the citation, and selected a justice who was present and ready, and offered to proceed in the disclosure. The debtor objected to the justice thus selected by the creditor, because he did not reside in the town where the disclosure was to be made, or in an adjoining town. The fact was, that he did not so reside. Thereupon the justice selected by the debtor, considering that the creditor had refused or neglected and unreasonably delayed to select a justice, adjourned to enable the debtor to procure the attendance of a justice; and on the next day, within twenty-four hours, another justice appeared, who was selected by an officer, according to law. The two justices, thus appointed, proceeded to act and to administer the oath and give the discharge.

If the law, at the time of the disclosure, did not require that the two justices should reside in the town, or in an adjacent town, then it is clear, and not disputed, that the exigency had

not arisen authorizing the officer to appoint one of the justices. If it did thus require a residence, the appointment was legal. The decision of this question depends upon the construction of the second section of the Act of March 13, 1856, chap., 213; which repeals section 46 of chap. 148, of the Revised Statutes, and chapter 88 of the public laws of the year eighteen hundred and forty-*five*.

By referring to the 46th section of the 148th chapter of the R. S. of 1841, as printed in the volume, we do not find the provision in question, in reference to the residence of the justices. But this section was amended by the insertion of that provision, by Act of Feb. 23, eighteen hundred and forty-*four*, c. 88. The repealing Act of 1856, after providing in the 1st section, for the selection of justices, enacts, that "section 46, of chapter 148, of the Revised Statutes, and chapter 88, of the Public Laws of eighteen hundred and forty-*five*, are hereby repealed." It is admitted that there was no Act in the Public Laws of 1845, which was numbered chapter 88, and no statute of that year on the subject of poor debtors.

We deem it unnecessary to decide the question, whether a naked repeal of an Act, described only by the year of its enactment and the chapter of the volume, can be applied to an Act of a former year, numbered as described, and operate to repeal that Act. There can hardly be a doubt that there is an error in reference to the year; because the first section of the repealing statute refers to the subject-matter of the 88th chapter of the Laws of 1844, and the 46th section of c. 148 of the Revised Statutes, (which, it is admitted, is repealed by this section,) is almost identical with the first section of the law of 1856.

The case *In re Boothroyd*, 15 M. & W., 1, is very similar to this. In that case, a statute was referred to, in another statute modifying or repealing it, as the statute of 13 Geo. 3, reciting its title, which was identical with the title of a statute of 17 Geo. 3. The Court held that, as the title was set out and as there was no other statute so entitled, and no statute of 13 Geo. 3, which could be affected by the repealing Act, the

statute should be read as referring to the 17 Geo. 3, although it actually read 13 Geo. 3. In this English case, the *title* of the Act was set forth, which is not recited in the case at bar. But the other points are the same in both. We are not prepared to say that there are not sufficient points of identification to show that the clear intent of the Legislature was to repeal the Act of 1844, notwithstanding the year named is 1845.

But we are satisfied that the question is not to be decided solely by reference to the words repealing the Act of 1845. This section, in the first place, repeals distinctly the 46th section of the 148th chapter of the Revised Statutes. This is admitted.

What did that repeal of the 46th section embrace? What was the 46th section of the Revised Statute in 1856, when the repealing Act was passed? Was it only the words of the section as they stand in the printed volume, or did it include the section as it read after it was amended in 1844?

The Act of 1844, c. 88, it will be observed, does not contain any enactment of matter independent of the 46th section of the Revised Statutes. It does not say that it is enacted that the justices selected shall reside in the town, &c; but only enacts, that the 46th section of the 148th chapter of the Revised Statutes shall be amended by inserting certain words, so that the section as amended *shall be* as follows:— "Sec. 46. In all cases," &c.

It does not repeal that section. It only puts into it a certain provision, in certain words. It simply enlarges the section, retaining its identity as *the* 46th section of the Revised Statutes. It even retains its number, 46. It simply enacts that *the* 46th section of the Revised Statutes shall remain as such 46th section, with certain words inserted in different places; but it is still the 46th section. The title of the Act is "to amend the 46th section of the Revised Statutes."

The Act of 1856 recognizes the fact of the continued existence of the 46th section. The question returns, what was repealed by the repeal of the aforesaid forty-sixth section of

the Revised Statutes? It seems to us clear that it repealed the section as it was in fact after the amendment of 1844. If, then, we strike out of the repealing section of the Act of 1856, the words relating "to chapter 88, of the Public Laws of 1845," or treat them as void and inoperative, the words preceding, repealing the 46th section, will cover the whole ground, and repeal the section as it reads in the law of 1844.

If we hold that the 46th section, as it stands in the printed volume, is entirely repealed, and the new matter in chapter 88, of 1844, is unrepealed, we shall have only disjointed parts of sentences remaining, without any thing in sense or syntax to support them. This can not have been intended. The 46th section of c. 148, of the Revised Statutes, as amended by c. 88, of the laws of 1844, is repealed by c. 213, of the laws of 1856. The last named Act was in force when these proceedings were had, and their legality must be determined by the application of the provisions of that Act to the facts established.

No provision is there found in relation to the residence of the justices, and the only existing requirement was that the justices should be of the county. The creditor did not neglect or refuse to make such selection, but did select a proper person.

The contingency did not arise, which would have given a legal right to an officer to select, and therefore the selection made by the officer was an inoperative and void act.

The only remaining question relates to the damages to be assessed. By statute of 1848, c. 83, as construed in the case of *Winsor* v. *Clarke*, 36 Maine, 110, when a debtor had taken the prescribed oath before two justices of the peace and quorum, the damages to be assessed were the actual and real damage, and no more, although the magistrates had no jurisdiction for the purposes of the disclosure intended.

This decision was in 1853. In 1856, by c. 263, (R. S. of 1857, c. 113, § 48,) the Legislature revised the law and enacted, as one of the conditions, that the oath should have been allowed by and taken before justices "having jurisdiction

and legally competent to act *in the matter.*" The *matter* here referred to must be the disclosure and adjudication thereon, and not merely the general power of a justice to administer an oath.

It is clear, as before shown, that in this case the justices, who acted, had not jurisdiction, and were not legally competent to act, and their proceedings were not a performance of the condition of the bond, and do not authorize the Court or jury to assess the actual and real damage.

Defendants defaulted.

Judgment for full amount of execution, costs and fees of service, with interest thereon, against all the defendants; and a special judgment against the principal, Hiram Brackett, for interest at 20 per cent. per annum, according to § 38, c. 113, of Revised Statutes.

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

BANGOR, OLDTOWN and MILFORD RAILROAD COMPANY *versus* THOMAS SMITH.

In the absence of proof that a suit brought in the name of a corporation was not authorized by it, its assent will be presumed, although the corporation is but a nominal party.

Where evidence has been offered, that a railroad corporation is building a branch track under the direction of its president, the company, if not otherwise shown, will be held to sanction the acts done and the purpose in view.

When an Act amendatory of the charter of a corporation contains no provision requiring a formal acceptance of it, acceptance may be implied from corporate acts. Grants beneficial to a corporation may be presumed to have been accepted.

A railroad corporation may lay side tracks for its convenience over any land it may own in fee, or land of individuals giving legal consent thereto, if no public interest or private right is affected.

Bangor, Oldtown and Milford Railroad Co. *v.* Smith.

An Act, general in its terms, and applicable to all railroads, is within the meaning of the Statute of 1831, c. 503, empowering the Legislature to modify the charters of corporations; and affects the charter of any railroad company which contains no express limitation to the contrary.

The Statute of 1853, c. 41, prescribing generally how railroad corporations shall proceed in the location of tracks, is applicable to a company incorporated in 1833, although its provisions in that respect are dissimilar to those in the Act of incorporation.

By locating their track across a highway, a railroad company acquires the right to lay their rails and road bed across said highway, in the direction or line of their road; and, it may be, to lay a second track in the same direction and parallel with the first, if the whole line is of that character, and the business of the road requires it; but not to lay a track in a different direction, on an angle or curve, though within the limits of their described location.

Under the statute of 1853, c. 41, § 3, providing that railroads shall not be carried *along* any existing highway, but "*must cross* it in the line of the railway," a corporation cannot extend a curve in a branch track partly over or along a highway, but without crossing it.

On Report of the evidence by Appleton, J.

This was an Action of the Case for obstructing the plaintiffs in the construction of their track at Oldtown.

Writ dated Sept. 13, 1858.

Plaintiffs introduced their Act of incorporation by the name of Bangor and Piscataquis Canal and Rail Road Company, passed Feb. 8, 1833; also an additional Act, extending the rights of said Company for ten years, approved July 31, 1847; also another additional Act, allowing the Company to take the name of Bangor, Oldtown and Milford Rail Road Company, approved March 14, 1855, all which Acts make a part of the case.

Also the records of the Company adopting a branch track at Oldtown, extending from the main track to Veazie's Mills; also the petitions of the Company to the County Commissioners, and their proceedings thereon, for the establishment of the branch track, and for crossing the highway at Oldtown village; also a plan of the proposed extension at Oldtown, filed Sept 15, 1854, in the office of the Clerk of the Courts for Penobscot County; also a deed from Jackson Davis to Samuel Veazie of lots No. 16, 17 and 18, in Oldtown, dated

May 19, 1826, and recorded the next day after its date; all which papers and records are made a part of the case.

The plaintiffs offered to prove that, on the 29th day of July, 1857, while they were at work with about a dozen men, finishing the branch track leading from the main track to the east end of the mills and the track laid down on the plan extending from the railroad bridge, thence by the front of the mills to the branch track at a point near the street where the branch track crosses it, the defendant and several other individuals forcibly opposed the workmen so as to prevent their going on with the work; that the president of the company was present, and requested them, and especially the defendant, to desist and stand away, so as to allow the men to work; that the defendant especially refused, and proceeded to place a bar in front of the workmen, and stand by it with determination to resist, and did resist the workmen, others being present in large numbers to assist in the resistance; that then the defendant seized the tools of the men as they undertook to work, the defendant being the principal or most active man in the opposition; that he seized the person of the president, and so opposed the work that the workmen were entirely prevented from proceeding with their work, and therefore quit; that they did not resume the work on the next day, because they regarded it as useless to attempt it, on account of the defendant's and others' determination to prevent the track being completed, and besides that, time enough did not remain after that day to complete the track before the expiration of said term of ten years, granted in the additional Act of 1847.

The plaintiffs also offered evidence to prove that, at the time and place where the defendant and others resisted them as aforesaid, the workmen were engaged in the work of constructing the track on land of Samuel Veazie, conveyed to him by said Jackson Davis' deed, and that he had been in possession of the land ever since said deed was given; that he assented to the laying out of the road over his land by the company, and to the construction of it; that he was the

president of the company, and owner of the mills, for whose benefit, in part, the track was established; and that the company were proceeding in the construction of the road under his direction; that but a single set of rails had already been laid down along said branch track; and that the track upon which the men were at work when resisted, would, before reaching the line of the street, come within the four rod strip laid down on the plan as taken across the street, thus amounting, as the plaintiffs contended, to only a "double track," "a turn out," "a set of rails," as provided in the charter, and if not so, that the right to cross the road with one or more sets of rails was perfect under the foregoing proceedings. The description of the tracks located, as contained in the County Commissioners' records and company's vote, does not include the track on which the men were at work when resisted; but the track is represented by the line on the plan, and its location, and the work upon it, were authorized and assented to by the owner of the land, Gen. Veazie, who was at the time president of the company.

The plaintiffs claimed as damages, for the illegal acts of defendant, the injury to them by reason of not being allowed to lay a double track as above contemplated, and thus to form a connection of the track in front of the mills with the track back of the mills, so that the cars might be enabled to proceed at once in a direct line towards the main track, instead of the circuitous and dangerous direction otherwise required to run the cars from the mills; the company having by the means been deprived of the power to complete the connection by reason of the acts of the defendant and others, inasmuch as the time allowed by law expired on the next day, under the circumstances aforesaid.

The plaintiffs also claimed damages for being prevented from laying the track up to the line of the road, as contemplated under the consent of the owner of the land; also for interrupting the workmen as they were engaged at the time.

The whole case was taken from the jury, under the agreement that if the plaintiffs were not entitled to recover, on

proof of the facts offered and legally provable as aforesaid, they were to be nonsuit, otherwise the case to stand for trial, and, in the latter case, the Court to decide upon the proper measure of damages to be adopted under the facts offered to be proved.

A. W. Paine, for the plaintiffs.

1. The suit is for damages to the corporation by unlawful disturbance of their rights while laying down a railroad track. Had they a right to lay down the track? They were laying it on land of Veazie, with his assent. It seems to be well settled that a railroad company may build a road over land of individuals with their consent by parol only. The land owner may waive the statute provision for appraisement of damages, and the company may proceed as if the statute had been followed. Redfield on Railways, 105, 106; *Miller* v. *A. & S. R. R.*, 6 Hill, 61; *Embury* v. *Conner*, 3 Com., 516; *Wallis* v. *Harrison*, 4 Mees. & Wels. 538. The land owner could be compelled to execute a license to cover the works erected on the faith of a parol permission. *Hatch* v. *Vermont Central R. R.*, 25 Vt., 72. See, on a kindred subject, *Ricker* v. *Kelley*, 1 Greenl., 117; *Clement* v. *Durgin*, 5 Greenl., 9; *Baker* v. *Brown*, 6 Hill, 47; *Old Col. R. R.* v. *Evans*, 6 Gray, 25.

The defendant had no interest in the land on which the work was going on, and no right to call the plaintiffs' acts in question. Suppose they had been laying a track by consent of the land owner to a gravel bank which they owned, what right has a third party to interfere? Or, suppose they, by consent, lay down side tracks for their empty cars near a depot, shall a third party tear them up? Yet all this may be done without a location or even a vote of the company.

2. But the plan introduced shows that there was a location. It has this very track marked upon it, on which they were at work. The action of the County Commissioners is not required where the parties agree. The statute is based on the idea that the consent of the owners waives all objection. It

forbids railroad companies taking land more than four rods in width, "otherwise than by consent of the owners." R. S., 1841, c. 81, § § 2, 3. The charter of this company also provides, "in case the parties shall not otherwise agree," &c., § 4. The consent of Veazie was equivalent to a location.

3. The only other question is that of damages. The plaintiffs are doubtless entitled to damages for the loss of the work of the men when driven off, and to such exemplary damages as the jury may assess. They claim more. It was important to lay this track in front of Veazie's saw mills, thence into the main track, and so on to Bangor. This would pass all the way on Veazie's land, except where it crosses the highway. It would cross the highway on the four rods already taken for the branch road, approved by the County Commissioners. It is thus *quoad hoc* a "double rail," "turn out," or "side track," which the charter authorizes. The charter allowed ten years for completing the works, and the additional Act of July 31, 1847, extended the time to July 31, 1857. The defendants obstructed the work July 29, 1857, and defeated the completion of the track within the limitation. Such is the testimony offered. In consequence, the cars have to go two or three times the distance around a sharp corner. Damages are claimed for this injury, if they had the right thus to cross the road. The right is claimed, because the crossing was to be within the four rods previously taken; the track for which it was taken was single, and this would make it a double one, which the plaintiffs had a right to lay, or it was a "turn out," as provided in § 4, of their charter. A "turn out" was actually laid down on the plan adopted by the Commissioners. This track was not an independent road, but the track and crossing were really one and the same with the one adopted. A formal location was not needed, as the whole road, besides the crossing, lay across land of consenting owners. Redfield, 190, 191; *Little* v. *N. A. & H. R. R.*, 14 Eng. L. and Eq. R., 309; *Ladd* v. *M. W. & B. R. R.*, 2 do., 410.

The charter of the company, § 5, expressly gives power to

construct the road over highways; under this power, the location was sufficient. The charter must control. It is doubtful if this charter is subject to the Act of 1853, respecting the location of railroad tracks. The law of 1831 subjected corporation charters to be altered, amended or repealed. But is a general law an amendment or alteration of a charter? The Act of 1853 is not a "police regulation." The conclusion is that the location is sufficient, if according to the charter.

The plan of extension is referred to as a part of the record of the County Commissioners, and a turn out being laid down on the plan, is adopted as a part of it.

The plaintiffs having been prevented by the defendant from completing their works within the ten years limited, have lost the right to complete them as they proposed to do across the highway. They therefore claim damages for the loss of this right.

J. A. Peters, for the defendant.

1. No authority is shown for commencing this action. No record authority is exhibited, nor is it proved that the president was a general manager of the road. Formerly, C. J. MARSHALL held that a corporation could neither talk nor act but in writing. This rule has been relaxed, and perhaps too far. In this State, the president of a bank may sue a note in the name of a bank. 29 Maine, 564. But in 1 Cush., 507, it was decided that the president of a manufacturing corporation could not commence a suit in the name of the corporation.

2. No authority from the corporation is shown for Veazie to build a new track or make an extension. It is not within the ordinary business of the road. The company had acted on extending the road across the highway, but nothing further. It is not shown that Veazie was president. But if he was, it does not authorize him to lay a new track. The record of the track put in, not including *this* track, excludes it. *Expressio unius est exclusio alterius.* If the president can build one mile without authority, or one track, why not 100

miles or 100 tracks? There being no corporate authority to commence the suit, and none shown about the cause of action, the plaintiffs must fail. *Coffin* v. *Collins*, 17 Maine, 440; *M. C. Cor.* v. *Herrick*, 25 Maine, 354; *Rollins* v. *Clay*, 33 Maine, 132. An agent can act for a corporation within the scope of his authority, in the execution of its ordinary business. If building a new track is ordinary, every day business for a railroad company, Veazie may have had authority.

3. There is no evidence that the Act of 1847 was ever accepted by the corporation. The plea of general issue by the defendant admits only the plaintiffs' capacity to sue, and this he could do by the original charter. *O. & L. R. R. Co.*, v. *Veazie*, 39 Maine, 571. The acceptance of the original charter may be presumed from acts under it; but not so with a modification. Redfield on Railways, § 2, p. 10, and cases there cited. If not accepted in the prescribed form, the corporation can derive no advantage from it. *Green* v. *Seymour*, 3 Sand. Ch. R., 285. Chap. 77, § 4, special laws of 1847, prescribes the mode of accepting the Act, which, not being complied with, it does not appear whether the plaintiffs sue as the old or the new corporation. Besides, the new Act was not only auxiliary to the original Act, but fundamental in its modifications. It authorizes an extension of the road in a new direction, across Penobscot river and into several new towns, at great cost: also the building of wharves and piers in tide waters at Bangor, § 2; also the increase of capital stock from $200,000 to $600,000. There can be no presumption of the acceptance of such material changes, without evidence of corporate action in the manner prescribed in the statute. *Bank* v. *Richardson*, 1 Greenl., 80; *Ellis* v. *Marshall*, 2 Mass., 269; *Hunt* v. *S. & C. Railway*, 3 Eng. L. and Eq. R., 144; *Middlesex Turnpike Co.* v. *Locke*, 8 Mass., 268; *Swinsten* v. *Lynch*, 4 Johns. Ch. R., 573; Redfield on Railways, § 10, p. 91, and succeeding pages, and cases cited in the notes.

4. The plaintiffs had no right to build a track where they were at work, because there had been no track located there. They petitioned for a location and crossing, but not this one.

The company's vote, the petition and location by the Commissioners, described a line, but not this line. True, there is on the plan a single line drawn along this track, but that does not constitute a location; if it does, there were fifty other lines on the plan which were each locations of tracks. In the written location, another track is minutely described, but no allusion is made to this line. The suit is for preventing the building of a track located; but no such track was ever located. The statute prescribes the mode of locating and recording tracks; but there is no pretence that it was done in this case.

The plaintiffs say they were on Veazie's land. The answer is, they have no right to build a road on anybody's land, with or without consent, without a prior location. And if they had this right, they had none to run their road across the street, without the consent of the town, which had not been given. They reply, that they would cross within the limits of their former location. But a railroad location across a way gives a mere right of transit, to be regulated by the town or County Commissioners, and not a right to use and occupy the whole width. All the statutes distinguish between the rights of a railroad *off* and *upon* a street. Otherwise the two easements would be wholly inconsistent with each other. The case of *Brainard* v. *Clapp*, 10 Cush., 6, gives a construction to the powers of a railroad not applicable to the crossing of a way. Take the case of one railroad crossing another, and if each is entitled to the width of its location, their rights would conflict. The plaintiffs' construction cannot be maintained, and the use claimed would be indictable as a nuisance. *Commonwealth* v. *N. & L. R. R. Co.*, 2 Gray, 59; *Comm.* v. *Vermont, &c. Corp.*, 4 Gray, 22; 4 Cush., 63; 6 Cush., 424; 19 Eng. L. and Eq. R., 131; Redfield on Railways, 540.

The plaintiffs set up a right to make this a switch or a turn out. But they have no right to make them in a street, and all the foregoing reasoning and authorities are an answer.

Damages. The suit is by the company, not by Veazie,

and for preventing a railroad connection. They had no authority to build the road; therefore there can be no damages. The same is true, if they had a right on Veazie's land, for they could not connect across the street. Even if they could connect across the street, there can be no damages for preventing them, for they can as well build now as before the Act of 1847 expired. The street would be their own, and Veazie's land in their control; and if no location was necessary before, none is necessary now. And the damages, if any, are nominal, for the defendant did not cause the injury, but the expiration of their time caused it.

A. W. Paine, in reply.

1. As to the authority to sue. The company prosecute the suit in their own name, and there is no evidence that the name is used without authority. The Court will presume it right. But the objection comes too late; it should be in abatement, if at all.

2. As to the authority to build the road. The workmen were laying down the track under the direction of the president. *O. C. R. R.* v. *Evans,* 6 Gray, 38, sanctions it.

3. As to the acceptance of the new Act. The company asked for it, and have acted under it. It was for their interest to accept it, and acceptance will therefore be presumed. Redfield, 10; *C. R. Bridge* v. *Warren Bridge,* 7 Pick., 344; *Bank U. S.* v. *Dandridge,* 12 Wheat., 64. Acceptance may be proved by parol, and is proved by the acts of the company. It is not a case where it must be in a prescribed form. The Act prescribes the mode of calling a meeting, not to accept it, but to choose officers.

4. The plan filed was equivalent to filing a location. But as to consenting parties, no location need be filed.

5. The company have no right to take land under the street, it is argued. The reply is, they take it subject to the public easement, and within the four rods taken may cross the street with two sets of rail, whether parallel or diverging; or with a turn out.

The opinion of the Court was drawn up by

KENT, J. — The first objection made by the defendant is that no authority is shown to commence this suit.

No motion to dismiss has been made, and no call for evidence on this point. If there had been, the offered evidence shows that the action is entirely for an alleged injury to the corporation and its rights; and the case finds that the plaintiffs offered to prove that they were at work finishing a branch track, and "that the company were proceeding in the construction of the road," under direction of its president, when the defendant interposed and obstructed the workmen of the company. In the absence of any proof that the suit was not authorized by the company, the Court must presume that it was properly instituted; and such assent may be presumed where the corporation is a nominal party only. *Lime Rock Bank* v. *Macomber*, 29 Maine, 564.

2. Defendant denies the right of the company to recover in this action, because, as he contends, there was no authority given by the corporation to Gen. Veazie, and the other men engaged with him, to lay the track in question.

The case finds, as above stated, that the plaintiffs offered evidence to prove that the *Corporation* was at work finishing the branch track, and was proceeding in the construction of the road, at the place in question, under the direction of their president. As the case is presented, we are bound to assume that the plaintiffs did or could establish these facts by legal proof, and that the company authorized, recognized or ratified the acts done, and the purpose in view.

3. Defendant objects that the corporation could not lay this track, or cause it to be laid, because, he says that the additional Act of 1847, by which the original Act of incorporation was extended ten years, and a new authority given to extend the railroad and branches in Oldtown, was never accepted by the company.

There is no requirement in this Act of 1847, as contended by the defendant, that the same must necessarily be accepted

by a formal vote of the corporation. The 4th section has reference to a reörganization of the company by the owners of the railroad, if they saw fit. There is nothing in that section from which we can infer that any formal vote of acceptance of the provisions of the other sections was required. The Act in this respect stands upon the same ground as any other amendatory Act. Grants, beneficial to a corporation, may be presumed to have been accepted by them, the same as in case of natural persons. *Charles River Bridge* v. *Warren Bridge*, 7 Pick., 344.

In *Coffin* v. *Collins*, 17 Maine, 442, it is said, in relation to acceptance of a charter, "No formal vote of acceptance is necessary. It may be implied from proof of any regular corporate act." In this case there is evidence that the company, by its directors, did, in September, 1854, vote to make an extension, authorized only by this additional Act of 1847, and did cause the same to be recorded and established. These proceedings clearly show an acceptance of the Act. *Bank U. S.* v. *Dandridge*, 12 Wheat., 64.

The next objection rests upon the position that there was no legal location or laying out of this branch track, over the land where the resistance was made by defendant.

It seems quite clear that this branch or side track was not included in the description in the petition of the company, the survey, or the action by the County Commissioners, as exhibited in the records. There was a mere single line, without any width, marked on the plan filed. But there was no reference to this line in any of the above named papers or records, and no evidence that it was recognized as a laying out. The branch track actually laid out was exactly defined as but one branch or line of railroad, from the extension to the end of the mills. We must therefore conclude that this side track in question was not located by the above proceedings, or by any legal action in pursuance of the provisions of the statute.

But the case finds that the plaintiffs offered to prove that the company had assumed to lay the track, and was actually

laying it, at the time and place of the acts complained of; and also that the place of interference was on land belonging to the president of the road, and that the work was proceeding by his express assent and under his direction. These facts we must assume as established by legal evidence. We have no doubt that a railroad corporation may lay side tracks for the purpose of facilitating its business operations, or to meet its necessities, over any land which it may purchase and own in fee, or over which it may obtain the legal consent of the owner to lay a track, if no public interest or private right is affected. The principal, if not the sole object of the provisions of the statute requiring a formal location and acceptance, and recording of the line of way, is that the rights of individuals in their lands, and the rights of the public in the highways and otherwise, may be protected and secured. At all events, we may safely assert that a private person, who has no right and interest in the land, and who sets up no claim of a right in any form to interfere, cannot, of his own mere will and motion, forcibly interpose to prevent the company from proceeding in their work of laying down a side track over land of their own, or over which they have the license or consent of the owner to lay their rails. The defendant represents neither the State nor any individual landholder, and is therefore a wrongdoer, and must be held answerable for his illegal acts.

The next question submitted has relation to the rule of damages.

This action is by the corporation for injuries to its corporate rights. Assaults upon individuals, or indignities offered to, or injuries suffered by them personally, cannot be considered in this action. Whatever loss or injury was sustained by the corporation by the wrongful interference and acts of the defendant, and were the natural results of such acts, would properly be regarded as damages to the plaintiffs. This rule would include the necessary loss of time of the workmen, the detention and suspension of the work for the time during which it was necessarily obstructed or suspended, and all

other damages, the manifest result of this illegal interference, and which the jury might, under all the circumstances, deem proper.

But the plaintiffs claim larger damages than the above rule might give to the corporation. It is asserted that the intention was to continue this track from the land of Gen. Veazie until it reached the rails on the track before laid out across the county road, and specified in the records of the County Commissioners, before referred to; and, further, that the corporation had a legal right thus to extend the track, and that the ten years extension, granted in the Act of 1847, expired on the next day after the interference of defendant; and that, by that interference and forcible resistance, the corporation was unable to complete this branch track within the time limited by the Act, and thus suffered great loss and injury, which ought to be paid by the defendant. It is, perhaps, unnecessary to consider what the exact rule of damages would be, provided all the above positions were sustained as facts in the case; because we are of opinion that the corporation had no legal right to lay the track, in the manner proposed, within the limits of the county road or highway. The railroad company had already laid out and established a track *across* the county road according to law, and had built their road thereon, in the direction of "the line of the railway."

The claim now is, to lay this side branch from a point on the railroad, in the highway, not "across" the road, in the "line of the railway," but in a curved line more nearly parallel with the side lines of the road than with the line of the rails across it, and leaving the railroad entirely before it reaches the opposite or easterly side of the highway.

The corporation claims this right mainly on the ground that all of this curved line or turn out, is within the limits of the four rods laid down on the plan and in the record, as the width of the railroad where it crosses the street, and that within that width the company have a right to use the space to lay down a double track, or to make a turn out, as they proposed to do.

Under the original charter of 1833, the company was authorized and required, after having surveyed and adopted a section or division of their line, to deposit a description of the same in the clerk's office, to be recorded, agreeably to section 4. They were, also, by section 5, authorized "to construct and carry their railroad on, over or across any roads, highways or other roads or ways, and construct any bridges or viaducts over or under the same, and to raise or lower any public or private road or highway;" but must leave such road or highway in a safe and passable state; and they must not "construct or carry their road over or across any other road in such a manner as to prevent, interrupt or impede the travel or transportation thereon."

The exercise of these powers seems to have been left to the discretion and judgment of the railroad company, subject only to the interference of the public by indictment for a nuisance, or to private individuals for any injury sustained by the abuse of power, or the neglect of the corporation, until the general law of 1853, which prescribes the mode and manner of crossing public highways.

A material question is, whether, as to this crossing, the corporation is bound by the Act of 1853. It will be observed that all the proceedings in reference to the surveys and adoption of this branch, which crosses the highway at the place in question, were subsequent to the Act of 1853.

The original charter was in 1833, and subsequent, of course, to the general Act of 1831, by which all Acts of incorporation passed since March 17, 1831, are liable to be amended, altered or repealed by the Legislature, as if express provision therefor were made in them, unless they contain an express limitation.

The question does not relate to any thing done by this company, in the matter of crossing highways, prior to 1853.

The Supreme Court in Massachusetts, in a case almost identical in its facts, on this point, with the case at bar, has decided that an Act, general in its terms, and applicable to all railroads in the Commonwealth, and in its terms specifically

applicable to the case in question, is warranted by the general Act giving the Legislature power to modify Acts of incorporation, and that the Legislature may thus modify or alter such charters; particularly where the Act has reference to the remedy, and points out and provides for a more practical way of carrying out the provisions in the charter of the company. *City of Roxbury* v. *Providence Railroad*, 6 Cush., 431.

This seems to be the intent of the statute of this State, of 1853, c. 41; and we have no doubt that this company are bound to comply with its provisions, as to locating and making their road, and as to crossing any street or highway. The plaintiffs seem so to have understood it, and acted in accordance with its provisions in their votes, petitions, surveys and location of the branch track which crosses the road. The regularity of the proceedings of the company, and of the County Commissioners, is not contested; and, by those proceedings, and the record thereof, this branch was duly located across the highway in the general line of the railway, according to the provisions of the law of 1853.

What right did that location give to the company in the highway? The right was that of transit—the right to lay down their rails, and carry their actual road over the highway, without curve or deflection from the line of the railway before it reached the highway—as provided in section 3. The right of the public in the highway is still paramount to that of the company, for all purposes except that of transit. *State* v. *Vermont Central Railway*, 27 Verm., 103; *Commonwealth* v. *Nashua and Lowell Railroad*, 2 Gray, 54; *Ibid.*, 389.

The company does not take the land of the highway as real estate of individuals is taken, nor does it acquire the right to take all materials in or upon the highway to be used for the railroad, as in that case. The railroad company cannot dig up the earth or gravel on the highway, to build or repair their road. No damages can be assessed for the public, for the taking or use of the highway. If the company acquires any right within the limits of the four rods in width in the highway, marked on the plan as in the limits of its lo-

cation, beyond that space actually occupied by the rails and road bed, it is only such as is indispensible or necessary to the full enjoyment of their right to lay the track across the road, and to use it beneficially. They acquire, perhaps, no proper easement in the soil, or, if any thing which can be thus denominated, it is qualified and limited to the special purpose of crossing with their rails, and supporting the necessary and sanctioned road bed. It may not be beyond their right to lay a double track across, in case the whole line is of that character, and required by the necessities or business of the road. But such second rails must, like the first, be laid in one line parallel to the other track, and that line must be in the direction or line of the railway, as before explained.

This brings us to the final and fatal objection, if no other existed, to the proposed curved line of the projected side track on which the work was progressing. The 3d section of the Act of 1853 provides, that "railroads shall not be carried *along*" any existing highway, but "*must cross* the same in the line of the railway"—unless leave be obtained from the town or city through which the same shall pass.

The proposed curved line is, as before stated, not *across* the road at all, but *along* the highway, nearly parallel with the side lines of it. If the company had the right to use the four rods to lay a new track, or side track, in the same manner and to the same extent as on land taken from an individual, the right is clearly and expressly limited to crossing only in the line of the railway; and any direction *along* the highway is distinctly prohibited, without consent. No consent is shown, or contended for. We are therefore satisfied that the company could not legally connect the track it was laying down, on Gen. Veazie's land, with the road already existing, in the manner and in the line proposed.

The result is, according to the agreement of the parties, the case is to stand for trial, upon the principles, as to the measure of damages, before stated.

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

MOSES GIDDINGS *versus* SAMUEL DUDLEY.

An agent having received money of his principal, and paid it in the course of business in his agency to a creditor of the principal, and both agent and creditor having settled their accounts with him, the creditor not allowing the payment, and the agent refunding it: — *Held*, that the principal, on proving the facts, may, nevertheless, recover the money of the creditor in a suit in his own name.

ON REPORT of the case by HATHAWAY, J.

This was an action on the case for money had and received. The plaintiff was conducting lumbering business in 1855; William McLellan was his general agent, receiving and paying out money; and the defendant boarded his men and drove his logs. Sometimes the plaintiff, and sometimes McLellan paid money to the defendant. July 2, 1855, the plaintiff himself settled accounts with the defendant. In February, 1856, he settled with McLellan, when McLellan claimed to have paid fifty dollars to the defendant, which had not been included in the plaintiff's settlement in July. If so paid, the defendant was overpaid to that amount.

The case was submitted to the Court, and the Court found that McLellan received of the plaintiff, June 7, 1855, $150, which sum he paid out in the plaintiff's business; and that he paid $50 of the sum to the defendant, as he alleged. In the settlement of the plaintiff with McLellan, he having no voucher from the defendant for the $50, and the defendant denying that he had received it, it was struck out of McLellan's account, and the account was thus settled. McLellan had no business of his own with the defendant.

A nonsuit or default was to be entered, according as the Court should determine, that this action could or could not be maintained in the plaintiff's name.

Blake & Garnsey, for the plaintiff, argued, that McLellan, being the agent of the plaintiff, having paid the money to the defendant for the plaintiff, and having no business of his own

with the defendant, it was the same as though the plaintiff himself had paid the money to the defendant. If he paid it by another, he can recover as though he had paid it himself. The fact that he did not allow the payment in his settlement with McLellan makes no difference. No bargain between the plaintiff and McLellan can affect the rights of the defendant. There is no privity between McLellan and the defendant. McLellan acted as agent or clerk for the plaintiff. Had he, as clerk, sold goods to the defendant, and, on defendant's denying the receipt of them, been required by his principal to settle for them himself, could not the principal, if afterwards he could prove the sale, sue the defendant in his own name?

Sewall, for the defendant, contended, that McLellan received the $150 of the plaintiff on a general account between them, and having settled for the whole sum subsequently, the plaintiff has lost nothing, and cannot maintain this action. McLellan voluntarily paid back the $50 to the plaintiff, knowing all the facts; under these circumstances, it is a settled principle of law that he cannot recover it of him again. The plaintiff is not, therefore, liable to refund it to McLellan, and cannot recover on the ground of any such supposed liability. If the defendant is liable to any one, it is to McLellan. If the plaintiff recovers in this action, he gets $200 for his $150.

The opinion of the Court was drawn up by

APPLETON, J.—When the plaintiff and the defendant settled, on July 2, 1855, the latter had in his hands fifty dollars of the former's money, which had been paid him by one McLellan, the plaintiff's agent, but the payment of which the defendant, as the case finds, falsely or through mistake denied. In the settlement there was an overpayment through mistake. Had the plaintiff, after discovering it, the next day commenced his action therefor, it is not denied that it might have been maintained. It is not perceived why it is still not equally maintainable. The defendant still wrongfully withholds it.

The privity of contract exists only between these parties. It is now equally the money of the plaintiff in the hands of the defendant as at the date of the overpayment.

Defendant defaulted.

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

MORRILL BARTLETT, *in Equity, versus* JOSHUA FELLOWS.

Where there is a conflict of testimony as to how much has been paid on a mortgage note, and whether sufficient to redeem the mortgaged premises, unless the parties submit it to a jury, the Court will not determine it, but refer it to a master in chancery.

BILL IN EQUITY, for the redemption of mortgaged premises.

In June, 1856, the plaintiff conveyed to the defendant in mortgage the premises described, to secure two notes of $250, each, payable in one and two years. The first note was paid at or about maturity, and surrendered. Certain payments were made from time to time on the second note; and the bill alleges that by these payments it was fully paid, and prays for a discharge.

The answer admits all the payments alleged in the bill, except one of $30, said to have been paid Aug. 1, 1857; denies that any such payment was made, and claims that the sum due on the mortgage and second note, at the date of the answer, Dec. 31, 1858, was $30,60.

The testimony with regard to the disputed payment of $30, was voluminous and conflicting, and tended to impeach the reputation of witnesses on both sides, as to their veracity. In the view taken by the Court, it is not important to report the evidence.

A. W. Paine, for the plaintiff.

Godfrey & Shaw, for the defendant.

The opinion of the Court was drawn up by

MAY, J.—The right of the mortgager to redeem the premises described in his bill is not denied. The only question discussed in the long and able arguments of counsel, is, whether the notes secured by the mortgage have been fully paid. Such payment is charged in the bill, and the respondent in his answer admits all the specific payments alleged to have been made, except that of $30, under date of August 1st, 1857. This he denies. If this payment was made as alleged, then nothing is due upon the mortgage, and the mortgager is entitled to a release of all the mortgagee's right and title in the premises with costs. On the other hand, if such payment has not been made, then the mortgager will be entitled to redeem only upon the payment of the balance found due, together with the respondent's costs, who, in such event, will appear to have been without fault. *Bourne* v. *Littlefield*, 29 Maine, 302.

Whether any thing is due upon the mortgage, and, if any thing, how much, are questions which, in cases like the present, where there is a conflict of testimony, and an attempt to impeach the witnesses upon the one side and the other, can be much more appropriately determined by a master, or, if the parties so agree, by a jury, than by the Court when sitting in bank, where its members must necessarily be deprived of the appearance of the witnesses upon the stand, which often furnishes a test to a master, or a jury, by which they are enabled to ascertain the truth. *Jewett, in Eq.*, v. *Guild*, 42 Maine, 246. There being, in this case, no agreement of the parties to submit the matter to a jury under the direction of the Court, the cause must be referred to a master to determine what sum, if any, is due to the respondent upon the mortgage set forth in the complainant's bill.

TENNEY, C. J., and APPLETON, CUTTING, DAVIS and KENT, JJ., concurred.

OREN CLARK *and another versus* SAMUEL PRATT.

A party in possession of land, but having no title, will not be permitted to object to an informality in the execution of the owner's deed, to defeat a writ of entry brought by the owner to recover possession of the premises.

THIS was a WRIT OF ENTRY, dated May 11, 1857, demanding sundry described lots on an island in Oldtown. The tenant pleaded the general issue, with a claim for betterments.

It appeared in evidence that Samuel Guild was, on Sept. 16, 1856, president of the People's Bank in Roxbury, and as such, in the name of the bank, executed a deed of the demanded premises to Oren Clark and William N. Soper, the demandants, affixing the corporate seal; and that, in so doing, he acted under the authority of a vote of the directors not recorded, but without written authority. The charter and organization of the bank, and its title to the premises by levy of an execution in 1842, were shown.

The tenant introduced the record of a mortgage of a portion of the premises by Leonard Reed to Edward and Samuel Smith, dated April 6, 1833, to secure $250, and an assignment of the mortgage to Levi Cram, April 27, 1833. Also the record of the assessment of a tax, by the assessors of the town, in 1837, on another portion of the premises, duly signed; the record of the town meeting when the assessors and collector of that year were chosen; the record of their oaths of office, and the collector's bond; and the record of the return of sale of the land so assessed, by the treasurer, May 7, 1838, and testimony to show that the original return was lost. Also deeds from the collector and treasurer, May 7, 1838, of the same land sold for taxes to the tenant, and a deed of another portion sold for taxes assessed in 1838 to G. P. Sewall, and a deed from Sewall to the tenant. Also proof that the tenant had entered upon the demanded premises in 1837, and held undisturbed possession, claiming title, since May, 1838. Also the deposition of J. B. Smith, col-

lector and treasurer at the time, stating that he could not find the lists of taxes committed to him for the year 1837, but that he advertised and sold the lots for non-payment of taxes, according to law, a part to the tenant, a part to Sewall, and the remainder to persons whose names he could not recollect.

On the testimony, CUTTING, J., the presiding Judge, ruled that the demandants had a legal title to the demanded premises; and the jury returned a verdict for the demandants, with an estimate of the value of the premises and of the betterments. The tenant filed *exceptions* to the ruling.

G. P. Sewall, for the tenant, argued that E. and S. Smith, having mortgaged a portion of the premises before the People's Bank obtained their title by levy of an execution, the Smiths and those claiming under them, are estopped from claiming the mortgaged portion. *Wilkinson* v. *Scott*, 17 Mass., 257; *Varnum* v. *Abbot*, 12 Mass., 474; *Fairbanks* v. *Williamson*, 7 Maine, 96; *Taylor* v. *Needham*, 2 Taunt., 278. To the portion conveyed by the collector of taxes for 1837 to the tenant, his title should be sustained. *Freeman* v. *Thayer*, 33 Maine, 76. The deed to the demandants was not properly executed, and they have no title. *Hoyt* v. *Thompson*, 1 Selden, 320; *Burrill* v. *Nahant Bank*, 2 Met., 163. Guild could only be authorized to convey by an instrument under seal, or by a vote of the directors. *Hayden* v. *Mid. Turn. Cor.*, 10 Mass., 403; 8 Mass., 299; *Miller* v. *Ewer*, 27 Maine, 509; *Lumbard* v. *Aldrich*, 8 N. H., 31; 12 N. H., 205. The vote conferred no power until recorded. The directors are the corporation as to dealings with others. 2 Metc., 163, and 12 N. H., 205, before cited. The books of a corporation are the evidence of its acts. *Hudson* v. *Carman*, 41 Maine, 84; Angell and Ames on Corporations, p. 283, and cases there cited. To authorize an agent to make a deed for an individual, he must be empowered in writing under seal. In the case of the corporation, the authority must at least be in writing. An unrecorded vote is parol authority, and can be

proved only by parol. This is contrary to the practice of our courts, so far as relates to real estate. *Meth. Ch. Corp.* v. *Herrick*, 25 Maine, 358; *Manning* v. *5th Par. of Gloucester*, 6 Pick., 6; *Stetson* v. *Patten*, 2 Maine, 555; *Emerson* v. *Coggswell*, 16 Maine, 77; 12 N. H., 205, before cited. R. S. of 1841, c. 91, § 30, provides that an estate otherwise than at will shall not pass except by an instrument in writing, signed by the grantor or his attorney; and Guild was not the authorized attorney of the bank.

J. H. Hilliard, for the demandants.

The deed to the demandants being unexceptionable in form, the presumption is that it was executed by authority. 1 Seld. 335; *Flint* v. *Clinton*, 2 N. H., 430; Angell and Ames on Corp., 158; 2 Metc., 166; 2 Greenl. Ev., § 62. The assent of the directors is sufficiently proved. *Gardner* v. *Gardner*, 5 Cush., 483. The bank has received its pay and ratified the transaction, and the objection comes from a stranger. As to the authority of agents of corporations, the counsel cited Angell and Ames, 174, 233–4; *Badger* v. *Bank of Cumberland*, 26 Maine, 425. Where there is no record, other evidence is admissible. *Bassett* v. *Marshall*, 9 Mass., 312; *Edgerly* v. *Emerson*, 3 Foster, 885. But the directors are agents of the corporation, and may authorize one of their number to sign and seal, without formal vote or record. 12 Wheat., 81. The tenant, being a stranger, disseizor or wrongdoer, is not in a position to object to any informality in the title of the demandants. *Knox* v. *Jenks*, 7 Mass., 492.

The tenant claims to have been in possession since the spring of 1857; but it does not appear that he claimed title until May, 1858. He fails to make out 20 years *adverse* possession, which is necessary to perfect his title. *Chadbourne* v. *Swan*, 40 Maine, 260. And his possession was interrupted by the levy made by the bank in 1842. *Woodman* v. *Bodfish*, 25 Maine, 317.

The tax title claimed by the tenant to a part of the prem-

ises is defective. *Shimmin* v. *Inman*, 26 Maine, 232; *Flint* v. *Sawyer*, 30 Maine, 226.

The opinion of the Court was drawn up by

DAVIS, J. — The demandants claim under a recorded deed, dated Sept. 16th, 1856. The proof of authority on the part of Guild to execute that deed, is sufficient, as against a *stranger*. The tenants have no interest in the mortgage assigned to Cram. And the evidence fails to show that the collector of taxes, under whose deeds they claim, proceeded according to statute in making the sales. *Exceptions overruled.*

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

JOHN BANCHOR *versus* A. S. MANSEL.

Where a Judge at *Nisi Prius* certified the evidence in a case, with his rulings, as matter of law, upon the facts which he found proved, and no exceptions were taken to the rulings, the case was considered by the full Court as one presented on report.

The promisee of a note given by an inhabitant of this State for spirituous liquors sold and delivered in another State, where the sale was not illegal, who had knowledge of the purchaser's intent to sell the same here in violation of law, and did acts, beyond the mere sale, which aided the purchaser in his unlawful design, cannot legally enforce the payment of such note.

The original contract being in violation of the statute, was void; and the subsequent repeal of the statute will not render the contract valid.

ASSUMPSIT on note of defendant, dated Boston, June 13, 1857, payable to his own order for $120, in one year, and by him indorsed.

The case comes before this Court on the report of the evidence and the finding of the facts by APPLETON, J., presiding at *Nisi Prius*. No exceptions were taken to the rulings.

The defendant testified that the note was given at Alton, in the county of Penobscot, and there delivered to Bryden,

who was a clerk and agent of plaintiff; that the consideration for the note was the bill of liquors included in the plaintiff's bill, and referred to in his two letters of October 25, 1852, dated at Boston. In one of the letters, plaintiff says, "above you have a bill of goods sent by Schooner Hamlin to Bangor, marked x x Alton. The captain will keep the goods on board the vessel till you call for them. You will have to manage with care. Perhaps they will have to be taken out of the vessel in the night. I enclose another letter in case there should be any trouble."

The second letter addressed to defendant is as follows:— "I have put on board schooner Hamlin 7 casks liquor marked x x Alton, which I wish you to take charge of till you receive further orders from me."

Defendant further testified that the bargain for these goods was made at his residence in Alton, with plaintiff's agent, to whom he gave a memorandum of what he wished sent; that he was keeping a tavern and selling liquors without license; had before that time purchased liquors of plaintiff's agent, who came to Alton twice a year.

Other facts were testified to by the witness, which are substantially stated in the opinion of the Court.

Upon the evidence in the case, the presiding Judge found that the note was made in this State; the intention of the defendant was to purchase these liquors to be sold in violation of the laws of this State, of which intention the plaintiff and his agent had knowledge, and sold the goods with the expectation that the defendant would sell the same in violation of the laws of this State.

The presiding Judge ruled, as matter of law upon the facts found, that the plaintiff was not entitled to recover.

If the ruling shall be found to be erroneous, the defendant is to be defaulted.

The case was argued by

Blake & Garnsey, for the plaintiff, and by

J. H. Hilliard, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—This case must be considered as before us on report from the presiding justice by whom it was heard, inasmuch as no exceptions were taken to any of his rulings in matters of law. So far as relates to the questions of law arising in the cause, it is immaterial in what form they may be presented.

It is a general principle of law that the validity of a contract is to be determined by the law of the place where it is entered into. But to this rule there are exceptions. No nation is bound to enforce contracts injurious to its interests or in fraud of its laws, though made without its jurisdiction, and valid when and where made. *Smith* v. *Godfrey*, 8 Foster, 380. The comity of nations, rightly understood, cannot violate, because it is a part of, the law of this and every other civilized country. No state can be justified in requiring its tribunals to enforce obligations which it holds to be founded in wrong, or which are made elsewhere for the express purpose of evading a prohibition decreed by the law of the country where they are to be performed. Westlake on Private International Law, § § 196, 200.

It fully appears from the facts reported that the liquors, which formed the consideration of the note in suit, were purchased with an intent on the part of the purchaser to sell them in violation of the laws of this State; that the plaintiff knew of such intentions; that he sold them to the defendant with the expectation that they would be resold by him illegally; and that they were so resold.

Assuming the sale to have been made in Massachusetts, and to have been in conformity with the laws of that State, it would seem, according to the general current of the more recent decisions, that mere knowledge on the part of the seller of the intent of the buyer to violate the laws of the place of his residence, by selling the liquors purchased contrary to their provisions, would not constitute a defence to the action in this State. *Smith* v. *Godfrey*, 8 Foster, 380;

Tracy v. *Talmage*, 4 Kernan, 162; *Datre* v. *Earl*, 3 Gray, 483.

In the present case, it appears from the letters of the plaintiff, that the liquors were to be kept by the master of the vessel carrying them, till called for by the defendant, and that he was cautioned against the dangers of, and advised how to avoid their seizure. The plaintiff then not merely knew that the liquors sold were purchased by the defendant to be sold by him in violation of law, but he coöperated with and aided the defendant in his efforts to evade the law and to elude the vigilance of its officers. Having done this, he asks this Court to enforce a contract made under such circumstances and for such purposes.

If goods are sold and delivered in the State where the contract is made, and the sale is there legal, and nothing remains then to be done by the vendor to complete the transaction, and his connection therewith ceases, an action may be maintained for the price, in a State where, by its laws, the sale would be prohibited. "But if," remarks EASTMAN, J., in *Smith* v. *Godfrey*, 8 Foster, 379, "it enters at all as an ingredient into the contract between the parties, that the goods shall be illegally sold; or that the seller shall do some act to assist or facilitate the illegal sale, the contract will not be enforced. Or, if the goods are sold to be delivered in the place where the sale is prohibited, the purchaser will not be held liable." In *Kreiss* v. *Selignan*, 8 Barb., 439, the Supreme Court of New York say "that where a party, who sells goods or advances money to another, with knowledge of a design on the part of the latter to put the money or goods to an unlawful use, does *any act whatever beyond the bare sale or loan*, in aid or furtherance of the unlawful object, he cannot recover." This view of the law is recognized as sound by the Supreme Court of Massachusetts, in *Datre* v. *Earl*, 3 Gray, 482. The authorities bearing upon this question were fully examined by SELDEN, J., in *Tracy* v. *Talmage*, 4 Kernan, 162, and it was there held that if the vendor, with knowledge of the intent of the purchaser to use the property purchased

for an unlawful purpose, do any thing beyond making the sale, in aid or furtherance of the unlawful design, he cannot recover. The same question came before the Court of Appeal of New York in *Curtis* v. *Leavitt*, 15 N. Y., (1 Smith,) 10, and the doctrine of *Tracy* v. *Talmage* was unanimously affirmed.

The original contract being in violation and fraud of the law as it then existed, was void. The subsequent repeal of the prohibitory laws of the State cannot restore validity to a contract void in its inception. *Hathaway* v. *Moran*, 44 Maine, 67; *Milne* v. *Haber*, 3 McLean, 212; *West* v. *Roby*, 4 N. H., 285.

"It is fit and proper," remarks RICHARDSON, C. J., in *West* v. *Roby*, "that those who make claims which rest upon violations of the law, should have no right to be assisted by a court of justice." *Plaintiff nonsuit.*

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

JONATHAN R. HOLT *& als. versus* WILLIAM A. BLAKE *& als.*

By certain articles of agreement, B., L. & B. were made trustees of a joint stock association for the purpose of publishing a newspaper. Each shareholder was to advance ten dollars. Only five shares were subscribed for beyond the number taken by B., L. & B. The press and necessary materials were held in equal proportions by the three trustees, and, from the trust property, they were to indemnify themselves against any loss that might happen. Subsequently H. & F. advanced money to participate in the enterprise and continue the publication, the trustees by a written agreement having promised to hold the trust property as much for the security of H. & F. as for their own: — *It was held*, that H. & F. are jointly liable with the other three defendants, to pay for printing paper subsequently furnished by the plaintiffs.

And that, to render all the defendants liable, it was not necessary to declare against them as being partners.

ON EXCEPTIONS to the ruling of CUTTING, J.

ASSUMPSIT on an account annexed, for reams of printing paper.

The plaintiffs offered testimony tending to prove the liability of the defendants.

The defendants put into the case, the following articles of agreement, to wit:—

"THE BANGOR JOURNAL.

"Agreement for establishing and carrying on a newspaper enterprise, under the above name, at Bangor, by a joint stock association, of which William A. Blake, George W. Ladd, and Albion P. Bradbury, and the survivor and successors of them are trustees, and the persons whose names are hereto annexed as subscribers for stock, are shareholders in proportion to the number of shares set against their respective names.

"1. The business of said association shall be the publishing of the daily and weekly newspaper under the above name, and such other business as appertains to a printing office.

"2. The property shall consist of the stock, tools, machinery and materials for a printing office, lately purchased by said William A. Blake, in his own name, with money subscribed for that purpose by the undersigned and others; such additions as may be from time to time made to the same, and the subscription list and good will of the paper and the office. The shares shall be fixed at the price of ten dollars each; on receipt of that fund from any person for that purpose, the trustees may issue certificates of stock to such persons. The whole number of shares may be fixed hereafter by the trustees, as the business of the office may make desirable. Shareholders shall be entitled to one vote, at the meetings, for each share held by them.

"3. The trustees, the survivor and successor of them, shall hold and manage all the property and shall carry on and have exclusive control of the whole business aforesaid, subject to the restrictions which are herein contained; exercising, among other powers for that purpose, absolute discretion as to the

matter to be published in the paper, as to what editors, publishers, agents, or other assistants, they may employ; fixing terms and prices, hiring and fitting up the office, collecting debts and subscriptions of all kinds, and making contracts which they deem necessary in carrying on the business.

"4. They may make, from time to time, such assessments equal upon each share, as may be necessary to carry on the business upon the scale it has begun in; but the whole amount of assessments on any share shall not exceed the sum of ten dollars; and the undersigned subscribers to stock hereby agree to and with the said trustees, their survivor and successors, that we, each for himself alone, will pay them in assessments as the same may be made for the above purpose, a sum not exceeding said amount of ten dollars for each share subscribed for by us respectively, in addition to said price of ten dollars per share, which we have already paid for the certificate. And it is expressly stipulated that we are to be no further liable for debts incurred by said trustees in said business.

"5. The money received for the sale of stock certificates shall be applied to enlarging the business and facilities of the paper and office, by purchasing materials and employing agents to solicit subscriptions for the paper, and for stock; unless it should be necessary from time to time to employ a part of the same for the payment of the running expenses of the business, in which case it shall be replaced from the proceeds of the business as soon as may be. It being the intention that the current expenses of carrying on the business, salaries, rents, wages, &c., shall be defrayed from the proceeds and assessments, and that any increase to the property shall be made out of the funds received for stock. No assessments for the purpose of increasing the property shall be made.

"6. The trustees may mortgage the property to raise money for carrying on the business, if necessary, and may sell and dispose of the property whenever they shall receive an offer they deem advantageous therefor; first, however, calling a shareholders' meeting and giving, at such meeting, the hold-

ers of a majority of all the shares, the preference as purchasers at the price offered.

"7. The net profits earned in the business, not needed to enlarge the office or increase the property, or replace loss occasioned by wear and tear shall be divided from time to time, by the trustees among the shareholders, *pro rata.* In case of sale, the trustees shall close up the whole concern and divide any proceeds remaining among the shareholders *pro rata.*

"8. Shareholders' meetings may be called by the trustees at Bangor, by notice published for three days in the Daily Journal, or some other daily paper in Bangor, should the Journal be discontinued. At such meetings shareholders may be represented by written proxy; and, provided fifty shares of the stock be represented at the meeting, the vote of a majority of the stock represented shall be binding in all matters where the shareholders may vote. The trustees shall call a meeting on written request of the holders of ten shares, or of five individual stockholders; if they refuse, then ten stockholders, holding at least fifty shares in all, may call a meeting which shall have the same power as a meeting called by the trustees.

"9. In case of a vacancy, from any cause, in the board of trustees, or inability of any one of them to act, the remainder shall call a shareholders' meeting and fill that vacancy by ballot, with some person from among the shareholders, who shall succeed to all the rights of his predecessor. And his associates shall make such conveyance to him as may be necessary to put him in that position, if any be necessary.

"10. The stockholders, at a meeting duly called, may, by such vote as aforesaid, remove any or all of the trustees, and fill their places as in case of vacancy. And the persons removed shall make such conveyance as may be necessary, if any, to vest all their powers and rights in their successors so chosen.

"11. The concurrence of a majority of the trustees, only, shall be necessary to give validity to any act they are authorized hereby to do.

"12. The trustees may appoint one of their number treasurer, who shall keep the trustees' accounts, showing the state of affairs, always open to the reasonable inspection of any shareholder.

"13. The trustees shall be fully indemnified out of the trust property, and have a lien thereon for all loss, cost, charges and expenses they may incur in the management of said business, and as security for such as they may from time to time incur. But the shareholders are to incur no loss beyond that of the shares paid for, and the sum before provided as assessments, respectively, and the trustees shall discontinue the publication and close the concern, whenever in their judgment it shall be so losing a matter as to require more funds to aid it than the stockholders are bound hereby to pay, in addition to what it may be reasonably hoped to realize from contributions.

"14. Said trustees shall not be liable except for such loss as may arise from gross negligence or wilful default, and each shall be liable only for his own acts or omissions.

"15. And said W. A. Blake, in whose name said property was purchased, hereby conveys one undivided third part of the same to each of said other trustees; and all said trustees hereby acknowledge that they jointly hold said property in trust, upon the terms and conditions herein set forth.

"In witness of all which said parties have set their hands, this ——— ———." [Signed by Blake, Ladd and Bradbury, trustees.]

"At a meeting of the trustees, held on the 16th day of September, A. D. 1854, A. P. Bradbury was chosen treasurer and clerk of the board of trustees."

The said Blake and Ladd each subscribed for five shares, the said Bradbury for three shares, and three other persons for five shares.

Defendants also put into the case the two agreements following, to wit:—

"Whereas F. W. Hill and George A. Fairfield have paid to the treasurer of the Bangor Journal, the sum of two hun-

dred and fifty dollars, and whereas the trustees of said Journal have advanced the sum of five hundred dollars each, for its support, the treasurer holding for their security the property of said Journal, as will appear by the articles of agreement of said joint stock company:—

"Now the said trustees hereby agree with the said Hill and Fairfield that they will hold the property of said Journal in trust, as much for them as they do, and have a right to do for themselves, as security for the sums advanced by them; that they shall have the same rights and security as by the articles of agreement we ourselves have. In case of a sale of said property, we agree to share with said Hill and Fairfield the profit and loss of such sale, subject to the rights of the stockholders.

"Bangor, Feb. 3, 1855." [Signed by Blake, Ladd and Bradbury, trustees.]

"Whereas F. W. Hill and Geo. A. Fairfield have paid to the treasurer of the Bangor Journal the further sum of one hundred dollars each; and whereas the trustees of said Journal have advanced the further sum of two hundred dollars each, for its support, the trustees holding for their security the property of said Journal, as will appear by the articles of agreement of said joint stock company:—

"Now the said trustees hereby agree with the said Hill and Fairfield that they will hold the property of said Journal in trust, as much for them as they do, and have a right to do for themselves, as security for this further sum advanced by them; that they shall have the same rights and security as by the articles of agreement we ourselves have. In case of a sale of said property, we agree to share with the said Hill and Fairfield the profit and loss of such sale, subject to the rights of the stockholders.

"Bangor, May 24th, 1855." [Signed by Blake, Ladd and Bradbury, trustees.]

The plaintiffs introduced a bill of sale of the Bangor Journal of which the following is a copy:—

"Bangor, July, 1857.—For a valuable consideration, to wit, two thousand dollars, ($2000,) to us paid in hand by Benjamin Wiggin and Marcellus Emery, we hereby to them sell and transfer and assign the establishment of the Bangor Daily and Weekly Journal, viz., the presses, type, cases, furniture and fixtures, being the same appraised by Samuel S. Smith, as per schedule hereunto annexed, together with the good will of said concern, meaning the subscription lists, the advertising and job patronage, to have and to hold for their sole use and benefit." [Signed by Blake, Ladd and Bradbury, trustees.]

"We hereby agree to the above release and make over all our interest in the above named concern." [Signed by Fairfield and Hill.]

The Court instructed the jury that said articles of agreement, for establishing and carrying on the Bangor Journal, the appointment of the trustees, and their acceptance and action under said appointment, together with the written agreements between said trustees and Fairfield and Hill, with the written sale of said newspaper, made all the defendants jointly liable as copartners in this action, if any of them were liable.

The counsel for the defendants requested the Court to instruct the jury that if all the defendants were copartners, as they were not declared against as such, this action could not be maintained.

The Court declined to give such instruction, but instructed the jury that the action could be maintained if the defendants were copartners, although the writ did not describe them as copartners.

The verdict was for the plaintiffs and the defendants excepted.

C. S. Crosby, for plaintiffs.

Sanborn, for defendants.

The opinion of the Court was drawn up by

CUTTING, J.—By the articles of agreement, it appears that three of these defendants, Blake, Ladd and Bradbury, were constituted the trustees of a joint stock association, "for the purpose of publishing a daily and weekly newspaper, to be called the Bangor Journal, and for such other business as appertains to a printing office;" *that* each shareholder was responsible for an advance payment of only ten dollars, and a subsequent liability for a like sum by way of an assessment; *that* only eighteen shares were thus represented when the concern went into operation; *that* Blake originally purchased the press and necessary materials in his own name, and subsequently conveyed one-third to each of his associated trustees, who, together with himself, were "to be fully indemnified out of the trust property, and have a lien thereon for all loss, costs, charges and expenses they might incur in the management of said business, and as security for such as they might from time to time incur;" *that*, on Sept. 16, 1854, Bradbury was chosen treasurer and clerk of the board of trustees; *that* these three defendants held in their own names thirteen shares, out of the eighteen subscribed. Thus, in fact, being trustees for themselves, with the exception of five shares representing in cash advanced and future liabilities, an amount not to exceed, in any event, the sum of one hundred dollars. But, in the progress of events, it further appears, *that* the *cestui que trust* funds were wholly insufficient to accomplish the great object anticipated. Hence arose the necessity of immediate aid and the introduction of two other individuals now made co-defendants in this suit; viz., Hill and Fairfield, who claim a joint participation only through the instrumentality of a certain document by themselves introduced, of the following tenor, viz.:—"Whereas F. W. Hill and Geo. A. Fairfield have paid to the treasurer of the Bangor Journal the sum of two hundred and fifty dollars, and whereas the trustees of said Journal have advanced the sum of five hundred dollars each for its support,—the trustees holding for their security the property of said Journal, as will appear by

the articles of agreement of said joint stock company;—now the said trustees hereby agree with the said Hill and Fairfield, that they will hold the property of said Journal in trust, as much for them as they do and have a right for themselves, as security for the sums advanced by them; that they shall have the same rights and security as by the articles of agreement we ourselves have. In case of a sale of said property, we agree to share with said Hill and Fairfield the profits and loss of such sale, subject to the rights of the stockholders. Bangor, Feb. 3, 1855,"—and signed by the trustees. And they also introduced another paper, dated May 24, 1855, of a similar tenor, showing a further advancement of one hundred dollars each, by Hill and Fairfield, and two hundred dollars by each of the trustees.

And by the case it further appears *that*, subsequent to this time, the plaintiffs furnished the concern with printing paper to an amount exceeding in value the sum of twelve hundred dollars, and charged in account; *that*, in July, 1857, the defendants sold and released their interest in the establishment for the sum of two thousand dollars, with no provision for the payment of outstanding claims.

From the records and documents thus exhibited, it is manifest that the concern went into operation, undertaking "to publish a daily and weekly newspaper, and such other business as appertains to a printing office," with a capital subscribed and paid in of one hundred and eighty dollars, besides a contingent liability on the part of the shareholders by way of assessment, to an equal amount; for there is a provision in their stock contract that "the shareholders are to incur no loss beyond that of the shares paid for, and the sum before provided as assessments, respectively, and the trustees shall discontinue the publication and close the concern whenever, in their judgment, it shall be so losing a matter as to require more funds to aid it than the stockholders are bound hereby to pay."

But we have since seen, as it might have been reasonably anticipated, that the funds raised were wholly insufficient to

accomplish the great object in view. The event anticipated in the articles of agreement had happened, when it became the duty of the trustees "*to discontinue the publication and close the concern.*" Such a course however was not adopted, but rather, it would seem, the now nominal trustees furnished on their own account the sum of twenty-one hundred dollars, and the other defendants the further sum of four hundred and fifty dollars, as appears from the agreements of Feb. 3 and May 24, 1855, before referred to. All "holding for their security the property of said Journal," which embraced, in addition to the publication of a daily and weekly newspaper, "such other business as appertains to a printing office."

Now, the trustees covenant with their co-defendants that "they shall have the *same rights* and security as by the articles of agreement we ourselves have." And "in case of a sale of said property, we agree to share with said Hill and Fairfield the profits and loss of such sale, subject to the rights of the stockholders." And, by the articles, it is provided that, "the trustees shall hold and manage all the property, and shall carry on and have exclusive control of the whole business aforesaid."

The rights or liabilities of the stockholders, as such by subscription, are too insignificant to enter into the inquiry as to the disposition of the profits and loss; they had provided against any loss except the fifty dollars advanced, and a like sum in the event of a contingency. And when the trustees had ascertained that "it had been so losing a matter as to require more funds to aid it" than had been subscribed for stock, and still proceeded, it was on their own responsibility and risk, and they must have so regarded it, for they then advanced the necessary funds, with the aid of the other defendants, whom they associated with themselves with equal security and *rights;* which "rights" are thus defined in the articles:—"The trustees, the survivor and successor of them, shall hold and manage all the property, and shall carry on and have exclusive control of the whole business aforesaid, subject to the restrictions which are herein contained, exer-

cising, among other powers for that purpose, absolute discretion as to the matter to be published in the paper, as to what editors, publishers, agents or other assistants they may employ; fixing terms and prices, hiring and fitting up the office, collecting debts and subscriptions of all kinds, and making contracts which they deem necessary in carrying on the business." On board of such a craft the defendants jointly embarked, trusting to favorable winds to conduct them into a friendly port, there to dispose of their vessel and cargo, and to share the proceeds — the only mode devised as a remuneration for the outlays. Great was the enterprise and great the expectations. If realized, then, by their contract, they are to share the profits — otherwise, the loss.

Exceptions overruled, and judgment on the verdict.

TENNEY, C. J., and APPLETON, MAY, DAVIS, and KENT, JJ., concurred.

SAMUEL THURSTON, *Adm'r, Appellant from decree of Judge of Probate, versus* CAROLINE R. LOWDER, *Adm'x.*

The provision of § 24, c. 120 of R. S. of 1840, is a conclusive bar against any process commenced by creditors of the estate of a deceased person, in case of new assets, after the expiration of four years from the time such assets actually came into the hands of the administrator.

And the statute applies as well to any process in the Probate Court, as to suits at law.

A claim will be subject to this limitation, notwithstanding it has been allowed by the commissioners of insolvency, and in no part paid, for want of any estate to be divided.

REPORTED by APPLETON, J.

APPEAL from the decision of the Judge of Probate for the county of Penobscot.

Appellant produces official copies from records of Probate Court showing the following facts: —

That, on July 31, 1832, said Thurston was appointed administrator on the estate of Henry Rider, deceased, and gave bond. That, on June 25th, 1833, said Rider's estate, on representation of said administrator, was decreed insolvent and commissioners were appointed. That, on December 31st, 1833, said commissioners made their report of claims allowed against said estate, which was accepted. That, in said report of claims allowed, was the following claim in favor of Samuel Lowder, since deceased, (whose administratrix *de bonis non* said Caroline is,) viz.:—"Note for $382,32, interest, 3 years, $68,81," then amounting to $451,13, which amount was reported as allowed to him. That, on June 30, 1835, said administrator settled his account of administering said estate at the Probate Court, by which it appeared that there were no effects in his hands for distribution, and no distribution was ordered. That, on May 28, 1851, said administrator received further assets to the amount of $5703,66, and he filed his additional inventory thereof. That, on January 28, 1856, said Caroline R. Lowder, administratrix as aforesaid, filed her petition for said administrator to show cause why he should not settle a further account of administering said estate, and that, after notice, on the last Tuesday of March, 1856, said administrator settled his account of administration of said estate, showing a balance in his hands of $2022,50; and, thereupon, the Judge of Probate ordered that, out of said effects, said administrator pay said claim allowed to Samuel Lowder, in full, with interest, it appearing by said administrator's account that the other claims allowed, had been paid by said administrator in full, and allowed him on settlement of his said account.

From which order and decree, said Thurston claims and takes this appeal, and offers to prove on the appeal the following facts:—

That, since said proceedings, one William Lowder, who was the payee and indorser of said note, paid the same in full, with interest, to the said estate now represented by said Caroline R. Lowder, and said Thurston reserves the right, if al-

lowable, to have his reasons of appeal so amended that, if not already sufficient, they may admit the defence herein alleged.

The case is submitted to the full Court for decision of the questions of law arising in the case; and, if the facts alleged by the appellant are material to this case, the cause is to stand for trial upon that point.

The administrator specifies various reasons for the appeal, some of which are in substance—(1,) that the estate of his intestate is under no legal or equitable liability to pay any part of the note;—(2,) that any right of action on account of the note, now is, and for a long time has been, barred by the statute of limitation and especially by § 23, c. 120 of R. S.;—(3,) that the Probate Court has no authority to revive a barred claim;—(4,) that the decree of the Court, in that respect, is invalid.

The administrator, in his account presented to the Judge of Probate, charges himself with "cash received of the United States on account of award of commissioners on treaty with Mexico—$5703,66."

The appeal was entered on the law docket, July term, 1858, and afterwards written arguments were submitted by

Kent, for the appellant, and by

Rowe & Bartlett, for the appellee.

The opinion of the Court was drawn up by

RICE, J.—This is an appeal from a decree of the Judge of Probate, ordering the appellant to pay a claim upon the estate which he represents, to the appellee. The legal question in issue between the parties is, whether that claim at the date of the decree was barred by the statute of limitations.

Administrators, before entering upon the execution of their trust, are required to give bond, conditioned as provided in c. 106, § 3, R. S. By § 40 of same chapter he is required to render his accounts agreeably to the condition of his bond; and the Judge of Probate may require him to account whenever he may deem it necessary, either with or without a spe-

cial application from the parties interested. By § 30, c. 109, if the administrator shall neglect to exhibit and settle his account within six months after the report of the commissioners shall have been made, or within such further time as the Judge of Probate shall think proper to allow therefor, such neglect shall be deemed a breach of the administration bond. And § 5 of c. 113 gives any person interested, either personally or in any official capacity, in any probate bond, or in any judgment that may have been rendered on such bond, the right to originate a suit on the bond, or to sue out a *scire facias* on such judgment, without application to the Judge of Probate.

By these several provisions, the liabilities of administrators are determined, and the rights and remedies of those interested in the estates represented by such administrators defined. These remedies are plain and complete. The policy of the law, however, requires that parties should not sleep over their rights, and that creditors shall pursue their remedies within a reasonable time, or they will be deemed to have waived or abandoned their rights. Hence, it is provided, in § 23 of c. 120, that no executor or administrator, who has given bond and notice of his appointment, according to law, shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond. This is the general rule. A similar provision is found in § 29 of c. 146. To this general statute of limitation there is, however, this exception, found in § 24, c. 120.

When assets shall come to the hands of the executor or administrator, after the expiration of the said four years, he shall account for and apply the same, in like manner as if they had been received within said four years; and he shall be answerable at law, or to any process in the Probate Court, on account of such new assets, for the benefit of any creditor, in like manner as if received within four years; provided such action or process be commenced within one year after the creditor shall have notice of the receipt of such new assets,

and not more than four years after the same shall actually be received.

It will be observed that these limitation statutes all apply to *creditors* only. Where there has been no new assets received after the expiration of four years from the time of giving the bond, the right to commence any suit against any administrator becomes absolutely barred as to creditors. *McLellan* v. *Lunt*, 11 Maine, 150; *Same parties*, 14 Maine, 254.

But if new assets come into the hands of the administrator, after the expiration of said four years, the general limitation bar is removed, and the estate re-opened so that any creditor may come in and assert his claim to such new assets. *Holland* v. *Cruft*, 20 Pick., 321. As to such new assets, the administrator is to apply them in like manner as if they had been received within said four years; and he is answerable at law, or to any process in the Probate Court, on account of such assets, in the same manner as if they had been received within said four years. R. S., c. 120, § 24.

Creditors, also, have the same practical remedies, by the provisions of the 24th section, to enforce their rights to such new assets, as they originally had to enforce rights to the assets which come into the hands of the administrator within the four years from the time of filing his bond. So far as prosecuting claims to the new assets are concerned, it is substantially a new administration.

The question then arises, within what time must these claims be enforced? Or when is the administrator protected by the statute of limitations against the claims of creditors to such new assets? The statute answers, at the end of four years from the time when such new assets actually come into his hands.

But the appellee contends that when a claim has once been proved before commissioners, and entered upon the records of the Probate Court, this limitation statute does not apply; that the case then being under the jurisdiction of the Court,

the Judge may decree the payment of such claims without regard to the statute of limitations.

The cases cited by the appellee do not sustain this position. *Walker* v. *Bradbury*, 15 Maine, 207, was a case of new assets of which the Judge ordered distribution. But when the decree was made, the money had not been in the hands of the administrator a single year. *White* v. *Swain*, 3 Pick., 365, was also a case of new assets, which were received in Sept., 1824, and proceedings were commenced in the Probate Court the same September. In *Williams* v. *American Bank*, 4 Met., 317, the question was whether, in competition between the creditors of the deceased debtor and his widow and heirs, the creditors were entitled to have interest computed on their claims, before the widow and heirs could claim any thing under the general statute of distribution. In *Pierce* v. *Nichols*, 15 Mass., 264, it was decided that after a creditor had filed his claim before commissioners, on a supposed insolvent estate, an action at law could not be maintained against the administrator, if the estate should afterwards prove to be solvent, but he must pursue the remedy provided in the case of insolvent estates.

The case of *Odee* v. *McCrate*, 7 Maine, 473, was an application in behalf of an heir at law, and not of a creditor. The limitation Acts, cited above, do not apply to heirs nor legatees but to creditors only.

The case of *Green* v. *Dyer*, 32 Maine, 460, would seem, at first sight, to support the doctrine contended for by the appellee. The authority of that case, however, will be found, on examination, not to sustain that position, but, rather, the reverse. The question in that case was not one of new assets, but arose under the 23d section of c. 120. The Judge of Probate, after the expiration of four years from the filing of the administration bond, revised the list of debts proved before commissioners, and decreed payment of the claim of the appellee. The administratrix interposed the statute of limitations, and, being overruled, brought the case into this Court on appeal. The Court, in their opinion, say, the four

years limitation, relied on in the first reason for the appeal, applies only to *suits brought*, and not to proceedings in the Probate Court. The cases of *McLellan* v. *Lunt*, cited by counsel from the 11th and 14th of Maine, were such suits. The 23d § of c. 120, on which that proceeding depended, refers only to *suits at law*, and not to proceedings in the Probate Court; whereas the 24th section applies as well to any process in the Probate Court, as to suits at law, both being placed upon the same ground. The implication is therefore very strong, if not conclusive, that if the case cited had depended upon the provisions of the 24th section, the decision would have been different. The opinion in that case was delivered orally, and evidently did not receive much consideration. We have no occasion, however, at this time, to question its authority.

It is the policy of the law, in all cases, to require creditors to pursue their rights with diligence; especially is this the case where they have claims against the estates of deceased persons, and that such estates should be closed at as early a day as practicable, having due regard to the substantial rights of claimants. There are good reasons why this should be so. The rights, and frequently the subsistence of widows and orphans, are involved in the settlement of the estates of their deceased relatives. Such parties are generally dependent, and but ill qualified to protect their interests and maintain their rights by protracted litigation. Hence, the law has wisely interposed statutes of limitation for their protection, which take effect at comparatively early periods, leaving, however, ample time within which creditors may, by the exercise of ordinary diligence, enforce their own rights.

An examination of the provisions of the statute, and the authorities cited, leave no doubt in the minds of the Court that the 24th section of c. 120, interposes a conclusive bar against the commencement of any process by creditors, in case of new assets at the end of four years from the time such assets actually come into the hands of the administrator, and that this bar applies as well to any process in the Probate

Court as to suits at law. The Judge of Probate, therefore, erred in decreeing the payment of the specific claim presented by the appellee, and so far his proceedings are reversed. The case is to be remanded to the Probate Court, the assets to be distributed according to the provisions of law. The appellant is entitled to his costs in this Court.

CUTTING, APPLETON and GOODENOW, JJ., concurred.

SAMUEL THURSTON, *Adm'r*, *versus* DAVID B. DOANE, *Adm'r*.

Where one, in his capacity of executor, had collected of the United States a sum of money, which had been paid under the treaty with Mexico, it was *held*, not to be new assets accruing and coming into his hands after the decease of his testator, but should be deemed to be the avails of a claim in the nature of a debt due to the testator at the time of his decease and afterwards collected through the medium of the government.

The remedy of a person alleging that he was interested with the testator in the claim to indemnity, and is entitled to a share of the money collected, is against the executor, in his capacity as such. So, too, if the money should be regarded as new assets.

Where the plaintiff *thus* brought his action, in which the statute of limitation prevented his recovering, and he afterwards commenced an action against the executor, but not in his representative character, claiming to recover of *him*, on the ground that the money was paid to him wrongfully and by mistake, — it was *held*, that having elected to enforce his demand against the executor, as such, and having full knowledge that he was prosecuting the claim as one due to his testator, and acquiesced therein; and knowing, too, that the executor had inventoried and accounted for the money as assets of the testator's estate, and did not object, he would thereby be estopped to recover, even if there were no other legal objections to his maintaining his action.

ASSUMPSIT, for money had and received.

The plaintiff is administrator of the estate of Henry Rider.

The defendant is administrator of John Wilkins' estate.

The plaintiff states his case as follows, and offers to prove the following facts: — That, in 1830, the plaintiff's intestate

and one Samuel Lowder were owners of the schooner Topaz, Lowder owning by register three-fourths, and Rider one-fourth; William Lowder claiming to be owner or interested in one-third of the three-fourths owned by Samuel Lowder; that said Rider was master of said vessel during all the time she was navigated; that said master took and sailed said vessel during all said time on shares, by which contract the said master was to pay all expenses of said vessel, except port charges, including all wages, provisions and supplies, and his own services, according to the usual custom where such vessels are taken on shares, and to retain one-half of the gross earnings of said vessel under said contract to his own use, and to account and pay over the other half to the owners of said vessel, viz.:—said Samuel Lowder and himself, according to their several interests. That, after a voyage to Hayti and several voyages without returning to Bangor, the said vessel was seized with all and every thing on board of her, including freight money and other proceeds of her voyages, and confiscated, and said Rider murdered, by subjects of the Mexican government, in the early part of the year 1832. That plaintiff and said John Wilkins, who was then executor of the estate of said Samuel Lowder, as such executor, subsequently, in 1849, made and instituted separate memorials and claims before a commissioner appointed by the U. S. Government, under the Act of Congress of that year, to carry into effect the treaty with Mexico, claiming according to their several ownership in said vessel; viz.:—said Wilkins, executor, three-fourths, and said Thurston, plaintiff, one-fourth. That it was not shown to or before said commissioners or known by them, nor at that time or subsequently, until after the receipt of the money awarded as hereafter stated by the plaintiff, or any one interested in said Rider's estate, that said Rider had taken the said vessel on shares as aforesaid, or that there was any such contract, or that said Rider had any other interest or relation except as master employed, and as owner of the one-fourth of the vessel. That upon said memorials an award was made by said commissioners, allowing for all claims arising from

said wrongs to said vessel and all belonging or connected with it. That in said memorials the same items of claims were made in each, and were $4500 for the value of the schooner Topaz, and, in addition, certain definite sums for outfits and provisions, advance wages, insurance, freights, expenses, clothes, watches, wages of the crew, and some other items, as will appear from said memorials separately stated. That said commissioners made an award based on said memorials and said items of charge, and for all said claims allowed the sum of $21640,81, and the same was allowed and paid according to the ownership of said vessel, viz.,—three-fourths part to said Wilkins, as executor as aforesaid, and one-fourth to said plaintiff, in the month of May, 1851, (except one-third of the amount allowed to said Wilkins, which was detained in the U. S. Treasury to await action on the claim of Wm. Lowder to the same,) a portion of which money, so received by said Wilkins, was accounted for by him, as executor, in his life time, and the balance was paid over by the administrator of said Wilkins, after his decease, to the administrator *de bonis non* of said Samuel Lowder. The plaintiff claims to recover in this action that part of the money paid to said Wilkins as aforesaid, which was allowed for outfits, provisions, advance wages, clothes, watches and other valuables, and wages of crew, and all freight or freight money and earnings of the vessel, and all that he, said Rider, was entitled to receive on account of his said contract for sailing said vessel as aforesaid, of said money paid over to said Wilkins.

A suit was instituted, October 13, 1851, by plaintiff against said Wilkins, as executor of the estate of Samuel Lowder, and afterwards continued against Caroline R. Lowder, administratrix *de bonis non*, to recover of said estate the money claimed in this action, which action, it was decided, was barred by the statute of limitation.

Said Wilkins died in 1852. William Fessenden gave a bond as administrator on his estate; said bond is dated May 25, 1852, and approved by Probate Court on the last Tuesday

of June, 1852; and defendant has since been appointed administrator *de bonis non*, and gave bonds in November, 1855.

Plaintiff offers to prove that, soon after the receipt of the money by said Wilkins, he was informed by a person not interested in the matters, that it was probable that some claim would be made by said Rider's heirs or representatives for a portion of said money and he was advised by said person not to pay over all said money to said Lowder's estate, but to hold it to meet such a claim, if made and sustained.

If, upon proving the foregoing facts, or such parts as are legally admissible, the plaintiff would be entitled to recover any thing, the case is to stand for trial:—otherwise a nonsuit is to be entered.

This case was argued at July term, 1858, by

Kent, for plaintiff, and by

Rowe & Bartlett, and *A. W. Paine*, for defendant.

The opinion of the Court was drawn up by

RICE, J.—The facts offered to be proved in this case are substantially the same as were offered to be proved in the case of *Thurston* v. *Lowder*, 40 Maine, 197. In that case the attempt was to charge the administratrix, in her representative character, with the same money for which it is now attempted to charge the estate of Wilkins, who was the original executor on the estate of Samuel Lowder, and by whom the money in controversy was obtained for that estate.

The former action against the representative of Lowder's estate was defeated by the interposition of the statute of limitations. There was no suggestion that it was not brought against the proper person, or that, if the facts offered to be proved had been substantiated, the plaintiff would not have been entitled to prevail if his action had been seasonably commenced.

In that case this Court held, that the money collected under the Mexican commission, by the defendant's intestate, was

not to be deemed new assets in his hands, but rather in the nature of a debt due to the intestate Lowder, at the time of his decease, and afterwards collected through the medium of the government, and was to be treated as other assets of said intestate in the hands of his executor, in which the plaintiff, in his representative character, had an interest.

The decision of that case was fully supported by the case of *Foster* v. *Fifield*, 20 Pick., 67.

But suppose it were otherwise. Should the money collected by Wilkins, under the Mexican commission, be deemed new assets accruing and coming into his hands after the decease of Lowder, and for which no right of action accrued against Lowder in his life time, still the action would have been properly commenced against the representative of Lowder's estate, in his representative character.

In the case of *DeValengin's adm'r* v. *Duffy*, 14 Peters, 282, which is a case in its principal features closely resembling this, the Court says, "there are doubtless decisions which countenance the doctrine, that no action will lie against an executor or administrator, in his representative character, except upon some claim or demand which existed against the testator or intestate in his life time; and that, if the claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor in his personal character. But, upon a full consideration of the nature, and of the various decisions on this subject, we are of opinion, that whatever property or money is lawfully recovered or received by the executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto. In our judgment, this, upon principle, must be the true doctrine."

It is, however, contended that if this be so, an action will also lie against such executor or administrator, personally, and that the claimant may elect to seek his remedy against either person or both. How that might be under other cir-

cumstances, or as a purely abstract proposition, it is not necessary now to determine.

But in this case, after the plaintiff or his intestate has seen the defendant's intestate, acting in his representative character, institute a claim under the Mexican commission for the money now in controversy, and stood by and seen that claim thus successfully prosecuted, and the money collected and inventoried, and accounted for as a part of the assets of the estate of Lowder, not only without objection, but apparently with his concurrence and approbation; and when we further consider that Wilkins could not have obtained one dollar of that money in any other capacity than as representing the estate of Lowder; and after the plaintiff, with a full knowledge of all these facts, had instituted a suit against Wilkins, in his representative character, in which he failed only in consequence of his own laches, it is too late for him to hold the estate of Wilkins liable for the money thus collected and paid out, as for a personal liability. By well settled principles of law and equity he is estopped from so doing.

Nor does the offer to prove that soon after Wilkins received the money, he was informed, by a person not interested in the matters, that it was probable that some claim would be made by said Rider's heirs, or representatives, for a portion of said money, and that he was advised by said person not to pay over all said money to said Lowder's estate, but hold it to meet such claim, if made and sustained, change the aspect of the case. No fact seems to have been stated by this volunteer as a reason for his gratuitous advice. He had no interest in the matter, nor was he authorized to speak for those who were interested. Wilkins was not bound to observe or act upon idle unauthorized suggestions. He could not have done so without a violation of his duty to the estate which he represented.

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

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

DANIEL W. BRADLEY *and another, Appellants, versus* JOHN W. VEAZIE.

The Revised Statutes of 1857, c. 64, § § 55 and 57, and the statute of 1859, c. 113, confer on a Judge of Probate plenary power to punish, as for a contempt, a person duly before him, who refuses to answer any lawful interrogatory.

Whether an interrogatory be lawful or otherwise, or whether a commitment be justifiable or not, can be determined only by the Supreme Judicial Court on a writ of *habeas corpus*.

If questions are improperly asked, they must be answered as the Judge, in his discretion, may order; such answers subject, however, to be excluded when offered as evidence in any legal proceeding.

From an order of the Judge, requiring any such question to be answered, an appeal will not lie.

ON REPORT of the evidence by APPLETON, J.

This was an appeal from an order of the Judge of Probate for the county of Penobscot.

D. W. Bradley and G. L. Boynton were cited on the petition of John W. Veazie, as administrator on the estate of John Winn, to appear before the Probate Court, to be examined on oath, in relation to an alleged concealment or embezzlement by them of property of the deceased. The respondents appearing, July term, 1859, certain questions were put to them in writing, against being required to answer which they protested, and the Judge ordered them to answer. From this order they appealed.

As questions of law arose in the case, the facts were reported to the full Court.

J. A. Peters, for the appellants, urged the impropriety and illegality of the questions on divers grounds.

Rowe & Knowles, in reply, contended, amongst other things, that the Judge of Probate erred in allowing the appeal, and that no appeal lies in such a case.

In the view taken by the Court, most of the arguments of counsel on both sides become inapplicable, and need not be reported.

The opinion of the Court was drawn up by

CUTTING, J.—It appears in this case, that certain questions were propounded to the appellants, concerning transactions between them and the appellee's intestate, in relation to personal property, which the Judge of Probate ordered the appellants to answer, and from which order an appeal was taken to this Court.

The proceedings in the Court below were authorized by R. S. of 1857, c. 64, § 55, which provides that—"upon complaint made to the Judge of Probate, by an executor, administrator, heir, legatee, creditor or person interested in the estate of a person deceased, against any one suspected of having concealed, embezzled, or conveyed away any of the moneys, goods or effects of the deceased, he may cite such suspected person to appear before him, to be examined on oath in relation thereto." And, further, by § 57—"if any person, duly cited as aforesaid, refuses to appear and submit to such examination, or to answer all lawful interrogatories, the Judge may commit him to the jail of the county, there to remain until he submit to the order of the Court, be discharged by the complainant, or by the order of the Supreme Judicial Court."

And, by an Act of amendment, passed in 1859, c. 113, the Probate Judge "may require him to produce, for the inspection of the Court and parties, all books, papers or other documents within his control, relating to the matter under examination."

The foregoing provisions were manifestly intended to confer upon the Probate Judge plenary power to punish, as for a contempt, the person duly before him, who should refuse to answer any lawful interrogatory; and, whether the interrogatory be lawful or otherwise, or whether the commitment be justifiable or not, can be determined only by the Supreme Judicial Court on a writ of *habeas corpus*. If otherwise, the statutes, creating a summary process to elicit the truth by a disclosure of facts within the knowledge of the person inquired of, may, by the ingenuity of counsel, be wholly evaded.

Suppose we decide that certain questions were properly put, and that the proceedings should be remitted to the Probate Court for answers, and the appellants still refuse, should the Judge invoke his judicial function conferred by § 57, or authorize another appeal? Or if new questions were propounded and answers declined, as probably would be the case, another appeal is taken, and so on *ad infinitum*. Such proceedings, if not a contempt of the Judge, would be of the statute. Such an absurdity is not to be attributed to that law.

In *O'Dee* v. *McCrate*, 7 Maine, 467, it was held that this process was in the nature of a bill in equity for a discovery, and can result only in the discovery of facts, to serve as the basis of ulterior proceedings. But if such be the nature and result, the process and proceedings have been otherwise in practice. A bill for a discovery must contain specific allegations, and is usually accompanied with interrogatories, which are to be met and answered by the respondent in writing, whereas, in this process, there is a general allegation of embezzlement, and the respondents, in the usual form, are cited to appear, and to submit themselves on oath to an examination in relation to the subject matter of the complaint. In such case, the respondents appear before the Probate Judge in the character of deponents to give their depositions, or witnesses upon the stand to testify. And when before even magistrates, as deponents or witnesses, their refusal to answer might be treated as a contempt, and punished as prescribed in § 57, certainly not less rigorously. And shall the Judge of Probate be more limited in his judicial functions than an ordinary justice of the peace?

The disclosure of the respondents, when made, can only be considered in the nature of a deposition, which, as a party defendant in a suit pending, under the present law, they might be required to give, even before any magistrate in the county. If questions are improperly asked, they must be answered as the justice or presiding Judge in his discretion shall dictate, subject, however, to be excluded, whenever such testimony

shall be offered in any legal proceeding. By such a course, the law is magnified and rendered efficient and effectual, and the just and lawful rights of all parties fully protected.

For the foregoing reasons, this appeal is dismissed, as being improperly before us, and the case remitted to the Probate Court for further proceedings.

TENNEY, C. J., and RICE, APPLETON, MAY, and KENT, JJ., concurred.

JOSEPH M. MOOR *and another versus* BRACKLEY SHAW *and another.*

Where a Judge, at *nisi prius*, allows an amendment to specifications of defence, his determination is final, and not subject to exception.

In an action for flowage, all the owners of the dam complained of should be joined in the process to obtain damages, and all the co-tenants of the land alleged to be flowed should join in the complaint.

The complaint for flowage is not an action at law, but *sui generis*, resembling more a process in equity; and if all the owners of the dam occasioning the flowage are not joined in the complaint, the process should not abate, but the complaint be amended, and the other owners be summoned in.

ON AN AGREED STATEMENT OF FACTS.

This was a complaint for flowage occasioned by a mill-dam, entered at April term, 1859. At April term, 1860, the case came on for trial, and the defendants pleaded that they were not the owners or occupants of the said dam or mill as alleged in the complaint, and filed a brief statement that during all the time mentioned in the complaint, and at the commencement of the suit, Fayette Shaw and Major Lord of Detroit, were owners in common with the defendants of said dam or mill, and that the latter was the sole owner of another mill on the same dam, and which was operated by means of the head of water raised thereby, which dam and head of water were necessary for Lord's mill.

The complainants objected to the admission of evidence for the defendants under the brief statement, because it should have been pleaded in abatement, and because no notice had been given of the point in the specifications of defence.

The presiding Judge allowed the defendants to amend their specifications so as to embrace the point.

The complainants then asked leave to summon in the other owners or occupants named in the brief statement, admitting its truth.

The case was submitted to the full Court, to determine whether the brief statement, made at such a stage of the case, can avail the defendants, and whether the complainants may have the leave asked for, to summon in the other owners; if not, the complaint to be dismissed with costs for the defendants, otherwise to stand for trial.

C. S. Crosby, for the complainants.

Josiah Crosby, for the respondents, cited R. S., c. 82, § 18; c. 81, § § 1, 12; *Hill* v. *Baker*, 28 Maine, 9; *Tucker* v. *Campbell*, 36 Maine, 346; R. S., c. 82, § 12.

The opinion of the Court was drawn up by

KENT, J.—The specifications were amended by leave of the Court; and the determination of the presiding Judge on this matter was final, and not subject to exception.

It was decided in *Hill* v. *Baker*, 28 Maine, 9, that all the owners of the mill-dam complained of should be joined in the process to obtain damages occasioned by the flowage of land. It was also decided in *Tucker* v. *Campbell*, 36 Maine, 346, that all the co-tenants of the land specified in the complaint as injured by flowing, must join as plaintiffs or complainants.

In this case, the defendants plead that they are not owners or occupants, and, in their brief statement, allege that there are other owners and occupants, not named in the complaint. The brief statement also gives the names of the other own-

ers. The question is, whether this should not have been pleaded in abatement.

If this were an action at common law, it is clear that the objection, even if taken by plea in abatement, would not avail. 28 Maine, 9, before cited. But the process is not an action at law. It is *sui generis*, in its nature, partaking of some of the elements of a suit at law, but resembling much more a process in equity. It is not commenced by writ, but by a bill of complaint. The judgment is not, as in a case at law, for damages actually sustained at the date of the process, but it fixes, in addition to such damages, the yearly damages thereafter; the height of the dam; the time allowed in which to flow; and there is also a provision for future proceedings to increase or diminish the damages.

In the case of *Hill* v. *Baker*, before cited, the Court takes this view of the nature of the process, and says, that it is not as *tort feasors* that the defendants are complained of, but that "the process is rather in the nature of a bill in equity to obtain redress for the injury occasioned by the flowing, and to obtain that which is, in effect, an injunction against an unreasonable exercise of the right of flowage."

Viewed in this light, the strict rules of pleading, applicable to suits at law commenced by writs, cannot apply; but the rules in cases in equity *do* apply. When, in such cases, it appears that other persons, not named, should be parties to the bill, they may be summoned in, and proper amendments may be made.

In this case, we think that the other owners should be joined as respondents, but that the process should not abate, but leave should be granted to summon in the other owners named, and to amend the complaint accordingly. As the defendant did not specify this objection, as to non-joinder, in his original specifications, the amendment is to be without terms as to costs. *The case to stand for trial.*

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

WILLIAM KINGLEY *versus* WILLIAM COUSINS.

The statute of 1848, c. 52, R. S., c. 111, § 1, providing that "no action shall be brought and maintained upon a special contract or promise to pay a debt from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, or the assignment laws of this State, unless such contract or promise be made or contained in some writing signed by the party chargeable thereby," applies to a suit instituted after the passage of the law, but based on a verbal promise made before its passage.

The provisions of the statute relate, not to the validity of the contract, but to the remedy for a breach of it, and are constitutional.

EXCEPTIONS from the ruling of APPLETON, J.

In October, 1839, the plaintiff recovered judgment against the defendant in the District Court for the Eastern District. September 19, 1859, he commenced this action of debt on the judgment. The defendant, in his brief statement, set forth his discharge in bankruptcy in 1843, under the laws of the United States. On trial, it was proved that in 1846, the defendant verbally acknowledged to the plaintiff the debt embraced in the judgment, and promised to pay it.

The Court ruled that such an acknowledgment and promise were not binding, and that the action was not maintainable, and directed a nonsuit to be entered. The plaintiff excepted.

J. A. Blanchard, for the plaintiff.

Is the promise made in 1846 binding for more than six years? This action is brought, not on the promise, but on the judgment. The promise is offered as evidence to show that the judgment has not been paid or cancelled by the proceedings in bankruptcy. *Otis* v. *Gaslin*, 31 Maine, 567; *Corliss* v. *Shepherd*, 28 Maine, 551. The new promise revives the debt, prevents any limitation from attaching to it, and places it in the same condition as before the discharge. The judgment of 1839 is therefore in full force for twenty years, which had not expired when this action was brought.

A. W. Paine, for the defendant.

1. A new promise does not revive a specialty or a judgment, although it is held to revive causes of action barred by limitation or bankruptcy in assumpsit. 1 Parsons on Contracts, 30, note (i); *Graham* v. *Hunt,* 8 B. Monroe, 7; Angell on Limitations, § 247. The *dictum* of the Court, in opposition to this doctrine, in *Otis* v. *Gazlin,* 31 Maine, 567, appears to have been made without reflection or examination, and is at variance with the doctrine of *White* v. *Cushing,* 30 Maine, 269, and *Wardwell* v. *Foster,* 31 Maine, 558, as well as with other decisions in this and other States.

2. The parol promise offered in proof was not valid to support this action, commenced thirteen years afterwards, but was itself barred by the statute of limitations.

It was early settled in England, that the new promise was a new contract, though the old contract might still be sued, and the new promise made to support the action. This view was adopted in this country. *Depuy* v. *Sweat,* 3 Ward., 135; *Moore* v. *Viele,* 4 Ward., 420. The Court accordingly declare that bankruptcy discharges the original debt absolutely, and that the new promise is a new cause of action. The same doctrine is law in Vermont. *Walbridge* v. *Hanom,* 18 Vt., 448. It was adopted in Maine. *White* v. *Cushing,* 30 Maine, 267; *Wardwell* v. *Foster,* 31 Maine, 558. These authorities were all overruled in Massachusetts, in *Way* v. *Sperry,* 6 Cush., 238; but this case is inconsistent with the decision in *Cambridge* v. *Littlefield,* 6 Cush., 211, by the same Court at the same term.

The case at bar is within the principles of those in New York, Vermont and Maine, above cited. In bankruptcy, the debt is *paid* by the debtor giving up all his property; it is not merely discharged by presumptive payment, as in cases of limitation. The Courts have therefore held that, after bankruptcy, there must be a distinct, unequivocal promise to pay, in order to sustain an action. *Merriam* v. *Bailey,* 1 Cush., 77; *Pratt* v. *Russell,* 7 Cush., 462; *U. Soc.* v. *Hinckley,* 7

Gray, 460; and cases above cited. Here it is the *new* promise that gives vitality.

In cases of limitation, only an acknowledgment of indebtedness is required, showing that it is the *old debt* in which the plaintiff's rights are vested.

3. The new promise, when requisite, must be taken according to its terms and conditions. If to pay "when able," or on any other contingency, it is limited thereby. It is also limited by the existing provisions of law. If the plaintiff had given his note for the debt, the note would have been subject to the statute of limitations; why not, then, his verbal promise?

The opinion of the Court was drawn up by

KENT, J.—The facts presented in this case are a judgment in favor of the plaintiff against the defendant, in 1839; a discharge of the defendant in bankruptcy, in 1843; a verbal acknowledgment by the defendant, in 1846, that the debt embraced in the said judgment was due, and a promise, at the same time, to pay it. This suit was commenced in 1859.

By the Act of 1848, c. 52, (which is in substance reënacted in R. S., c. 111, § 1,) it is provided, that "no action shall be *brought and maintained* upon a special promise or contract to pay a debt from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, or the assignment laws of this State, unless such contract or promise be made or contained in some writing signed by the party chargeable thereby."

In the case of *Spooner* v. *Russell*, 30 Maine, 454, it was decided that this provision was prospective only as to suits, and that it did not apply to *suits* which had been commenced prior to its passage. This was reäffirmed in *Otis* v. *Gazlin*, 31 Maine, 567. In *Williams* v. *Robbins*, 32 Maine, 181, in the oral opinion as reported, the Court say, "the conversation relied upon was prior to the Act invalidating new promises in bankruptcy cases, except those made in writing." The report in that case does not show when the action was commenced; but on

referring to the writ on file, it appears to have been dated in 1845, prior to the passage of the Act.

The point presented upon the facts in all the above cases, was, whether the statute, by a fair interpretation, did in its terms embrace suits pending. It was not whether the Legislature could constitutionally pass a law embracing them, but whether it had passed such a law, in fact. The Court decided that it was not clear that such suits were included in the provision, "that no action shall be *brought* and maintained," and therefore held that the Act did not apply to pending suits.

This case presents the question, whether the provision reaches those cases on suits which are instituted after the passage of the law, based upon a verbal promise made before its passage. This point has not been decided by the Court.

It is quite clear that the case is covered by this statute, which bars all actions brought upon a verbal promise, whenever and wherever made, and declares that no such action shall be maintained. This is such an action. The only question is, whether the provision, so far as it applies to verbal promises made before its passage, is unconstitutional. It is contended that it is, on the ground that it impairs the validity of a contract. The Act does not, in terms, declare the contract void, nor does it affect, in any way, the original debt or judgment. It simply gives a rule of evidence as to the proof of a new promise to revive the old debt; or, in other words, declares that the law will furnish no remedy to enforce such a promise, unless it is in writing. The law has relation to the remedy, and not to the validity of the contract.

After many discussions and decisions in the Courts of the United States and of the several States, it seems now to be well settled that the Legislature cannot constitutionally pass any retrospective laws, general or special, which affect the validity, construction or discharge of contracts, but may constitutionally pass such laws, which affect only the remedy to enforce or the evidence to establish them.

It is well said by SHEPLEY, J., in *Oriental Bank* v. *Freese*,

18 Maine, 112, that "when a person, by the existing laws, becomes entitled to recover a judgment or to have certain real or personal estate applied to pay his debt, he is apt to regard the privileges which the law affords him as a vested right, not considering that it has its foundation only in the remedy, which may be changed, and the privilege thereby destroyed."

"There is no such thing as a vested right to a particular remedy." *Springfield* v. *County Com.*, 6 Pick., 501.

The provision in the constitution of the United States, by which States are prohibited from passing any laws impairing the obligation of contracts, does not imply a prohibition against varying the remedy.

Obligation and remedy are not identical. The obligation begins when the contract is made, and attaches to it. The remedy to enforce it, or to recover damages for its breach, is subsequent in time, and depends upon the law which may be in force at the time and place of instituting the action. *Ogden* v. *Saunders*, 12 Wheat., 350.

In the same case, C. J. MARSHALL says, that, "in prescribing the evidence which shall be received in its courts, and the effect of that evidence, the State exercises its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and the mode of proceeding in courts."

In the case of *Thayer* v. *Seavey*, 2 Fairfield, (11 Maine R.,) 284, the Court, after a full discussion, decided, that an Act of the Legislature, which provided that no action should thereafterwards be *maintained* to recover damages for an escape of an imprisoned debtor, except a special action of the case, operated upon an action then pending, and that it was not unconstitutional on the ground of its operating retrospectively, or disturbing vested rights; although its effect was to deprive the plaintiff of his right to recover his whole debt and costs, to which, by the existing law, when that suit was commenced, he was entitled.

The distinction between obligation and remedy is clearly pointed out in *Fales* v. *Wadsworth*, 23 Maine, 553. The

Court say, "no person has a vested right in a mere mode of redress provided by statute. The Legislature may at any time repeal or modify such laws. They may prescribe the number of witnesses which shall be necessary to establish a fact in court, and may again, at pleasure, modify or repeal such law. And so they may prescribe what shall, and what shall not be evidence of a fact, whether it be in writing or oral; and it makes no difference, whether it be in reference to contracts existing at the time or prospectively."

The same doctrine is found in the case of *Oriental Bank* v. *Freese*, 18 Maine, before cited.

The case of *Lord* v. *Chadbourn*, 42 Maine, 441, involved the construction of the provision of the statute, that no action of any kind should be *maintained* in any Court of this State for intoxicating liquors. The conclusion is, "that the Legislature may pass laws altering, or modifying, or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, which forbids the passage of *ex post facto laws.*"

There are other cases in this State and Massachusetts which contain the same principle.

In the case before us, whether we regard the provision of the statute as one prescribing the kind of evidence necessary to establish a fact in Court, or as one affecting the remedy on the new promise, we cannot declare the provisions unconstitutional. It was the manifest intention of the Legislature to include in the provision a case like this.

Exceptions overruled and
Nonsuit to stand.

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

City of Bangor *versus* Inhabitants of Brewer.

Where a pauper is absent from the place of his domicil, and is temporarily in another town, and while there forms an intention to remove to and reside in a third town, but, instead of doing so, remains for a longer time at his temporary abode, this is not sufficient to break up the continuity of his residence in the place of his domicil.

Declarations made by a pauper whilst temporarily in a town away from the place of his domicil, indicating an intention to remove to and reside in still another town, not having been carried into execution, are inadmissible in evidence.

On Exceptions from the ruling of Appleton, J.

Assumpsit to recover for supplies furnished by the plaintiff city to Ephraim W. Howe and family as paupers. Howe lived in Brewer from 1843 till 1849 or 1850, except that in 1846, he took a job of work in Bangor, and moved there with his wife for a few months, and then returned to Brewer; soon afterwards hired with one Brastow in Orrington, and went there with his family, leaving part of his furniture in Brewer; remained some months, and then engaged to assist in building a wharf for one Savage in Orrington, and subsequently returned to Brewer; in a few weeks took his wife to Topsfield, where she remained all winter, but he returned to Brewer, and worked there; and, after his wife's return in the spring, he lived awhile longer in Brewer, and then removed to Bradley. He lived in Orrington, in all, nearly a year.

The defendants introduced Samuel Baker, who testified, that while Howe lived in Orrington, he told the witness that he was going to hire a house of Cushing in Frankfort, and remove there, and keep boarders; also that he thought of removing to Bangor. The plaintiffs objected to this testimony; but it was admitted.

The defendants also introduced George O. Goodwin, who testified, that he had a talk with Howe after he left Brewer, and he said he should go where he could get work; also another talk with him a few days before the trial, when he said he had no object in coming back to Brewer, except to

get work. The plaintiffs objected, but this testimony was admitted.

The presiding Judge, amongst other instructions to the jury, instructed them, that if Howe left Brewer for Orrington for a temporary purpose, and with no intent to abandon his residence in Brewer, yet if he formed the intention while in Orrington to abandon Brewer, and after such intention was formed remained there, no matter whether for a longer or shorter time, such intention and his actual absence from Brewer would break up his continuity of residence, and prevent his gaining a settlement in Brewer, unless he lived there five years before or afterwards.

The verdict was for the defenants. The plaintiffs excepted.

A. G. Wakefield, for the plaintiffs.

The pauper moved to Brewer in 1843, and left that town in 1850. He was absent from Brewer part of 1846 and 1847, and the question is, with what intention, as, if he intended to return, his home remained in Brewer. *Wayne* v. *Greene*, 21 Maine, 357; *Brewer* v. *Linneus*, 36 Maine, 428; *Warren* v. *Thomaston*, 43 Maine, 406. The evidence, except that of Baker, shows that in removing to Bangor, and afterwards to Orrington, he intended to return, and left part of his furniture in Brewer. He was taxed in Brewer in 1846 and 1847.

The testimony of Baker, as to declarations made by Howe while in Orrington of his intention to remove to Bangor or Frankfort, are inadmissible, not being contemporaneous or coupled with any act in relation to his removal to or from Orrington, Bangor or Frankfort. It does not appear that Howe went to Frankfort, or saw Cushing. The declarations are no part of the *res gestæ*. On general principles, they were not admissible. 1 Greenl. Ev., 137. In pauper cases this principle has been rigidly adhered to. *Richmond* v. *Thomaston*, 38 Maine, 232; *Wayne* v. *Greene*, 21 Maine, 357. At the time of the conversation with Baker, the pauper was not in either of the towns interested in the declarations sought

to be proved. Had he declared his intention to remain in Orrington, his remaining there afterwards would have been acting out and illustrating the declarations. It being otherwise, they should be excluded. *Bangor* v. *Brunswick*, 27 Maine, 351.

Goodwin's testimony, being a recital of past transactions and purposes, was not admissible. Greenl. on Ev., c. 5, § 110; *Salem* v. *Lynn*, 13 Met., 544; *Haynes* v. *Boulter*, 24 Pick., 242.

The instruction to the jury, that the intention of the pauper, formed after he left Brewer, of removing to Bangor or Orrington, though not carried into effect, broke up the continuity of the residence, was incorrect. A change of domicil is not affected by an intention to remove, until that intention is carried out by actual removal. *Hallowell* v. *Saco*, 5 Maine, 144; *Greene* v. *Windham*, 13 Maine, 225; *Wayne* v. *Greene*, 21 Maine, 357.

J. A. Peters, for the defendants.

The testimony of witnesses to the declarations of Howe were admissible on two grounds:—1st, as having a direct tendency to contradict the pauper's testimony, and 2d, the testimony of Baker was a part of the *res gestæ*. The pauper and his family were *in* Orrington, and, whether residing there, was a question of *intention*. His declarations during the time, as well as his conduct, would be more or less indicative of his intention, and hence were admissible. *Richmond* v. *Vassalborough*, 5 Maine, 396; *Baring* v. *Calais*, 11 Maine, 463; *Thorndike* v. *Boston*, 1 Met., 242.

The instructions were correct, upon principles long since established, and deducible from the cases already cited. Circumstances mark different cases with slight distinctions, where there is no substantial difference. The whole question is one of intention. If, while in Orrington, Howe made up his mind to remain there, or not to return to Brewer, and, in pursuance thereof, remained there, or away from Brewer, it was an abandonment of Brewer, and broke up his continuity of residence.

It can make no difference whether his intention is formed when he leaves or after he leaves. I go to Boston on a visit; I am not a resident there, but reside in Bangor, and am absent temporarily only. But, while in Boston, I determine to remain and reside there; I inform my friends of it, and do in fact remain there, say, ten years. Certainly my conduct and declarations of intention, made at the time, are admissible. No matter whether the time is ten years, ten days, or ten minutes. But, by the plaintiffs' construction, I must return to Bangor, and take a new start with new intentions. See 13 Met., 544; 3 Met., 199.

The opinion of the Court was drawn up by

MAY, J.—Assumpsit for supplies furnished by the plaintiffs to one Ephraim W. Howe and family. There was testimony tending to show that said Howe had resided in the defendant town for five years together, without having received, directly or indirectly, any support or supplies as a pauper during that period. It also appeared that, during these five years, the pauper went with his family into the town of Orrington and worked there for one Brastow, building a wharf, some four or five months, leaving a part of his household furniture in Brewer, to which place he intended to return.

During this temporary sojourn in Orrington, the pauper made declarations tending to show an intention of removing at some subsequent time, from that place to the town of Frankfort, and of making his permanent residence there. These declarations were offered in evidence by the plaintiffs, and, though objected to by the defendants, were admitted. It further appeared that the pauper did not, in fact, remove to Frankfort, but shortly afterwards returned to his residence in Brewer.

In view of these facts, the presiding Judge instructed the jury, in substance, that if the pauper formed the purpose while in Orrington, of moving to Frankfort, though he did not carry that purpose into effect by such removal, but remained in Orrington after such intention, for a longer or shorter time,

the continuity of residence for five years would be thereby broken up.

We think this instruction cannot be sustained; and that the declarations of the pauper, avowing his purpose of a subsequent removal from Orrington to Frankfort, not having been made upon the eve of, or in connection with any such act, were inadmissible. If an intention existed of removing to Frankfort, it was never executed. The first question is, whether the instructions were correct. No question is now better settled, than that, in order to break up an existing residence, such as the statute requires, there must be an act of removal from the place where it exists, accompanied by an intention of the pauper to remain permanently at the place of removal or at some other place, or, at least, the pauper must be without any present intention of returning to the place from which he removed;—and such intention must be simultaneous with the act of removal, or in some way connected with an actual residence in another place. *Warren* v. *Thomaston*, 43 Maine, 406. An unexecuted intention of the pauper, while in Orrington, to take up a permanent residence in Frankfort, unaccompanied with any act, can legally have no more effect upon the pauper's statute residence in Brewer, than if the same intention had been formed by the pauper while residing personally with his family in Brewer, and never executed. The instruction upon this point was therefore erroneous. It is unnecessary to consider any other.

In regard to the declarations of the pauper, they were clearly inadmissible, except so far as they might tend to contradict the pauper as a witness in other respects. At the time they were made, the statute residence of the pauper, necessary to gain a settlement in this mode, was running on, and the personal presence of himself and family was in Orrington, they being there only for a temporary purpose; and the declarations related to an act subsequently to be performed in Frankfort, but never, in fact, performed. They were therefore wholly disconnected with any act, and were not any part of any *res gestæ*. The authorities cited in de-

fence, and many more that might be cited, show that declarations thus disconnected with the performance of any positive act are inadmissible. We see no contradiction between these declarations and any material statement of his upon the stand.

If the pauper, while residing in Orrington, had made declarations expressive of an intention of his permanent residence there, it may be that such declarations would be admissible, as being connected with, and explanatory of, his actual residence then in that town; but of this we give no opinion, as it is not this case. *Exceptions sustained.*

TENNEY, C. J., RICE and CUTTING, JJ., concurred. KENT, J., concurred in sustaining the exceptions on the point that the evidence in question was inadmissible.

ÆNEAS SINCLAIR *versus* DANIEL B. JACKSON.

In an action of *trover*, brought to recover damages for goods stolen, it is not necessary to prove the guilt of the defendant beyond a reasonable doubt, but the jury is to give a verdict according to the weight of evidence, as in other civil cases.

In civil cases, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt, before the plaintiff is entitled to a verdict; but, where no such issue is raised by the pleadings, the jury may decide upon the preponderance of evidence.

An accomplice in the crime is a competent witness in the civil action; and instruction to the jury, that they are to receive his testimony, and give it the same effect as that of any other witness, *so far as they believe him*, is not incorrect.

THIS was an action of TROVER for $70 in bank bills. The defendant pleaded the general issue.

The loss of the bills was proved by the plaintiff's own testimony.

The plaintiff introduced James Conner, who testified, that

he, one Costellow and the defendant, by preconcert, went to the house of the plaintiff in the night of Sept. 22, 1853, armed with knives and a club, for the purpose of getting the bills; that witness and the defendant stood at the outside door, and Costellow opened the door, which was not locked, went in and brought out a trunk containing the bank bills; that they opened the trunk, took out the bills, and Costellow returned the trunk into the house; that they put the bills into a wallet, and witness hid the wallet and its contents under the foot of a post in the fence, Conner, Costellow and the defendant all being in company together; and that witness had never received any of the money. There was no evidence, except that of Conner, that the defendant ever had any of the bills, or any thing to do with them.

The defendant introduced testimony tending to impeach Conner.

Upon this evidence, the defendant requested the Court, APPLETON, J., to instruct the jury, that it was incumbent on the plaintiff to prove, beyond a reasonable doubt, that the defendant was guilty of stealing the bank bills, or of participating in the larceny, before the plaintiff would be entitled to a verdict.

The Court declined to do so, but instructed the jury, that the rules of evidence in criminal cases did not apply to this case; that the plaintiff would be entitled to a verdict, if he satisfied them by the balance of evidence that the defendant took the money or aided in taking it, as in any civil action; that there was no crime charged in this action, and, although Conner, by his own testimony, proved himself to have been an accomplice in stealing the bank bills, the jury were to receive his testimony, and give it the same effect as that of any other witness, so far as they believed him.

The verdict was for the plaintiff; and the defendant *excepted.*

J. E. Godfrey, in support of the exceptions.

Testimony to prove the money, for which this action is brought, to have been stolen, was offered from a witness who

represents himself to be an accomplice of the defendant in the theft. There were no circumstances to confirm, but testimony to contradict the witness. The Judge declined to instruct that the fact alleged must be proved beyond a reasonable doubt, but ruled that it need only be proved by a balance of testimony, as in civil cases. At common law, there must have been a conviction for the theft, before an action would lie to recover the stolen money. 3 Blackstone's Com., 88. It was the same in Maine until 1844. *Crowell* v. *Merrick*, 1 Appl., 392; *Boody* v. *Keating*, 4 Greenl., 164. A jury may convict on the testimony of an accomplice, but not unless sustained by corroborative evidence. Starkie on Ev., Part 3, § 66. The defendant was thus proved to be guilty, before an action could be commenced. The change of law by the statute does not change the rule of evidence in such cases. No one can be condemned for crime by the verdict of a jury in any form of action, unless upon evidence excluding all reasonable doubt.

In *Thayer* v. *Boyle*, 30 Maine, 475, the Court required evidence sufficient to convict of crime, in order to sustain an action for the recovery of the statute penalty. The Judge, in that case, as in this, instructed the jury that they might decide upon the balance of testimony. Exceptions were taken to the instructions, and sustained.

True, the declaration, in the case cited, sets forth the crime, and in this case simply a tort. But the defendant, being absent, had no knowledge of what he was to meet, and was not here even to give his testimony. His friends assumed the defence, and found at the trial that the charge was burglary and larceny, proved by the uncorroborated testimony of an alleged accomplice. Should he be condemned, under such circumstances, without proof beyond a reasonable doubt? Should a mere preponderance of evidence overcome the presumption of his innocence?

A. Sanborn, for the plaintiff.

This is a civil action. The writ alleges the conversion by the defendant of certain bank bills of the plaintiff to his own

use. Larceny is not alleged, and need not be proved. The defendant is not on trial for stealing, else a verdict here would be equivalent to a conviction, and bar a criminal prosecution. A party cannot be tried a second time for the same offence, after he has been once convicted or acquitted by the verdict of a jury, and judgment rendered. Story's Com. on Con., § 1781; *Saco* v. *Wentworth*, 37 Maine, 165.

In criminal cases, the guilt of the accused must be proved beyond a reasonable doubt; but in civil actions, the plaintiff is to satisfy the jury, by a preponderance of evidence. 1 Stark. on Ev., § 53; 1 Greenl. on Ev., 19. In an indictment for adultery, the former rule prevails; in a libel for divorce for the cause of adultery, the latter. 2 Greenl. Ev., 40.

The case at bar differs from *Thayer* v. *Boyle*, 30 Maine, 475, which, being for a penalty, though in the form of a civil action, was really a criminal prosecution.

A verdict in civil actions, sometimes, may be set aside if against the weight of evidence, but not if supported by the weight of evidence. It follows, that the balance of testimony was sufficient to warrant a verdict for the plaintiff; and the instruction given was right.

In criminal trials, the testimony of an accomplice is received, though with great caution and discrimination; yet his credibility is a question for the jury, and they may convict on his testimony, without corroboration, if sufficient to satisfy beyond a reasonable doubt. The jury were therefore warranted, in the civil case at bar, in finding for the plaintiff on the testimony of Conner alone, and notwithstanding the attempt to impeach him.

If the verdict was justified by the weight of evidence, the Court will not disturb it, although the instruction was not entirely correct. *Farrar* v. *Merrill*, 1 Maine, 17; *French* v. *Stanley*, 21 Maine, 512; *Howard* v. *Minor*, 20 Maine, 325.

J. W. Hathaway, for the defendant.

The only witness was Conner, and his testimony, if true, proved the defendant guilty of burglary and larceny in ob-

taining the bank bills. The jury, therefore, must have found the defendant guilty of these crimes, before they could give a verdict against him for the value of the bills.

The action is in civil form; but the correctness of the instructions depends on the evidence on which they were based.

The object of the statute of 1844, (R. S., c. 120, § 12,) was not to change the rule of evidence concerning the same matter put in issue by the proof, but to prevent the indefinite postponement of the owner's remedy for loss, should the government delay prosecution for the crime. Before the statute was enacted, if, in the course of a trial, it was proved that the defendant stole the goods, a nonsuit would have been entered. But *now*, as soon as the larceny by the defendant appears *prima facie*, he has the benefit of the presumption of innocence, as much as if on trial for the felony. The ruling of the Court in this case deprived him of that benefit. 3 Greenl. Ev., § 39. The ruling cannot be sustained without overruling *Thayer* v. *Boyle*, 30 Maine, 475.

The tendency of the instructions as to Conner's credit as a witness and an accomplice, was to divest him of all taint arising from his participation in the crime. The Court should have ruled that it was unsafe and dangerous to find the defendant guilty on the uncorroborated testimony of an accomplice. 1 Greenl. Ev., 379, 380, 382.

The opinion of the Court was drawn up by

RICE, J.—Trover for a quantity of bank bills. Plea, general issue.

There was evidence in the case tending to show that the defendant, with others, obtained possession of the bills by an act of larceny. In view of this testimony, the presiding Judge was requested to instruct the jury, that it was incumbent on the plaintiff to prove, beyond a reasonable doubt, that the defendant was guilty of stealing the bills, or of participating in the larceny of them, before the plaintiff would be entitled to the verdict. This instruction was not given.

In the case of *Thayer* v. *Boyle*, 30 Maine, 475, which was

trespass for wilfully and maliciously setting fire to and burning the plaintiff's barn with its contents, the presiding Judge instructed the jury, that they should decide upon the balance of testimony, as in other civil cases. These instructions, the majority of the full Court held, were not so favorable to the defendant as he had a right to require.

In cases of insurance it is said, in 2d Greenl. on Ev., 408, when the defence is, that the property was wilfully burned by the plaintiff himself, the crime must be as fully and satisfactorily proved to the jury as would warrant them in finding him guilty on an indictment for the same offence.

The same rule has been held to be the law in this State, in cases of that description. *Butman* v. *Hobbs & Tr.*, 35 Maine, 227.

But in *Schmidt* v. *New York M. F. I. Co.*, 1 Gray, 529, which was an action on a policy of insurance, and where one of the grounds of defence was, "that the fire was set by the plaintiff, and was his own fraudulent and wilful act," the Judge was requested to instruct the jury that the defendants must satisfy them beyond a reasonable doubt, that the plaintiff purposely set fire to the property insured, before they could find for the defendants. The Judge declined so to instruct, and his ruling was sustained.

In civil cases, when the rule contended for by the defendant is required, the criminal act must be so set out in the pleadings, as to raise that distinct issue before the jury. But when no such criminal act is raised by the pleadings, the jury are authorized to decide upon the preponderance of the evidence. 1 Greenl. on Ev., 537; *Schmidt* v. *Ins. Co.*, 1 Gray, 529.

No such issue was presented by the pleadings in this case. Nor was it necessary that the jury should find that a larceny had been committed to entitle the plaintiff to a verdict. Though the taking might have been felonious, it was not necessarily so. The only issue presented to the jury was one of conversion. That fact is all that will be established by the record. The fact that testimony was introduced tend-

ing to show that the defendant had committed a larceny as well as converted the property, cannot change the result.

Suppose, in a case of assumpsit on a note of hand, tried upon the general issue, evidence should be introduced tending to show that the defendant's name upon the note was a forgery; or in a case of replevin, testimony should be introduced tending to show that the defendant obtained possession of the property under such circumstances as to constitute larceny, would the plaintiffs be required to establish their rights by the same *degree* of evidence as would be required to convict the defendants of forgery or larceny? Clearly not; and for the plain reason that no such criminal charges would be in issue before the jury. So in this case.

The instructions to the jury, that they should receive the testimony of Conner, the alleged accomplice of the defendant, and give it the same effect as that of any other witness, *so far as they believed him*, were correct. He was a competent witness, and, if the defendant had desired further specific instructions in relation to his standing or his testimony, he should have asked them. *Exceptions overruled.*

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

ELISHA PETTENGILL *versus* FRANCIS MERRILL.

When an article is manufactured to order, the manufacturer furnishing the materials, it continues to be his property until completed and delivered, or tendered.

Replevin will not lie to obtain possession of an article manufactured to order, until it is completed and delivered.

A accepted an order to build a boat for B, and proceeded to build one which he repeatedly declared he was building for B on the order, but, after it was finished, refused to deliver it. *Held*, that B cannot maintain *replevin* to recover the boat, his remedy being by an action on the contract.

REPLEVIN for a boat.

The plaintiff introduced the following copy of an order: —

"Bangor, Jan. 31st, 1859.

"Mr. Francis Merrill: —Please build for, and let Elisha Pettengill's agent have one twenty foot boat, of the value of sixty dollars, being such a one as he describes to you, and charge to account of your obedient servant,

"L. D. Higgins."

The order was duly accepted in writing upon the face of it by Francis Merrill.

Pettengill testified that he presented the order, and described such a boat as he wished, and Merrill accepted the order. Witness was frequently at Merrill's shop while he was building the boat, and Merrill said he was building it on the order. Witness saw the boat after it was taken; it was such a boat as he described to Merrill, but he did not know whether it was the same he built on the order.

Charles D. Gilmore testified, that he found the boat at the defendant's shop finished; the defendant said it was the boat built for Pettengill's new brig, on the order from L. D. Higgins, but that it should not be taken away.

The defendant pleaded the general issue, with a brief statement alleging property in the boat in Gibbs & Phillips, and not in the plaintiff.

On this testimony, the Court, APPLETON, J., ordered a nonsuit. The plaintiff *excepted.*

S. W. Knowles, for the plaintiff, argued that the defendant having accepted an order for a boat, by that acceptance received payment in advance, and, having proceeded to build the boat accordingly, it was the property of the plaintiff, on two grounds:—

1. The defendant contracted a debt to the plaintiff by accepting the order, and the boat having been built in discharge of the debt, and accepted by the plaintiff, it became his property. The acts of the parties, in pursuance of the agreement, amounted to a transfer. If the plaintiff had refused afterwards to receive the boat, he could not have brought an action on the order. If the defendant had built it in the plaintiff's shop instead of his own, could there have been any doubt as to the title?

2. By accepting the order, and assuming the liability to the plaintiff, the defendant received payment for the materials furnished, and they became the property of the plaintiff. Then, as the plaintiff virtually furnished the materials and superintended the work, the boat was his. *Beaumont* v. *Crane,* 12 Mass., 400; *Stevens* v. *Briggs,* 5 Pick., 147; *Crookshank* v. *Burrell,* 18 Johns., 58; *Bement* v. *Smith,* 15 Wend., 493.

In the case of *Stevens* v. *Briggs,* just cited, A agreed to make a desk for B, B furnishing part of the materials, and A the remainder, to take pay of lumber of B's in his hands. Before finishing the desk, it was attached by a creditor of A. But the Court decided that it was the property of B. The case at bar is analagous to this, but stronger for the plaintiff. It is between the original contractors, and not between one of them and a creditor of the other.

The case of *Moody* v. *Brown,* 34 Maine, 107, differs from the case at bar. A customer ordered an article but, after it was made and tendered, refused it. He had not paid for it, nor was there any thing from which an acceptance could be inferred, except the mere giving of the order. On trial, it was held that he was not liable for the price of it, as the title did not pass to him by the transaction, but might be liable for

damages for refusing to take it. In the case at bar, it is contended that payment had been made, and there had been a delivery and acceptance of the articles.

A. H. Briggs, for the defendant.

The only question is, whether there was such a delivery as to pass the property. The plaintiff is obliged to show property in himself. The plea of *non cepit* does not admit the property to be in the plaintiff, when accompanied by a brief statement denying it. *Dillingham* v. *Smith*, 30 Maine, 370; 31 Maine, 296; 32 Maine, 192. When the pleadings do not admit the property in the plaintiff, or present an issue upon its being in the defendant, there must be proof of property in the plaintiff. 30 Maine, 370. Although the pleadings claim that the property was in Gibbs and Phillips, the plaintiff fails to show property in himself, for he proves no delivery. The defendant contracted to build a boat; this may or may not be the one; but, before it was finished, the defendant decided not to deliver it to him. The plaintiff may be entitled to an action for damages, but not for the price of the article. Until a delivery, actual or constructive, the claim of a vendee rests in contract, for the breach of which he has a remedy by action. 35 Maine, 385. The property not having passed, the nonsuit should stand.

The opinion of the Court was drawn up by

RICE, J. — This is an action of replevin for a boat. The evidence shows that the defendant accepted an order in favor of the plaintiff, drawn by one Higgins, to build a boat of specified dimensions, and for a certain price. After the order was accepted, the defendant proceeded to build a boat of the dimensions specified in the order, and at different times declared he was building it on the order of the plaintiff. The boat was never delivered to the plaintiff, and the defendant refused to permit him to take it away. This action is brought to obtain possession.

There is no evidence in the case tending to show that the

materials of which the boat was constructed, or any part thereof, were furnished by the plaintiff.

By the pleadings, the plaintiff's title is put in issue. To maintain his action, he must therefore show title. *Dillingham* v. *Smith*, 30 Maine, 370.

The mere order given for the manufacture of an article, does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. *Moody* v. *Brown*, 34 Maine, 107.

When an article is manufactured to order, delivery only can pass a title. Hilliard on Sales, 28; 2 Kent's Com., 504.

The contract here was merely executory. The rights of the parties, until delivery, rested in contract, and can be enforced only by an action on the contract. *Bennett* v. *Platt*, 9 Pick., 558; *Brewer & al.* v. *Smith*, 3 Maine, 44. The nonsuit was properly ordered. *Exceptions overruled.*

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

WILLIAM GOODWIN *versus* RUFUS DAVENPORT.

A note indorsed and delivered when over due, is to be treated, as between indorser and indorsee, as a note on demand, dated at the time of the transfer, so far as demand and notice are concerned.

What is a "reasonable" time in which to demand payment, is to be determined by the circumstances of each case.

Where a note over due was transferred on the twentieth day of September, and demand made and notice given on the thirteenth day of October following, it was within a reasonable time.

Evidence that a note was indorsed before it was due, and years before the transfer, and merely for the purpose of enabling an agent to negotiate or collect it, and not with the intent of being holden as indorser, cannot affect the rights of the party to whom it was subsequently sold and delivered. As between him and the indorser, the indorsement must be deemed to have been made at the time of the transfer.

Goodwin *v.* Davenport.

Evidence that the parties to the transfer agreed, at the time of the transfer, that the indorser should not be personally liable on the note, is inadmissible as contradicting or varying the written contract.

Although the indorser did not understand the legal effect of his acts, he is nevertheless bound by them.

ON REPORT of the case by APPLETON, J., April term, 1860.

This was an action of ASSUMPSIT against the defendant as indorser of three notes of hand, dated March 31, 1853, signed by one Thompson Sleeper, for one hundred dollars and interest, each, payable to the defendant or order, in three, four and five years respectively from their date, and indorsed by the defendant.

It was in evidence that, on the twentieth day of September, 1858, the defendant sold and delivered to the plaintiff the notes, all being then over due, and assigned to him a mortgage of land in Milford, by which the notes were secured, taking in payment certain personal property. The notes were indorsed in blank by the defendant. On the thirteenth day of October, 1858, the notes were presented at the Norombega Bank in Bangor, in banking hours, and payment demanded and refused. On the same day, the notes were presented to Sleeper, in Oldtown, for payment, and he refused to pay; and, in the evening, the plaintiff notified the defendant of Sleeper's refusal, and that he would look to him for payment of the notes, and this was the first intimation the plaintiff had ever given to the defendant that he would look to him for payment.

The defendant testified, that he indorsed the notes in February, 1856, when about going to California, not intending thereby to make himself liable on them, but to enable his agent to manage and collect them. He further testified, that when negotiating with the plaintiff for the sale of the notes and mortgage to him, that he repeatedly told the plaintiff that he would not pay the notes, and that he must look to the mortgaged premises for payment, and advised him to foreclose the mortgage, as the notes could not be collected.

On the evidence reported, the full Court is to enter judg-

ment by nonsuit or default, according to the legal rights of the parties.

H. M. Plaisted, for the plaintiff.

The notes in suit were indorsed to the plaintiff by the defendant, after their maturity. The indorsement of a negotiable note, after its maturity, is a new and independent contract between the immediate parties. It is, in substance, a bill drawn by the indorser upon the maker, payable on demand; and, in order to hold the indorser, there must be a demand and notice within a reasonable time. What is a reasonable time is a question of law, to be determined by the circumstances of each case; there is no certain time. 3 Kent, 92.

Eleven, eight, and even six months, have been held, in this State or Massachusetts, to be *unreasonable* time. So seven days, one month, six weeks and two months, have been held to be reasonable. In 7 Taunt., 159, "so long as the convenience of the holder might require," was held a reasonable time. 21 Pick. 267; *Romeyn* v. *Casey*, 1 Met. 374; *Rice* v. *Wesson*, 11 Met. 400; *Sanborn* v. *Southard*, 25 Maine, 409. In *Brooks* v. *Mitchell*, 9 M. & Welsby, 15, a note on demand, *with interest*, was held not to be over due, after more than a year had elapsed. *Wesley* v. *Andrews*, 3 Hill, 582.

In this case, the maker lived some 15 miles from the plaintiff's residence, and only 23 days intervened between the transfer and demand. The notes were on interest.

It would seem, then, that the demand and notice were within a reasonable time.

If the defendant's testimony was admissible, no defence would be made out. The notes and interest amounted at the time of sale to $426; the property sold to the defendant by the plaintiff to $435, according to the bill. Would any sane man have parted with property to that amount, for notes and mortgage of property he had never seen, without responsible indorsement? But the testimony, to prove that the defendant was not to be liable on his indorsement, was inadmissible, as

tending to contradict a written contract by parol. *Crocker* v. *Getchell*, 23 Maine, 392; 25 Maine, 410; 8 Maine, 213; 14 Maine, 335; 18 Maine, 103 and 146; 9 Pick., 550; 8 Johns., 148.

F. A. Wilson, for the defendant.

Parol testimony is admissible to prove a distinct bargain between the plaintiff and the defendant, that the latter was not to be liable on his indorsement:—1. Because it is only by implication of law that an indorser is holden. The rule excluding parol evidence to alter or explain written contracts does not apply to those implied by operation of law. *Susqu. B. B. Co.* v. *Evans*, 4 Wash., 480.

Parol agreements and declarations on the faith of which an instrument was executed, may be given in evidence to control the use to be made of it. *Miller* v. *Henderson*, 10 S. & R., 290; *Hain* v. *Kalbach*, 14 S. & R., 159; *Leibert* v. *Grew*, 6 Wharton, 404; *Rhodes* v. *Risley*, N. Chipman, 84; 1 D. Chipman, 52.

2. The indorsement in blank is only part of the contract, and parol testimony may be introduced to show the entire contract. The plaintiff has not produced all of the written contract, the assignment of the mortgage being part of it. 1 Greenl. on Ev., 281, a; *Lewis* v. *Gray*, 1 Mass., 297; *Lapham* v. *Whipple*, 8 Met., 59; *Taylor* v. *Weld*, 5 Mass., 109.

3. The indorsement is alleged to have been made after maturity of the notes, and, being a promise without date, parol testimony is admissible to prove when made. *Loft* v. *Stanley*, 5 Adolph. & Ellis, 474.

4. By reason of fraud practised by the party seeking the remedy upon the adverse party. 1 Greenl. on Ev., 284, a, and cases there cited; *Larrabee* v. *Fairbanks*, 24 Maine, 363.

Finally,—The plaintiff did not use due diligence in making demand on the maker of the note. There is no stated or certain time in which demand must be made; but what is a "reasonable" time must depend on the circumstances of

each case. In *Seaver* v. *Lincoln*, 1 Pick., 266, where seven days was held to be a reasonable time, it was seven days after the date of the note, not after the transfer. The notes were indorsed four years before the transfer, and the indorser was not notified of their non-payment at their maturity. Hence, the burden is on the plaintiff to show a new promise. *Hunt* v. *Wadleigh*, 26 Maine, 271.

A bargain between indorser and indorsee, written or oral, that the indorser shall not be sued, is available against the same indorsee. Parsons' Merc. Law, 124, and cases cited. Such a bargain is proved by the defendant.

The opinion of the Court was drawn up by

RICE, J.—The plaintiff claims as indorsee of three promissory notes, signed by one Sleeper, and made payable to the defendant or his order. The notes were indorsed by the defendant in blank, and delivered to the plaintiff after they were over due, in exchange for certain articles of personal property. Twenty-three days after the delivery of the notes, plaintiff made a demand on the maker for payment, which was refused, and the defendant was notified of the refusal the same day.

To charge an indorser on a note negotiated after it is over due, demand must be made upon the maker and notice given to the indorser, within a reasonable time after indorsement. *Rice* v. *Wesson*, 11 Met., 400; *Sanbourn* v. *Southard*, 25 Maine, 409.

As between indorser and indorsee, such note is to be treated as a note on demand, dated at the time of the transfer, so far as demand and notice are concerned.

There is no precise time when a note payable on demand is deemed to be dishonored. *Lossee* v. *Dunklin*, 7 Johns., 70.

Where a note payable on demand is indorsed within a reasonable time after its date, it is held in the United States that the indorsee has all the rights of an indorsee receiving a negotiable instrument before it becomes due. But if not

indorsed within a reasonable time, it will be considered as over due and dishonored. Bailey on Bills, 134.

What is such reasonable time, has not been precisely settled; though it is clear that such a note is to be considered as over due and dishonored in a year, or even eight or nine months after its date; but not over due a few days after its date. *Ibid.*, 136.

What is a reasonable time, is matter of law, to be decided by the Court. *Field* v. *Nickerson*, 13 Mass., 131; *Freeman* v. *Haskin*, 2 Cains, 368.

In *Field* v. *Nickerson*, the period of eight months was held not to be within a reasonable time in which to make demand to charge an indorser; while in *Hendricks* v. *Judah*, 1 Johns., 319, it was held that a note, on demand, drawn in England, and put in suit within one year from its date, was not dishonored.

In *Carlton* v. *Bailey*, 7 Fost., N. H., 230, it was decided, that a note payable on demand is presumed to be dishonored after seven months and seventeen days, and in *Freeman* v. *Haskin*, 2 Cains, 368, the same result followed in eighteen months; and in *Ranger* v. *Cary & al.*, 1 Met., 369, such a note was held not to be dishonored at the end of one month.

In England the rule would seem to be not to treat a note payable on demand as dishonored until a demand of payment and refusal. *Barough* v. *White*, 4 B. & C. 325.

Cases are numerous in which this question has, in one form or another been before the Courts, and wherein attempts have been made to establish some definite and tangible rule by which to determine when this class of paper is to be deemed dishonored. The question has been raised on almost every conceivable period of time, from "a few days" to eighteen months; but the precise number of days, weeks or months even, which will constitute a "reasonable time," has never been, although a question of law, judicially determined, but is made to depend upon *circumstances* as variable and uncertain as are the transactions and characters of men;

and finally to be determined by the discretion, not to say, caprice of the Court.

Judge SHAW well remarks, in *Seaver* v. *Lincoln*, 21 Pick., 267, "that one of the most difficult questions presented for the decision of a Court of law is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time, in a particular case, that one decision goes but little way in establishing a precedent for another."

For the purpose of establishing with some degree of certainty, a legal latitude and longitude for this fugacious rule, by which to determine when a note payable on demand may be said to be over due and dishonored, the Legislature of Massachusetts, in 1839, c. 121, § 2, provides that a demand made on any such note within sixty days of its date, without grace, shall be deemed to have been made within a reasonable time.

Similar legislative action, in this State, would relieve the Courts from a class of questions, which, under the conflicting authorities, presents much embarrassment, and would also be of much practical benefit to the business community.

In *Sanbourn* v. *Southard*, 25 Maine, 409, the note in suit was indorsed after it was over due. The indorsement was in blank, and was made on the last of January or first of February, 1839. Demand was made about, or a little past, the middle of March, next following the indorsement, and payment refused, and notice given to the defendant the same day. The Court would not say that the demand and notice were not within a reasonable time.

In view of all the authorities, a few of which only have been cited, we are of the opinion, that the demand and notice in this case were made and given within a reasonable time.

The defendant offered parol evidence to show that the indorsement was made by him upon the notes several years

before they were transferred to the plaintiff, and before they were due, to enable his agent to collect or negotiate them for him, while he was absent in California, and that, by thus indorsing them, he did not intend to render himself personally liable as indorser. Such evidence, if admissible, would not avail the defendant in this case. With that indorsement, the plaintiff was in no wise connected, nor is it material for what purpose it was made. So far as these parties are concerned, the transfer took place at the date of the delivery of the notes, and the indorsement, as between them, must be deemed to have been made at the time.

The defendant also proposed to show, by parol, that at the time of the transfer it was agreed between the parties that he should not be personally liable on the notes. This testimony was objected to, as contradicting or varying the legal contract evidenced by the indorsement in writing. Such would be the effect of the proposed testimony, and, for that purpose, it is inadmissible. *Sanbourn* v. *Southard*, 25 Maine, 409; *Crocker* v. *Getchell*, 23 Maine, 392; *Fuller* v. *McDonald*, 8 Maine, 213.

The evidence offered does not disclose any such fraudulent practices on the part of the plaintiff, as will in any way affect his rights as presented by the written contract between the parties. If the defendant did not understand the legal effect of his acts, it was his misfortune or his fault. However that may be, he is bound by them. A default must be entered according to the provision of the report.

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

JOHN WILSON *and others versus* LEWIS F. STRATTON.

A contract of sale between a vendor in another State, and a purchaser in this State, in which it is stipulated that, after the goods are delivered here, the purchaser need not have them nor pay for them, unless they suit him, is not complete until after the delivery is made, and the purchaser has an opportunity to make his election.

A sale of intoxicating liquors in this State, by a Massachusetts dealer, he knowing that they are intended by the purchaser to be sold in violation of the laws of this State, is illegal and void; and an action on a note, given for a part of the price, cannot be maintained.

Where the Massachusetts dealer, well knowing the law and policy of this State, prohibiting the indiscriminate sale of intoxicating liquors, sends his agent to solicit orders for liquors to be sold here in violation of law, even if the sale is completed in Massachusetts, it is in fraud of our laws, and cannot be upheld by any sound principle of comity.

THIS was an action of ASSUMPSIT on a note, as follows:—

"$231,54. "Boston, Jan'y 25, 1858.

"Four months after date, I promise to pay to the order of Wilson, Fairbanks & Co., two hundred and thirty-eight, 54-100 dollars, at Winn, Me., value received. L. F. Stratton."

Indorsed, "June 10, 1858. Received on the within $41,00."

The plea was the general issue, with a brief statement, that the consideration of the note was illegal, being for intoxicating liquors sold in violation of law.

The facts were reported by APPLETON, J., April term, 1860, the law Court to draw any inference from the testimony that a jury might properly draw, and render such judgment as the law requires.

From the deposition of the defendant, introduced by himself, and that of William Smith, introduced by the plaintiffs, the following facts appear:—The plaintiffs were dealers in liquors in Boston, and Smith, as their agent, solicited orders from the defendant, some time previous to the date of the note, at the public house which the defendant kept in Winn. The defendant, at that time and place, ordered certain liquors, which were afterwards forwarded to him from Boston. A

bill of the liquors was sent, at the prices agreed upon, and a charge for trucking added, which the defendant paid. He also paid freight from Boston to Bangor, and cost of transportation to Winn. Afterwards, at the defendant's public house in Winn, he paid Smith $25, cash, and gave the above note for the balance of the bill; and in June, 1858, he paid $41 on the note.

The defendant further testified, that he never looked after the goods, nor directed them to be looked after, until they reached him in Winn; that he wrote no order, and sent no order or letter, and had no transactions with the plaintiffs except at his house in Winn; that he agreed with Smith, that if the liquors were not what they were represented, he need not take them nor pay for them; that they did not prove to be of good quality, and he afterwards requested Smith to take them back, but Smith refused. Smith testified that the defendant never refused to pay the note nor asked for any discount, but when the indorsement was made, promised to pay the balance when he could.

Blake & Garnsey, for the plaintiffs.

The only question presented is, was the consideration of this note void? The law declares all contracts founded on the illegal sale of liquor in this State void. Was the sale made in this State?

1. The defendant gave an order to Smith for liquors at the defendant's house in Winn. The liquors were put up in Boston, and there delivered to a truckman, who put them on board the boat for Bangor. The defendant paid both the truckman and the freight on the boat. The delivery to the truckman completed the sale, and *then* the defendant's liability commenced. *McIntire* v. *Parker,* 3 Met., 207; *Torrey* v. *Corliss,* 33 Maine, 333; *Orcutt* v. *Nelson,* 1 Gray, 536.

2. The defendant says he never looked after, nor ordered the liquor looked after, till it reached him at Winn. This does not alter the position. A delivery to a common carrier, in the usual course of business, when no carrier is named by

the purchaser, is a good constructive delivery to vest the property in the vendee. *Dutton* v. *Solomonzer*, 3 Bos. & Pul., 582. Here, by payment of freight and acceptance of the goods, the defendant makes the delivery equivalent to a delivery to a designated common carrier, which certainly absolutely vests the property in him, subject to the right of stoppage *in transitu* only. *Stanton* v. *Eager*, 16 Pick., 467.

3. There is no evidence that the sale was invalid by the laws of Massachusetts. The validity of a contract is always determined by the laws of the place where made, and must be so held, wherever it is sought to be enforced. *Dater* v. *Earl*, 3 Met., 482, and cases cited; *Banchor* v. *Mansel*, (see *ante*, page 58.) The contract, therefore, being made in Massachusetts, and being legal there, must be held valid here, and the consideration of the note good.

F. A. Wilson, for the defendant.

This action cannot be maintained, under the statute of 1856, c. 255, § 18, in force when the sale was made.

The validity of a contract is to be determined by the law of the place where it is made. *Banchor* v. *Mansel*, (see *ante*, page 58.) It appears by the defendant's testimony, that all the transactions he had with the plaintiffs were at his house in Winn; that he wrote no order or letter. In *Torrey* v. *Corliss*, 33 Maine, 333, and *Orcutt* v. *Nelson*, 1 Gray, 536, cited for the plaintiffs, the facts were different; written orders were sent by the purchaser out of his own State, and the sales were not completed until the orders were filled in the State where they were sent. So long as any thing remains to be done on either side, the sale is not complete. *Houdlette* v. *Tallman*, 14 Maine, 400; *Banchor* v. *Cilley*, 38 Maine, 553. In the case at bar, if the sale was not complete when the bargain was made at Winn, it was not until the liquors were received and accepted at that place by the defendant. It does not follow, because trucking was charged in the bill of liquors, and the defendant paid the freight from Boston, that the sale was made at that place; for the defendant gave

no orders respecting the mode of sending, and did not look after them until they reached Winn. If they had been seized at Bangor, the plaintiffs could have claimed them as their property.

If sold in Massachusetts in violation of the Act of that State, passed in 1855, c. 215, a note given for the price could not be collected by the original holder. The sales, therefore, are made so loosely that the dealer may either claim or disown the liquors as occasion calls.

But the parties to the note in suit took pains to bring the contract under the laws of this State, by making the note payable at Winn. 2 Parsons on Contracts, 97. It is in evidence that the agreement was, that if the liquors did not prove to be such as they were represented, the defendant need not take them nor pay for them. This shows that the sale was not completed until the defendant accepted the liquors.

There is a failure of consideration for the note; and it is a question for the Court, whether the defendant has not already paid the actual value of the liquors. It appears they were not what they were recommended to be; and the plaintiff fails to show their actual value.

The rule "*caveat emptor*," does not apply, for the vendor only had the means of knowing the quality of the goods sold. The purchaser had only the representations made. The vendor, in such a case, warrants them to be what the purchaser understands them to be. 1 Parsons on Contracts, 466. The defendant testifies that, after he had examined the liquors, he requested Smith to take them back, but Smith refused. Under such circumstances, the defendant cannot be held for more than the actual value.

Blake & Garnsey, in reply.

1. It is immaterial whether the order was sent by letter or by word of mouth by Smith, so far as it goes to determine the place of sale. The giving of the order, the taking it by Smith, did not make a sale. When he got to Boston, the

plaintiffs might fill it or not, at their election. It was simply an offer to buy, which they might accept or reject. It had no binding force on them as a contract.

2. The agreement that the defendant might return the liquors, if not satisfactory, forms no element of the contract of sale, to determine either the time when or place where it becomes complete.

A is prosecuted under this law for the sale of intoxicating liquors; shall he be permitted to escape, on the ground that the purchaser has the privilege of returning them if not satisfactory? In other words, by setting up, that in consequence of such condition the sale is not complete?

Then, again, such return, if it amounted to any thing as *affecting the sale*, must be made within a reasonable time. But here the note was given some five or six months after the purchase, and the proposal to rescind was *after that;* and then only as to part. By giving the note, and by the delay, which was more than a reasonable time, the defendant ratified the trade, if ratification was necessary; and such ratification relates back to the date of purchase.

3. The laws of Massachusetts were not offered in evidence by the defendant. He cannot invoke their aid. Had he put them in, we should have shown that the plaintiffs were licensed under them to sell.

4. We do not claim that the place where the note was made is material to the issue. If the sale was made and complete in this State, the defendant is right; if in Massachusetts, we are. Where was the sale made, is the only question.

The opinion of the Court was drawn up by

RICE, J.—The consideration for the note in suit was intoxicating liquors. The question presented by the parties is, where was the contract for the liquors, out of which the note originated, completed. The plaintiffs concede, that if that contract was made in this State, there was no legal consideration for the note.

The case shows that the defendant, at the time the liquors were purchased, was a tavern keeper in the town of Winn, in this State, and that he gave a verbal order for them at his house, in that town, to an agent of the plaintiffs. The order was filled by the plaintiffs in Boston, Mass., and the liquors forwarded by steamer to the defendant. The truckage, from the warehouse of the plaintiffs to the wharf in Boston, was charged in the bill with the liquors, and afterwards settled by the defendant, and the freight was also paid by him, he, however, giving no direction as to the shipment of the goods, nor did he take any personal control over them until they reached his place in Winn.

In view of these facts, it is contended by the plaintiffs, that the delivery of the goods, which had been ordered by the defendant, to a common carrier in Boston, for transportation to the defendant, was in law a delivery to him, and that this delivery was a completion of the sale in Massachusetts; and, further, that there is nothing to show that such sale in Massachusetts was in violation of law, and, consequently, under the authority of *Torrey* v. *Corliss*, 33 Maine, 333; *Orcutt* v. *Nelson*, 1 Gray, 536; *McIntire* v. *Parks*, 3 Met., 207, and other authorities of like character, the action may be maintained, though the contract, if made in this State, would be unlawful.

Were there no elements in this case differing, and distinguishing it from the cases relied on, such might be the fact. But the defendant testifies, and on this point he is not contradicted, that "Smith, (the agent to whom the order was given,) told me when I agreed with him for the liquor, that if I did not get just what I wanted in every respect, I need not have it, nor pay for it."

He also testified, that this liquor was all entirely different from what he had agreed for with Smith, and a poorer quality.

This is an important qualification. The order was given in Maine; the goods were delivered to a common carrier in Massachusetts, directed to the defendant in Maine, subject,

however, to his acceptance or rejection as they should or should not prove satisfactory to him.

Where an agreement is conditional, it shall not be complete till the condition be performed, as if a man sell goods for so much as A shall name, this contract is not complete till A shall name the price. Com. Dig., Agreement, A, 4.

If the condition be, if he likes the corn or goods upon view, when he first has seen them, and agreed or disagreed, approved or disapproved, the bargain is complete. Ib.; Story on Contracts, 20; Brown on Sales, § § 44, 45.

Where the goods of A were sold by a broker to B, on Saturday, "the quality to be approved on Monday," and the buyer did not renounce the contract on Monday, it was held, that, *after that day*, the contract became absolutely binding on both parties. Long on Sales, 281.

The contract in this case was conditional; upon a condition precedent. That condition could not, under the circumstances, be determined until the goods came to the defendant's hands. Until he had determined whether the liquors were just what he wanted in all respects, or had a reasonable opportunity to do so, the contract was incomplete. *Crane* v. *Roberts*, 5 Maine, 419; *McConners* v. *McNulty*, 1 Gray, 139; *Grout & al.* v. *Hill & al.*, 4 Gray, 361.

This is decisive of the case.

But even were we to find that the sale was technically completed in Massachusetts, it may well be doubted whether this action can be sustained. The policy of this State to prohibit the indiscriminate sale of intoxicating liquors, is matter of almost universal notoriety. No part of our State policy has been the subject of more deliberate consideration on the part of our Legislature and of our people. Laws prohibiting this traffic, under severe penalties, have long been upon our statute book. Of the existence of these laws the plaintiffs could not have been ignorant. Yet, in the face of these laws and of the known and settled policy of the State, they send their agents into the State to seduce our citizens to en-

ter into contracts looking directly to their violation, and, after having succeeded by such solicitation, in inducing them to enter into such a contract, they come before our courts and ask them, on the principle of comity, to enforce them on the technical ground that they were *completed* in another State. Such proceedings are manifestly in fraud of the laws of the State, and cannot be upheld by any sound principle of comity. *Banchor* v. *Mansel*, *ante*, p. 58. *Plaintiffs nonsuit.*

CUTTING, APPLETON, MAY, and KENT, JJ., concurred.

TENNEY, C. J., concurred in the result.

INHABITANTS OF VEAZIE *versus* INHABITANTS OF HOWLAND.

Whether an agreement made by the officers of two towns, by way of settlement of a pauper suit, that a part of the pauper family should thereafter have their settlement and be supported in one of the towns, and the remainder in another, is binding on those towns, as a contract for the future support of the paupers, *quære*.

But where a portion of one of the towns affected by the agreement is incorporated into a new town, the new town is in no way bound by the stipulations of the agreement, but is at liberty to assert all its rights as to the settlement and support of any or all of the paupers.

ASSUMPSIT for supplies furnished to Mrs. Lydia A. Doe and her children, not including her two eldest children.

The defendants introduced a paper, of which the following is a copy:—

"Whereas the city of Bangor has sued the inhabitants of Howland for the support of Lydia A. Doe and her four children, and the said inhabitants of Howland contest their settlement to be in their town:—Now therefore, as a settlement of all controversy, it is agreed that said inhabitants of Howland shall now pay to said Bangor two-fifths of said city's claim, and shall take and forever hereafter save said Bangor harmless from the support of said Lydia's two oldest children,

and said city shall take and forever hereafter save said inhabitants of Howland harmless from the support of said Lydia and her two youngest children, hereby agreeing that the settlement of the said two oldest children is in said Howland, and the said Lydia and her two youngest children in Bangor, so far as the said town and city are concerned or interested, unless they shall hereafter gain another settlement.

"John S. Chadwick, } *Overseers of the Poor*
"Henry Hill, } *for the city of Bangor.*
"Wm. S. Lee, *Town Agent of Howland.*

"May 29, 1851."

Also a receipt of the overseers of the poor of Bangor for $68,93, in full discharge of all claims named in the foregoing writing.

There was no evidence of any authority in the parties who made the agreement, more than they may derive from their official position.

The town of Veazie was a part of Bangor until July, 1853, when it was incorporated as a separate town. The paupers in question never acquired any settlement in that part of Bangor, now Veazie, and did not reside there at the time of the incorporation.

The facts were reported by APPLETON, J. If the plaintiffs cannot recover for the support of such persons as Bangor undertook by the agreement to provide for, that part of the claim sued is to be struck out; otherwise, the case is to stand for trial without amendment.

Peters and *Mace*, for the plaintiffs.

The parties making the agreement had no power to make it. They could settle claims *in presenti*, but not *in futuro;* much less bind their principals to what amounts to a covenant of indemnity.

But if they had such power, the paper can have no more force than its terms declare. It is an indemnity, not from Veazie, but from Bangor in its corporate name and character. There is no provision binding the whole territory then in-

cluded in Bangor. How can Veazie be bound by such a contract, more than upon a note given or an account contracted by Bangor? If Veazie had been *in part only* formed out of the territory of Bangor, how could the contract be apportioned?

If the agreement of Bangor is valid, Howland can enforce it against Bangor in damages. But the statute must settle the question whether the pauper's settlement is in Veazie; and Bangor and Howland cannot settle it for Veazie.

How could Veazie know of such a contract? and that notice must be given to Bangor, although the residence of the pauper was in Howland?

A. Knowles, for the defendants.

The agreement between Bangor and Howland has been observed and acquiesced in more than eight years by both parties. The inhabitants of Veazie, at the date of the contract, were citizens of Bangor, and were represented by its officers, and, it is contended, were parties to the contract.

The parties signing the agreement, by their official position, had power to bind the towns they represented. Acts, not unlawful, done by municipal officers in good faith, and in execution of their functions, bind the corporations they represent. *Thayer* v. *Boston*, 19 Pick., 511; *Belfast* v. *Leominster*, 1 Pick., 123; *Augusta* v. *Leadbetter*, 16 Maine, 45.

If there is any question as to the power, the subsequent ratification is equivalent to an express authority. *Emerson* v. *Newbury*, 13 Pick., 377. That it has been so ratified, is shown by the payment made and received in pursuance of it, and by the long acquiescence of both parties. If dissatisfied, Bangor could have returned the money, and either, or both, could at least have repudiated the contract.

Veazie at that time formed a part of Bangor, and constructively received a part of the money paid by Howland, and availed themselves of the benefit of the arrangement. The rights of the parties were then fixed; and Howland has a right to insist on the fulfilment of the agreement against all

parties and privies. The terms of separation between Bangor and Howland could not in any way affect Howland, being no party to the act of separation. Howland having made a bargain with them while together, cannot be called upon to make a different bargain now they have separated.

When a town is divided, both parts are held to the responsibilities resting upon the original town at the time, as though there had been no separation, whether beneficial or otherwise. *Windham* v. *Portland*, 4 Mass., 384; *Hampshire* v. *Franklin*, 16 Mass., 86.

The opinion of the Court was drawn up by

KENT, J. — The question presented to the Court, in this case, is, whether the plaintiffs are estopped by the agreement between Bangor and Howland, from recovering for the support of such persons as by that agreement Bangor undertook to provide for.

We do not think it necessary to decide authoritatively all the questions which have been raised, in relation to the power of the parties signing the instrument, to bind their respective towns in the matters set forth; or, if binding as a contract, how far the legal settlement of the paupers is affected as between the two towns named therein. As Bangor is not a party in this suit, we cannot properly adjudicate judicially so as to bind that corporation.

As a general proposition, it is very clear that such an agreement between town officers cannot limit or control the rights of other towns. A town which furnishes needed supplies is bound to give notice only to the town in which the pauper has a legal settlement, and is not bound to know or to act upon any agreement between other towns, as to support or even settlement.

In the case of *Peru* v. *Turner*, 10 Maine, 185, it was decided, that, although, from the necessity of the case, overseers of the poor may, by virtue of their office, make contracts for the support of the poor, and transact a variety of business in relation to their regulation and employment, yet "they have

no authority, by their mere acts or declarations, to change the settlement of a pauper from one town to another, and confess away the rights of their town, and subject it to liabilities and burdens by any of their arrangements. This is no part of their duty."

If this agreement is binding on Bangor and Howland, it is as *a contract* for the future support of certain paupers, and not because by its own force it changes legal settlements. An action to enforce it must rest upon the express contract, and not upon a statute settlement.

It is admitted, that, at the time when this contract was made, the territory which is now the town of Veazie was a part of the city of Bangor; and it is contended that this fact estops Veazie from recovering for the support of those persons whom Bangor agreed to support.

It has been repeatedly held, where a new town is created out of the territory of an old one, that, without some express provision in the statute, the old town retains all its property, powers, rights, and remains subject to all its contracts, obligations and duties. The new town is a child leaving the old homestead, and setting up for itself, portionless, but free from all the contracts, debts or obligations of the parent. *Windham* v. *Portland*, 4 Mass., 384; *Hampshire* v. *Franklin*, 16 Mass., 86.

It is quite clear, that no action on this contract could be maintained against Veazie, nor could any execution issued on a judgment thereon, be levied upon the property of its inhabitants. It is a contract of Bangor, and remains a contract of that city, "however bounded." If its borders had been afterwards enlarged, the new territory and its inhabitants would have become bound by the contract. If its territory was diminished, those who are set off would be no longer within, or members of the corporation, or bound by its liabilities or contracts, provided, always, that there is no statute provision on the subject.

The new town of Veazie is an independent corporation, and its inhabitants are not debarred from asserting all their

rights, even against their mother. If a pauper of Bangor, who had been legally adjudged to be such whilst Veazie was a part of the city, should fall into distress in the new town, it would be no answer, to a claim for reimbursement, for Bangor to say,—"This pauper once had a settlement fixed in the town of which you at the time composed a part, and therefore you cannot maintain your action." And, certainly, Howland cannot set up as a defence against Veazie, when an offer is made to prove that certain paupers have a legal settlement in Howland, that Bangor agreed, when the territory of Veazie was included in its limits, to provide for the support of such paupers.

According to the agreement of the parties, *the case is to stand for trial, without amendment.*

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

COUNTY OF PISCATAQUIS.

TIMOTHY EATON *versus* EDWARD NASON *& al.*

Although the recent statutes, relating to the rights of married women, neither authorize them, nor recognize their right, to *mortgage* their real estate, yet it was manifestly not the intention of the Legislature thereby to restrict them in the exercise of that right, which existed at common law.

And where the wife, the husband joining with her in the deed, conveyed her estate in mortgage to secure a debt of her husband, the mortgage was held to be valid.

ON FACTS AGREED.

WRIT OF ENTRY, for possession of a lot of land in Orneville. The plaintiff claims to recover on a deed of mortgage to him, by "Betsey J. Lord, wife of Gershom Lord, in her right, and said Gershom Lord," of the premises demanded,

made and recorded on the 16th day of March, 1853, to secure the payment of four notes due to the plaintiff from said Gershom Lord, of even date with the deed. The premises were purchased by said Betsey in the year 1847, with money which she had prior to July, 1842, when she married the said Gershom. The title was never in the husband. After the mortgage was given, the wife sold and conveyed the premises to one Coburn, through whom the defendants claim title.

The case was argued by

Blake & Garnsey, for the plaintiff, and by

Everett, for the defendants.

The opinion of the Court was drawn up by

MAY, J.—That a deed of conveyance, executed by husband and wife, for the purpose of conveying her interest in real estate, when made in conformity to the requirements of law, and, without fraud, is effectual to pass her title to such estate, has been too long and well settled, both at law and in equity, to be now questioned. This mode of conveying the wife's interest in lands has been recognized, not only in early provincial legislation, but in the statutes of this and other States, and its validity, in ordinary cases, is not denied by the learned counsel in defence. *Fowler* v. *Shearer,* 7 Mass., 14; *Shaw* v. *Russ,* 14 Maine, 432. In this country, it seems to have sprung up out of the English practice for the husband and wife to convey her freehold estates by fine and common recovery.

It is now insisted, however, that a mortgage of the wife's estate, in which her husband has duly joined, is invalid, especially where the purpose or condition of the mortgage is to secure the debt of the husband. We find no such distinction in the law, nor in the long and uniform usage which has prevailed in regard to such conveyances. All the different kinds of deeds evidently fall within the usage and are justified by it. In the case of *Swan* v. *Wiswall & ux.,* 15 Pick., 126, SHAW, C. J., when speaking of the wife's estate, says, that

"by immemorial usage in this Commonwealth, she could join with her husband in conveying or mortgaging it." The same usage has always prevailed in this State. *Rangely* v. *Spring*, 21 Maine, 130; *Mills* v. *Darling*, 43 Maine, 565; *Roach & ux.* v. *Randall*, 45 Maine, 438, are cases in which such an usage is disclosed, and where mortgages of the wife's estate, executed in accordance with it, have been treated as valid, and in most instances, if not in all, without objection. The husband, by joining with her, gives efficacy to her act. *Whiting* v. *Stevens*, 4 Conn., 44.

Nor does it make any difference, that the debt secured by the mortgage was the debt of the husband. In the cases just cited from our own Reports, the mortgages were given for the purpose of securing such debts. It is sufficient if the debt mentioned in the condition is a valid debt. It is true that the wife may be presumed to be more or less under the influence of her husband. Hence, in some of the States, she is required by statute to be examined, apart from her husband, by the magistrate who takes her acknowledgment of any deed, as to the circumstances and the freeness of her act in the execution of it. But, in this State, we have no such statute. If the deed is properly executed and acknowledged, it will, by our law, be presumed to have been obtained not only freely, but fairly; and when so obtained, without fraud or any undue influence, no reason is perceived why a *feme covert* may not mortgage her estate to secure the debts of her husband, as well as those of a stranger, or the performance of any other condition. Such mortgages will be upheld. 1 Hilliard on Mort., 272; *Damarest* v. *Wynkoop*, 3 Johns. Ch. R., 144.

It is further urged, that our recent statutes, touching the rights of married women, neither confer nor recognize the right of a wife to mortgage her estates. This may be true. But the right existed at common law, long before the passage of the statutes referred to, and it was manifestly their object not to restrict, but to enlarge her rights in regard to the disposition and management of her separate property. They

cannot have the effect contended for without doing judicial violence to the manifest intention of the Legislature.

The mortgage, on which the plaintiff declares, is found upon inspection to be sufficiently formal to pass the estate of Betsey J. Lord in the premises; and her subsequent conveyance to the defendants, therefore, conveyed only her right of redemption. The plaintiff, therefore, is entitled to judgment as on mortgage. *Defendants defaulted.*

TENNEY, C. J., and RICE, APPLETON, CUTTING, and KENT, JJ., concurred.

NATHANIEL CHAMBERLAIN *versus* INHABITANTS OF GUILFORD.

To entitle the holder of a town order that had been issued by mistake, to recover thereon, he must show that he received it from the payee, for value, in the ordinary course of business, and ignorant of any of the circumstances under which it was given by the officers of the town, which would constitute a valid defence to the order, if it had not been negotiated, but remained in the hands of the payee.

ON REPORT.

ASSUMPSIT on a writing, signed by two of the selectmen of the defendant town, of the following tenor:—"Pay W. W. Harris or bearer one hundred dollars out of the town funds, given for his claim for damages in building the bridge at Guilford village, payable in six months from date, with interest." This was dated February 10th, 1857, and directed to David R. Shaw, Treasurer.

The plaintiff was called by his counsel as a witness, and testified that, on February 13th, 1857, he took the order as cash, of Harris, as a payment in part of an award of referees which he had against Harris; *that* subsequently Harris gave him a writing; *that* he knew there was a controversy about the payment of Harris' claim; Harris did not tell witness he had agreed to pay back the money to Guilford.

The defendants introduced the docket entries under the action *Chamberlain* v. *Harris*, February term, 1857, showing a reference of the case at a former term, and judgment on the report of the referees for $312 damages, and $70,02 costs; payment of which the plaintiff acknowledged and discharged the same on the record. Also, the guaranty of Harris, to the plaintiff, dated March 24th, 1857, of the order, and a promise to indemnify him against all costs he shall incur, in a suit to enforce payment of the same against the town.

The defendants also introduced a receipt given by Harris for $1164,58; and there was evidence tending to show that this was the amount agreed on by Harris and a committee of the town to contract for the building of a bridge at Guilford village, for certain parts of which, Harris had contracted to build. That Harris then made no claim for damage at the time of the settlement; but said Chamberlain might claim damage of him, in which case he thought the town should pay him something.

Isaac Weston testified, in substance, that Harris, before the order was given, had agreed, if the town objected to its payment, he would return it, or the amount of it; and a writing to the effect was drawn up, and, he supposed, had been signed by Harris, before he placed his name to the order.

The contract of defendants with Harris, for the erection of the bridge; that of the plaintiff with Harris; and also a contract of defendants with Isaac Wharff for erection of abutments, &c., were introduced by plaintiff, and he testified that he was delayed several days in his work, and suffered damage by the non-performance of the contract of Wharff within the time therein stipulated; *that* the question of damage was by Harris and himself submitted to arbitration. And it was admitted that plaintiff recovered of Harris the sum of $36, for damage which he sustained.

H. Hudson testified, that he was one of the Selectmen, and prepared the writing for Harris to sign; gave it to him, with the expectation that he would sign it. After witness had signed the order, he passed it to Weston for his signature.

It was in evidence that one of the selectmen refused to sign the order; and that the town refused to pay it.

One witness testified that Harris told him he had agreed to return the order if the town should refuse to pay it. The substance of the material evidence appears in the opinion of the Court.

The parties consented that a nonsuit should be entered, and the evidence reported, for the decision of the full Court upon so much thereof as is admissible, if objected to; the nonsuit to be taken off and the action to stand for trial, if the Court should be of opinion that the plaintiff is entitled to recover; otherwise, the nonsuit is to stand.

J. H. Rice, for the plaintiff argued,—

1. That it was clearly within the scope of the duties of the selectmen to adjust the claim of Harris against the town, and the defendants were bound by their determination and acts, citing *Augusta* v. *Leadbetter*, 16 Maine, 45; *Danforth* v. *Hallowell*, 10 Maine, 307; *Blake* v. *Windham*, 13 Maine, 74; *Vanner* v. *Nobleboro'*, 2 Maine, 121; *Barnard* v. *Argyle*, 16 Maine, 276, and 20 Maine, 296; *Dennett* v. *Nevens*, 7 Maine, 399.

2. That the plaintiff was *bona fide* the holder of the order, having paid a full consideration therefor, without knowledge of any agreement on the part of Harris, that might affect his right to recover if the suit had been brought by him; that, as an innocent indorsee of a negotiable paper, the plaintiff was entitled to recover in this action.

A. M. Robinson, for the defendants, argued:—

1. The case shows that Harris wrongfully obtained the order, even if the selectmen had been authorized to issue it; that its issue to Harris was clearly an excess of authority on the part of the two selectmen, by which the defendants were not bound, unless they have since rendered themselves liable by some act of adoption or ratification. The case shows no such act, but on the contrary, an early and continued repudiation of their liability.

2. The plaintiff is in no better condition to maintain this action, than if it had been instituted by Harris. He is not an innocent indorser without notice. An examination of the evidence renders the conclusion inevitable, that, if the plaintiff was not fully acquainted with all the facts as to the manner in which Harris obtained the order, there were circumstances attending the transaction brought to the plaintiff's knowledge, that were justly calculated to awaken suspicion and inquiry. *Perrin* v. *Noyes*, 39 Maine, 384.

Other questions were argued by the counsel, but the result at which the Court arrived, rendered their consideration unimportant.

The opinion of the Court was drawn up by

TENNEY, C. J. — This action is upon an instrument purporting to be signed by two of three selectmen of the town of Guilford, in the following terms: —

"$100, "No. 157.

"Pay to W. W. Harris, or bearer, one hundred dollars and no cents, out of the town funds, given for his claim for damage, in building the bridge at Guilford village, payable in six months from date, with interest."

It appears, that the other selectman declined to sign the order.

The building committee, chosen to make contracts for the erection of a bridge at Guilford village, on Oct. 11, 1854, contracted with Isaac Wharff, to build the abutments and pier for the bridge, and on the same day made an agreement with W. W. Harris to construct and put up the superstructure of the same bridge. And, on August 10, 1855, said Harris contracted with the plaintiff to do work, which he had agreed with the town to do. The work under these several contracts was to be performed to the acceptance of the building committee, at certain specified times.

The bridge was accepted by the building committee on December 6, 1855, and the bill was made out by Harris, and paid to the full amount in behalf of the town on the same

day. At the time of the settlement and payment, he did not give a receipt *in full* but *on account* of building the bridge. He declined to give a receipt in full on the ground, as he stated, that the plaintiff might claim damage of him; and if he did, he thought the town ought to pay him something. This statement was made anterior to the time when his receipt was given to the building committee, and was not repeated at the time.

At the time the order was drawn, it was signed by Isaac Weston, one of the selectmen, under the promise of Harris to execute a written agreement to return the order, or pay the amount of it, if the town would not allow it. Such agreement was written by Hudson, the other selectman, whose name is signed on the order, before the order was drawn; and Hudson and Harris went aside at the place where the papers belonging to the town were kept, for the purpose of having the agreement executed by Harris. Weston supposed it was executed, and was to be left there, with the other papers of the town; and he was induced to sign the order, on the promise of Harris, that the agreement, which was written was to be executed at the same time. It appears that Harris never signed the agreement on his part, but destroyed or retained it.

The delivery to Harris of the order was to be a part of the same transaction with his written agreement, to return it, if not satisfactory to the town, and the possession of it, by him, was unauthorized by a majority of the selectmen, and cannot be treated as valid in the hands of Harris, unless the town have in some way approved the delivery, independent of the promise to execute the agreement on his part. It does not appear that the town have ever given such approval, but the defence of the suit shows the contrary.

Does the plaintiff stand in a better position to prosecute this suit than would Harris, if it had been commenced in the name of the latter?

The order shows upon its face the consideration thereof, and the plaintiff knew, before he received it, that there was

a condition about the settlement. There was litigation between him and Harris, in which he claimed damage, among other things, on account of being delayed in the prosecution of the work under his contract with Harris. His claim was the subject of a suit in court, and it was referred to referees. An award was made in favor of the plaintiff for the sum of $312, in damages, $36 of which was on account of the interruption in the performance of the contract with Harris, and $70,02, costs. The report of the referees was accepted at February term, 1857, and a discharge upon the docket signed by the plaintiff, after the final adjournment of the Court, on March 7, 1857. He took the order of Harris, on February 13, 1857, and gave his receipt therefor, before the final settlement of the matter. The final settlement was on March 24, 1857, when Harris gave the plaintiff a writing, under a copy of the order, stating that the original was the order in suit; that the town of Guilford is liable for the sum named therein; and, if the plaintiff should fail to collect the same, he will pay the full amount thereof with interest, together with such costs as he shall incur in a suit to enforce payment.

The receipt given by the plaintiff for this order is not in the case, and, of the tenor thereof we have no knowledge. It is in testimony, that it was taken as an absolute payment. This, however, is not inconsistent with an agreement to guaranty the payment, on a settlement of the judgment in favor of the plaintiff against Harris, on account of which it was received.

From all the facts disclosed in the report of the evidence, we are not satisfied that the plaintiff received the order for value, in the ordinary course of business, ignorant of its consideration and the circumstances, to some extent at least, under which it was given. He must be treated as having been admonished, that a defence would probably be set up, when he became the absolute owner of the order.

Nonsuit to stand.

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

WILLIAM CRAFTS *versus* INHABITANTS OF ELLIOTSVILLE.

The owner of real estate seized and sold on an execution against the town in which it is situated, cannot recover the value thereof against the town, (under the provisions of § 31 of c. 84 of R. S.,) where there has been such a non-compliance with the requirements of the statute, as to the levy and sale, that no title vested in the purchaser.

Where the statute required the officer to publish in his notice, "the names of such proprietors as are known to him, and, if the names are not known, the number of the lots," it is not a compliance, if the officer certify in his return "that the proprietors were *mostly* unknown" to him.

Nor where an adjournment of the sale was authorized "from day to day, not exceeding three days," if, from his return, it appears that he adjourned the sale from the sixteenth to the twenty-second day of the same month.

ON FACTS AGREED.

This was an action to recover of the defendants the value of certain lots of land in said town of Elliotsville, belonging to the plaintiff, which had been seized and sold on an execution, against the defendant and in favor of the city of Gardiner.

The action is founded upon the provisions of c. 117, § 45 of R. S. of 1841, (c. 84, § 31, of R. S. of 1857,) by which it is enacted that, where estate is thus taken, the owner may recover of the town the real value thereof.

P. S. Merrill, for the plaintiff.

J. H. Rice, for the defendants.

The questions presented by the case, and which were argued by the counsel, appear in the opinion of the Court, which was drawn up by

KENT, J. — The plaintiff in this suit claims to recover of the defendants the value of certain lots of land belonging to him, which he alleges were sold by a deputy sheriff to satisfy an execution against the town. The action is based upon § 45 of c. 117, of the statutes of 1841, the same reënacted in c. 84, § 31, of the statutes of 1857.

The plaintiff must show that his land has been legally seized and sold, and that the proceedings were such that he had lost his title, which has been transferred to the purchaser at the sheriff's sale.

It is well settled law, that when an execution is extended upon lands, either by sale or levy, the title of the owner will not be divested unless all the statute requirements are complied with, and so appear in the return of the officer.

The statute under which this sale was made, (c. 117, § 44, of the laws of 1841,) required the officer to publish in his notice "the names of such proprietors as are known to him of the land which he proposes to sell," and "where the names are not known, he shall publish the number of lots or divisions of said land."

It appears, from the return of the officer, that he did publish the numbers of lots and ranges, but did not publish the name of any proprietor, and assigns in his notice, as a reason for not so publishing the names, "that the proprietors thereof were mostly unknown to me;" and in his return averring, "such proprietors' names being so mostly unknown."

This is not a sufficient compliance with the statute requirement. The word "mostly" implies, that some were known, and, if any were known, the officer should have inserted the names of such persons, although, as to some of the lots, he did not know the proprietors.

The statute authorized an adjournment, if necessary, from day to day, not exceeding three days. The return shows, that the officer adjourned the sale from the 16th of April, the day named in the advertisement, to the 22d day of April. This was not an adjournment "from day to day," and was for more than three days. The sale therefore, for this cause also, was illegal. *Plaintiff nonsuit.*

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

LEVI CAMPBELL *versus* WILLIAM R. SMITH.

Where proceedings are instituted which are intended to secure the plaintiff's lien upon logs, under the provisions of the statute, the debtor not being the owner of the logs, if the writ and officer's return show a case *in personam* and not *in rem*, any order of the Court in relation to the *owner* will be entirely nugatory. But the case may proceed to judgment against the debtor as in ordinary cases.

REPORTED by KENT, J.

The writ, which is in the common form, contains a count, on an account annexed, for labor and also a count for money had and received. On the back thereof is indorsed the following direction to the officer:—"Attach the logs and timber at Kingsbury's mills, belonging to the defendant." The officer, in his return, certifies that he has attached all the logs hauled there by defendant or by his direction within six months, &c.

The action was entered at the February term, 1858, when notice was ordered to the owners of the logs, by publication in a newspaper. At the next term there was proof of notice as ordered. J. S. Abbott appeared at the following term, as an owner of the logs attached, to contest the lien claim. At the next term he requested leave to file specifications of defence, as one of the log owners, if the presiding Judge should rule, as was contended by the plaintiff's counsel, that specifications were required by law. The Judge ruled *pro forma*, that specifications shall be filed. And, for the purpose of settling the question, the parties agree that the case be reported. If the law does not require specifications, the case is to stand for trial; if required, the case to stand for such action at *Nisi Prius*, as may be according to law.

Abbott, pro se., contended, that the specifications were required only by *defendants*. R. S., c. 82, § 18. The log owners may defend under the general issue and brief statement. *Lambert* v. *Lambert*, 44 Maine, 85.

The writ and declaration of the plaintiff, and the attachment made by the officer, do not create or secure any lien

upon the property of any other person than Smith. The notice to the owners should not have been ordered. *Cunningham* v. *Buck*, 43 Maine, 455; *Redington* v. *Frye*, 43 Maine, 578.

Hudson, for the plaintiff, contended that the owner having entered his appearance of record, after the publication of notice, was a defendant, and as such, was required to specify the grounds of his defence, as other defendants were. He was a party of record and bound by the judgment.

CUTTING, J., in announcing the opinion of the Court, remarked:—

This suit is brought against Smith *in personam;* his property only was in the writ ordered to be attached, and his *interest* only in the logs was attached. The writ and officer's return do not present a case *in rem.* The case, as reported, gives this Court no jurisdiction or authority to interfere with other parties, whose title to the logs can be questioned only when the logs are specifically attached and the proceedings are *in rem,* apparent from the writ and the officer's return. It not so appearing, but the contrary, all subsequent orders in relation to the owners become nugatory. The plaintiff can therefore proceed against the debtor, but not against the property of third persons. *Action to stand for trial against the debtor alone.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT.

1859.

COUNTY OF SOMERSET.

MOSES FOSS *versus* HENRY H. EDWARDS *and another.*

The record of a subordinate tribunal, is not conclusive as to its jurisdiction; but, the jurisdiction being established, the statements in the record, touching matters legitimately before the tribunal, are conclusive.

In poor debtors' disclosures, each party is entitled to a reasonable time for selecting one of the justices; and the whole of the hour named in the citation is a reasonable time therefor.

Where the oath was administered to a poor debtor, by magistrates not incapacitated by interest, relationship or otherwise, and the case is within their general jurisdiction as justices of the peace and quorum, although their action was premature and void, the damages in an action on the bond are to be assessed by a jury, under statute of 1856, c. 263, § 2, R. S., c. 113, § 48.

ON REPORT of the evidence by TENNEY, C. J.

DEBT on poor debtor's bond, dated April 3, 1856. Plea, general issue, with a brief statement alleging performance of the first alternative condition named in the bond.

In March, 1856, Foss recovered judgment against Edwards for $102,50, debt, and $10,26, costs. An execution was issued, and Edwards, on being arrested, gave a poor debtor's bond, with W. Flowers as surety. In April, 1856, Edwards caused a citation to be served upon Foss, fixing upon August

16, 1856, at ten o'clock in the forenoon, at C. P. Brown's office in Bangor, as the time and place for him to make disclosure and take the poor debtor's oath, if allowed by the justices.

On the day appointed, Edwards attended at the place named, with A. L. Simpson, a justice of the peace and quorum for the county of Penobscot, selected by him as one of the magistrates to hear his disclosure. The creditor not appearing at the hour, T. W. Porter, likewise a justice of the peace and quorum, was selected by A. H. Bicknell, a deputy sheriff for the same county, as the other magistrate. The two magistrates examined the debtor, administered the oath, and discharged him at about fifteen minutes past ten o'clock.

At about half past ten o'clock, D. D. Stewart, counsel for the creditor, appeared at Brown's office for the purpose of selecting one of the justices to hear the disclosure of the debtor. He found the office locked, and went to a neighboring office, where he met R. H. Mace, who declared himself to be a justice of the peace and quorum for the county; and Stewart, in behalf of the creditor, selected Mace to act as one of the magistrates. He called repeatedly at Brown's office before eleven o'clock, finding it locked each time. Mace remained in a neighboring office ready to act, until a quarter past eleven o'clock. Subsequently Stewart saw Edwards, and told him the purpose for which he came. Edwards stated that he had already disclosed and taken the oath, and refused to do any thing further.

There was evidence tending to show that Edwards was possessed of little or no property; also evidence tending to prove a custom to wait the hour, in cases of disclosure, for the adverse party to appear and act.

Copies of the bond, citation and discharge were in evidence; also a certificate signed by the officer, Bicknell, that the creditor "neglecting and *refusing* to appear" at the time and place named, he had appointed T. W. Porter, &c. The case was taken from the jury, and submitted to the whole Court, a nonsuit to be entered, or judgment for the plaintiff

for the debt, costs and interest, or damages for the plaintiff to be assessed by a jury, as the Court shall determine the law to be, on the evidence reported, so far as legally admissible.

D. D. Stewart, for the plaintiff.

The creditor is entitled to the full hour after the time fixed in the citation, to appear and hear the debtor's disclosure. It is a right given by custom, and by a practical construction of the law. Any other construction would render the law of disclosure valueless to a creditor who has a dishonest debtor. The case is analogous to that of a defendant summoned to appear before a justice of the peace. The language of the statute is the same, and so is the reason of the thing. *Blanchard* v. *Walker*, 4 Cush., 455. This Court has already decided the precise question raised in this case. *Perley* v. *Jewell*, 26 Maine, 104. So has the Court in Massachusetts. *Hobbs* v. *Fogg*, 6 Gray, 251.

The return made by the officer, Bicknell, on the citation, was made without any legal authority. It was not in his hands a returnable process, and contained no command or direction to him to make a return. His return was unofficial, and of no legal validity. *Davis* v. *Clements*, 2 N. H., 390; *Hathaway* v. *Goodrich*, 5 Verm., 65; Phil. on Ev., ed. 1849, Cowen & Hill's notes, part 2, 794. But if otherwise, the return only means that up to that time, ten o'clock, the creditor had not appeared. The remaining question relates to damages. The debtor having "failed to fulfil the condition of his bond," in the language of R. S., c. 113, § 38, the plaintiff should recover his whole debt. By statute 1856, c. 263, § 2, the damages are to be assessed by a jury, when prior to breach of any condition of the bond, the principal therein has legally notified the creditor, and has been allowed by two justices of the peace and quorum of the county where the arrest was made, *having jurisdiction* and legally competent to act in the matter, to take the oath, &c. The creditor was entitled to the hour; and the debtor had no more right

to procure the organization of a court, and the justices had no more authority to hear his disclosure, during that hour, in the absence of the creditor, than at eight or nine o'clock. Hence, they had no jurisdiction, and were not "legally competent to act in the matter," and all their proceedings were void. *Hobbs* v. *Fogg*, before cited.

C. P. Brown, for the defendants.

The defendant Edwards has fully complied with the conditions of the bond, as shown by certified copies of the application, citation and return, return of the officer who selected the second justice, record of the justices and discharge of the debtor. This proof is all legal and admissible, and conclusive upon the parties and upon the Court. It is not pretended that the proceedings were not all in good faith. Fraud is to be proved, and never presumed.

The return of Bicknell of his selection of the second justice is of the same binding force as an officer's return on a writ, as between the parties. If false, the plaintiff has his remedy against the sheriff. The duty was imposed upon him by law to select the justice, and, consequently, to make return of his doings. With this return, the case is stronger than any heretofore decided by our Courts. But, without this return, the case is clear for the defendants, both upon principle and authority.

As to the inadmissibility of parol evidence to contradict or vary a record, the counsel cited *Moore* v. *Newfield*, 4 Greenl., 44; 2 Starkie on Ev., 1042; Chitty's Plead., 354.

The judgment of a justice, within his jurisdiction, although erroneous, is conclusive, until reversed. *Boynton* v. *Fly*, 3 Fairf., 17; *Bannister* v. *Higginson*, 15 Maine, 73; *Smith* v. *Keen*, 26 Maine, 411. The record cannot be contradicted, even by the deposition of the justices. *Paul* v. *Hussey*, 35 Maine, 97. Or by other testimony. *King* v. *Robinson*, 33 Maine, 114; *Dolloff* v. *Hartwell*, 38 Maine, 54; *Holden* v. *Barrows*, 39 Maine, 135; *Pike* v. *Herriman*, 39 Maine, 52. The principle is applicable to poor debtors' disclosures, unless

presented to the Court on an agreed statement of facts. *Hanson* v. *Dyer*, 17 Maine, 96; *Clement* v. *Wyman*, 31 Maine, 50; *Baldwin* v. *Merrill*, 44 Maine, 55. The record of the justices is conclusive. *Agry* v. *Betts*, 3 Fairf., 417.

A court may be organized at the hour. *In matter of Pulver*, 6 Wend., 632. The justice selected by the plaintiff is to attend at the time and place appointed. *Burnham* v. *Howe*, 23 Maine, 494.

The case of *Perley* v. *Jewell*, 26 Maine, 101, relied on by the plaintiff, was submitted on an *agreed statement* of facts. In the case at bar, the parties are here on their strict legal rights. In all the decided cases, the Court has held that this makes a material difference.

The testimony as to a custom of waiting the hour is objectionable and inconclusive.

If there is any defect in the proceedings, the question of damages should go to a jury under the statute.

Stewart, in reply, cited *Williams* v. *Burrill*, 23 Maine, 144, to the point that the jurisdiction of justices cannot be conclusively established by their own records.

The opinion of the Court was drawn up by

RICE, J.—This case presents the question whether it was competent for a debtor, who has given a poor debtor's relief bond, and has cited his creditor to hear his disclosure on a particular day and hour, to proceed and organize a Court for that purpose by appointing one magistrate, and causing an officer to appoint another, in the absence and without the consent of the creditor, before the hour at which the creditor had been cited to appear had expired; and, further, if such procedure should be deemed irregular and unauthorized, whether the fact of such organization can be shown by evidence other than the record of the magistrates who compose the Court, and in opposition to the recitals in their record.

Though nothing is to be presumed in favor of the jurisdiction of justices of the peace, and other subordinate tribunals,

yet, when their proceedings show upon their face that they have jurisdiction, a *prima facie* case of jurisdiction is established. But the records of such subordinate tribunals are not conclusive upon this point. *Williams* v. *Burrill*, 23 Maine, 144. When, however, the jurisdiction of such tribunals is fully made to appear, the recitals in their records touching any matters legitimately before them are conclusive. *Paul* v. *Hussey*, 35 Maine, 97.

The main question here presented is one of jurisdiction. Was the Court before which the principal defendant disclosed legally organized? The evidence introduced, and for that purpose rightfully, shows that the plaintiff, by his attorney, was present at the place appointed to hear the debtor's disclosure at or near half past ten o'clock on the day appointed, the hour indicated for that purpose in the citation being ten in the forenoon, with the intention to appoint one of the magistrates to hear the debtor disclose. The evidence also discloses that prior to the appearance of the plaintiff's attorney, but after ten o'clock, the principal defendant had appeared at the same place and selected one justice, and had caused an officer to select a second, and, before the two justices thus selected, had made a disclosure, and by them had been admitted to take the oath prescribed by the statute for the relief of poor debtors. This proceeding, it is contended, was premature on the part of the defendant, and, therefore, unavailing to save a breach of the bond.

It was held by this Court in *Perley* v. *Jewett*, 26 Maine, 101, that a justices' court organized at the instance of the debtor, after the expiration of the hour named in the citation, had jurisdiction of the subject matter, and that a discharge given to the debtor by that court was valid, it appearing to the satisfaction of the Court, in that case, that the debtor was present at the time, and ready to proceed by the selection of one justice within the hour named in the citation; but, the creditor not appearing, the other justice was selected by the officer, without unreasonable delay, after the hour had

expired. This decision, manifestly, rested upon the ground that each party was entitled to a reasonable time within which to exercise the right of selecting one of the magistrates, and that the whole of the hour named in the citation was a reasonable time for that purpose.

In the case of *Hobbs* v. *Fogg*, 6 Gray, 251, the facts agreed were similar in all material points to the facts as we find them from the evidence in this case. In that case the debtor cited the plaintiff to appear at two o'clock; and he appeared at half past two, for the purpose of hearing the disclosure, but, before that time, a court had been organized by the debtor, and he had disclosed and been discharged. The Court held this action to be premature, and that the debtor was not legally discharged.

The case at bar falls within the principle of the two cases last cited, which seem to rest on sound reasons, and are in conformity with what is believed to be general usage in analogous cases.

While, on one hand, it would be inconsistent with sound policy, by an over strict and rigidly technical construction, to involve the debtor in a forfeiture, when he had acted in good faith and with reasonable diligence; so, too, on the other hand, as the statute has been made for his protection, such a construction should not be given to it as would enable him to avoid a full examination by the creditor, and an honest and particular disclosure of the condition of his property, and his ability to pay. The rule must be reciprocal, and should be such as not to permit either party to obtain a snap judgment against the other.

On the question of damages, the case falls within the provisions of § 2, c. 263, Laws of 1856, R. S., c. 113, § 48, and the amount to be assessed is the real and actual damage. The magistrates selected were legally competent to act in the case; that is, they do not appear to have been incapacitated by reason of interest, relationship or otherwise, and the case falls within their general jurisdiction as justices of the peace and quorum for the county. In other words, had the justices

been properly selected, there could have been no objection to them, on the ground that the case was not within their general jurisdiction as magistrates for the county, nor that they were under personal disabilities which would prevent their acting in the premises.

According to the provisions of the report, the damages are to be assessed by a jury, and, for that purpose,—

The case will stand for trial.

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

JOSEPH ANNIS *versus* CHARLES D. GILMORE.

In a suit to enforce a lien claim on logs, masts and spars, the general owner having been duly notified, whether he or the defendant in the suit appears or not, there must be, to preserve the lien of the plaintiff, a judgment of court confirming the validity of the lien.

When no such judgment appears of record, and an action is brought against the officer for not retaining the logs attached and selling them on the execution, the defendant officer is not estopped from showing that the lien did not exist, or is lost.

In an action brought to enforce such a lien, if judgment is recovered, and execution issued in common form, with directions to satisfy it out of the goods, chattels or lands of the debtor, and for want thereof, upon his body, the logs attached cannot legally be seized by virtue of it, nor is the officer responsible for not seizing and selling them.

In an action against an officer for not retaining property attached, to be sold to satisfy the execution, an amendment introducing a count for not returning the execution, embraces a new cause of action, and, if admitted, may be excepted to as improperly allowed.

ON REPORT of the facts by TENNEY, C. J., March term, 1859.

Joseph Annis, the plaintiff, was employed by one Josiah Marsh, during the winter of 1854–5, in getting out logs on Rapagemus stream. As he testifies, a certain mark was put on the logs on which he worked, and no other mark was

put on them. He settled with Marsh in April, 1855, and took Marsh's due bill for $64,90, payable in June, then next. $4,00 was afterwards paid and indorsed on the due bill. In July, 1855, Annis commenced a suit against Marsh, for the *balance due* for his work on the logs so marked, with written directions on the back of the writ to attach the logs specified. The writ was delivered to the defendant, then sheriff of Penobscot county, and he returned that he had attached all the logs, masts and spars of the specified mark in the Penobscot river, on that and other writs, the plaintiffs in each of which claimed to have a lien on the logs attached for their labor thereon. The action was entered at September term, 1855, and judgment obtained March 28, 1857. At the September term, an order was entered on the docket for personal notice to be given to Rufus Dwinel of the pendency of the action, and, by entries on the docket at December term following, it appeared that Dwinel had acknowledged notice, "as per agreement." Execution was issued and put in the hands of the defendant, as sheriff of Penobscot county, April 7 or 8, 1857, with directions to seize and sell the logs. It was further shown by the admissions of the defendant, that, in April and May, 1857, he found the logs attached on the writ all gone from the river. It was also in evidence that Marsh was a man of no property.

This action was brought August 24, 1857, against the defendant, as sheriff of Penobscot county, for not retaining and keeping the logs attached, for thirty days after the rendition of judgment, that they might be taken on execution to satisfy the judgment.

Before trial, the plaintiff moved for leave to amend his declaration, by inserting a count for not returning the execution against Marsh, which had been seasonably put into the defendant's hands. This was objected to by the defendant as introducing a new cause of action, but was allowed by the presiding Judge.

In defence, the deposition of Rufus Dwinel was introduced, who testified that, in the winter of 1854–5, he carried on lum-

bering operations on the Penobscot river and its tributaries, and employed Josiah Marsh to drive lumber by the thousand; that Marsh had no interest in, or lien upon the logs; that a part of the logs were marked as specified in the plaintiff's writ against Marsh, as also some hauled by Marsh the year before, all of which came down and were driven by Marsh, in the spring of 1855; that that particular mark was witness's general log mark, and had been for more than ten years, and he never knew of any other person on the river having logs of that mark; that, on July 30, 1855, he had a large number of logs of that mark in Penobscot river, not cut, hauled or driven by Marsh; and that, on that day, Marsh had no interest directly or indirectly in any of the logs so marked, having been fully paid for all he had done in cutting, hauling and driving them up to that time.

The defendant also introduced a memorandum in writing, dated Dec. 29, 1855, and signed by Dwinel, taken from the files of the Court, acknowledging notice on a large number of actions, but that of *Annis* v. *Marsh* was not amongst them.

The case was taken from the jury, and the evidence reported, the parties agreeing that the full Court should give judgment for either party, as the law and evidence should require.

E. Hutchinson, for the plaintiff, argued that the writ and proceedings upon it had been substantially correct, and that notice had been duly given to Dwinel, as shown by the entry on the docket. Execution was issued on the judgment, *Annis* v. *Marsh*, in the only form prescribed by the statute. Neither the law nor the Court has prescribed any different form for the execution to enforce a lien. The delivery of the execution seasonably to the defendant, with orders to seize and sell the property attached, fixed his liability. *Davis* v. *Richmond*, 14 Mass., 473; *Humphreys* v. *Cobb*, 22 Maine, 380; *Hart* v. *Sherwin*, 1 Pick., 521.

There is no evidence that the note was given in payment, and to discharge the lien; and without proof of such agreement, the lien is not discharged. Statute 1851, c. 216, § 1.

As to the amendment. In most cases, the allowance of an amendment is a matter of discretion, and not subject to exceptions. *Wyman* v. *Dorr*, 3 Greenl., 183; *Clapp* v. *Balch*, 3 Greenl., 216, and other cases in Maine and Massachusetts. An inadmissible amendment may be excepted to. *Newall* v. *Hussey*, 18 Maine, 249. The amendment in this case introduces no new cause of action, and is, therefore, in the discretion of the Court. The gravamen in the writ was the neglect to keep the property attached, so that the execution could be satisfied therefrom. The amendment, at most, aids a declaration defectively stated. In *Pullen* v. *Hutchinson*, 25 Maine, 249, the Court say, that "a declaration so defective that it would exhibit no sufficient cause of action may be cured by an amendment without introducing any new cause of action." The intended cause of action may often be as clearly perceived in a defective declaration, as though it were perfect. R. S., 1857, c. 82, § 10; *McLellan* v. *Crofton*, 6 Greenl., 307; 16 Maine, 263, 282.

The case of *Redington* v. *Frye*, 43 Maine, 578, does not shake the positions here taken. The law should be administered according to the rules and forms of the common law, and without regard to the codes and ordinances of the middle ages, or the forms of admiralty process drawn from the civil law.

D. D. Stewart, for the defendant.

1. The amendment was inadmissible. The writ, as drawn, did not allege that any execution had ever been placed in the defendant's hands. If execution had not been placed in his hands, and that within thirty days after judgment recovered, the plaintiff had suffered no injury by the neglect of the defendant, and could not hold him liable for damages. A suit brought against a sheriff, during the pendency of the original action, for not taking care of property attached, might present a different question; but here, the plaintiff alleges distinctly that judgment had been recovered in the suit on which the logs were attached. Hence, before the amendment, the

writ did not set out facts enough to constitute a cause of action.

The amendment introduces an entirely new cause of action, alleging that an execution was issued, and seasonably placed in the defendant's hands, so that if the first alleged ground of neglecting to retain the property failed, the plaintiff might still claim to hold the defendant for nominal damages, for not returning the execution in the life of it. This, according to every legal authority, was inadmissible. *Sawyer* v. *Goodwin*, 34 Maine, 419.

2. Dwinel, the general owner of the logs, was not notified of the pendency of the suit. The inadvertent entry on the docket, that Dwinel acknowledged notice, is corrected by a reference in the same entry to the "agreement" on file. An inspection of that agreement shows that the action of this plaintiff against Marsh, is not embraced in it. The want of notice to Dwinel destroys the plaintiff's lien, if he had any. *Redington* v. *Frye*, 43 Maine, 578.

3. The direction to the officer in the plaintiff's writ against Marsh was defective and insufficient. There was no judgment of Court adjudging a lien on the logs in favor of the plaintiff. Nor does the execution run against the logs specifically. These defects are fatal. *Redington* v. *Frye*, before cited; *Cunningham* v. *Buck*, 43 Maine, 455; *Perkins* v. *Pike*, 42 Maine, 141.

The opinion of the Court was drawn up by

MAY, J. — If there was a sufficient direction in the plaintiff's writ against Marsh to authorize the attachment of the logs, masts and spars, upon which the plaintiff claims to have a lien, they being the property of Rufus Dwinel; and if said Dwinel had the necessary legal notice of the pendency of that suit, that he might appear and show cause why the plaintiff should not have judgment as upon a lien claim, of which we give no opinion; still, it appears that no lien judgment was in fact rendered, the only judgment being against the defendant Marsh, in the same manner as if no lien had been

claimed. It is not apparent, from the record, that any notice was taken by the Court of any such claim. The validity or invalidity of the lien should have appeared in the judgment of the Court. Such a judgment may follow the brief statement or other pleadings of the claimant, if he appear, or, if he does not appear after notice, it may be made up as in other cases upon a default.

No such judgment appearing of record, the defendant cannot now be estopped from showing that the lien did not, in fact, exist; or, if it ever existed, that it has been lost. The reason why the owner of such property, alleged to be subject to a lien, may be notified, is that the question of lien may be settled in the same suit wherein the attachment is made. The want of such notice vitiates the lien, if any existed. *Redington* v. *Frye*, 43 Maine, 578. And, for the same reasons, a judgment touching the validity of the lien, whether the general owner of the property appear or not, is absolutely necessary. In the case of *Redington* v. *Frye*, just cited, it is said by CUTTING, J., "that the defendant having appeared and defended, or having had the notice and neglected, the lien judgment is conclusive upon him and his property to which the lien was alleged to have attached." In the case before us, there being no lien judgment, the lien is lost; and, under such circumstances, the defendant is excused for not keeping the property attached, and for not selling it upon the execution, or producing it for that purpose.

It further appears that the execution against Marsh was in common form, containing no direction to the officer other than to satisfy it out of the goods, chattels or lands of the said debtor, and for want thereof, upon his body. It contains no allusion to the logs, masts or spars, which are the subject of this controversy. They could not therefore have been legally seized by virtue of it. *Cunningham* v. *Buck*, 43 Maine, 455. For this reason, also, the attachment was lost; and the defendant, even if the lien had continued to exist, was justified in his neglect to make sale of the property upon the execution, and for any official neglect in not keeping it for that purpose.

The writ, as now amended, contains a count for not return-

ing the execution according to its direction. The writ, as originally drawn, was very imperfect. It sets forth, in substance, that the defendant Marsh was indebted to the plaintiff for personal services upon the lumber in controversy; that it was sued out to secure his lien claim thereon; that it was directed to, and placed in the hands of the defendant, as sheriff of Penobscot, for service, and by him was duly served by an attachment of the lumber, and returned into court; and that judgment thereon was duly rendered in his favor; and then alleges that neither the defendant or any of his deputies, for whose defaults he is answerable, did retain and keep the said logs, masts and spars, for the space of thirty days after the rendition of said judgment, to the end that the same might be taken on execution to satisfy said judgment, the same being no otherwise satisfied within that time.

By the amendment, the plaintiff was allowed to allege a new breach of duty, to wit, that the defendant never returned said execution. To the allowance of this amendment, the defendant seasonably excepted, and the question now is, whether it was within the authority of law to allow it.

The rule of law undoubtedly is, that where an intended cause of action is defectively set forth, and yet so as clearly to be distinguished from any other cause of action, in the manner it would be if the declaration was perfect, then the amendment may properly be allowed. *Pullen* v. *Hutchinson*, 25 Maine, 249. In the case before us, we think it is apparent that the cause of action, and the only cause, originally set forth in the writ, was the neglect of the defendant to keep the property attached for the satisfaction of the judgment upon the execution. Not the slightest reference is made to any other neglect. So far from being alleged in any manner that the execution had not been returned, the original count did not even allege that one had been obtained. The amendment was improperly allowed. *Exceptions sustained, and Plaintiff nonsuit.*

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

PETER WYMAN *versus* MOSES M. GOULD.

A compound question propounded to a witness, one part being admissible, and the remainder inadmissible, may be rightfully excluded as a whole.

An *expert* only can be permitted to state how a party "appeared," in respect to soundness or unsoundness of mind.

A party showing no title cannot impeach that of his opponent by proving a want of consideration.

REPLEVIN for a cow. The plaintiff held a bill of sale from James Millay, dated Jan. 17, 1855, of certain stock, including "one two year old heifer, red," &c. The heifer remained in the possession of Millay, and, in the winter of 1856, was placed by Millay in the care of one Phillips. Whilst in his care, the defendant came to him with an order signed by Millay for a heifer. After looking at one or two others, he selected the red heifer, and, although Phillips remonstrated, drove her away. Thereupon the plaintiff brought this suit.

On the trial, various testimony was adduced. M. W. Norton testified that he saw Millay on the 16th of January, 1855. The defendant asked the witness,—"How did Millay appear on the 16th of January? State any facts tending to show the state of his mind as to soundness." The plaintiff objected to this question, and the Court excluded it.

James Millay testified that he signed a bill of sale to the plaintiff in January, 1855. The defendant asked,—"Did you receive any money from the plaintiff for the stock embraced in the bill of sale of January 17th, 1855, or any other payment?" This question was objected to by the plaintiff, and excluded by the Court.

The case was submitted to the Court on the evidence, with leave to either party to except. The Court rendered judgment for the plaintiff for one cent damages and costs. The defendant filed exceptions.

J. H. Webster, for the defendant, argued that evidence of the unsoundness of Millay's mind on January 16th, 1855, was important, and should have been admitted.

The defendant stands in the place of Millay, and testimony as to the consideration of the contract with the plaintiff should not have been excluded. *Folsom* v. *Muzzy*, 8 Maine, 400; *Barker* v. *Prentiss*, 6 Mass., 450; *Storer* v. *Logan*, 9 Mass., 55; *Davenport* v. *Mason*, 15 Mass., 85.

J. S. Abbott, for the plaintiff, contended that the question put to Norton was properly excluded, for the reasons, that it does not appear that Norton saw Millay on or about the day when the bill of sale was made; that Norton, not being an expert, could not give an opinion as to how Millay appeared, whether of sound or unsound mind; that the question of his soundness on that day was not material, Millay having at other times declared that he had sold the stock to the plaintiff; and that the defendant shows no title to the cow or right to take her from Phillips.

The question put to Millay, and excluded, was of no importance on this trial, as the defendant is not a creditor nor even a subsequent vendee. If there was no consideration for the bill of sale, and it was a fraud upon the creditors of Millay, the defendant is not in a position to avail himself of the fact in defence to this action.

The opinion of the Court was drawn up by

CUTTING, J.—Both parties claim the property in controversy, under one James Millay; the plaintiff, by a bill of sale, dated January 17th, 1855, and prior to the claim of the defendant. One Norton having testified,—"I saw Millay, I think, 16th January," was asked by defendant's counsel, "How did Millay appear on the 16th January? State any facts tending to show the state of his mind as to soundness." This question, on objection, was excluded by the Judge. And, in our opinion, correctly. It was either a compound question, or a simple question accompanied by a command. If the former, one component being admissible and the other not, both may be excluded. If the latter, the question *only* is objected to, and is one which could not properly be put except to an expert.

In relation to the exclusion of the second question, it cannot be pretended that the defendant's title was such as to enable him to impeach that of the plaintiff by showing a want of consideration. *Exceptions overruled.*

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

RICHARD L. BROWN *versus* JONATHAN WATSON.

Although no person can maintain an action for a common nuisance, unless he has suffered special damage thereby, yet, when one returning home with a loaded team is stopped by obstructions placed in the highway, and compelled to take a more circuitous route, he is entitled to recover damages from the person who placed the obstructions there.

Under our statute, damages cannot be recovered against a town in such a case; but the rights and remedies of parties injured, and the liabilities of the person erecting the nuisance, under the common law, remain unaltered.

For an injury to a private person, by a common nuisance, however inconsiderable, he may maintain an action.

TRESPASS ON THE CASE. Appeal from a justice of the peace. On trial of the appeal, the case was submitted to the Court, on the evidence, with leave to except.

It appeared in evidence, that the plaintiff, having been from home, was returning with a loaded team over the way in question, and found the road wholly obstructed by logs and trees felled across it by the defendant, and which the plaintiff could not then remove; and he was compelled to go back, and return to his house, with his load, by another road, a distance of about two miles. For this obstruction and damage to himself, the action was brought.

The defendant denied the existence of the way in controversy; but, in another case tried by the Court, between the same parties, the Court decided, upon the evidence adduced, that it was a public highway, by user, continuing nearly forty years.

The Court ruled that this action could be maintained, and ordered a default to be entered, with nominal damages. The defendant excepted.

E. Hutchinson, in support of the exceptions, cited statute of 1841, c. 25, § 89; R. S., c. 18, § 61. If towns are only liable for actual injuries, and not for consequential damages, it is not perceived how any and every one who may be delayed by an obstruction in the highway can have a right of action. Those who obstruct a highway may be punished for a nuisance. R. S., c. 25, § 98; c. 18, § 70; 20 Maine, 246; 29 Maine, 310; 32 Maine, 536; 33 Maine, 271. Private ways are subject to different rules, and damages suffered are to be remedied by suit, as in other private injuries; but if a right of action accrued to every one obstructed and delayed on a highway, there would be no end to lawsuits.

D. D. Stewart, for the plaintiff, replied.—An action lies where an individual suffers special damage by an obstruction on the highway. 2 Chitty on Pl., 808–9; 2 Bing., 156, 263; 4 M. & S., 101; 1 Chitty, 142; 9 Moore, 489; *Stetson* v. *Faxon,* 19 Pick., 147; *Atkins* v. *Boardman,* 2 Met., 469; *Sutherland* v. *Jackson,* 32 Maine, 80; *Barden* v. *Crocker,* 10 Pick., 388; *Cole* v. *Sproule,* 35 Maine, 161; *Thayer* v. *Boston,* 19 Pick., 514.

The opinion of the Court was drawn up by

APPLETON, J.—The defendant obstructed the public highway, over which the plaintiff was passing, by felling trees across the same, so as to render it impassable. He thus caused a nuisance, for which he might have been indicted.

The law is well settled, that no person can maintain an action for a common nuisance, unless he has suffered therefrom some special and peculiar damages other and greater than those sustained by the public generally. Those, who have no occasion of business or pleasure to pass over a road thus obstructed, and who have not attempted it, cannot maintain an action for the obstruction thereon.

The case of the plaintiff is different. He was returning home with a loaded team, as well he might, upon a legal highway, till, on his way, he was stopped by the obstructions of the defendant, and compelled, with his team, to proceed by a more circuitous route to his place of destination. The trouble and loss of time thus arising may not be great, but that affords no reason why the defendant, who wilfully caused them, should not recompense him therefor.

"An action of the case lies by the plaintiff for the disturbance of a way by stopping it, *per quod uti non possit.*" 1 Com. Dig., Action on the Case, A 2. It was decided in *Griesley* v. *Codling*, 2 Bing., 263, that a person, being obstructed on his journey and obliged to proceed by a more circuitous route, might recover for the loss of time and inconvenience, against the individual by whom the obstructions were erected. The same right of action was held to exist against one obstructing a navigable river. *Rose* v. *Miles*, 4 M. & S., 103. The same principles were affirmed in *Pierce* v. *Dart*, 7 Cow., 609. The individual obstructed, removing the obstructions, was held entitled to recover the expenses thus incurred in *Lansing* v. *Wiswell*, 5 Denio, 213. The Supreme Court of Pennsylvania applied the principles of the common law, as already stated, to the analogous case of a public highway by water. *Heiser* v. *Hughes*, 1 Bin., 463. In *Pittsburgh* v. *Scott*, 1 Barr., 309, the declaration alleged that, in consequence of the alleged common nuisance, the plaintiffs were forced to conduct their horses and carts by a longer and more difficult way, and it was held that the action could be supported on this ground. In accordance with these authorities is the case of *Stetson* v. *Faxon*, 19 Pick., 147, in which the whole subject is elaborately discussed in the learned opinion of Mr. Justice PUTNAM.

It has been held that a recovery could not be had against a town for loss or inconvenience arising from its negligence in not seasonably removing an obstruction, in consequence of which the plaintiff was delayed in his journey or was obliged to take a more circuitous route. *Holman* v. *Townsend*, 13 Met., 297. The same principle, as applicable to towns, has

been recognized as law in this State, in the case of *Weeks* v. *Shirley*, 33 Maine, 271. The duties and obligations of towns are regulated solely by statute; and these decisions rest entirely upon the peculiar language of the statute imposing them. But the common law, as to nuisances, is unchanged. The rights and remedies of those injured thereby, and the liabilities of those causing an injury through their unlawful acts, are unaffected by any statutory enactments. They remain as at common law.

It is urged that, to sustain this action, would lead to a multiplicity of suits; that is to say, that very many persons have been put to loss and inconvenience by reason of the wrongdoings of numerous defendants; and that because they are so many, therefore, none should receive compensation. In other words, the better is the defence of wrongdoers, the more numerous the persons whom they have injured, and the more extensive and wide spread the consequences of their injurious acts. A principle like this would undoubtedly be grateful to all wrongdoers; but it would hardly commend itself to the sufferers.

For an injury to a particular person, as by a common nuisance, no matter how inconsiderable the injury, he may maintain an action. *Alexander* v. *Kerr*, 2 Rawle, 83.

Defendant defaulted.

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

STATE *versus* ALBERT B. WITHAM.

In indictments for forgery, the instrument alleged to be forged should, when practicable, be set forth according to its *tenor*, by which is intended an exact copy, and not according to its *purport* and *effect*, which implies the import or substance only.

INDICTMENT for forgery. The first count sets forth that the defendant, at Norridgewock, on the sixteenth day of December, 1857, forged an order for the payment of money, of the following "purport and effect." "Please to pay the bearer my fees in action the State against A. B. Witham. Pittsfield, Dec. 16, 1857. Julia Rines."

The second count sets forth that the defendant, at Norridgewock, on the eighteenth day of December, 1857, had in his possession a certain forged order of the following "purport and effect:"—the order is then recited in the same words, except that it is addressed "To the Treasurer of the county of Somerset."

To this indictment, the defendant demurred.

D. D. Stewart, in support of the demurrer.

1. The order described in the first count is not within the meaning of the statute defining forgery. 3 Chitty's Criminal Law, 1033.

2. It will not support an indictment, because addressed to no person. Ib.; 2 Russell on Crimes, 516, 520.

3. The indictment does not charge any offence in either count; it does not allege that there was any such action as the order describes; nor that Julia Rines was a witness, or was entitled to fees, or had authority to draw such an order; nor that Knowlton had any fees belonging to her. 2 Russell on Crimes, 519.

4. Indictments for forgery must set out the exact tenor of the instrument alleged to be forged. But, in this case, both counts set out the "purport and effect," not the tenor. That this is not sufficient, this Court has settled in *State* v. *Bonney*, 34 Maine, 383.

N. D. Appleton, Attorney General, in support of the indictment.

The indictment is good in form. Davis' Prec., 152, 153. It is not necessary to allege the instrument to be of the "tenor following." 2 East, P. C., 975, § § 53, 54. The instrument should be set forth in words and figures, but there is no technical form for expressing that it is so set forth. *Commonwealth* v. *Houghton,* 8 Mass., 110. East refers to several cases. In *Rex* v. *Powell,* O. B., 1771, for forging a receipt for money "as follows," it was objected that it should have been set forth "of the tenor following," but all the Judges held it to be good. In *Rex* v. *Hart,* the forgery of a bill of exchange was set forth in the same form. So in *Birch* and *Martin's* case, for forging as a true will a paper "purporting to be the will of C." East says the word "purport" imports what appears on the face of an instrument, for want of attending to which many indictments have been set aside. See *Gilchrist's* case, 2 Leach, 753. "Purport" means the substance of an instrument as it appears to every eye. 1 Chitty's C. L., 214. And, if so, it is the same as "tenor." Other words than "tenor" may be used to introduce the recital of the forged instrument. Archbold's C. P., 47; 2 Russell, 1480; Crown Circuit Comp., 7th ed. 1799.

In *Commonwealth* v. *Parmenter,* 5 Pick., 279, the note was described as "of the purport and effect following." *Commonwealth* v. *Cary,* 2 Pick., 47; *Commonwealth* v. *Boynton,* 2 Mass., 77; *Commonwealth* v. *Ward,* 2 Mass., 397; *Lyon's* case, 2 Leach, 608. The form adopted in this case, from Davis' Precedents, has been followed for fifty years in Massachusetts and Maine, and has thus obtained an appropriate and technical sense which the Court is bound to respect. *Wright* v. *Clements,* 3 Barn. & Ald., 503; *Regina* v. *Keith,* 6 Cox's C. C., 533; 29 Eng. Com. Law & Eq., 558.

A charge, expressed in a plain, intelligible and explicit manner, and in the accustomed legal phraseology, is sufficient to warrant a judgment. *Commonwealth* v. *Bugbee,* 4 Gray, 206.

The case, *State* v. *Bonney*, 34 Maine, 383, is contrary to the whole tenor of authorities and precedents for half a century, and stands alone and unsupported by reason or a single decision or *dictum* in point for that period.

The case of *Commonwealth* v. *Wright*, 1 Cush., 46, was for a *libel*, where the offence consists in the very words. So of other cases cited in *State* v. *Bonney*.

It is not necessary to set forth a *fac simile* to inform the party or the Court of the charge intended to be made. *Commonwealth* v. *Taylor*, 5 Cush., 605. Other authorities expressly repudiate the opinion that a *fac simile* of the instrument forged is necessary. *Commonwealth* v. *Starr*, 1 Mass., 55; *Commonwealth* v. *Bailey*, 1 Mass., 62; *Commonwealth* v. *Stevens*, 1 Mass., 203.

The decision in *State* v. *Bonney*, was clearly erroneous, and ought not to receive the continued sanction of the Court. It is better to reverse such an opinion, than to sanction error. "Next in elevation to the discovery of truth, is the confession of error."

The opinion of the Court was drawn up by

CUTTING, J. — In *State* v. *Bonney*, decided in 1852, 34 Maine, 383, this Court held that, in indictments for forgery, the instrument alleged to be forged should, whenever it is practicable, "be set forth according to its *tenor*, and not according to its *purport* and *effect*; that by the former mode an exact copy is intended, but by the latter the import or substance only is indicated." And the Court further remark that, "if the instrument be in the possession of the prisoner, or if it be lost or destroyed, or not attainable by the government, and it be so stated in the indictment, this may constitute an exception to the general rule, and be a sufficient reason for not setting out an exact copy." And when we consider the constitutional provision, (which must be paramount to all conflicting and prior decisions,) that "in all criminal prosecutions, the accused shall have a right to demand the nature and cause of the accusation, and have a copy

thereof," and the further fact that the prosecuting officer had the instrument in his possession, we think the rule not unreasonable in its application to the present case.

The copy of an instrument is something certain and definite, whereas the purport and effect, as alleged, may be uncertain and indefinite, depending in a great measure upon the skill, ability or judgment of the draughtsman, and not very dissimilar, perhaps, to certain marginal notes to cases reported. Besides, who is to determine whether the purport and effect be correctly set forth? If the original instrument be produced on the trial, according to the rule in civil cases, it would be for the presiding Judge; but in criminal proceedings it might become a question of fact for the consideration of the jury; thus raising an issue wholly unnecessary, if the prosecuting officer had discharged his duty, and one on which the prisoner might often escape, and thus avoid his trial upon the merits. Upon this point, *see* the remarks of Judges HOLROYD and BAYLEY, in *Wright* v. *Clements*, 3 Barn. & Ald., 503.

In Train & Hurd's Precedents of Indictments, published in 1855, and "written with exclusive reference to American jurisprudence," page 212, the decision in *State* v. *Bonney* is fully sustained, not only by the text and the precedent, but by numerous authorities, English and American.

Demurrer sustained,
Indictment quashed.

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

GOODENOW, J., *dissenting.*—I do not concur, for reasons set forth in the argument of the Attorney General. I think there is no necessity for multiplying the chances for the escape of felons.

INHABITANTS OF HARTLAND *versus* BENJAMIN P. CHURCH *& al.*

The decision of this Court in a former case, that the assessors of a town have no right to assess one not an inhabitant thereof, applies only to poll taxes.

Improved real estate, and personal property enumerated in the statute, may be assessed to non-residents, and, upon neglect to pay within the time limited, the collection may be enforced by arrest and imprisonment in the county in which they may be found.

A collector of taxes, under a warrant from the assessors in which the time for completing the collection is specified, may arrest a delinquent after the lapse of the time limited therein.

ON REPORT of the evidence, by TENNEY, C. J., March term, 1859.

This was an action of *debt* upon two bonds, both dated May 30, 1857, given by Benjamin P. Church as principal, and James Church as surety, to the plaintiffs, to obtain the release of Benjamin from arrest on two warrants against him for taxes.

The recitals in one of the bonds were as follows:—"That whereas the said Benjamin Church has been, and now is, arrested by Nathan Elliot, collector of said town of Hartland, by virtue of a warrant issued for school tax assessed against him, the said Benjamin Church, by the assessors of said town of Hartland, for the second school district in said town, for the year 1853, which warrant is dated the ninth day of July, A. D., 1853, for the sum of twenty-seven dollars and eighty-five cents, with the officer's fees taxed at one dollar and forty-three cents, and whereas the said Benjamin Church now stands committed to the jail in said county," &c.

The recitals in the other bond were substantially similar, except that the warrant was for State, county and town taxes, and the sums named were different.

The defendants offered to prove that the bonds were given while said Benjamin P. Church was in jail, committed by virtue of the warrants severally mentioned in the bonds, and were given to release him from confinement; that he was not an inhabitant of the town of Hartland, liable to be taxed

therein, for the year for which said taxes were assessed; that, therefore, said taxes were not legally assessed against him; and that the warrants on which he was arrested were not in force at the time, and did not authorize the arrest;—all of which, being objected to, was excluded by the presiding Judge.

The defendants thereupon submitted to a default, with the agreement that the case should be reported to the full Court, and, if they should decide that the testimony offered, or any of it, was admissible, and would constitute a defence, or if, from the recitals in the bonds, the warrants did not justify the arrest, the default is to be taken off, and the case to stand for trial; otherwise the default is to stand.

W. Folsom, for the plaintiffs, argued that, in order to show that the bonds were obtained by *duress*, the defendants must prove that the arrest was not lawfully made, or the imprisonment was unlawfully continued. The recitals in the bonds admit the legality of the arrest and imprisonment, and the defendants are estopped to deny it. *Athens* v. *Ware*, 39 Maine, 345, and cases there cited in argument; *Watkins* v. *Baird*, 6 Mass., 506; 1 Fairf., 333.

The tax warrant, although issued in 1853, authorized the arrest in 1857. Stat. 1841, c. 14, § 71; stat. 1857, c. 6, § 93. It would be absurd to contend that a person might leave the State after a tax was assessed, and be exempt from arrest on his return.

Liability to taxation in a town does not depend upon actual residence there, if the person taxed has property in the town liable to taxation. Stat. 1841, c. 14, § 91; 1850, c. 190; 1857, c. 6, § § 99, 100.

J. H. Drummond, for the defendants.

If the imprisonment in this case was unlawful, it constitutes such *duress* as will avoid the bond. *Crowell* v. *Gleason*, 10 Maine, 325; *Whitefield* v. *Longfellow*, 13 Maine, 146; *Eddy* v. *Herrin*, 17 Maine, 338; *Fisher* v. *Shattuck*, 17 Pick., 252.

The arrest was unlawful, because made after the time when

the collector was required by his warrants to complete his collections of the taxes committed. The warrants were dated in June and July, 1853. The arrest was not made until May 30, 1857, nearly four years after. The time for completing the collection was fixed in the warrants. Stat. 1841, c. 14, § 57. The collector is to obey the directions faithfully. § 62. § 71 merely extends his power to collect the taxes committed after another collector is chosen.

The warrant is the collector's sole authority. By it he is directed to close his collections by a stated day. Has he any authority to enforce collections afterwards? If so, how long is his warrant in force? Can he arrest the body or distrain property for twenty or thirty years? There is no limit, unless contained in the warrant. It seems analogous to an execution, which cannot be enforced after the return day.

In *Bassett* v. *Porter*, 4 Cush., 487, the arrest was within a year, and was sustained by the Court. It is not shown that the statutes of Massachusetts are similar to ours. It is said that an arrest, after the time limited, is not prohibited by law. But no prohibition is necessary. It requires a positive provision of law to authorize an arrest. The silence of the law makes the arrest illegal. If the power to arrest is lost by lapse of time, it is forever lost, unless renewed.

Evidence was offered that Church was not an inhabitant of Hartland, liable to be taxed, for the year 1853. Assuming this to be proved, the assessment was illegal; and, having assessed him wrongfully, could they rightfully arrest him for non-payment? If not, the bond was given to obtain his release from unlawful imprisonment, was obtained by *duress*, and was void.

In *Athens* v. *Ware*, 39 Maine, 345, it was decided that the proof of *duress* rests upon the defendants; and the arrest in that case, not having been proved to have been unlawfully made, was sustained. The implication is, that if they had proved the arrest to have been unlawful, this would have shown *duress*. It is said the obligees are estopped to dis-

prove the recitals in the bond. But if they cannot show that the recitals were obtained by *duress*, no bond can be avoided for that cause. But the estoppel does not apply to bonds obtained by *duress*. *Cordis* v. *Sager*, 14 Maine, 475.

A bond void for *duress* is void both against principal and surety. *Fisher* v. *Shattuck*, 17 Pick., 252; *Whitefield* v. *Longfellow*, 13 Maine, 146.

The opinion of the Court was drawn up by

APPLETON, J.—From the recitals in the bond, the warrants therein described justify the arrest of the principal.

It was decided in *Herriman* v. *Stowers*, 43 Maine, 497, that the assessors of the town have no right to assess one not an inhabitant thereof. But that relates only to the poll tax. By R. S., 1857, c. 6, § § 99 and 100, which is a reënactment of previously existing provisions, the improved real estate and certain enumerated personal property may be assessed to non-residents, and, upon their neglect to pay for six months after the taxes are committed to an officer for collection, they may be committed to the jail in the county in which they may be found.

By R. S., 1857, c. 6, § 93, it is enacted that, "when new constables or collectors are chosen and sworn before the former officers have perfected their collections, the latter shall complete all their collections, as if others had not been chosen and sworn." It was held in *Bassett* v. *Porter*, 4 Cush., 489, that a collector of taxes, under a warrant from the assessors in which the time for the completion of the collection of taxes therein mentioned is specified, may arrest a person for the non-payment of his tax after the time limited in the warrant.

The facts offered to be proved would not have constituted a defence. *Default to stand.*

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

JOHN PIERCE *versus* JOTHAM S. GOODRICH *and others.*

In a writ of *error*, where on a hearing the former judgment is affirmed, the obligors in the bond are bound to "pay and satisfy" the judgment rendered, including the damages and costs awarded in the original suit.

The clerk's docket is the record of the Court until the record is fully extended.

An agreement, after judgment rendered, to submit the question of the correctness of the taxation of costs to a Judge, and indorse the amount disallowed, if any, was for the benefit of the defendant, and it is for him to procure the revision.

ON REPORT of the case by TENNEY, C. J.

DEBT ON BOND. John Pierce, Nov. 30, 1853, brought an action against Jotham S. Goodrich, on a note of hand, which was entered and continued until December term, 1854, when Pierce recovered judgment. The defendant filed exceptions, but failed to enter them at the law term, June, 1855. The plaintiff entered a complaint at that term, and it was allowed. An order was issued, and received by the clerk in Somerset county, July 4, 1855, directing judgment to be entered on the verdict, damages, $727,55, costs, $67,70.

The defendant sued out a writ of error, July 23, 1855, which was entered and continued until December term, 1856, when the former judgment was affirmed without costs in the suit in *error.*

At this stage of the case, the parties entered into a written agreement, that a hearing might be had before any Judge as to the costs allowed in the original action, and, if any part was disallowed, the amount was "to be indorsed." The hearing was had, but no decision rendered.

No execution was issued on the original judgment.

It appeared that the clerk's entries on the docket constituted the only record in Somerset county of the proceedings in the case, the clerk then in office having removed from the State without completing his records.

This suit was brought on the bond given in the proceed-

ings in *error*, and the case was, by agreement, reported by the presiding Judge, for final decision by the whole Court.

John S. Abbott, for the plaintiff, argued that the docket entries were sufficient to sustain the action on the bond, although the judgment had not been recorded in full, by reason of the clerk removing to a distant State. The judgment is substantially found on the docket. At any rate, nothing further remains for the plaintiff to do. R. S., 1841, c. 100, § § 14, 15; 1857, c. 79, § § 8, 10, 11, 12. The first judgment sufficiently appears by the judgment in *error*.

The recitals in the defendants' bond estop them from denying the former judgment.

The agreement for a hearing as to costs is not admissible to defeat this action. But, if admissible, it cannot affect the judgment. It is simply an agreement to "indorse" any amount disallowed by the Judge. The plaintiff is ready to do it. There has been a hearing, but no decision. The defendants should have procured an adjudication within a reasonable time. The Judge, although more than two years have elapsed, having failed to determine that any amount is to be indorsed, it may be inferred that he thinks none should be indorsed, or that the question is not within his jurisdiction.

John H. Webster, for the defendant.

The judgment awarded in *error*, according to R. S., 1841, c. 143, should have been penal damages and costs, not including the former judgment. The original judgment is no part of the new judgment. No such judgment was awarded in the suit in *error*. The former judgment was merely affirmed. The sureties on the bond are liable only for the proper judgment in the suit in *error*, which has not yet been rendered.

The condition of the bond is modified by the plaintiff's agreement as to costs. No decision has been had, and it does not appear what amount of costs is to be paid. If the amount disallowed is to be indorsed, it must be indorsed before the judgment is satisfied. It is by the plaintiff's neg-

lect, that the question of costs has not been disposed of, and the indorsement made. The obligations of a bond may be varied by parol. *Haynes* v. *Fuller*, 40 Maine, 162. Much more by written agreement. So long as any thing remains to be done to ascertain the amount payable, no action can be sustained. *Hamlin* v. *Otis*, 36 Maine, 381.

The hearing as to costs has been had. The defendant could do no more. Neither he nor the plaintiff could compel an adjudication. But until an adjudication, determining the amount of costs to be paid, the action on the bond is premature.

Abbott, in reply. — The statute and the bond both require the obligors to "pay and satisfy such judgment as shall be rendered." R. S., 1841, c. 143, § 2. "The prevailing party" is "entitled to his costs" "and, if the judgment is *affirmed*," "damages for his delay," &c. § 5. In the case at bar, the right to costs was waived, and penal damages not claimed. The proper form of judgment, under such circumstances, was to affirm the former judgment.

The doctrine that the obligors in the bond are liable only for costs and penal interest is absurd. The original plaintiff might lose an attachment of valuable property, by means of the writ of error and stay of execution, and recover nothing but costs in the case in *error*, and penal interest. The bond requires the obligors to pay what shall be found legally due.

The original judgment having been treated as valid by the defendants in their writ of error and bond, and affirmed by the Court, is to be considered as established. *Read* v. *Sutton*, 2 Cush., 123.

The opinion of the Court was drawn up by

APPLETON, J. — The plaintiff having obtained judgment against the defendants, *Goodrich & others*, they, on the 23d of July, 1855, sued out a writ of error, and gave the bond prescribed by R. S., 1841, c. 143, "with condition that the plaintiff shall prosecute his suit to effect, and shall pay and satisfy such judgment as shall be rendered thereon."

The writ of error was duly entered and continued till the December term, 1856, when the former judgment was affirmed, and, by agreement, no costs were to be allowed to either party. The record of the judgment in error is in the usual form.

Judgment having thus been rendered, the defendants were bound by the condition of their bond "to pay and satisfy" the judgment rendered in error. Having failed to do this, it is difficult to perceive why this action should not be maintained against them.

It is objected, that the record of the original judgment, sought to be reversed, has not been completed, and that therefore the action must fail. But the case finds that the docket of the Court contains entries of all the proceedings during the progress of the suit, till final judgment thereon, and affords all the data required to complete the record. The clerk's docket is the record of the Court until the record is fully extended. *Read* v. *Sutton*, 2 Cush., 115. But the bond was to pay the judgment rendered in error, and that, the defendant not having done, his bond is forfeited.

It would seem, when the original judgment was affirmed, that a question as to the taxation of costs thereon having arisen, it was agreed to submit the correctness of that taxation to any Judge, and that the amount disallowed, if any, should be indorsed. This was for the benefit of the defendants. It was for them to procure the revision of the costs. The very language of this agreement, so far as it appears from the report, for the original is not made a part of the case, most clearly indicates that no delay was to be had for that cause.

The agreement, that there should be no costs in the writ of error, was for the benefit of the defendants, and of which they cannot take advantage. *Defendants defaulted.*

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

JOHN S. ABBOTT *versus* WILLIAM B. JOY.

The indorsee and holder of a negotiable note against a fraudulent debtor has *prima facie* evidence of a just claim against the debtor, and unless the indorsement is shown to have been conditional, and the condition to have terminated, he may maintain an action against a third person who has knowingly aided the debtor in transferring his property to prevent its being attached, under the provisions of R. S., 1841, c. 148, § 49.

On the trial of such an action, proof of fraudulent acts and declarations of the debtor before and after the sale, though in the absence of the defendant, are admissible to contradict evidence previously introduced by the opposing party.

THIS was an action on the case against the defendant for aiding his son, Samuel T. Joy, in fraudulently transferring certain property to prevent its being attached by the plaintiff as a creditor of the latter.

W. R. Smith sold his stock of goods in Brunswick, Dec. 18, 1855, to Samuel T. Joy, for $846,20, and took his negotiable promissory note therefor, payable on demand; which note, May 5, 1856, was negotiated and indorsed to the plaintiff, and Joy duly notified thereof, May 7, 1856. S. T. Joy sold the goods to the defendant, June 20, 1856, receiving in payment three promissory notes of the defendant for about $750.

There was evidence tending to show that Smith indorsed the note to the plaintiff to secure him for his liability as bail for Smith. Smith and the plaintiff both testified that the transfer of the note was absolute. It was proved that S. T. Joy had an account of $100, against Smith, before the note was transferred.

The defendant requested the Judge to instruct the jury, that if the note was indorsed to the plaintiff to secure his liability for Smith, and the condition of the bail bond had not been broken, the plaintiff had not such a debt against S. T. Joy as to entitle him to recover in this action. This the Judge refused, but instructed the jury, that if the transfer of the note was absolute, as appeared by the indorsement as

well as by evidence, the note having been over due when indorsed, the amount due on the note, after deducting any payment made by S. T. Joy, or off-set he had against it, would be the just claim of the plaintiff against Joy.

The plaintiff introduced evidence tending to show that the sale by S. T. Joy to the defendant, was made by both parties expressly to prevent the plaintiff from attaching the goods. The defendant introduced evidence tending to show the contrary.

There was various conflicting testimony as to the conduct and declarations of S. T. Joy, about the time of the sale to the defendant, particularly as to his offering for sale, as his own, $40 worth of leather in the attic, after his sale to the defendant.

The Judge instructed the jury, that the defendant's rights should not be prejudiced by the words or acts of S. T. Joy before or after the sale, unless it was first proved that the sale was fraudulent, and that the defendant knowingly participated in the fraud; but that, should they be satisfied beyond a reasonable doubt of his intentional participation in a fraudulent transfer, the declarations and conduct of either party concerning the goods would be competent evidence for their consideration.

The plaintiff introduced a copy of a writ, *Abbott* v. *Samuel T. Joy*, being an action on the note of Joy to Smith, indorsed to the plaintiff; also entries on the clerk's docket, from which it appeared that the action was entered, defaulted, and continued for judgment, September term, 1856.

The verdict was for the plaintiff, for $746,20. The defendant excepted to the ruling and instructions of the Judge, HATHAWAY, J., presiding.

J. H. Webster, in support of the exceptions.

The first instruction requested should have been given. The plaintiff, as bail for Smith, had no such demand against S. T. Joy as to entitle him to recover against the defendant. Penal statutes are to be construed strictly. *Thacher* v. *Jones*,

31 Maine, 528; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Craig* v. *Webber*, 36 Maine, 504; *Wellington* v. *Small*, 3 Cush., 145.

The plaintiff having suffered no injury when he commenced the action, it cannot be maintained. *Morgan* v. *Bliss*, 2 Mass., 111; *Fuller* v. *Hodgdon*, 25 Maine, 243.

The admission of evidence of S. T. Joy's acts after the sale to the defendant, was erroneous. *Bridge* v. *Eggleston*, 14 Mass., 245; *Bartlett* v. *Delprat*, 4 Mass., 702; *Clark* v. *White*, 12 Mass., 439. S. T. Joy's offer to sell leather, after the sale to the defendant, had no tendency to show that the sale to the defendant was fraudulent, and should have been excluded.

Abbott, pro se.

The transfer of the note was absolute and unconditional, made in writing, and the note delivered. The consideration is wholly immaterial, all payments and claims in set-off by S. T. Joy having been allowed.

The instructions of the Judge as to the transfer were correct. The transfer being in writing and absolute, could not be modified by any oral testimony. S. T. Joy's having been defaulted in a suit on the note, is conclusive as to his indebtedness, collusion not being suggested. But if otherwise, the instructions were not erroneous. It is not pretended that the liability of the plaintiff on the bail bond had ceased. His liability continuing, the title to the note was valid as between him and all other persons than Smith.

The instructions, as to the evidence touching the declarations and conduct of S. T. Joy, were sufficiently favorable to the defendant. The evidence objected to was admissible to contradict that of S. T Joy.

The opinion of the Court was drawn up by

CUTTING, J. — This is an action on the case, instituted on August 7, 1856, under the provisions of R. S., c. 148, § 49, by an alleged creditor, against the defendant for knowingly aiding or assisting a debtor in the fraudulent transfer of his property.

In *Thacher* v. *Jones*, 31 Maine, 528, it was held that, in such an action, the plaintiff must show that he was a creditor at the time of the fraudulent transfer, and has continued to be such up to the time of trial.

The plaintiff, aware of this rule, has endeavored to bring himself within it. He shows a sale of a stock of goods, by one *Smith* to *Samuel T. Joy*, a son of the defendant, for which the son gave his negotiable note for eight hundred and forty-six dollars and twenty cents, payable to Smith on demand, with interest, dated Dec. 18, 1855. He also produces this note indorsed to himself, on May 5, 1856. He further shows a transfer of the stock of goods from the son to his father, the defendant, on June 20, 1856, which he alleges was fraudulent, and intended to prevent an attachment of the goods by the plaintiff.

The production of the note, thus indorsed, was sufficient, *prima facie*, to prove the plaintiff to have been a creditor at the time of the sale from the son to the father; but it was not conclusive. The relationship existing between creditor and debtor was a material allegation, and one which the defendant might well traverse. He might have introduced any evidence which the debtor could have done in defence, in an action on the note. Had the plaintiff recovered judgment in his suit on the note against the son, the latter, being a party of record, would have been estopped to deny its validity, and the defendant also, collaterally, except for covin or collusion between the parties. *Adams* v. *Balch*, 5 Maine, 188. But where no judgment has been rendered on a default, the rule is otherwise. And this case discloses that—"There was evidence introduced tending to show that *Smith* indorsed the note to the plaintiff to secure him against his liability as bail for *Smith*. Smith and the plaintiff both testified that the transfer of the note to the plaintiff was absolute." Whereupon, the defendant requested the Judge to instruct the jury, "that if, at the time of the sale of the goods from *Samuel T. Joy* to the defendant, the plaintiff held the note declared upon only to secure him for his liability as bail for *Smith*, and the condition of the bail bond had not been broken, he had

not such a just debt against *Samuel T. Joy* as to entitle him to recover in this action." The Judge refused to give such instruction, and rightfully; for neither the evidence, nor the requested instruction, negatived the plaintiff's *continuing* liability on the bail bond. Had they been otherwise, a very different question would have been presented. And we are not prepared to say, if the liability had terminated, and the plaintiff had been saved harmless, that he, as the mere trustee of Smith, and to whom he would be accountable for the note, could be considered the holder of such "just debt or demand" as would enable him to maintain this action. If the continuing liability had been questioned, and any evidence touching that fact had been presented to the jury, then the Judge's subsequent remarks to the jury would have encroached upon their province, because he decided as a matter of fact that the indorsement was absolute, when, upon that point, the testimony was conflicting. But, as the case is presented to us, that instruction becomes immaterial, for, whether the note was indorsed absolutely or conditionally, until the condition had terminated, which was for the defendant to show, that *prima facie* evidence as to ownership, arising from the production of the note at the trial, by the plaintiff, and indorsed, has not been overcome.

Exceptions were also taken to the admission of certain testimony. "But no reason was given for the objection, at the trial, and none is stated in the exceptions." *Emery* v. *Vinal*, 26 Maine, 295; *Kimball* v. *Irish*, Ib., 444; *Glidden* v. *Dunlap*, 28 Maine, 379. And, besides, the evidence thus admitted was admissible for the purpose of contradicting that previously introduced by the excepting party. The instructions of the Judge to the jury upon this evidence were sufficiently guarded to render it ineffectual to produce any influence unfavorable to the defendant upon the question at issue.

Exceptions overruled, and
Judgment on the verdict.

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

ALBION JONES *versus* ISRAEL SPENCER *and others.*

When a poor debtor discloses property in his possession, and it is not appraised by the justices hearing the disclosure, although they allow him to take the oath prescribed in the statute, the condition of the bond is not fulfilled, and the creditor is entitled to recover in a suit upon the bond.

ON REPORT of the evidence by TENNEY, C. J.

DEBT on a poor debtor's bond. Plea *non est factum*, with a brief statement alleging performance of one of the conditions of the bond, by taking the poor debtor's oath within the time limited in the bond.

It was admitted that Spencer, the debtor, who gave the bond, took the oath in due time before two justices of the peace and quorum of the county, and received a certificate thereof in proper form.

The plaintiff introduced the disclosure of Spencer, made before said justices; from which it appeared that Spencer disclosed a debt due him from Calvin Dwinel of $500, another from Welcome Doe of $5, money in hand $5, &c. None of the property disclosed was appraised by the justices. It was further proved that Dwinel was a man of wealth.

The evidence was reported, the Court to enter judgment by nonsuit or default, according to the law of the case.

D. D. Stewart, for the plaintiff, argued that the bond was forfeited, and the plaintiff entitled to recover. *Fessenden* v. *Chesley*, 29 Maine, 368; *Baldwin* v. *Doe*, 36 Maine, 494; R. S., 1857, c. 113, § 48.

E. Hutchinson, for the defendant.

The decision of the Court was delivered by

TENNEY, C. J.—*Defendant to be defaulted. Judgment for plaintiff.*

APPLETON, CUTTING, MAY and GOODENOW, JJ., concurred.

INHABITANTS OF STARKS *versus* INHABITANTS OF NEW PORTLAND.

In an action for supplies furnished to a pauper, who is proved to have once had his settlement in the defendant town, the burthen is on that town to prove a subsequent settlement gained elsewhere.

THIS was an action of ASSUMPSIT to recover for supplies furnished, in 1856, by the overseers of the poor in Starks, to Stimson Paine, a pauper, alleged to have a settlement in New Portland.

The evidence was, that the pauper was born in New Portland in 1819, and resided in his father's family, in that town, until March 15, 1846; that, at the latter date, he, with his father, removed to Starks; and that he continued to reside in his father's family for some time afterwards. There was conflicting testimony as to whether the pauper broke up his residence in Starks, before the lapse of five years from his removal to that town.

The Court instructed the jury that, if satisfied that Paine once had a legal settlement in New Portland, the burthen was upon the defendant town to prove a continued residence of five years in Starks, without assistance as a pauper; otherwise the plaintiffs were entitled to recover.

Some other points were raised in the case, but they were unimportant.

The verdict was for the plaintiffs. The defendants excepted.

J. H. Webster, in support of the exceptions, cited 1 Starkie on Ev., 55; 2 Ib., 688; *Martin* v. *Fishing Ins. Co.*, 20 Pick., 389; *Sawyer* v. *Knowles*, 33 Maine, 208; *Brewer* v. *Linneus*, 36 Maine, 428; *Warren* v. *Thomaston*, 43 Maine, 406; *Wayne* v. *Greene*, 21 Maine, 357; *Powers* v. *Russell*, 13 Pick., 69; *Ross* v. *Gould*, 5 Maine, 204; *Wilmington* v. *Burlington*, 4 Pick., 174; *Gilmore* v. *Wilbur*, 18 Pick., 517; *Lane* v. *Crobie*, 12 Pick., 177; *Robinson* v. *White*, 42 Maine, 209.

J. S. Abbott, contra.

The decision of the Court was announced by

GOODENOW, J.—*Exceptions overruled; Judgment on the verdict.*

LEVI B. WYMAN *versus* HARLOW KILGORE.

In real actions, an amendment embracing a different piece of land from that described in the declaration, is inadmissible, as setting forth a new cause of action.

Otherwise, if the amendment merely gives a more particular and certain description of the land originally sued for.

ON REPORT of the evidence by TENNEY, C. J.

WRIT OF ENTRY to recover possession of a lot of land in Norridgewock.

The demandant claimed under a deed from John Lowell to Levi Wyman, dated April 6, 1819, the demandant being said Wyman's son and sole heir. The deed conveyed the "easterly part of great lot E 1."

The tenant claimed under a grant from the Proprietors of Kennebec Purchase to Samuel Goodwin, dated Dec. 12, 1770, conveying lot marked E 2, and intervening deeds.

The question at issue was the true south line of E 2. The testimony was voluminous and conflicting. The demandant claimed the "Ballard line" as the true one, and the tenant claimed the "Perham line."

David Garland was appointed by the Court as surveyor, and described the land as he surveyed it.

At the December term, 1857, after a large part of the testimony had been taken, the demandant had leave to amend on certain terms, and the case was continued, the defendant filing exceptions to the leave granted and to the amendment.

At the March term, 1858, the case was tried on the amend-

ed count; and the parties, after the testimony had been elicited, agreed to submit the case to the full Court on so much of the evidence as was legally admissible, the Court to draw such inferences as a jury might lawfully draw. The case turned upon questions of fact, rather than of law.

The case was argued at length by

J. S. Abbott, for the demandant, and

J. H. Webster, for the tenant.

The opinion of the Court was drawn up by

MAY, J.—Upon a careful examination of the evidence in this case, we are satisfied that if the demandant can recover, it must be by force of the deed from John Lowell to his ancestor, Levi Wyman, dated April 6, 1819. The evidence wholly fails to establish any title by disseizin in the demandant to any land described in his writ. The amendment, therefore, which was allowed, if it embraces any other land than was originally described in the writ, becomes unimportant, because, in our judgment, the demandant cannot recover for any such land; and if the object of it was only to make a different and more certain description of the land originally declared for, then it is unobjectionable. As the writ originally stood, its description of the premises was in perfect harmony with the description in the deed above referred to, unless there has been some change in the location of the south line of Norridgewock since the making of that deed, and before the commencement of this suit, of which there is some evidence in the case.

The description of the land, as contained in the deed, is of a tract "in Norridgewock, beginning where the south line of lot marked E 2 crosses the south line of Norridgewock, thence north 67½° west by the S. Goodwin line, so called, 51 rods, to a stake and stones, thence south 22½° west about 25 rods to the town line; thence east by the town line to the first mentioned bound, containing four acres; being the easterly part of great lot E 1."

The whole controversy between the parties arises from the uncertainty upon the face of the earth of the place of beginning. This must be determined by the monuments referred to in the deed; and the lines therein mentioned, as they existed at the date of the deed, are to be taken as monuments for that purpose. *Flagg* v. *Thurston*, 13 Pick., 145; *Cook* v. *Babcock*, 7 Cush., 526. The place of beginning being fixed, the other boundaries become certain, or are easily made so. The uncertainty, now existing, grows out of the difficulty of ascertaining the exact location of the south line of the lot marked E 2, and where the south line of Norridgewock then was, as they in fact then existed upon the face of the earth. If these can be made certain, the place of their intersection or crossing, referred to in the deed as the place of beginning, will at once appear. When the starting point is fixed, the residue of the description in the deed becomes plain, so that the location of the demandant's land upon the face of the earth can be determined with absolute certainty. If the other monuments cannot now be found, then the courses and distances, mentioned in the deed, may be resorted to, to determine where they originally were.

The burden is upon the demandant to show what land is embraced within the deed upon which his title depends. It is contended by the counsel for the demandant, that the south line of lot E 2 is identical with the line which is known as the Ballard line; while, on the other side, it is contended, with equal confidence, that such is not the fact, but that said south line of lot E 2 is the same as the Perham line. That the Ballard line and Perham line are nearly parallel with each other, and some considerable distance apart, seems to be conceded by both sides. We think the evidence in the case does not satisfactorily show any such change in the location of the town line since the making of the deed from Lowell to Levi Wyman, as essentially to affect the place of its being crossed by the south line of E 2. If it turns out that the Perham line is the north line of the demandant's land, then the fact, if such be the fact, that the Ballard line

may be some 20 rods or more to the north of it, and that the owners of lots 5 and 6 are bounded on the south by the Ballard line, thus leaving a strip of land on lot E 2, outside of Ballard's survey, can have no effect to carry the north line of the demandant any further north. His land must be located by the boundaries in the deed from which his title is derived.

The question then returns, where, upon the face of the earth, is the true south line of lot E 2, and where did it cross the town line? It does not appear from any evidence in the case that Samuel Goodwin ever made any survey of the lots in question; but it is probable that the line in the deed to Levi Wyman, described as running from the place of beginning "67½ degrees west on the S. Goodwin line," was the south line of lot E 2, as it appears from some of the deeds in the case to and from him, that he was, prior to 1800, if not after, the owner of that lot, or of some part of it bounded on the south line. We have no doubt but that his south line and the south line of E 2, were identical.

The monuments, fences, and other indications, as testified to by the surveyor Garland, as being in, upon and near along the line which he ran at the request of the tenant as the south line of E 2, tend very strongly to establish the fact that that line was the true south line of that lot. It is difficult to reconcile so many coincidences with any other view. The fact that so many other persons claiming lands along that line, and bounded by their deeds upon it, have for so many years acknowledged and treated the line claimed by the tenant as the true line of E 2, is also deserving of great weight. We think it is fairly deducible, from the testimony on both sides, that this line is what is called the Perham line, and that, at the place where the demandant's land lies, it is some 20 rods or more south of the Ballard line. It probably took its name from the fact, that one Perham assisted Hayden and Downing in ascertaining the location of these lot lines in 1813.

It appears, from the testimony of William Allen, that the

Ballard line was of an older date, he having traced it soon after his removal to Norridgewock in 1810. It also appears, from the records of the Proprietors of the Kennebec Purchase, that, in their grant of lot E 2 to Samuel Goodwin in 1770, said lot is said to be delineated on a plan made by John McKechnie as surveyor, dated November 7th, 1769. The only evidence of any survey of this lot by Ballard, as a whole, arises from the fact that he run it out into 100 acre lots; but the south ends of the lots, as run out by him, do not extend so far south as the Perham line. Whether he ran the south line of these lots in accordance with McKechnie's running in 1769, does not clearly appear. As there is some evidence in the case, that ancient monuments with McKechnie's marks upon them, have been seen and known by the early settlers upon the line called the Perham line, the inference is, that he did not, and that Perham and his party did. Garland says that Hayden and Downing's survey corresponds with McKechnie's, and we have already seen that it is probable that their survey took the name of Perham from the fact that he assisted them. There is no testimony tending to any other result. We are brought, therefore, to the conclusion that the true south line of lot E 2 is the same as the Perham line. Following this line, it is found to cross the town line of Norridgewock some 20 or 25 rods south of the Ballard line. The plaintiff, therefore, can recover no land lying north of the Perham line.

It is true, there are some things appearing in the evidence, and referred to by the able counsel for the demandant, which appear to be inconsistent with the view we have taken of this case; but not sufficient, in the judgment of the Court, to control the facts and circumstances to which allusion has been made, as the basis of the conclusion to which we have arrived.

The result is, that the demandant cannot recover.

Demandant nonsuit.

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

STATE *versus* EDWIN NOYES, *Appellant.*

The Legislature, in granting the charter of the Penobscot and Kennebec Railroad Company, adjudged that the railroad was required by public necessity and convenience; and this decision is conclusive.

This charter conferred upon the directors of the company the right to exercise certain powers, without interference by the Legislature, unless the company should, in some way, abuse the privileges granted; and, whether there has been an abuse of these privileges, is a question to be decided by the Court, and not by the Legislature.

The charter is a private contract between the government, acting in its sovereign capacity, and the corporation, binding on both, and cannot be changed or impaired by the Legislature. It is to be construed exclusively by the Courts, upon the same principles which are applied to contracts between private individuals.

The privileges thus granted may be taken for public use in the same manner as the property of individuals; but the intention of the Legislature to do so must clearly appear, and provision must be made for compensation to the owners of the property taken.

If the Legislature charter a railroad between certain *termini*, and it is constructed and put in operation, another railroad may be chartered between the same *termini*, unless, in the first charter, there is a limitation of the power of the Legislature to do so.

The charter of the Penobscot and Kennebec Railroad Company vests in the directors the power to prescribe the times and places at which it will receive persons and property for transportation.

The Act of March 26, 1858, is an interference with this right, and some power of the Legislature, other than that reserved in the charter, must be found to justify such interference; duties and obligations, additional to those required by the charter, being thereby imposed upon the company.

The Penobscot and Kennebec, and Somerset and Kennebec Railroads, being *crossing* and not *connecting* roads, their relative position imposes upon them no duties, in respect to receiving persons and property for transportation, that do not fall upon railroads situated in the vicinity of each other without crossing.

Private corporations, without any express reservations of the powers over them, in their charter, by the Legislature, are subject, like individuals, to be restrained, limited and controlled in the exercise of powers granted, by such laws as the Legislature may pass, based upon the principle of *safety* to the public.

Police regulations, established by the Legislature for the *convenience* of the public, or travelers on railroads, cannot be upheld against individuals or private corporations.

State *v.* Noyes.

The provisions of sections five and six of the Act of March 26, 1858, being in violation of the rights secured to the Penobscot and Kennebec Railroad Company, in their charter, are not binding on that corporation.

ON EXCEPTIONS from the ruling, *pro forma*, of TENNEY, C. J.

Complaint founded on sections five and six of chapter thirty-six of the statutes of 1858. It was commenced before a justice of the peace, before whom the respondent pleaded "Not guilty," upon which issue he was convicted, and, from the conviction, appealed. In this Court, the respondent had leave to retract his plea before the justice, and pleaded a special plea in bar of the further prosecution of the complaint.

To this plea the County Attorney, in behalf of the State, demurred generally, and the respondent joined the demurrer.

The presiding Justice sustained the demurrer, and ruled, *pro forma*, that the plea was not sufficient to bar or preclude the State from prosecuting said complaint against the respondent. To which ruling the respondent excepted.

The complaint charges that the respondent, "at Fairfield, in the county of Somerset, on the tenth day of January, A. D., 1859, was superintendent of the Penobscot and Kennebec railroad, which said railroad was then and there located and situated by authority of law, and then and there, in said town of Fairfield, in said county, crossed the railroad of the Somerset and Kennebec Railroad Company, a corporation established by the laws of the State, and which then and there, and for a long time previous thereto, had a railroad located and situated in, and extending through said town of Fairfield, by authority of law, and then and there crossing said Penobscot and Kennebec railroad; and, on the tenth day of January aforesaid, at said Fairfield, the passenger trains on said railroads were both due at the aforesaid point of crossing of said railroads in said town of Fairfield, at the same hour, to wit, at five of the clock in the afternoon; and the passenger train of the aforesaid Penobscot and Kennebec Railroad Company arrived at said crossing before the passenger train of the said Somerset and Kennebec Railroad Company arrived

at said crossing, and the train of the said Penobscot and Kennebec railroad did not then and there wait at the station near such crossing until the arrival of the passenger train of said Somerset and Kennebec Railroad Company, and said passenger train of said Somerset and Kennebec Railroad Company did then and there arrive at said crossing within twenty minutes after the arrival then and there of said passenger train of said Penobscot and Kennebec railroad, contrary to the form of the statute in such case made and provided, and against the law and peace of the State."

Sworn to in due form.

The matter specially pleaded in bar by the respondent is as follows:—

"And the said Edwin Noyes, in his own proper person, comes into Court here, and, by leave of said Court, retracts his plea to said complaint, as heretofore pleaded, and, for a plea in this behalf, the said respondent, by leave of Court here for this purpose first had and obtained, says, that said State ought not further to prosecute the said complaint against him, the said Edwin Noyes, because, he saith, that although true it is, as set forth in said complaint, that the Somerset and Kennebec railroad, which extends from Augusta to Skowhegan, through the town of Fairfield, and the Penobscot and Kennebec railroad, which extends from Waterville to Bangor, through said town of Fairfield, did, on said 10th day of January, A. D., 1859, cross each on the same level at a place called Kendall's Mills, in said town of Fairfield, but did not connect with each other; and at the time mentioned in said complaint the afternoon passenger trains of cars from Augusta to Skowhegan on the Somerset and Kennebec railroad, and from Waterville to Bangor on the Penobscot and Kennebec railroad, were due at said point of crossing at the same hour, and that the said train from Waterville on said Penobscot and Kennebec railroad did arrive at said point of crossing before the said train of said Somerset and Kennebec railroad arrived at said point of crossing, and on arriving at its station at Kendall's Mills

aforesaid, and near to the crossing aforesaid, at the time it was due so to arrive, did not there wait until the arrival there of said passenger train of said Somerset and Kennebec Railroad Company; and said train on said Somerset and Kennebec railroad, which was then and there due, did then and there arrive within twenty minutes after the arrival then and there of said passenger train on said Penobscot and Kennebec Railroad Company, but said train on the Penobscot and Kennebec railroad, after delivering at said station its passengers and receiving them, immediately proceeded over said crossing to Bangor, as it is alleged in said complaint; nevertheless the respondent says, that the Penobscot and Kennebec Railroad Company was created by, organized under, and, on said tenth day of January, did exist, and still exists, by virtue of an Act of the Legislature of Maine, approved April 7, 1845, which is as follows, viz.:—"

The plea recites the charter of the Penobscot and Kennebec Railroad Company, the sections of which, material to the issue, are the following:—

"SECT. 4. Said corporation shall have power to make, ordain and establish all necessary by-laws and regulations, consistent with the constitution and the laws of this State, for their own government, and for the due and orderly conducting of their affairs and the management of their property.

"SECT. 5. The president and directors for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of locating, constructing and completing said railroad, and for the transportation of persons, goods and property, of all descriptions, and all such power and authority for the management of the affairs of the corporation as may be necessary and proper to carry into effect the objects of this grant; to purchase and hold within or without the State, land, materials, engines and cars, and other necessary things, in the name of the corporation, for the use of said railroad and for the transportation of persons, goods and property of all descriptions: to make such

equal assessments, from time to time, on all the shares in said corporation, as they may deem expedient and necessary in the execution and the progress of the work, and direct the same to be paid to the treasurer of the corporation. And the treasurer shall give notice of all such assessments; and, in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares, for the space of thirty days after such notice is given as shall be prescribed by the by-laws of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving such notice as may be prescribed as aforesaid, to the highest bidder, and the same shall be transferred to the purchaser; and such delinquent subscriber or stockholder shall be held accountable to the corporation for the balance, if his share or shares shall sell for less than the assessments due thereon, with the interest and costs of sale; and shall be entitled to the overplus, if his share or shares shall sell for more than the assessments due, with interest and costs of sale. *Provided, however*, that no assessment shall be laid upon any shares in said corporation of a greater amount, in the whole, than one hundred dollars.

"SECT. 6. A toll is hereby granted and established for the sole benefit of said corporation, upon all passengers and property of all descriptions, which may be conveyed or transported by them upon said road, at such rate as may be agreed upon and established from time to time by the directors of said corporation. The transportation of persons and property; the construction of wheels; the forms of cars and carriages; the weights of loads, and all other matters and things in relation to said road, shall be in conformity with such rules, regulations and provisions as the directors shall from time to time prescribe and direct.

"SECT. 7. The Legislature may authorize any other company or companies to connect any other railroad or railroads with the railroad of said corporation, coming from a northerly or easterly direction. And said corporation shall receive and transport all persons, goods and property of all descrip-

tions, which may be carried and transported to the railroad of said corporation on such other railroads as may be hereafter authorized to be connected therewith, at the same rates of toll and freight as may be prescribed by said corporation, so that the rates of toll and freight on such passengers and goods and other property as may be received from such other railroads, so connected with said railroad as aforesaid, shall not exceed the general rates of freight and toll on said railroad received for freight and passengers at any of the deposits of said corporation.

"SECT. 12. The said corporation shall at all times, when the postmaster general shall require it, be holden to transport the mail of the United States from and to such place or places on said road as required, for a fair and reasonable compensation. And, in case the said corporation and the postmaster general shall be unable to agree upon the compensation aforesaid, the Legislature of the State shall determine the same. And the said corporation, after they shall commence the receiving of tolls, shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles for the transportation of persons and articles, and be obliged to receive, at all proper times and places, and convey the same, when the appropriate tolls therefor shall be paid or tendered, and a lien is hereby created on all articles transported for said tolls. And the said corporation, fulfilling on its part all and singular the several obligations and duties by this section imposed and enjoined upon it, shall not be held or bound to allow any engine, locomotive, cars, carriages or other vehicle for the transportation of persons or merchandize to pass over said railroad, other than its own, furnished and provided for that purpose, as herein enjoined and required:—*Provided, however*, that said corporation shall be under obligations to transport over said road, in connection with their own trains, the passenger and other cars of any other incorporated company that may hereafter construct a railroad connecting with that hereby authorized, such other company being subject to all the provisions

of the sixth and seventh sections of this Act, as to rates of toll and all other particulars enumerated in said sections.

"SECT. 17. The Legislature shall at all times have the right to inquire into the doings of the corporation and into the manner in which the privileges and franchises herein and hereby granted may have been used and employed by said corporation, and to correct and prevent all abuses of the same, and to pass any laws imposing fines and penalties upon said corporation, which may be necessary, more effectually, to compel a compliance with the provisions, liabilities and duties, hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations. And this charter shall not be revoked, annulled, altered, limited, or restrained without consent of the corporation, except by due process of law."

The plea also recites the Acts of June 3, 1851, and section 8, of the Act of March 29, 1853, extending the time of the location of said railroad, and alleges "said Acts were, on said tenth day of January, 1859, and are still, in full force; and, under said charter and Acts the said company had, on said tenth day of January, constructed and put in operation said railroad from Waterville to Bangor, connecting at Waterville with the railroad of the Androscoggin and Kennebec Railroad Company, and had done and performed every thing required by said Acts to be done and performed on its part, and had not then, and has not now, lost or forfeited any of its rights, privileges, immunities or powers granted by said charter."

It then recites the tenth section of the Act of April 1, 1856, authorizing the lease of the Penobscot and Kennebec railroad to the Androscoggin and Kennebec Railroad Company, the lease made in pursuance of that authority, and the charter of the latter company.

By the lease the control of the running of the trains on the Penobscot and Kennebec railroad is transferred to the Androscoggin and Kennebec Railroad Company. The charter of the latter company, so far as material in this case, is identical

with the corresponding provisions in the charter of the former.

The plea alleges the execution, &c., of the lease, and that the Androscoggin and Kennebec Railroad Company had taken and retained the possession and management of the Penobscot and Kennebec railroad, and proceeds as follows:—

"Under and by virtue of which Act said last named company had constructed, and were and still are operating their said railroad from Waterville, aforesaid, to Danville Junction, in the State of Maine; and the Androscoggin and Kennebec Railroad Company, by virtue of the authority granted in said charter of the Penobscot & Kennebec Railroad Company, and transferred by virtue of the lease as aforesaid, to themselves, on the said tenth day of January, 1859, were, and ever since have been, running trains of cars for the transportation of persons and property from Waterville to Bangor, over said Penobscot and Kennebec railroad; and the directors of said Androscoggin and Kennebec Railroad Company had, prior to said tenth day of January, prescribed and directed, among the 'rules, regulations and provisions' for the management of said trains, that the afternoon passenger train, mentioned in said complaint, leaving Waterville at forty-three minutes past four of the clock in the afternoon, should arrive at said Kendall's Mills station, near the crossing of said railroads, at fifty-two minutes past four of the clock, and having received the passengers at that station, and delivered such as were to be there left, said train should thereupon immediately leave said station, and proceed on over said crossing to Bangor, without any delay or stop; which said rule and regulation was in force on said tenth day of January aforesaid, and still is in force.

"And this respondent further avers that at the time aforesaid, and long before and ever since, he was employed by said Androscoggin and Kennebec Railroad Company as the superintendent of their road, and of the Penobscot and Kennebec railroad; and as such it was his duty to cause the trains of cars for the transportation of persons and property

to be run over said railroads, in accordance with such rules and regulations as the directors of said Androscoggin and Kennebec Railroad Company should from time to time prescribe and adopt; and that in accordance with the rule and regulation aforesaid, adopted and prescribed by the directors as aforesaid, he caused said train to leave said station at Kendall's Mills as complained of him, as it was lawful for him to do.

And the said respondent further avers that said complaint and prosecution against him has been commenced and is prosecuted under and by virtue of an Act of the Legislature of the State of Maine, approved March 26, 1858, which is in the words following, to wit:—

"An Act to secure the safety and convenience of travelers on railroads.—

"*Be it enacted by the Senate and House of Representatives in Legislature assembled,* as follows:—

[Sections 5 and 6 only appearing to be material the other sections of the Act are here omitted.]

"SECT. 5. When railroads cross each other, and passenger trains are due at such point of crossing at the same hour, it shall be the duty of the train first arriving to wait at the station near such crossing until the train upon the other road shall arrive; *provided* it shall so arrive in twenty minutes; and each train shall afford suitable opportunity for such passengers as desire it, (with their baggage,) to be changed to and transported on the other train.

"SECT. 6. Whenever the provisions of section five shall be violated, the superintendent of the road and the conductor and engineer of the train so transgressing, shall each be subject to a fine, to the use of the State, of not less than ten dollars nor more than fifty dollars, for each offence, to be recovered on complaint before any justice of the peace, or on indictment in the county where such violation shall occur."

Which said Act, if enforced in manner sought in said complaint and prosecution, is an infringement of the rights, powers, privileges and franchises granted in and by said Act

incorporating said Penobscot and Kennebec Railroad Company: and that said Act of March 26, 1858, under which this complaint is prosecuted, is contrary and repugnant to the tenth section and first article of the Constitution of the United States, and contrary to the Constitution of the State of Maine, and void. All of which the respondent is ready to verify and prove; whereupon he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said complaint above specified.

Drummond, in support of the exceptions, made the following points, which he elaborately argued:—

I. The Act of 1858 conflicts with the charter under which the respondent acted.

II. The charter is a contract which the Legislature cannot annul or modify, unless the power to do so was reserved in it.

III. In this charter such power was not reserved.

IV. It is not for the Legislature to determine what "are proper times and places for the corporation to receive persons and property for transportation."

V. This Act cannot be sustained under the right of government to take private property for public uses, because it does not purport to do so, nor provide for compensation to the owners.

VI. This is a *private* corporation, and not *public*, although it was authorized to take private property.

VII. The Legislature had the power to make this contract, though it might prevent future Legislatures from passing laws calculated to promote the public interest.

VIII. This Act is not an exercise of the right of eminent domain by the Legislature.

IX. It cannot be sustained under the police power of the State.

In respect to this power, corporations are placed on the same ground as natural persons, *to whom a similar grant has been made.*

This power cannot be exercised to promote the public *convenience*, but only for the public *protection.*

The enactment of laws to promote the public *convenience* is an exercise of the right of *eminent domain*, and implies compensation in all cases.

Snell, County Attorney, *contra*, argued in support of the following positions:—

1. It appears, on an examination of the charters and statutes involved in this case, that the Legislature intended that the Penobscot and Kennebec railroad and the Somerset and Kennebec railroad should connect with each other.

2. These charters are qualified legislative grants.

3. The acceptance of the charter by a company creates, by necessity, an obligation to comply with the letter and spirit of the grant.

4. Such acceptance is, in legal contemplation, an agreement on the part of the company with the Legislature, that it will perform all the duties imposed by law, and be subject to all liabilities enjoined.

5. Any intentional non-compliance on the part of the corporation, in this respect, is an abuse in the exercise of its privileges and franchises, which the Legislature has a right to correct and prevent.

6. The Penobscot and Kennebec Railroad Company, by accepting the Act of 1853, have waived the provisions of their charter which prohibit interference by the Legislature.

7. This company has forfeited its charter by failing to locate their road within the time prescribed by law. At any rate, the plea fails to show any such location.

8. Corporations are subject to the general police power of the State in the same manner as individuals.

9. The right of control of the modes of travel, whether upon sea or land, resides in the State. This right is one of those essential attributes of sovereignty, of which the State cannot divest itself.

10. Any property granted by the State, whether a railroad franchise, or any other grant, may be taken for public use, without the consent of the owner, under the right of eminent domain.

11. The Legislature has the right to pass any law which is reasonable and for the benefit of the people, and its decision in this respect is conclusive.

12. In this charter the Legislature reserved the right to correct abuses of the franchise.

The Legislature has the power to determine *conclusively* whether there has been an abuse; and if it finds there has been, it can apply the remedy.

13. In passing the law of 1858, the Legislature did determine there had been an abuse of this charter by the company, and from this determination there is no appeal.

14. It follows, therefore, that said Act was passed by virtue of the reservation in this charter and is therefore binding on the corporation and all its officers.

Appleton, Attorney General, also argued for the State, and

Rowe, for the respondent, in reply.

The opinion of the Court was drawn up by

TENNEY, C. J.—It is charged in the complaint, that, on January 10, 1859, the defendant was superintendent of the Penobscot and Kennebec railroad, which said railroad was then and there located and situated by authority of law, and in Fairfield crossed the railroad of the Somerset and Kennebec Railroad Company, a corporation established by the laws of the State, &c., and that, at the time stated, the passenger trains on said railroads were both due at the point of crossing the same in said Fairfield, at the same hour, to wit, at five o'clock in the afternoon; and the passenger trains of the Penobscot and Kennebec Railroad Company arrived at said crossing before the passenger train of the Somerset and Kennebec Railroad Company arrived at said crossing, and the former train did not then and there wait at the station near said crossing until the arrival of the passenger train of the latter company, which train last named did then and there arrive at said crossing, within twenty minutes after the arrival of the said passenger train on the Portland and Kennebec railroad; contrary to the form of the statute, &c.

The defendant files a special plea, in which he recites the charter of the Penobscot and Kennebec Railroad Company, and the subsequent Acts, passed by the Legislature, in addition to the same; also the Act authorizing the lease of this road to the Androscoggin and Kennebec Railroad Company; together with the lease in pursuance of the provisions of the last named Act, alleging that they all were accepted, before the passage of the Act under which the complaint was made, and that there has been a compliance with all the requirements of the same. The plea also recites the 8th section of an Act, entitled "an Act to provide for certain railroad connections for the European and North American Railroad Company," approved March 29, 1853, and the charter of the Androscoggin and Kennebec Railroad Company. And it is alleged in said plea, that although true it is, as set forth in the complaint, that the Somerset and Kennebec railroad, and the Penobscot and Kennebec railroad, did, on the 10th day of January, A. D., 1859, cross each other on the same level at Fairfield, but did not connect with each other. And it is alleged, that the Act of the Legislature, passed on March 26, 1858, if enforced in manner sought in said complaint and prosecution, is an infringement of the rights, powers, privileges and franchises granted in and by said Act of incorporation of said Penobscot and Kennebec Railroad Company, and said Act last named is contrary and repugnant to the 10th section and first article of the Constitution of the United States and contrary to the Constitution of the State of Maine, and is void. To this plea the government filed a general demurrer.

From the facts alleged in the plea, and confessed by the demurrer, it does not appear that the Somerset and Kennebec Railroad Company sustain any relation to the Penobscot and Kennebec Railroad Company, excepting that they crossed each other, and this by necessity, from the fact that one terminus of the first named road is on a different side of the road last named from the other. And it may not be

improper to remark that no other relation has been suggested in argument.

The charter of the Penobscot and Kennebec Railroad Company provides, in section 1, "that the company shall have and enjoy all proper remedies at law and in equity to secure and protect them in the exercise and use of the rights and privileges, and in the performance of the duties, hereinafter granted and required, and to prevent all invasion thereof, or interruption in exercising and performing the same, and said corporation shall be, and hereby are invested with all the powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this Act, as hereinafter set forth."

By section 4, the corporation shall have power to "ordain and establish all necessary by-laws and regulations, consistent with the constitution and laws of the State, for their own government, and for the due and orderly conducting of their affairs, and the management of their property."

Section 5 provides, that "the president and directors for the time being are authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of locating, constructing and completing said railroad, and for the transportation of persons, goods and property of all descriptions, and all such power and authority for the management of the affairs of the corporation, as may be necessary and proper to carry into effect the objects of this grant."

By section 6, "a toll is granted and established for the sole benefit of said corporation, upon all passengers and property of all descriptions, which may be conveyed or transported by them upon said road, at such rate as may be agreed upon, and established from time to time by the directors of said corporation. The transportation of persons and property, the construction of wheels, the forms of cars and carriages; the weight of loads, and all other matters and things in relation to said roads, shall be in conformity with

such rules and regulations and provisions, as the directors shall from time to time prescribe and direct."

By section 12, "the corporation, after they shall commence the receiving of tolls, shall be bound at all times, to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles, for the transportation of persons and articles, and be obliged to receive, at all proper times and places, and convey the same, when the appropriate tolls therefor shall be paid or tendered," &c.

By section 17, "the Legislature shall, at all times, have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchises, herein and hereby granted, may have been used and employed by said corporation; and to correct and prevent all abuses of the same; and to pass any laws, imposing fines and penalties upon said corporation, which may be necessary more effectually to compel a compliance with the provisions, liabilities and duties herein before set forth and enjoined, but not to impose any other or further duties, liabilities or obligations. And this charter shall not be revoked, annulled, altered, limited or restrained, without consent of the corporation, except by due process of law."

Of the statute approved by the Governor, March the 26th, 1858, the 5th and 6th sections are as follows:—"When railroads cross each other, and passenger trains are due at such points of crossing at the same hour, it shall be the duty of the train first arriving to wait, at the station near such crossing, until the train upon the other road shall arrive;—*provided*, it shall so arrive in twenty minutes; and each train shall afford sufficient opportunity for such passengers as desire it, (with their baggage,) to be changed to, and transported on the other train." Whenever the provisions of section 5 shall be violated, "the superintendent of the road and the conductor and engineer of the train, so transgressing, shall each be subject to a fine, to the use of the State, of not less than ten dollars, nor more than fifty dollars for each offence, to be

recovered on complaint, before any justice of the peace, or on indictment in the county where such violation shall occur."

It is not doubted that, in granting the charter of the Penobscot and Kennebec Railroad Company, the Legislature had in view public improvement and benefit. It was upon this ground alone, that the company was allowed to take private property in the construction of the road, on paying a just compensation. Without such adjudication by the Legisture, that the road was supposed to be what public necessity and convenience required, made in some mode, express or implied, no basis would exist for such provisions. And this judgment, touching the question, which must have been presented to the Legislature, was conclusive.

The work, contemplated by the Act, was of great magnitude, requiring the expenditure of large sums of money, before it could be put into the operation designed; and, whether the enterprise would be attended with a remunerating return for the outlay was a question upon which unanimity of opinion could hardly be expected. Hence it could not be assumed that capital would be thus employed, without some guaranty was given in the charter, that no modification thereof should take place so that the privileges granted should be less valuable. Hence, after providing what was deemed important for the public good, the rights, before mentioned, were secured to the company, and the power of alteration on the part of the Legislature, by which new duties, liabilities and obligations; or by which the charter should be revoked, annulled, altered, limited or restrained, without consent of the company, excepting by due process of law, was expressly inhibited. The right was conferred, so that the directors of the company, in the matters enumerated, should prescribe rules and regulations according to their own judgment, without any interference of the Legislature, unless the company should in some way abuse the privileges granted. And, in determining whether they had been so abused, the power to judge is not left with the department of the government which conferred the privileges, but, according to the Act of incor-

poration itself, as before stated, "by due process of law;" though the Legislature might provide, by general legislation, fines and penalties for abuses, and modes in which they might be imposed; but, whether abuses of the privileges granted had taken place, in given cases, is exclusively with another department of the government to find. *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 339.

The company being thus secured in its independence of the Legislature, and having the right by its directors to establish a toll, for the sole benefit of the corporation, upon all passengers and property of all descriptions, which might be conveyed and transported by them on the road, it was induced to construct the road and put it into operation, as the consideration of the grant in the charter. The Act of the Legislature thus became a contract between the government, acting in its sovereign capacity, with the company, founded on the mutual considerations moving from one party to the other. This contract is to be construed by the tribunal established for such purposes generally, on the same principles which are to be applied to contracts between private individuals; and, in both classes, the great question presented is, what was the intention of the parties? And the answer to this question, and the construction to be given to all such contracts, generally, is the appropriate and exclusive business of the judicial department.

The Act of incorporation was not only a contract between the Legislature and the company, but it was a private contract. It is true, that this is not admitted on the part of the government, but a reference to the cases cited on both sides will show that this question is well settled both on principle and authority. And this has been done, so clearly and so extensively, by arguments to which no satisfactory answer has been given by those who have denied the doctrine, that it would be an useless expenditure of time to do more than to refer to some of the numerous citations. And the result of them is, that the charter is a contract binding equally upon the government and the corporation. The privileges granted there-

by, absolutely, cannot be changed or impaired, by the Legislature alone, unless under a constitutional provision, which will be considered. *Dartmouth College* v. *Woodward*, 4 Wheat., 518; *Allen* v. *McKeen*, 1 Sum., 276; *Fletcher* v. *Peck*, 6 Cranch, 89; *New Jersey* v. *Wilson*, 7 Ib., 164; *King* v. *Dedham Bank*, 15 Mass., 454; *Charles River Bridge* v. *Warren Bridge*, 7 Pick., 344; *Yarmouth* v. *North Yarmouth*, 34 Maine, 411; *Boston and Lowell Railroad Corporation* v. *Salem and Lowell Company & als.*, 2 Gray, 1.

It is insisted, on the part of the government, that the Legislature is limited in the exercise of this power, to some extent; and that it is not competent for them to barter away absolutely, beyond recall, the rights of the public, which may afterwards become essential to its good, and if this department of government are not subject to some restraint in this respect, the power to provide for public improvement will be diminished, and may be eventually lost. This proposition has no support in right reason or sound law. The Constitution has guarded the rights of the people, so that they are exposed to no danger from the exercise of this authority, which is apprehended to be so perilous.

Private corporations are no more secured in the absolute and uncontrollable enjoyment of their property and franchises, granted by the sovereign power, than are individuals, who are possessed of property and privileges, independent of legislative grants. By the Constitution of the State, Art. 1, § 21, "private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require it." By the Constitution of the United States, Art. 5, of the amendments, "private property shall not be taken for public use, without just compensation." The right to take private property, for public uses, under the circumstances and conditions mentioned in the citations just made respectively, has been acted upon by the Legislatures of individual States and by Congress. Without such power, government would be embarrassed in a State or Nation like our own, where enterprize is attended in its operations with such great improvements

for the public good. It is upon this very provision that railroads are established ordinarily. If this power was withheld, corporations for such an object might proceed, if they could, by contract, with individuals, acquire every thing essential to the prosecution and completion of the work; but it is not difficult to perceive that, in that case, obstacles would probably be presented, which would induce the corporation to abandon its designs or submit to enormous and uncertain exactions. In the language of the Court, in one of the citations from Gray's Reports, in reference to this subject, "Whatever exists, which public necessity demands, may be thus appropriated." "Such appropriation is not regarded as impairing the right of property, or the obligations of any contract; on the contrary, it freely admits such right, and, in all just governments, provision is made for an adequate compensation which recognizes the owner's right. Nor does it appear to us to make any difference whether the land, or other right, or interest thus appropriated, be derived directly from the government or acquired otherwise, for the reasons already stated, that it does not revoke the grant, or annul or impair the contract, but recognizes and admits the validity of both." *West River Bridge* v. *Dix*, 6 How., 507; *Richmond, Fredericksburg & Potomac Railroad* v. *Louisa Railroad*, 13 Haw., 83.

But, in the exercise of this power, it must appear distinctly, "by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent. It must also appear, by the Act, that they recognize the right of private property, and mean to respect it, and, under our Constitution, the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. In general, therefore, when any Act seems to confer an authority to another to take property, and the grant is not clear and explicit, and no compensation is provided by it, for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to exercise the right of

eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected." 2 Gray, 1, before cited.

If the Legislature, having chartered a railroad or turnpike corporation, containing no provision that the Legislature may not confer similar privileges in another Act to others, and the same should be constructed and in operation, and it should subsequently pass another Act creating a body corporate, for the purpose of constructing and putting in operation a similar railroad or turnpike, which should have termini near those of the former, the object being to give additional facilities for communication from one terminus to the other, the proper power having adjudged it to be of common necessity and convenience, the second grant is no infringement of any constitutional right of the first, and it becomes effectual as a contract.

But if the Legislature, in granting the charter to the former corporation, restrained itself from conferring a similar privilege upon another corporation of the same kind, within a specified distance, the restriction would be binding, and could not be revoked, excepting under the high prerogative of sovereignty, and by making just compensation. This doctrine has been solemnly announced in this State, in *Moor* v. *Veazie*, 32 Maine, 343, and, in Massachusetts, in 2 Gray, 1, before referred to.

It is not contended by the counsel for the State, that the Legislature has undertaken to appropriate the property and the franchise of the Penobscot and Kennebec Railroad Company under the constitutional provision referred to; there is no indication of an intention to do so. But it has required of this company a duty, which is not *expressly* enjoined by the charter, and prescribing a fine for the omission to comply, thus making the omission a crime. If this provision is authorized under the power, which it is insisted the Legislature possess, the defendant must submit, though it does not appear that the liability arises from any abuse of the privileges and franchises by the charter granted. And it is not upon that

ground that the 5th and 6th sections of the law of 1858 is attempted to be sustained.

It is, however, contended, that the company being subject to a duty to receive, at all proper times and places, persons and articles and convey the same, &c., the Legislature, may properly take measures to see this duty fulfilled. The proper times for doing this service, must necessarily, be provided for by some rules and regulations, which shall be "prescribed and directed" in the language of the charter. Some persons or body of persons must do this, or it must remain undone. The directors, by the charter, alone are intrusted with this power. That they have abused this power, cannot be contended; for no objection whatever is made to the propriety of the rule, fixing the time of departure from the station at Kendall's mills. The Act of 1858 requires that trains shall wait beyond that hour, if the train of the crossing road do not arrive by that time. The place *where* the alleged omission of duty in the defendant occurred is in nowise the subject of complaint. The interference by the Legislature to modify the rules and regulations, touching the time of departure, is certainly in terms inconsistent with the power with which the directors are clothed in the 6th section of the charter. The rules and regulations were prescribed, upon this matter; they were complied with by the defendant, at the time in question. And some other power of the Legislature, than that existing in them by any reservation in the charter, must be found in order to hold him liable. If he had waited as required by the Act of 1858, and had thereby secured himself from the penalty affixed to the omission of that which is declared a crime, he must have been regarded by his employers as having neglected his duty to them, unless excused by some higher necessity. And if the statute of 1858 was not passed in obedience to this high necessity, it was the imposition of duties and obligations, and liabilities to punishment, for a neglect of those duties and obligations, additional to those required by the charter.

Was there any thing, in the relative position of the two

roads, crossing each other, or any duties arising therefrom, which authorized the legislative interference? The Somerset and Kennebec Railroad, not being connected with that of the Penobscot and Kennebec Railroad Company, further than that one crosses the other, it is not perceived that the latter have any duties, under the charter, to perform, arising from that fact, further than to take all precautionary measures, enjoined by statute, or otherwise, to prevent collision of the locomotives and trains generally on the two roads, or any interference with the other. The cars of one are under no obligation to go upon the road of the other; they do not, and from the construction of the roads, engines and cars, they cannot do so. If passengers or merchandize are offered at the places and times, when and where such are received, according to the rules and regulations of each respectively, they are to be taken and transported, whether they are brought or come to those places in one mode or another. The charter gives no power to require by the statute, that the train on one road shall wait for the train of the other, further than what safety demands, more than where such railroads having no connection with each other come in the same vicinity, without crossing.

In large cities, where numerous railroads centre, and where passengers and goods come thereto on one road, and go therefrom on another, both leading on the general course on which it is designed that the passengers and goods should proceed; and for the reason that the hours of departure of the trains of the latter are earlier than the hours of the arrival of the former, great inconvenience and loss may occur; but in a charter like that of the Penobscot and Kennebec Railroad Company, we do not perceive, in what way, according to the terms of the charter, the Legislature can prevent it by statute regulations.

But the ground on which the government's counsel principally rely, to sustain the 5th and 6th sections of the statute of 1858, is that the Legislature are vested with the power to establish rules and regulations for the safety and convenience

of all persons, by suitable statute provisions; and that this power is incidental to the general authority of this important branch of the government; that corporations, public and private, without any reservation, are subject to the exercise of this authority; that individuals are subject also to such restraints, by this power, as shall, in the judgment of the Legislature, be reasonable and conducive to the public good; and that private corporations, as they come into existence, with chartered rights and obligations, are not only bound to yield obedience to such statutes, which were in force at the time, but new provisions afterwards, looking to the same end, as police laws embrace such corporations, actually existing at the time, in the same manner as they do individuals; and that general railroad laws are of this character.

It is not denied, in behalf of the defendant, that the power contended for by the prosecuting officer of the State does actually exist in the Legislature, so far as it has reference to the safety of persons and property. But it is denied that the power exists, so that it can be exercised so far as to establish laws promotive of the *convenience* simply, of individuals, among themselves; and it is also denied that private corporations can be in any degree affected by laws passed by the Legislature, for the sole purpose of promoting the *convenience* of other private corporations, or the public generally, or any citizens or classes of citizens, in contravention of provisions in the charters of such private corporations respectively, unless it is by the constitutional provision of taking private property for public purposes, and upon compensation therefor.

With the Legislature, the maxim of the law, "*salus populi suprema lex*," should not be disregarded. It is the great principle on which the statutes for the security of the people is based. It is the foundation of criminal law, in all governments of civilized countries, and other laws conducive to safety and consequent happiness of the people. This power has always been exercised by government, and its existence cannot be reasonably denied. How far the provisions of the

Legislature can extend, is always submitted to its discretion, provided its Acts do not go beyond the great principle of securing the public safety — and its duty, to provide for this public safety, within well defined limits and with discretion, is imperative. The principle is expressly recognized in the Constitution of this State, Art. 1, sections 1 and 20. All laws, for the protection of the lives, limbs, health and quiet of persons, and the security of all property within the State, fall within this general power of the government. The statute requirement, that the bell upon the engine of a railroad shall be rung as the train approaches a crossing of other roads; the placing of signboards, to warn persons who may be at or near a crossing; the erection of gates and bars, and the employment of persons to guard the crossings at the time of the passage of locomotives and cars; and of faithful and skilful brakemen upon the trains, and the coming to a stop at a specified distance of the place of the crossing of another railroad before crossing the same, and many others are examples of the exercise of this power of the government, through the Legislature. *Thorpe* v. *R. & B. R. R. Co.*, 27 Verm., 142.

Another class of cases has been the subject of legislation, under the power of the government to establish police regulations, and has been thought to be promotive of public *convenience*, rather than public safety. Such cases are when two parties have the right to do things similar to each other at the same time and place, and laws are properly made to prevent interference and interruption. This class of laws, which may be quite numerous, may be illustrated by what has been generally denominated the law of the road. Without any statute, or custom having the force of law, on the subject, difficulty might sometimes arise between travelers upon our highways. But when the subject is attentively considered, it will be found that such laws fall within the principle of promoting the public safety.

The counsel for the government has called our attention to many statutes and decisions which, it is contended, look more

to public convenience than to public safety; and, judging from the ability and the untiring diligence manifested in his argument, we cannot doubt that authorities favoring his views would be found, if they exist. But we have been unable to discover in any of them the doctrine contended for, that legitimate police regulations will extend to matters conducive to the convenience of the public, when they conflict with the recognized rights of other parties.

It is not understood that the requirement contained, in the 5th section of the statute of 1858, is for the safety of the public, or for that of travelers upon railroads. The delay demanded extends only to the space of twenty minutes; and if this delay was really essential to the safety of travelers concerned, the necessity of a greater delay will exist in full force.

It cannot be doubted that the Legislature, in the passage of this statute was influenced by a laudable desire, that the travel of passengers, who wished, at crossings of different railroads, to go from one to the other, should continue unbroken without any suspension; that it was not supposed that the safety of such travelers demanded the delay is made apparent by the title of the statute, which has reference to their convenience as well as their safety.

It is a well settled doctrine, that private corporations, without any express reservation of the powers over them in the Act of incorporation, by the Legislature, are subject, like individuals, to be restrained, limited and controlled in the exercise of powers granted, by such laws as the Legislature may pass, based upon the principle of safety to the public. Whether, in the exercise of power by the Legislature, for the security of this object, it would be bound by an express reservation, we have no occasion to consider. It may be that such a limitation of authority would be entirely nugatory, as a restraint upon the discharge of an imperious duty; but, of this, we give no opinion.

No reason is perceived for imposing upon private corporations, established from public necessity and convenience, more

onerous duties, in police regulations, than those to which individuals in the same condition are made subject. "The great object of an incorporation is to bestow the character and properties of an individuality on a collected and changing body of men." This is said by C. J. MARSHALL, in *Providence Bank* v. *Billings*, Pet. S. C. Rep., 514; and Redfield holds, "that, upon examination, this will be found to have placed the matter upon its true basis;" and, he adds, "as to the general liability to legislative control, it places natural persons and corporations upon the same ground." Redfield on Railways, 550, 551, 552, note.

If convenience to travelers on railroads will authorize the provisions under which this complaint is brought, it is not easy to perceive any limit to the power of the Legislature, in relation to its authority in matters of police. If travelers on railroads can invoke legislative aid for their convenience, the right can be extended to natural persons in all their operations, perhaps to the great inconvenience of other natural persons or corporations, who shall be made subject to such servitude. And, if such laws can be made effectual in direct violation of the provisions of a charter to a company, as a police regulation, there seems to be no good reason for withholding the exercise of the same power, where a natural person is concerned.

It is not believed that those who travel, or cause goods to be transported upon railroads, have a legal claim for the security of convenience, by statute laws, requiring duties of the proprietors of such roads, which duties are additional to those prescribed in their respective charters, and which the Legislature has precluded itself from imposing, which those, who undertake to travel in stage coaches, or have goods carried by common carriers for hire, have not.

But if railroads can be made subject to police regulation from which others are exempt, how far can this duty be extended? If the power exist to impose it in the slightest degree, we know of no line of limitation. It would certainly be convenient for the travelers living in a country thickly set-

tled with inhabitants, to be able to find stations where they can take passage within the shortest distances of each other; and have the train come to a stand against the dwelling of every one living near the railroad track, that he might be accommodated in taking his passage with greater convenience to himself, than it would be, if he were obliged to take another mode to reach a station. No one would probably contend that this should be done, and thereby subject the proprietors to burdens against which they were protected in the Act of incorporation, and if allowed, might be attended by ruinous results. Numerous examples might be mentioned showing the absurdity of the doctrine contended for on the ground of public convenience, which is often regarded as an argument quite as convincing as many others. For, if propositions will necessarily lead to absurd conclusions, they cannot be sound.

But from logical deductions of adjudged cases, which have been referred to, the doctrine that police regulations may be established by the Legislature for the convenience of the public, or travelers on railroads, cannot be upheld. It is not contended, or understood by the counsel for the State, in the imposition of duties under the police power, that it is taking private property for public use, and that, therefore, just compensation can be required therefor.

In the charter of the *Boston & Lowell Railroad Corporation* v. *The Salem & Lowell Railroad Company & als.*, 2 Gray, 1, it was provided that no other railroad, than the one granted, should, within thirty years from and after the passing of the Act, be authorized to be made, leading from Boston, Charlestown or Cambridge, to Lowell, constituted a contract, by the Commonwealth with the Boston and Lowell Railroad Corporation, that no other should be lawfully made for thirty years, and was within the constitutional powers of the Legislature to make, and was binding on their successors. The same principle was enunciated in the case of *Moor* v. *Veazie*, 34 Maine, 343, in which the exclusive right was conferred by the Legislature to navigate parts of the Penobscot

river by steamboats, in consideration of making improvements in the same river, which were treated by the Legislature as being for public benefit.

In neither of these cases could the Legislature create a new power to do the same thing, as that granted, consistently with the contract already existing, although it might be for public convenience that it should be done. And in the former of the two cases, just referred to, it was held that distinct railroads, of companies chartered afterwards, for other purposes, could not form an union of their roads, by which indirectly another road would exist within the limits prescribed for the whole distance, and the object, which could not be affected directly, thus in this mode attained.

This union, having in view the convenience of travelers on railroads, might have been deemed within the police power equally with that which we are now considering. But the case contains no intimation that the contract could be avoided in this manner.

But, as we have seen, if the sovereign power of the State, acting through the Legislature, adjudged that the property, the privileges and franchises of a private corporation could be taken, because public necessity and convenience required it, and thereupon create a new corporation for such a purpose, the Act is void, unless provision is made by which just compensation can be obtained. *But*, if chartered rights may be impaired, and new duties imposed upon a corporation, without compensation is effectually secured, with success, in contravention of stipulations in the charter, under the principle that it is merely the exercise of the police power to promote public convenience, it is a new and easy mode by which this constitutional security of private property and privileges may be broken down.

From the best consideration which we have been able to give to the subject before us, and with a steady determination to sustain the action of a co-ordinate branch of the government, unless it clearly appeared beyond all substantial doubt that it could not be done, we have come to the con-

clusion, that the provisions under which the complaint against the defendant was made were in violation of the rights secured to the Penobscot and Kennebec Railroad Company in their charter, and that they cannot be sustained on any of the grounds presented under the facts and the argument in behalf of the State. *Exceptions sustained.*

Demurrer overruled; plea adjudged good.

CUTTING, MAY, GOODENOW, DAVIS and KENT, JJ., concurred.

COUNTY OF LINCOLN.

WILLIAM AYER *versus* REBECCA WARREN *& al.*

The general rule of law is, that a married woman cannot make a binding contract, or be the subject of a suit; but if there has been a *desertion* by the husband, in the ordinary meaning of the term; and their separation has been long continued, and is so complete that he must be regarded as having renounced all his marital rights and relations, — such a case would be an exception to the rule, and she would be treated as a *feme sole*.

Evidence that the separation was by the mutual consent of the parties, and that provision for a separate maintenance of the wife was made by the husband, *tends* to prove such a renunciation, but does not render the conclusion inevitable that the husband has renounced all his marital rights.

The rights of the parties, in such a case, (on a contract made in 1856,) are not materially affected by the statutes of this State, giving to married women the power to hold and manage their property, and to enforce remedies, in their own names, when it has been taken or injured.

REPORTED by MAY, J.

ASSUMPSIT on the defendants' joint promissory note, dated at Rockland on the 4th day of June, 1855, for $550, in three months, payable to the order of the plaintiff.

Rebecca Warren alone defended, the other defendant, Edward Everett, having been defaulted.

The action was commenced on the 17th day of Oct., 1856, and, at the January term, 1859, the female defendant pleaded the general issue with a brief statement of coverture at the time of executing the note.

At the trial, the plaintiff read in evidence the note declared on.

For the defence, *Leonard Cooper*, of Montville, was called, and testified:—"some twenty years ago I knew Rebecca Warren. She married Samuel S. Warren. I was present at the marriage. She was the widow Everett at the time. She lived first at Clinton, as the wife of Warren."

Cross-examined.—"The name of her son, by her former husband, was Edward. The marriage was at Montville. Warren was a lawyer. They removed from Clinton to Albion. I saw them there. Do not know that they lived together since I saw them at Albion. Have not seen Warren within 14 or 15 years. As I understood, he went to Massachusetts:" which statement, as evidence, was objected to by defendants' counsel.

"After living with her husband in Albion, she returned to Montville, remained eight or ten years; then removed to Rockland. While living in Montville, her home was about a mile from mine. Her son Edward and two daughters lived with her. While there she did business in her own name. She held my notes payable to her, which I paid her. Her husband did not live with her while she was there."

It was admitted, that defendant and her husband separated before the date of the note, and have never lived together in this State since that time.

Artemas Libbey, called by plaintiff, testified in substance, that he now resides in Augusta; formerly practiced law in Albion; was in the office of Samuel S. Warren, as a student, from the year 1841 to 1844; in April of 1844, Warren left there to reside in Foxboro', Massachusetts; corresponded with him at that place till about 1851; Warren has never lived in Albion since he left in 1844; most of his unsettled business was left with me; a day or two before he left, his wife re-

moved to Montville; they agreed to live separate; to my knowledge he has not lived in this State since 1844; he was at Albion a few hours in 1847 or the year after; have done business with and for the female defendant in her own name since her separation from her husband, in 1847 or 1848 collected a note for her; visited Warren at Foxboro,' Massachusetts, in 1846; was there four or five days; he appeared to be permanently settled there, (objected to by defendants' counsel.) About a year ago, was informed that he was residing with his son at Mobile.

The plaintiff was called by his counsel as a witness and testified:—"I am acquainted with Mrs. Warren. When she lived in Montville she resided about a mile from me. Her husband did not live with her while she was there. She went to Rockland to reside, and afterwards, in April, 1836, removed to Boston."

Witness stated, on *cross-examination*, "I do not know that the note was for the benefit of Ayer & Everett. Edward Everett told me at the time the note was made, that he wanted the money and had obtained his mother's signature to it, and wished me to indorse it, that he could get the money at the bank; I did so, and after it was protested, I took it up."

The case was thereupon taken from the jury, the parties requesting that the evidence might be reported to the Law Court for decision, according to the legal rights of the parties, on so much of the evidence as is legally admissible.

L. W. Howes, for the plaintiff, argued that the evidence in the case was a sufficient answer to the defence of coverture. There was a desertion of the wife by the husband in 1844, which has continued ever since. He abandoned his residence, closed his business and left the State, (abjured the realm.) He has never since returned here to reside. The desertion and residence, as disclosed by the evidence, are equivalent to a residence in a *foreign* State. *Abbott* v. *Bailey*, 6 Pick., 89.

There can be no reasonable controversy as to facts in this case, and the law applicable to the case appears to be well

settled. *Gregory* v. *Pierce*, 4 Met., 478; *Abbott* v. *Bailey*, before cited; *Gregory* v. *Paul*, 15 Mass., 31.

The doctrine of the case of *Gregory* v. *Pierce*, as laid down by C. J. SHAW, is decisive of this. There the plaintiff failed for want of proof of desertion. He was able to show only a temporary absence of the husband, caused by his being insolvent when he went away. There was no evidence of a separation between him and his wife. Here, there is no proof or pretence of insolvency; the evidence is clear of separation from and desertion of the wife—the abandonment of his business and of his residence in this State; of the wife's doing business, taking and collecting notes in her name.

Having for so many years availed herself of the privileges and benefits, which the law allows to one thus deserted by her husband, she ought not now to be permitted to escape from liability for her contracts, on the plea of coverture.

The law, as applicable to women thus situated, does not limit them in their authority to make and take contracts, or do business of any kind, in their own name, nor make any exception as to their *power* or *liability*, but gives them the full benefit of entering into all sorts of business and connecting themselves with all kinds of business relations; as SHAW, C. J., says, "she may make and take contracts, and sue and be sued in her own name as a *feme sole*," thus treating her as a single woman for the purposes of business.

The courts make no exception whatever as to her liabilities. That would be as unjust towards her as it would be to deprive her of acting in her own name, for that would be the effect.

In *Gregory* v. *Paul*, the Court remark,—"And the same reason applying, where the husband had abjured the realm, the wife was allowed to sue *as a widow* for her *dower*. In such case, also, she has been permitted to alien her land without her husband. She may be sued as a *feme sole*. She might make her will. She might, in *all things*, act as if her husband were dead; and the necessity of the case requires that she should have that power."

In this case the husband of the defendant has virtually "abjured the realm," by abandoning his residence in this State, and going to reside in another of the United States, as is well settled in the said case of *Abbott* v. *Bailey.*

Sometimes, in England, there has been a distinction made in the rule, where there has been a separation and *maintenance furnished by the husband,* he *still remaining within the jurisdiction;* but, in this case, there is no maintenance, neither has the husband remained within the jurisdiction, where we could reach him by process.

Gould, for the defendant, Rebecca Warren:—

If the plaintiff can recover against the female defendant, who is a married woman, upon the note, given, not for *necessaries,* but as *surety;* he can do so, only, upon the ground that, at the time of the execution of the contract, her husband was *mortuus civiliter.*

Counsel cited and commented upon the early cases on this subject. *Lady Belknap's case,* reported in the Year Books, 2 Hen. 4th, 7; *the case of the wife of Thomas Wayland,* reported in the 19th year of Edward the first, referred to by Lord COKE, 1 Co. Litt., 133, a; *Walford* v. *the Duchess of Pienne,* 2 Esp. Rep., 554, and, in same vol., p. 587, *Franks* v. *same; De Gaillon* v. *Victoire Harel L'Argle,* 1 Bos. & Pull., 357.

And later cases, where the law is more definitely settled— *Marshall* v. *Rutter,* 8 Term Rep., 545; *Marsh* v. *Hutchinson,* 2 Bos. & Pull., 226; *Baggett* v. *Frier & al.,* 11 East, 301, and note to this case, in Day's American edition, p. 304, and cases there cited; *Edwards & ux.* v. *Davis,* 16 Johns., 281. See, also, Bayley on Bills, c. 2, § 3; Chitty on Bills, p. 22; *Gregory* v. *Paul,* 15 Mass., 31; *Abbott* v. *Bailey,* 6 Pick., 89; *Ames* v. *Chew & Tr.,* 5 Met., 320.

In the more recent case of *Gregory* v. *Pierce,* 4 Met., 478, the former Massachusetts cases were reviewed, and the law is clearly stated. Apply the rule, as adopted in that case, to this, does the evidence offered by the plaintiff, (the burden

being on him,) "render the conclusion inevitable" that here was a total renunciation of the marriage relation; "embracing both the fact and intent of the husband, to renounce, *de facto*, as far as he can do it," that relation? Does it conclusively establish the *mors civilis*, indispensable to the restoration of the wife, to all her rights as a *feme sole*? Could the defendant, at the date of the note, upon such proof, have maintained an action to recover her dower in the lands of which her husband was seized, during coverture, *as his widow?*

The argument of *necessity* cannot arise in this case. The note was not given for necessaries of life, nor in any transaction beneficial to the defendant. She is simply a surety.

It is not to be presumed that a husband intends a total renunciation of his marriage relation, simply because he and his wife agreed to live separately. There may be good reasons for a separate maintenance, or a separate residence, which would by no means be sufficient to warrant a dissolution of the matrimonial bond. As, in this case, both the husband and the wife had families, by former wife and a former husband. These families could not be agreeably commingled.

Even if there be no question, as to the admissibility of the testimony, "that they separated by mutual consent," if the testimony be taken in its largest significance, it fails to prove the *mors civilis*, which it is indispensable for the plaintiff to establish to entitle him to maintain this suit.

Does the fact of voluntary separation, and the going to another State, with the design of residing there, and a continued residence there until 1856, *exclude the idea* of an intended re-union at some future day?

Does it *conclusively* establish *a total abandonment* of the wife, in the *absence* of proof that he did not support her during the separation? Especially, as it *affirmatively appears* that he *left property in this State*, and returned here at least to look after it.

He was a native of this State, and may be presumed to have the *animus revertendi* spoken of in some of the cases cited. He was not again married.

In *Lady Belknap's case*, the ground was, that there was a "*deportation forever* into a foreign land" of the husband; he being *attainted of a felony*. The cases against the *Duchess of Pienne*, as also the case of *Abbott* v. *Bailey*, 6 Pick., 89, were put upon the ground that the husband was *never* a citizen of the country. So also in the case of *Gregory* v. *Paul*, the husband there *deserted* the wife in a foreign country, had *abandoned* her for a great number of years, in his own country, and had never been within the United States.

In *Frank's* case against the *Duchess of Pienne*, 2 Esp., 578, it was said that, if it had been the case of an *Englishman*, the case would be different, as he might be presumed to have the *animus revertendi*.

The agreement to live separate, and the *fact* of living separate, and the wife doing business as a *sole trader*, even though the husband be domiciled in a foreign country or state, does not make out a case for the plaintiff; as is established by the cases of *Marshall* v. *Rutter* and *Marsh* v. *Hutchinson*, cited above. And, in the *latter* case, it was held, by Lord ELDON, that in order to restore a married woman to her right to make contracts, the circumstances must amount to the *civil death* of the husband, and the wife be entitled to dower, and be put *in the same situation as if he were actually dead*.

In the case of *Bogett* v. *Frier & al.*, the husband had abandoned the wife and gone *beyond the seas*. She had, for several years, contracted as a sole trader, receiving no support from, nor having any communication with her husband; still, it was held, that she could maintain no action, even to protect *her own property*.

These cases are all *much stronger* in their facts, than the case at bar. So is the case of *Gregory* v. *Pierce*, 4 Met., 478, for in that case it was *agreed* that the husband made no provision for the support of the wife and family, and that he *abandoned her* fourteen years before his death; he living all the time in another State, still she was held not liable for necessaries.

I think no case can be found where the husband has been

held to be civilly dead, on such facts as have been proved in this case. And I submit, that the *circumstance* that this is not a debt for *necessaries*, taken in connection with the *absence of proof* that she was left without proper provision by the husband, and the *affirmative* proof that he had property in this State, is one of great weight.

Even if the defendant had been left without the proper means of support, when her husband went to Massachusetts, there is no necessity of assuming that he was civilly dead; for, by the statutes of this State then in force, c. 87, R. S., 1840, § 22 to § 27, inclusive, she might have been authorized, on application to the Supreme Court, to make contracts in her own name, and to prosecute and defend suits.

The enactment of that statute shows that the rule of the common law was not regarded as extending to the facts of such a case as this; otherwise, there could be no necessity of making such a law. Section 22 provides that "the Supreme Judicial Court, on application of any married woman, whose husband has absented himself from the State, *abandoning her*, and not making sufficient provision for her maintenance, may empower her" to make contracts in her own name. This section embraces more *facts* tending to establish the *civil death* of the husband, than the plaintiff has made out, viz.:—The *abandonment*, while the plaintiff shows only a *mutual agreement* of separation; an *absenting himself from the State;* and *not making provision for her support*, which the plaintiff does not show.

The opinion of the Court was drawn up by

TENNEY, C. J.—Rebecca Warren, one of the defendants, denies her liability on the note in suit, because, at the time she signed her name thereto, she was the lawful wife of Samuel S. Warren, then in full life. And the question before the Court is whether, under the facts reported in the case, the plaintiff is entitled to recover against her. In *Corbett's* case, as stated in 1 Dane's Abr., 357, the learned author, "Lord MANSFIELD, and the Court, held the general

rule to be, 'that a married woman can have no property, real or personal;' her contracts are entirely and universally void; for her contracts, even for necessaries are the contracts of her husband; she cannot be sued or taken in execution. Then the exceptions to this rule are, as when the husband *is in exile*, or has *abjured the realm;* and credit has been given to the wife alone. So in the case of *transportation*, though temporary, because she acts as a *single* woman, and gains credit as such. So if the husband resides abroad, his wife is liable to be sued."

That a suit may be maintained against a woman who has a husband living, as if she were a *feme sole*, has long been settled in England and in this country. But eminent English Judges have differed in relation to the principle, which, on being applied to cases, would render her liable or otherwise. It was not doubted, under the jurisprudence of that country, that she might be sued alone on her contracts, or for her torts, when her husband was banished; when he was an alien enemy; was transported, though only for seven years; or when there was a judicial divorce from bed and board.

It has been supposed, by those who most strongly resist the liability of the wife while her husband is living, that it is upon the ground that he is *civilly* dead. *Marshall* v. *Rutter*, 8 T. R., 545. On the other hand, Lord MANSFIELD and others have held the wife liable on her contracts, in cases in some respects similar to those in which other Judges have treated them as exempted, on the ground of a separation, between the husband and wife, the agreement to live separate, and a separate maintenance in favor of the latter. *Corbett* v. *Poelnitz*, 1 T. R., 5. The test of the wife's liability by the former class of jurists, has been pronounced unsound, as the rule cannot be universally true; as, for example, it cannot with propriety be said that the husband is civilly dead, when his wife cannot be married again; when he is an alien enemy; has been transported and in exile; when no administration of his estate can be granted, no descent to his children; and no dower can be assigned in it. 1 Dane's Abr.,

335, in which it is said, "so are clearly the best authorities." The doctrine of Lord MANSFIELD was attacked by Lord KENYON, when he declares, "that to take the wife in execution, when sued alone, is a divorce between her and her husband." This argument has been regarded of little force at most, because no inconvenience to the husband can arise, when, by a valid agreement, the husband and wife live separately and there is a separate maintenance; and why may not the execution run against the separate property secured to her? *Clayton* v. *Adams*, 6 T. R., 604; 1 Dane's Abr., 360.

In the case of *Ringstead* v. *Lady Lanesborough*, 23 Geo. 3, B. R.,—Cooke's Bank. Laws, 24, decided in 1783, which was assumpsit for goods sold and delivered, upon the plea of coverture, and replication that she lived separate from her husband at the time of making the promise, and that she had a large and sufficient maintenance secured to her by deed; and a special demurrer to this replication; the replication was adjudged good, and the plaintiff had judgment.

In *Barwell* v. *Brooks*, 24 Geo. 3, B. R.,—Cooke's Bank. Laws, 28, decided the next year, which was also assumpsit against the wife, on her separate promise, for goods delivered to her, she was held liable though her husband resided in England.

The case of *Corbett* v. *Poelnitz*, before cited, was one which was presented to the Court soon after the two last cited, and the result was similar, they being regarded as authority and cited in the case by BULLER, J.

In the year 1800, the case of *Marshall* v. *Rutter*, before referred to, was decided by Lord KENYON and his associates, in which decision Lord Chief Justice EYRE, who heard the first argument, concurred. After the decisions upon this question, in Lord MANSFIELD'S time, the law as to the wife's liability seemed to have been altered, but, upon the announcement of the judgment in *Marshall* v. *Rutter*, the old law was thought to be restored; and the former decisions have been treated as overruled by the latter case. *Gregory* v. *Paul, Ex'r*, 15 Mass., 31.

These two classes of cases, according to the reasoning of the decisions respectively, appear to rest upon principles not reconcilable one with the other. But Mr. Dane, in his Abr., vol. 1, p. 339, says, "It was natural for Judges, &c., opposed to such separations, vastly multiplied, to sieze on these defects in the articles of separation, to discountenance those modern inroads on the marriage state; and one way was, in *Marshall* v. *Rutter*, to hold the wife, separated, not capable to contract, so as to be alone suable, as this at once placed her in a humble, subjected state, so that no one would trust her; a state in which her friends would not be much inclined to place her. It must be admitted that this wife ought to be suable as a *feme sole*, until she is restored to the condition of one in relation to her husband, that is, until she has the rights of a *feme sole*, as to her separate property, and rendered no longer liable to have her person, society, or personal services ever after claimed by her husband. Now, upon close examination, it will be found that, in Rutter's case, and in every case in which the decision has been against this separate liability of the wife, there has existed one or both of these defects in the articles of separation. Either her separate maintenance has been clearly inadequate, and a mere fraud upon her, or not effectually, or not permanently secured to her, or her husband has retained some right at some time to seize her person, or to claim it, with her society, and, of course, her services. In either case, the reason of her liability fails. It is true, though such defects have been so discoverable in these cases, they have not always been expressly mentioned by the Judges, in giving their opinions. On the whole, it is very clear, the cases of *Barwell* v. *Brooks*, *Ringstead* v. *Lady Lanesborough*, *Corbett* v. *Poelnitz*, &c., remain unshaken, if we examine the cases themselves, and do not hastily rely on the reasoning in them." And the learned author remarks, on page 357 of the same volume, "In *Corbett's case*, LAWRENCE, J., truly observed, that the husband had no rights to the person of his wife afterwards." And, on page 335, "on examining the cases carefully, it will be found she cannot be sued, though living

separate, when her husband has not renounced his right to her person. And that she may be sued alone, when he has renounced this right, and she may bind herself, so as to be sued alone on her contracts, whenever his marital rights are not affected by them, and there is no coercion. And it is upon this ground, when her husband is an alien enemy, as he contends, that he has no rights which can be affected by her being sued alone and imprisoned." And on page 361 he remarks, "on the whole, though there have been several *dicta*, contrary to the decision in the case of *Corbett* v. *Poelnitz*, yet there has been no decision directly contrary to it, or that can materially shake it. In *Marshall* v. *Rutter*, the wife had no remedy for her maintenance, as she could not sue her husband."

It is not understood that, in English Courts, the decision of *Marshall* v. *Rutter* has been overruled, as applied to the facts of the case, but is treated as being in harmony with previous decisions, though the exact principle on which they respectively rest has not been always distinctly enunciated. But it is believed that, in no case, in that country, has the test of LAWRENCE, J., before quoted, that the wife cannot be sued alone, because her husband *had not renounced his marital rights* to her person, society, service, &c., been denied to be true.

The separate maintenance secured to the wife effectually, upon a separation, and other facts in cases referred to, may be regarded as evidence of a renunciation by the husband of his marital rights. But, when this effectual renunciation has been fully established, it is believed that no case can there be found, denying to the wife the power to bind herself by her contracts, and making her liable to be sued thereon.

In this country, the question has been examined by able jurists and Courts, and although the decisions have not always been in all respects consistent with each other, but still the great principle referred to has not been repudiated, expressly.

Judge REEVE, in his work on Domestic Relations, holds the wife, while her husband is living, suable merely on the

principle, that her husband *has renounced his marital rights*, not on the ground of separate maintenance; as, if so, that would be the measure of her liability. 1 Dane's Abr., c. 19, art. 10, § 5.

In the case of *Gregory* v. *Paul*, 15 Mass., 31, the English authorities were fully examined, and, it appearing that the husband deserted his wife in a foreign country, and she maintained herself, and for five years had lived in Massachusetts, the husband being a foreigner, and never having been in the United States, it was held, that she was competent to sue, and be sued as a *feme sole*, and her release would be a valid discharge of any judgment she might recover, upon the ground that the case fell within the spirit of the rule of the common law, founded in reason and necessity, in case of exile and abjuration.

The case of *Abbott* v. *Bailey*, 6 Pick., 89, was an action of trover, brought for a note running to the plaintiff, a woman having a husband living. The defendant pleaded in abatement, that the plaintiff was under coverture of Peter Abbott, who was then living in New Hampshire, under proper pleadings, which resulted in an issue of law on demurrer; it appeared that the plaintiff was driven from her husband, and her home, more than twenty years before. She had all the time acted as a *feme sole*, and been treated as such by those with whom she had had dealings. The husband had considered the connection as at an end, and had married, and was then living with another woman. And it was admitted that this separation was caused by the cruelty and ill usage of the husband. He obliged the plaintiff to live separately from him, and to obtain her own living, and she had sustained herself in the State where she resided. According to the principle of *Gregory* v. *Paul*, her action was maintained. In both these cases, the facts showed that the husband had renounced his marital relations.

The case of *Gregory* v. *Pierce*, 4 Met., 478, was a suit upon a promissory note signed by the defendant, a married woman, and submitted on an agreed statement of facts. She

was married in 1806; her husband, in 1816, became insolvent and went out of the State, and did not return till 1818, when he came back and remained with her about a week. He then left her and went to Ohio, where he remained till his death in 1832. He made no provision for the support of his wife and family, after he left her in 1816, but she supported herself and family by her own labor, contracting debts, and making contracts in her own name. The note was given for a balance of account between the parties thereto. SHAW, C. J., in delivering the opinion of the Court, remarks, "The principle is to be considered as established in this State, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that when the husband was never within the Commonwealth, or gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole.* It is an application of the old principle of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm." But it is held, that the separation must be voluntary, from an abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and so far as he can do it, the marital relation, and leave his wife to act as a *feme sole.*

By the statutes of this State, married women enjoy rights entirely unknown to the common law, touching the ability to hold and dispose of property independent of their husbands, and also to enforce remedies, when their property is taken away or injured, without joining them in suits, which they may institute. But it is not perceived that the case now before us is in any manner affected by those statutes, and further consideration thereof is unnecessary.

It appears, from the evidence in the case, that many years ago, the defendant, Rebecca Warren, was married to Samuel S. Warren, in the town of Montville, and immediately moved to Clinton, both towns in this State, and, after some time, they moved to Albion, in this State, and cohabited together as man

and wife. They separated by mutual consent; and he left Albion in April, 1844, saying, as he was leaving, that he was going to Foxborough, Massachusetts, to reside there, and he never lived in Albion after that time. His wife moved to Montville, a day or two prior to his leaving Albion. He was in Foxborough as late as 1846, in the fall, apparently making his home there. His wife continued to live in Montville after the separation, till she removed to Rockland in this State, and thence to Boston, the latter in April, 1856. She has done business in her own name, while she lived in Montville, holding notes in her own name, and receiving payment therefor, and had a family residing with her, the children of a former marriage. The separation took place before the date of the note in suit, and the parties to the marriage have never since lived together. The husband was a member of the legal profession, and did business as such. No imputation is shown to rest upon the moral character of either, which can be treated as unfavorable, aside from their mutual agreement to live separate from each other.

The general rule being, that a married woman cannot make a binding contract, or be subject to a suit, the plaintiff must show, by sufficient proof, that she falls within the exception.

The fact of the desertion of the husband from his wife, according to the ordinary meaning of the term has not taken place. The desertion was nothing more than the separation, which took place under an agreement between them. It was not a desertion, under the statute of 1841, c. 80, § 2, as would authorize, under that provision, a dissolution of the bonds of matrimony. Nothing is proved, showing that the separation was designed to be perpetual, farther than its continuance since it took place.

No separate maintenance was provided by the husband, much less, that it was sufficient, or made effectual permanently, by any contract which could be regarded as binding; the separation being "by mutual consent," and no intervention of trustee, or other contracting parties. The husband and the wife cannot be regarded as under any legal prohibition

from putting an end to the separation, whenever it should suit either to do so. It appears from the evidence that both resided in the State of Massachusetts in the year 1856, after removal there; and there is no evidence or admission that they have not lived together in that State, or elsewhere since that time, aside from what may be inferred from other facts in the case. Whether he has or not provided a home for her, if she was willing to return to him, and whether he is of pecuniary ability to support her on her return, or otherwise, are questions to which the case has given us no direct answer. We are not satisfied that the separation is so complete, that he is to be treated as *having renounced his marital rights and relations.* *Plaintiff nonsuit.*

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

SEWALL P. TOMLINSON *versus* MONMOUTH MUTUAL FIRE INSURANCE COMPANY.

By c. 125, § 1, R. S. of 1840, it is enacted that an absolute conveyance "with a separate instrument of defeasance of the same date, and executed at the same time, shall constitute a mortgage."

But a deed, purporting to be absolute, though intended to be defeasible by bond, will not be defeated, unless the bond be recorded in the registry of deeds. R. S. of 1840, c. 97, § 27.

Where, by the terms of a policy of insurance, it was to be absolutely void, if the insured, without the assent of the company, alienated the property in whole or in part, and he conveyed it in mortgage, and afterwards, by a deed recorded, released to another person his right of redemption, and took back a bond of defeasance, which he neglected to have recorded, *it was held,* in an action to recover for a loss that had occurred, that it appearing of record there had been an alienation of the property, the policy became void; and that the lien of the mortgagee, upon the policy, was defeated by the alienation of the property.

REPORTED by CUTTING, J.

THIS was an action of ASSUMPSIT on a policy of assurance,

issued by the defendant company to the plaintiff Nov. 10th, 1856, for $300, on plaintiff's house, and $75, on his barn, for four years. The writ is dated July 12th, 1858.

From the report of the case, it appears that the loss of the property insured against happened on the 20th day of January, 1858, and notice thereof was given to the company by the plaintiff on the 25th day of the same month, with a request that the loss be paid to S. E. Smith, who held a mortgage thereof. No objection was made to the sufficiency of the notices given by the plaintiff or the mortgagee.

The mortgage was made and recorded in March, A. D., 1857, to secure a note for $550, and interest, in two years. Other parcels of land, of sufficient value to secure the note, besides the lot on which were the insured buildings, are included in the mortgage.

The company introduced a copy of the record of a deed from plaintiff to Isaac Averill, of the parcels embraced in the mortgage, dated May 6th, 1857, and the plaintiff put into the case a bond of defeasance of the same from Averill to him, of the date of May 9th, 1857. And there was testimony tending to prove that there was an error in the date of the bond; that it should bear even date with the deed, having been executed and delivered at the same time the deed was, and constituted one transaction.

The policy was made to conform to one of the provisions of the Act incorporating the defendant company, that "when the property insured shall be alienated by sale, or otherwise, the policy shall thereupon be void."

The case was submitted to the Court, with jury powers, to be decided on so much of the evidence reported as is legally admissible.

The point which, in the judgment of the Court, is decisive of this case, being the only one considered in the opinion of the Court, it becomes unnecessary to state the other questions argued by the counsel, or the evidence reported bearing upon them.

M. H. Smith, for the plaintiff, in his argument, made the following points:—

By statute, as well as by numerous decisions, an absolute deed with a separate instrument of defeasance back, constitutes a mortgage.

In order to create a mortgage by an absolute deed and deed of defeasance, it is not necessary that the dates of the two instruments should be the same. It is sufficient if both be delivered at the same time. *Harrison* v. *Academy*, 12 Mass., 456; *Newhall* v. *Burt & al.*, 7 Pick., 157; *Eaton* v. *Whiting*, 3 Pick., 384.

In *Pollard* v. *Somerset Insurance Co.*, 42 Maine, 221, it is decided, that a mortgage of the insured property is not an alienation within the meaning of the Act of incorporation. And although the marginal note in this case states that, "where there is a provision that the policy shall be void if the property insured shall be alienated in whole *or in part*, a mortgage violates such provision and avoids the policy," no such decision was made in this case. It is true, in the opinion of the Court, the Judge incidentally remarks that it was so held in *Abbot* v. *Hampden Insurance Company*, 30 Maine, 414; but in this the learned Judge was under a misapprehension; no such decision was made in the 30th of Maine, and the careful attention of the Court is respectfully asked to the before named two cases of *Pollard* v. *Somerset Insurance Co.*, 42 Maine, 221; *Abbot* v. *Hampden Insurance Co.*, 30 Maine, 414; by neither of these cases is it decided, that a mortgage would be an alienation either in whole or in part.

The first mortgagee, for whose benefit this suit is brought, has a lien on the policy which he can enforce, (under the facts proved in the case,) only by this suit; and he cannot be deprived of his lien by any conveyance by Tomlinson, his mortgager, made subsequent to the date of his, said Smith's, mortgage. R. S., c. 49, § § 34, 35, 36; also, *Grosvenor* v. *Atlantic Fire Insurance Co.*, 5 Duer, N. Y., 517.

The Act of incorporation of the defendant company in the

case at bar, § 9, provides that when the property insured shall be alienated by sale, or otherwise, the policy shall be void. The defendant company had no right nor legal authority, under this Act, to provide by their by-laws that an alienation in whole *or in part* should vacate the policy, and, by so doing in their by-laws, transcended the authority conferred upon them by the Act of incorporation, and, therefore, the insured is not to be affected by this provision in the defendants' by-laws.

Parsons, in his recent work on Laws of Business, states, pages 397, 398:—"A conveyance by one insured, intended to secure a debt, will be treated in a Court of Equity as a mortgage, and, therefore, it does not terminate the interest of the insured. A contract to convey is not an alienation." * * * "Nor is a mortgage, even after breach." * * * "Nor selling and immediately taking back."

J. Baker, for the defendants, argued:—

That the plaintiff is not entitled to recover, because he has alienated the insured property since the policy was effected.

This policy contains this proviso:—"And it is also provided that, in case he shall have * * * sold or alienated the property, in whole or in part, without the consent of the company certified on the back of this policy by the president and secretary or by two of the directors, the policy shall be absolutely void." Also this provision:—"It is mutually agreed that this policy is made subject to the lien created by law, and with reference to the votes and by-laws of the company, which may be resorted to in explanation of the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." The defendants' charter, § 6, provides for a lien on the property insured, and § 9 provides, among other things:—"And, when the property insured shall be alienated by sale or otherwise, the policy shall, thereupon, be void." The 8th by-law of the company provides:—"In case the insured shall have sold or alienated the property in whole or in part, without having transferred the

policy to the purchaser or alienee, with the consent of the company, certified by the president and secretary or by two of the directors, on the back of his policy, then the policy shall be absolutely void."

The policy was dated Nov. 10, 1856, and the case finds that, on the 23d day of March, 1857, he mortgaged this property, with two other pieces, to S. E. Smith, for $550, and, May 6, 1857, he quitclaimed all his interest in the same premises to Isaac Averill, taking back an obligation for a reconveyance, on certain conditions, dated May 9, 1857. Considering, at present, this latter transaction as constituting only a mortgage, still these mortgages are clearly an alienation "*in part*," and the policy thereby became void prior to the fire, which was January 19 or 20, 1858, and this action cannot be maintained. *Abbot* v. *H. M. F. Ins. Co.*, 30 Maine, 414; *Pollard* v. *Som. M. F. Ins. Co.*, 42 Maine, 221.

The transaction with Averill was not a mortgage, but an absolute conveyance.

It is not the same date as the deed, and therefore does not conform to R. S., 1840, c. 125, § 1, which was the law in force then, and, if not a mortgage then, it is not now, and cannot be made so by any change of the law.

It is not recorded, and therefore not binding on us. R. S., c. 73, § 9. *Adams* v. *R. M. F. Ins. Co.*, 29 Maine, 292; *Fuller & al.* v. *Pratt & al.*, 10 Maine, 197, 200.

The opinion of the Court was drawn up by

APPLETON, J.—It is enacted by R. S., 1840, c. 125, § 1, that an absolute conveyance, "with a separate instrument of defeasance of the same date and executed at the same time, shall constitute a mortgage."

It is further enacted, c. 97, § 27, that a deed "purporting to convey an absolute estate of any kind in lands, which is intended to be defeasible by bond or any other instrument of defeasance, *shall not be defeated* by means of such bond or other instrument against any other than the maker of such defeasance, his heirs or devisors, *unless the instrument of de-*

feasance shall have been duly recorded in the registry of deeds in which the deed referred to in the bond or defeasance shall have been recorded."

The deed of the plaintiff to Averill constitutes an alienation of the premises insured. The defeasance executed at the same time was not recorded. By the express words of the statute, the deed is not to be defeated *unless* the instrument of defeasance is recorded. The title to the land remained in Averill of record, and he might convey a good title, or it might be attached as his property. The plaintiff, by neglecting to record Averill's bond, put it out of the power of the defendants to perfect their lien by recording the same. The registry of deed shows an alienation of record, and the statute provides that it shall not be defeated by reason of any unrecorded bond or other instrument of defeasance. The policy, thus, by its terms, becomes "absolutely void," as between these parties.

Plaintiff nonsuit.

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

WILLIAM PAGE *& als. versus* DENNETT WEYMOUTH, and THOMAS NELSEN, *Trustee.*

The statutes, relating to an assignment by an insolvent debtor of his property, in trust, for the benefit of such of his creditors as shall become parties thereto, prescribe no particular form in which it shall be made; and any instrument, the provisions of which will render effectual the purposes of the law, should be upheld as a valid assignment.

And where there is no suggestion of fraud, an assignment will not be deemed invalid, because the debtor and his assignee executed, at the same time, three instruments of assignment, alike in all respects, each of whom retained a copy, and the third was delivered to their attorney, who was also the attorney of several of the creditors.

Also, *held*, that the creditors signing the part taken by the attorney, as well became parties to the assignment, as those executing that in the hands of the assignee.

Before the R. S. of 1857 took effect, the time allowed to creditors to become parties to an assignment was three months *after* the publication of notice, and not *from* the date of the assignment.

From the computation of time, the day of publication should be excluded; *after* and *from* being words of exclusion.

THIS case is presented on plaintiffs' EXCEPTIONS to the ruling, *pro forma*, of MAY, J., presiding at *Nisi Prius*, discharging the trustee on his disclosure.

From the disclosure of the trustee, it appears that, on May 11th, 1857, Weymouth, the principal defendant, assigned to him in trust all his property, for the benefit of such of his creditors, as should, within the time limited by statute, become parties to the assignment. That he accepted the trust, filed his bond, published notice, and in all other respects complied with the requirements of the statutes relating to such assignments.

The trustee further states that, before the expiration of three months *from the date of the assignment*, sundry creditors of said Weymouth, whose demands amount to $6,780, became parties thereto; that, on the 20th day of August, 1857, and after the expiration of the three months, Z. Hyde & Company, creditors of said Weymouth, claimed the right to become a party to the assignment, and signed the same.

It also appears that, on the said 11th day of May, there were three instruments, in all respects the same, executed by the assignor and the assignee, on each of which was a certificate of the same magistrate, that the assignor then took the oath required by the statute.

In his disclosure, the trustee further states,—"all the instruments were executed at the same time. It was one instrument in three parts. One part of the instrument was taken by Weymouth, one by me, and the other by a third person, acting as attorney for Weymouth, myself and the creditors.

"I have in my possession two parts, on which are the signatures of the creditors.

"I cannot say how long it was after the 20th day of August, 1857, before the assignment which is signed by the creditors, other than Z. Hyde & Co., came into my possession. I think it was after the service of the writ on me in this case, and before the entry of the action at January term, 1858."

The writ is dated November 23d, 1857, and on the same day was served upon the trustee. The first publication of notice by the assignee was in a newspaper of the date of May 20th, 1857. Swanton & Jameson, partners, under the name of Z. Hyde & Co., were the only creditors or firm that executed the assignment that was in the hands of the trustee.

W. Hubbard, in support of the exceptions.

If three assignments may be made and be legal, any number may be. If a signature to any one of these makes a party to the assignment, then it is clear that the creditors may be deprived of the knowledge whether there is a general assent of the creditors, or a general refusal by them to become parties, to enable a creditor to judge whether he will become a party.

The law designed that there should be some place where a creditor should be *legally* entitled to call and see the assignment. The Act of 1849, c. 113, § 4, required the assignee to file a copy of the assignment in the Probate office. This implies that he was to have possession of the original. By

the first section of that Act he was required to make return into the Probate office of the names of all creditors, who have become parties to the assignment, together with a list of their respective claims. This not only implies, but requires a *personal knowledge* on his part, only to be obtained by possession of the assignment, and by a knowledge that the signatures were really made and the claims asserted. This is to be made on *oath*, and necessarily implies such personal knowledge.

There can be but one legal assignment or instrument, and that, in the contemplation of the law, is to be in the hands of the assignee.

The statutes speak of assignment, in the singular number; and do not contemplate the possibility of several original instruments. The fact, which is admitted, that neither the copy taken by the assignor nor that taken by the attorney of the assignor, and of the assignee, and of sundry creditors, ever came into the possession of the assignee, until nearly three months after the time he was obliged to make the return, on oath, of the list of creditors who had become a party to the assignment, and the amounts respectively claimed, shows that they cannot be regarded as such instruments in the sense of the statute, for they were not in the assignee's hands when he was bound to make his return to the probate office; and therefore the creditors to either of them should have been excluded in his return.

All others than the one in the possession of the assignee can only be regarded as copies of the assignment. And if so, can one become a party to an assignment by signing a copy of it? The statutes do not authorize such a course, and the assignee could not properly make his return from such documents.

If the assignment which was in the hands of the assignee, to which Hyde & Co., became a party, is not the *only* legal assignment, then all the assignments are void.

The assignment was made on the 11th day of May, 1857; the first publication of it was on the 20th day of the same

month, and, on the 20th day of August following, Z. Hyde & Co., as creditors of the assignor, executed the assignment in the hands of the assignee.

This was *within* three months *from* the publication of notice, the time allowed by law prior to the operation of the R. S. of 1857.

The Act of 1844, c. 112, § 1, provides for an equal distribution of the debtors' estate "among such of their creditors as, *after notice as herein provided, become parties.*" By the 3d sec. it is provided "that, within fourteen days after the assignment shall have been made as aforesaid, public notice thereof shall be given, in some newspaper, * * * * *allowing three months to all creditors to become parties to said assignment.*"

It is provided in the next section, (§ 4,) that the assignee shall not be liable to the trustee process, nor the property liable to attachment "until the expiration of the three months *from* the publication of the notice aforesaid."

In contemplation of law, the creditors are to have three months, within which time they may become parties to the assignment. *Not three months from the date of the assignment,* but three months *after notice* of it.

The property is not attachable, nor subject to trustee process, until the expiration of three months from publication.

The word "from" is a word of exclusion of the day of publication, to ascertain when the three months expired.

So, in the additional Act of 1849, c. 113, § 5, the time for attachment, and for the trustee process, is enlarged from three to six months "*from* the publication of notice, as required in the Act to which this is additional."

An assignment in favor of creditors that should, "within sixty days *from* the date of the said instrument," execute a release, was held to *exclude* the day of the date from the computation of the sixty days. *Pierpont* v. *Graham,* 4 Wash. C. C., 232.

As to the computation of time, *vide Windsor* v. *China,* 4 Greenl., 298; *Bragdon* v. *Wilson,* 1 Pick., 485; *Jackson* v. *Van Volkenburg,* 8 Cow., 260.

Ingalls, contra, argued:—that, as the statute prescribed no particular form to be observed in making a valid assignment, any mode would be sufficient, if the provisions of the instrument will give effect to the purposes designed by the statute to be accomplished.

The design of the statute was to provide for an equal distribution of an insolvent debtor's property *pro rata* among all his creditors, who should elect to become parties to the assignment, without preferring any; and to give greater security to the creditors, that all his estate, not exempted from attachment, should pass into the hands of the assignee. There is nothing in the statutes indicating an intention to change the mode, which, before these enactments, had been adopted of making an assignment, which was by an indenture of three parts. *Ward* v. *Lewis,* 4 Pick., 518.

Such a mode works no wrong to any party; not only gives effect to the law, but facilities which are not afforded, if the assignment be not by an instrument, tripartite.

The firm of Z. Hyde & Co., did not legally become a party to the assignment. They did not signify their assent to the provision therein made for them, within three months from the date of it, as the statute contemplates. The Legislature could not have intended to leave the time to become a party uncertain, as would be the case, if the three months are computed from the time of publication of notice.

But whatever construction may be given to the statute on this point, the adjudication that the trustee be discharged cannot be affected by it, inasmuch as the amount of the debts of the creditors, becoming parties within three months from the date of the assignment, vastly exceeds the amount he discloses in his hands *in trust* as assignee.

The opinion of the Court was drawn up by

MAY, J.—The trustee claims the property in his possession by virtue of an assignment from the principal defendant, made on May 11th, 1857, for the benefit of creditors. No objection is made to it on account of any of its provisions.

Its phraseology is such as to secure the precise objects and purposes which the statute requires; and there is no doubt but that the assignee has done and performed all the statute duties which were devolved upon him by the acceptance of the trust.

Still, it is claimed by the plaintiff that said assignment is void, upon the ground that the manner of its execution, and the circumstances attending, are not a reasonable compliance with the statute which authorizes a debtor to make an assignment for the benefit of his creditors. The objection, and the only one which has been urged against it, lies in the fact that, when it was executed by the principal defendant and trustee, it was made to consist of three parts, all signed by both parties at the same time, and each part being an exact transcript of the others. The proper oath is duly certified upon each part. At the time of the execution, one part was taken by the assignee, one by the assignor, and the other was left with one acting as the attorney of all the parties thereto. That part which was left with the attorney was, subsequently, but within three months from its date, duly executed by eight individuals and firms as creditors of the assignor, and that part taken by the assignee received the signature of no creditor until it was signed by the firm of Zina Hyde & Co., on the 20th day of August after, which was not within three months from its date, but was within three months from the time of the publication of the notice then required by the provisions of the statute of 1844, c. 112, § 3.

The question was discussed, by counsel at the argument, whether this signing was in season to constitute the firm of Zina Hyde & Co., legal parties to the assignment, and, although the determination of this question may not be necessary to a decision of the question before us, it may not be improper to say, for the purpose of preventing future litigation, that, in our judgment, the notice which is required by the provisions of the third section of the statute just referred to, and which is to be given within fourteen days after the making of the assignment, is to allow three months to all creditors to become

parties thereto. The evident intention was to give three months notice.

The publication of the notice appears to have been on May 20, 1857. In computing the time, the day of its date is properly to be excluded. The signing of Zina Hyde & Co., was, therefore, in season under the statute then in force. By the Revised Statutes of 1857, it would have been too late.

That part of the assignment which was taken by the assignor does not appear to have received the signature of any creditor.

In view of the foregoing facts, our inquiry now is, was this tripartite assignment valid? The statute has prescribed no form. It requires only such an instrument as will perfect its object. It evidently contemplates but one assignment, but, upon the question, whether this may or not consist of various parts, it is silent. If an assignment in three parts will fairly effectuate the purposes of the statute, then it will be valid, notwithstanding an assignment consisting of but one part may be equally effectual. The question is not, therefore, which is the better mode, but whether the mode adopted in the case before us is a legal mode.

It is contended, with much force, that notwithstanding an assignment is to provide for three parties and to contain provisions in favor of each, still it ought to consist of but one part; and, it may be, that such an instrument, a copy being left in the Probate office for the benefit of all who may be interested in it, would be amply sufficient to secure the rights of all. It is also said that an instrument which is tripartite is irregular, leading to confusion and likely to deceive; and that a creditor, who wishes to become a party to it, has the right to know what creditors have become a party to it, because such knowledge would be likely to influence his own action. Undoubtedly, the amount which any creditor would receive, in the distribution of the debtor's estate, would depend upon the number of creditors who should become parties, and the amount due to each. But such knowledge is not contemplated as appearing upon the face of the assign-

ment, by the statute. Those who first become parties cannot, in the nature of things, know who will subsequently become such. Each creditor acts for himself, and acts upon such information as he may chance to obtain, in regard to the number of creditors and the amount of their debts. If no fraud is practiced upon him, he has no right to complain, and if he becomes a party to the assignment, he must be bound by it. It is not perceived how the last creditor who becomes a party, is, of right, entitled to any more information than those who preceded him, or how, if such information be, without fraud or accidentally, withheld from him, his rights can be affected thereby. If he desires such information, and, by inquiry, seeks it, and it is fraudulently withheld, a different question would be presented.

By the statute of 1849, c. 113, § 1, it is made the duty of the assignee, within ten days from and after the time allowed for creditors to become parties to such assignment, not only to return into the Probate office a true inventory of all the property that has come into his hands, but also the names of all the creditors who have become parties to the assignment, with a list of their respective claims. The validity of each and every claim, and its justness, may be legally established, if the assignee so desires. Under such circumstances, it is difficult to apprehend how any creditor, who becomes a party, can sustain any legal injury by his lack of knowledge as to what creditors have become parties before him; or what injustice is done to him, if he supposed, when he became a party, that no other creditor had or would become so, if it subsequently turns out that there are many others to share with him in that equitable distribution of the debtor's estate, which the statute, in such case, was designed to give to all the creditors alike. While, therefore, as a matter of convenience, it may be expedient that an assignment with one part only should be made, and that should be kept in one place, open to all who may be interested therein, we are unable to see, in the fact that it is not so, any evidence of fraud or unfairness, which should render it void.

It may be that some advantages will be found in an assignment that is tripartite, over one that is not. That the assignor should have one part in his hands seems to be peculiarly appropriate and proper. It may be necessary for his security and the protection of his rights. Suppose that the assignee, after having accepted the trust, should fail to give a bond, and, having taken the assignor's property, should refuse to give any notice or to act at all, yet still holding the property and refusing to give it up, would not the assignor be safer with a part in his own hands than with an assignment of one part only, and that in the hands of the assignee?

It is not perceived how the fact that the assignee has two parts of the assignment duly executed by him and the assignor, in all respects alike, one in his own hands and the other in the hands of his attorney, can render the assignee less liable to any creditor who becomes a party, whether by signing the one or the other, than he would have been, if the assignment had been made with one part only; nor is it perceived why such creditor does not as effectually express his assent to the assignment, and bind himself, by affixing his signature and seal to the one as to the other.

In the case of *Ward & al.* v. *Lewis*, 4 Pick., 518, an assignment by an insolvent debtor, in trust for his creditors, by an indenture of three parts, was regarded and upheld without question as valid. We see no distinction between such an assignment, so far as relates to its form, and one under our statute. The practice of making assignments in this manner, we think, will be found to have prevailed to some extent in this State.

An assignment is but a contract between the several parties to it. From the nature of such an instrument, it would seem to be proper that each party should have it in his possession, and, notwithstanding the inconveniences which have been suggested as growing out of a multiplicity of parts, we cannot doubt that an assignment in the form of an indenture is valid. When an instrument is to contain a contract between several parties, and covenants by and in favor of each, there seems

to be no legal reason why there may not be as many parts as parties. Hence, formerly the mode of securing the rights of each party in such a case, so far as the selection of the instrument was concerned, was by several instruments exactly alike, which was called an indenture. This mode was selected because a deed-poll was not, strictly speaking, an agreement between two persons; but a declaration of some one particular person, respecting an agreement made by him with some other person. See Bouvier's Law Dic., vol. 1, under the words, deed-poll and indenture.

It is not to be denied, however, that in our practice the strictness which was formerly observed in regard to the use of these several instruments has been very much relaxed; and, in our judgment, an assignment under our statute, if made and executed in either mode, without fraud, will be binding. The result is, that the trustee is entitled to retain the property disclosed, to be applied by him to the purposes for which it was assigned. He must, therefore, be discharged.

Exceptions overruled.

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

NOTE BY DAVIS, J. — The assignment in this case is not, strictly, tripartite. Neither part refers to any other. Each purports to be the only assignment.

And yet that does not make the assignment void. If they had not been executed at the same time, the *first* would have been valid; and the others might have been invalid, because the assignor, after executing the first, had nothing left. But by executing several at the same time, he, and the assignee, are estopped from denying the validity of either. And, in the absence of fraud, such an assignment will be good; and all who become parties by signing either copy, will be entitled to share in the proceeds.

If a debtor should execute several composition deeds, all of the same date and tenor, and distribute them among his creditors, to be executed by them severally, there can be no doubt but that they would be held valid as one contract on his part, and binding on all creditors who should become parties. The assignment in this case is valid for the same reasons.

There might be some difficulty, in case all the copies were not returned to the assignee immediately upon the expiration of the time for the creditors to become parties thereto, in making his return to the Probate office. But no such difficulty has arisen in this case. And though I have no doubt it was

HIRAM BLISS *versus* NELSON SHUMAN *& al.*

A party to a suit, being, by the express provisions of the statute, a witness, the provisions of c. 107 of R. S., 1857, relating to depositions, are as applicable to him as to any other witness.

It is no good cause for exceptions, that the presiding Judge refused to exclude an answer in a deposition, because it was made to a question which was leading, put upon the cross-examination. Its admission, if given to such question on direct examination, would be within the discretion of the Judge presiding at the trial.

EXCEPTIONS from the ruling of APPLETON, J.

This was an action of TRESPASS, for maliciously and cruelly beating and killing the plaintiff's horse.

The defendants offered the deposition of *Lincoln Benner*, one of the defendants, who lives and was at Waldoboro', in said county of Lincoln, at the time of the trial. There were two other defendants in the action. The plaintiff objected to the deposition, but the objection was overruled and the deposition admitted. The deponent stated fully the facts as they were alleged in the defence. One of the other defendants was not present at the trial, nor was his deposition taken.

The plaintiff had read the deposition of *John Eugley*. Also that of *Edward H. Mink:* the 4th interrogatory, by the defendants, on the *cross-examination*, was, "what do his (Eugley's) neighbors say of him for truth and veracity? Is his character for truth and veracity good or bad?" [The magistrate, taking the deposition, entered under it, "Question objected to."]

Ans.—"They say it is bad. I heard other people say he would lie."

Exceptions were also taken, by plaintiff, to rulings admitting other testimony elicited on cross-examination, in the sev-

intended by the statute, that there should be but one copy of the assignment, and that such a course would be safer, and better; I see no reason in this case why the assignment should not be sustained.

eral depositions introduced by him to prove his case; but the exceptions as to those were not relied on by the counsel who argued in support of the exceptions.

Gould & Oakes, for plaintiff.

The deposition of the defendant *Benner*, should have been excluded.

The statute admitting parties as witnesses is in opposition to the policy of the common law, and is of course to be strictly construed. Section 79 of the 82d c. of the R. S., 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 offers himself as a witness, and, in that case, the plaintiff may be a witness." In such a case, can one of several defendants come into Court and be permitted to go upon the stand, and testify to facts to exculpate his co-defendants as well as himself, without bringing them into Court with him, in order that they, as well as he, may be submitted to a cross-examination? The design of the statute was to put the parties on an equal footing. If one of the defendants is put upon the stand, to prove the innocence of the others, the plaintiff has the disadvantage of the testimony of a party against him, without the advantage of cross-examining all those parties, with whom is peculiarly the knowledge of the facts of the case. If Lincoln Benner had confined his testimony to his own participation in the transaction, the objection would not be so serious, but he testified to all the facts as they were alleged in the defence, of the others, as much as himself; and, by such testimony, procured *their* acquittal, without subjecting them to be exposed to the penalty of perjury, and without giving the plaintiff the advantage of the facts within their knowledge.

"No person shall be excluded from being a *witness*" is the provision of the statute.

The term *witness*, as applied to the person in possession of facts, means "one *personally present*, who knows a thing." Webster's Unabridged Dictionary.

The same author says, that "deponent" means "one who deposes or gives a deposition under oath; one who gives written testimony, to be used as evidence in a court of justice. With us in New England, this word is never used, I believe, for a witness who gives oral testimony in Court." That "deposition" means "the attested written testimony of a witness." The Legislature are, by the well recognized rule, understood to use language according to its common acceptation among the mass of citizens.

If deponent is never used in New England for a witness, who gives oral testimony in Court, or, if in common acceptation, there is this distinction between the two words, the term "witness" in the statute cannot be construed "deponent," without doing violence, both to the rule for the interpretation of the language of statutes, and to the rule that statutes in derogation of the common law are to be strictly construed.

The deposition of John Eugley was introduced by the plaintiff. If believed, he made a case. The defendants sought to impeach him; and were permitted to ask, and have the answer, the fourth cross-interrogatory to Edward H. Mink.

"2. What do his neighbors say of him for truth and veracity? Is his character for truth and veracity good or bad?" "A. They, (that is, his neighbors,) say it is bad. I have heard other people say he would lie," &c. This is not the question. It is one of general character. A man may have a very limited number of neighbors. The two persons, who live on either side of him, perhaps may, strictly speaking, be all "his neighbors," and both have a bad opinion of him. That would not constitute a bad general character.

Our Court, in *Phillips* v. *Kingfield*, 19 Maine, 375, after a good deal of discussion, as to the proper questions to be asked, lay down a rule on page 381, which they say they will be governed by. The inquiry to be put to the impeaching witness is, *first*, "whether he knows the general character of the witness? And, if the answer be in the affirmative,—2d, What is his general reputation for truth?" And the Court further say, "every thing else is much better suited to mislead, than

instruct the jury; and, after this decision has been regularly published, will, in "our practice, be excluded." The practice has ever since conformed.

The deponent was not only permitted to say, what the neighbors said of him, but that "he had heard other people say that he would lie."

Greenleaf, in his first volume on Evidence, section 461, of the 2d edition, says, "the inquiry must be, as to his general reputation. It is not enough that the impeaching witness professes merely to state what he has heard 'others' say; for those 'others' may be few. He must be able to state what is generally said of the person."

Hubbard & Kennedy, for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—In courts of common law, witnesses are orally examined or cross-examined before a jury; or their depositions taken upon oral or written interrogatories, in pursuance of statutory regulations upon the subject, are received as evidence. When motions are addressed to the Court, the testimony of witnesses, offered in the form of *ex parte* affidavits, is heard and acted upon.

In England, the Chancellor never hears oral testimony, but his judicial action is entirely based upon the depositions of witnesses, reduced to writing in an examiner's office. In this country, unless by the express provisions of some statute, the evidence of witnesses is received in chancery in the form of depositions. Orally delivered testimony is unknown in English Equity Courts, or in Courts of Equity in this country in which the English type of procedure has been adopted.

A witness is "one who, being sworn or affirmed according to law, *deposes* as to his knowledge of facts in issue between the parties in the cause." 1 Bouvier's Law Dic., 658. Johnson defines the word as "one who gives testimony;" Richardson, as "one who *witeth* or knows, one who tells what he knows, sees, or has seen, who gives evidence or testimony."

"*Deponent, witness,*— one who gives information on oath or affirmation respecting some fact known to him, before a magistrate; he who makes a deposition." 1 Bouv., 406. Richardson, in his Dictionary, defines *depose* or, as the Scotch say, *depone*, "to give evidence, bear witness or testimony." He defines *deponent*, "one who gives evidence, bears witness or testimony;" so called, says Skinner, "because the *witness depones*, (*deponit*,) places his hand *upon* the book of the Holy Evangelists, while he is bound by the obligation of an oath." It is thus seen that the word *depone*, from which is derived *deponent*, has relation to the mode in which the oath is administered, and not as to whether the testimony is delivered orally or reduced to writing. So the word depose is used in the forms of indictment for perjury, in the allegations of the commission of that offence, as that he (the person accused) "falsely, wickedly, knowingly, wilfully and corruptly did say, *depose*, swear and give evidence to said court and jury," &c.

The modes in which testimony is extracted may vary—as by affidavit, upon oral or written interrogatories, or on the stand, but in each case the person testifying is a witness, and subject to the punishment incident to false testimony. All writers on the law of evidence, without exception, treat of affiants, or deponents, as witnesses, in discussing the admissibility of testimony.

The word witness is a most general term, including all persons, from whose lips testimony is extracted to be used in any judicial proceeding. It embraces deponents, as the term is used with us, and affiants equally with persons delivering oral testimony before a jury. The affiant, or deponent, is always a witness, but a witness is not necessarily an affiant or deponent.

It is enacted by R. S., 1857, c. 82, § 78, 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 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. The term witness, in specific terms, is made applicable to a party, and he is to testify in all cases "*except as is hereinafter provided.*" Those cases are found enumerated in subsequent sections and do not affect the present inquiry.

The party being, by the express provisions of the statute, a witness, the provisions of R. S., 1857, c. 107, relating to depositions, are as applicable to him as to any other witness. The term witness is as equally predicable of him as of any other witness.

By that chapter provision is made for the taking of depositions. The statute regards the deponent as a witness, and the term deponent or witness is indiscriminately applied to all persons giving their testimony. A witness may be compelled to attend and give his deposition, by § 11. Objections to the competency of the witness, or to the answers, may be made when the deposition is produced, as if the witness testified on the trial, by § 18. The deponent is none the less a witness because his testimony has been reduced to writing. The statute regulating the taking of depositions is applicable to all who are witnesses, whether their number be increased or diminished by legislation. When interest ceased to be a ground for disqualification, the depositions of those interested fell within the provisions of this chapter. The deposition of the defendant was properly received.

It was determined in *Parsons* v. *Huff*, 38 Maine, 137, that it was a matter of discretion on the part of the presiding Justice, whether leading questions should be proposed or not. It was held in *Cope* v. *Sibley*, 12 Barb., 521, that the same discretion exists on the part of the Court to receive or reject the answers to leading questions in a deposition as in an oral examination at the trial. In the present case, if the interrogatory to Mink, to which exceptions were taken, had been direct, it would hardly justify setting aside a verdict for such cause. But, as the inquiry was made upon cross-examination, it is difficult to perceive any well grounded objection to it.

Indeed, it would seem to be substantially within the very mode pointed out as proper, in *Phillips* v. *Kingfield*, 19 Maine, 375. *Exceptions overruled.*

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

CHRISTOPHER DYER *versus* CHARLES W. SNOW.

The enrolment, as well as the register of a vessel, is not evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner.

The copy of the enrolment, certified to be such by the collector, is not admissible, as he is not authorized to grant copies generally.

The master cannot bind the owner to pay for repair of his vessel at the port where he resides, by virtue of his office, and without special authority.

EXCEPTIONS from the ruling of APPLETON, J., and on MOTION *for new trial.*

ASSUMPSIT for labor done upon and materials furnished for the schooner *Chance.*

A copy of the enrolment of the vessel was offered, to prove that the defendant was owner, which, against the objection of defendant, was admitted.

The enrolment was issued by W. E. Tolman, deputy collector at Rockland; the copy was certified by his successor T. K. Osgood, as being "a true copy of the original enrolment, on file in the office."

The portions of the testimony reported, which are material, appear in the opinion of the Court.

Gould, argued in support of the exceptions.

Thacher, contra.

The opinion of the Court was drawn up by

TENNEY, C. J.—This is an action of assumpsit, for the recovery of the value of labor and materials done and furnished by the plaintiff for the schooner Chance. The plaintiff was allowed, against the objection of the defendant, to introduce the copy of enrolment of the vessel, with the following certificate thereon.—"I hereby certify, under my hand and seal, that this is a true copy of the original enrolment on file in this office. "Rockland, Oct. 12, 1858.

"[L. S.] T. K. Osgood, Dy. Coll."

The enrolment is not a species of evidence of a higher nature than that of the registry of vessels. Laws of U. S., 1793, c. 52. The register is not evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has not been held to be even *prima facie* proof, to charge a person as owner, and, even with such proof, it is not conclusive evidence of ownership. *Weston* v. *Penniman*, 1 Mason, 306; 1 Greenl. Ev., § 494.

But, in this case, the objection applied to the competency of the evidence to show the existence of the enrolment.

In the case of *Coolidge* v. *The New York Firemen's Insurance Company*, 14 Johns., 308, a paper was offered, purporting to be a register of the vessel, granted by the custom house, at the port of Boston and Charlestown, accompanied by the certificate under the hands of H. A. S. Dearborn, collector, and James Lowell, naval officer, and the seal of office, certifying that the within was a true copy of the register of the ship, as recorded in that office. SPENCER, J., in delivering the opinion of the Court says, "The collector is not authorized to grant copies generally. There the rule of law applies, which declares, that, when an officer is not entrusted to make out a copy, and has no more authority than any common person, the copy must be proved in the strict regular mode." And the regular mode, by the authority of

the same case, is by the comparison of a copy with the original, by a witness, who can testify to its being a true copy.

In the case at bar, the evidence was less than that introduced in the case referred to, where the certificate was adjudged incompetent. *Bradbury* v. *Johnson*, 41 Maine, 582.

But, upon the assumption that the defendant was the owner of the schooner Chance, at the time the labor was done, and the materials were furnished, the evidence fails to show a liability on his part.

The plaintiff testified, as a witness, that Isaac C. Abbott asked him, if he could do some work for him, on a schooner; to the inquiry, by the plaintiff, what schooner it was, he answered, "the schooner Chance, Charles W. Snow's schooner," and, after being told by Abbott what he wished done, the plaintiff said he would do it.

Abbott testified that he engaged to do the job for the defendant on the schooner Chance, and employed the men, worked himself, and found materials; that he hired the plaintiff for himself, and for no other man.

The defendant testified that he did not employ the plaintiff to do any work on the schooner Chance, and did not authorize Abbott to employ him, or other men, on the defendant's account.

It appears, from the testimony of the plaintiff, that, at the request of Abbott, in the conversation referred to, the latter proposed that they should go and see Captain Keating, the master of the schooner, and they saw him, and Keating told the plaintiff how big he wanted the *trunk*, (which was the work proposed to be done,) and the plaintiff got the length of the sills.

The defendant further testified that he did not authorize Keating to employ any carpenters, but told him he had employed Abbott to do the carpenter's job, in putting on the trunk and making the necessary repairs, and he might show Abbott how he wanted it done; and that he did not authorize Keating to make any repairs.

The testimony of the plaintiff himself has a strong ten-

dency to show that the contract, under which he did the work and furnished the materials, was with Abbott. This is fully confirmed by Abbott. The plaintiff does not pretend that he was employed in any manner by the defendant, who expressly denies that he did ever employ him or authorize any other to do so; but that he agreed with Abbott to do the carpenter's job, which embraced that claimed by the plaintiff to have been done by him.

The report contained nothing tending to show that Keating employed the plaintiff to do the job in question. But, if there had been express evidence that Keating, as master of the schooner, employed him, it is difficult to perceive how the defendant is to be holden. It is understood that the vessel was at Rockland, the home port. The plaintiff and the defendant, as appears by the writ, resided at that place. The master of a vessel, without any other authority than that derived from his official capacity, was not entitled to order repairs to be made in a home port. *Jordan* v. *Young*, 37 Maine, 276. *Exceptions and motion sustained;—*

Verdict set aside, and new trial granted.

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

WILLIAM S. CARVER *versus* DAVID L. HAYES.

A writing, "Due A. B., or order, twenty dollars on demand," is admissible in evidence to sustain a count for money had and received, in a suit by the indorsee against the signer thereof.

ON EXCEPTIONS from the ruling of MAY, J.

Action of ASSUMPSIT for money had and received, and was submitted to the presiding Judge at *Nisi Prius*, with right to except.

To the admission of the note above referred to, in evidence, to sustain the count in the writ, defendant excepted.

L. W. Howes, for plaintiff.

Meserve, for defendant.

The opinion of the Court was drawn up by

MAY, J. — Assumpsit upon the money counts for money had and received, and for money paid. To sustain his action, the plaintiff offered in evidence the following instrument:— "Rockland, Sept. 6, 1855. Due L. D. Carver, or order, twenty dollars and 50–100, on demand." Signed by the defendant, and duly indorsed by the payee to the plaintiff. It was contended that it was not admissible under either count in the writ. The presiding Judge ruled that it was admissible and competent evidence to sustain the action, and the defendant excepted.

That negotiable promissory notes may be given in evidence by the indorsee to sustain a money count, is too well settled to be denied; and it requires no citation of authorities to sustain the right.

Is the paper offered in evidence such a note? No particular form of words is necessary to make a bill or note. It is sufficient, if the instrument, fairly construed, contain a promise upon consideration, which, from the time of making it, cannot be complied with or performed without the payment of money to the party holding it. That due bills like the one before us import both a promise and a consideration, seems to be well settled by the authorities. The word "due" necessarily implies this.

In the case of *Franklin* v. *March,* 6 N. H., 364, cited by the plaintiff, the words "Good to Robert Cochran, or order, for thirty dollars, money borrowed," were held to be a negotiable promissory note.

So, in *Kimball* v. *Huntingdon,* 10 Wend., 675, the words "Due A. B., or order, $325 on demand," was held to be a promissory note, and the authorities cited by the plaintiff all tend to show that such is now the law; and, when such a note contains appropriate words to make it negotiable, and it is

negotiated, it stands precisely upon the same footing of any other negotiable paper. The note offered at the trial was properly admitted. *Exceptions overruled.*

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

NATHANIEL ROBBINS *& ux., Petitioners for Partition, versus* JOSEPH GLEASON *& ux.*

Where, in the return of commissioners to the Probate Court, of their division of real estate, among the heirs of a deceased person, and also, in the decree of the Judge accepting the same, there is a want of technical accuracy, — if all the heirs had signified in writing their approval of the assignment, and the heir to whom the whole estate was assigned went into possession thereof, paid a part of the sum which the commissioners adjudged to be the proportionate value of the share of the others, and they made no claim to the estate for many years, they will, afterwards, be precluded from contesting the correctness of the proceedings in making the division.

And where the commissioners, adjudging that a division of an estate would greatly injure the whole, assigned the same to one of the heirs, fixed the amount to be paid by him to the others respectively, and the times of payment, and state, in their return, that the estate assigned "shall be held as collateral security for the payment of the several sums;" which sums were paid in part only, *it was held,* that the conduct of the parties, the proceedings in probate, and the long continued possession under the assignment, without complaint, indicate that it was clearly the intention of the parties that the assignee should hold the estate as of freehold, subject to be defeated by non-fulfilment of the conditions; in which event the other heirs might re-enter and hold the same *as collateral security* for the sums due to them.

But, before re-entry, they cannot sustain a petition for partition, being only in the nature of mortgagees out of possession, but with the right of entry to foreclose, or hold possession for condition broken.

Where conditions are annexed to an estate, the question, whether the conditions are precedent or subsequent, must depend on the intention of the parties, and the nature of the case.

REPORTED by MAY, J.

THIS was on *petition for partition* of two lots of land in the town of Union, described in the petition, which was

entered at May term, 1857, when notice was ordered, which, at a subsequent term, was proved. Joseph Gleason and Betsey G. Gleason his wife, (the other respondents having been defaulted,) appeared and pleaded, by brief statement, claiming to be sole seized of the first lot described in the petition, in right of said Betsey; and, also of a portion of the second lot in their demesne as of fee, and disclaiming the residue. A second brief statement, claiming title by virtue of twenty years possession, was afterwards filed.

From the report of the evidence, and the papers accompanying the same, it appears it was agreed, that the premises, of which partition was prayed, were the part of the real estate left by Micajah Gleason, which was set off to his widow, Polly Gleason, as her dower. The said Micajah died during or about the year 1823, leaving two sons, Joseph, the respondent, and William; also five daughters, Eliza, Mary, Olive, Sarah, and Harriet, the petitioner.

On January 23d, 1828, the premises in question were assigned to the widow, as her dower. The residue of the real estate was divided among the heirs by partition, approved March 4th, 1829.

The widow died in 1835. At a Probate Court held at Warren, on the 9th of November, 1836, the heirs petitioned the Court to appoint a committee to divide the premises in question among the heirs. And, on the same day, the Judge issued a commission to John W. Lindley and two others, described as "three discreet and disinterested freeholders," to make partition as prayed for.

The commissioners, in their return, after stating that they had been duly sworn, had notified the parties interested, and had examined and appraised the estate, which they describe, further state, "and not finding sufficient to accommodate the whole, and that a division would be injurious, we have set off to Joseph Gleason, the oldest son and heir, said estate." * * *

"And we award that said Joseph Gleason pay to Nathaniel Robbins, jr., and Harriet, his wife," [and to the other heirs, who are severally named,] "the sum of $167,20, each, with interest

annually, on the first day of April, A. D., 1839, and the above described property is to be considered as holden as collateral security for the payment of the above named sum severally."

To which report is added a writing, signed by the petitioners and the other heirs, in these words:—"we, the undersigned, heirs to the above named estate, hereby signify our approval of the way and manner of dividing the aforesaid property."

The report was returned to the Probate Court, on the 10th day of May, 1837. The certificate of acceptance, signed by the Judge, is as follows:—"The within being returned as the division of the widow's dower within named, among the heirs of Micajah Gleason, and it appearing that the persons interested are satisfied therewith, I do therefore decree that the same be accepted and recorded."

Nathaniel Robbins, one of the petitioners, testified in substance, that Harriet, his wife, was one of the daughters of Micajah Gleason; he married her in the year 1822. That the sum to be paid to him and his wife, according to the report of the commissioners, by said Joseph, has been paid in part only—the sum of $75, paid on May 26, 1839, and $60, on April 22, 1844. The balance of principal and interest remains unpaid. Had frequently called on Joseph for it, who replied that he was "pressed for money; did not know where to get it; if you can't wait, you must take the land, that is holden for it, and you will be sure of your pay." He replied thus to me, about four years ago, and had so replied, frequently, before that time.

On cross-examination, witness testified that neither he nor his wife had had any possession of the premises, since the partition in 1837; have not claimed to own or occupy, nor claimed any of the rents and profits. The respondent has improved and occupied the premises as others occupy the premises they own. Does not know that any others of the heirs have claimed the premises or any part of the rents and profits since the partition.

There was other testimony as to the nature of the posses-

sion by the respondent, and also as to his acknowledgment of indebtment to the heirs.

The respondent, called by his counsel, testified as to his exclusive occupation of the premises, and as to the value of improvements made by him. On his cross-examination, it appeared that the consideration of a deed from him to one Collins, (which was put in by respondent,) was a note of $700, which Collins gave him at the time he conveyed to him; "that he let his wife have the note, which she gave up to him when he conveyed the premises to her."

The cause was withdrawn from the jury, to be reported for the decision of the whole Court, such disposition to be made of the same as to the Court shall seem meet.

The statute provisions, referred to in the arguments of the counsel and in the opinion of the Court, are contained in c. 51 of the laws of 1821.

By section 31, the Judge of Probate was authorized to issue his warrant to three discreet and disinterested freeholders, to cause such real estate as should be situated in the county, to be divided among the heirs or devisees of a person deceased. And, by section 38, the Judge of probate might, in like manner, cause a division of the reversion of the widow's dower, either during the existence of a tenancy in dower, "or upon the determination of the estate in dower, at the discretion of the Judge."

And, by section 31, it is provided "that where such real estate cannot be divided among all the heirs or devisees, without great prejudice to, or spoiling the whole, the Judge may assign *the whole* to one of the heirs;" preferring the older to the younger children, and males to females; such heir, paying to the other heirs "their proportionate share of the value thereof," on appraisement by the committee, or giving sufficient security to pay the same, as the Judge of Probate should direct.

By section 36, it is provided, that where any tract of land should be of greater value than the share of any one of the petitioners, and the same "cannot *without great inconvenience*

be sub-divided, the same may be assigned to one of the parties only, such party paying such sum of money, to the other parties, as the committee appointed to divide the same shall award, and at such time and manner as the Judge of Probate shall direct." Such assignment was to be accepted by the heir to whom it was made.

By section 33, it was provided, "that such division of any such real estate, made as aforesaid, and accepted by the Judge of Probate, and recorded in the Probate office, in the same county, shall be binding on all persons interested."

Ruggles & Vose, for the petitioners.

1. The proceedings of the Judge of Probate and of the commissioners, in making the distribution among the heirs, were not in accordance with the statute. The commissioners did not find that the land could not be divided without "great injury" to, or "destruction of the whole." They decided that Joseph should have a pay-day, and that the land should be considered as holden as collateral security for the payment; which the law gives them no authority to do. Whether the Judge himself could make such a stipulation, in regard to lands "being considered as holden as collateral security," must depend upon what construction the stipulation is to receive. The Judge makes no such order. His decree is merely an approval and acceptance of the report of the commissioners, made, not as an adjudication of his own, but because, as he says, the parties were satisfied with it.

There are other irregularities; but it cannot be pretended that, (apart from the approval signed by the parties,) such a departure from the statute requirements would not be fatal.

It is not a *partition* of the land, but a conveyance from one heir to another. It is a transfer of real estate, to be done by a functionary who has nothing in it, in a manner provided by statute. To be legal, it must be done in the manner provided. If not so done, it is merely void.

An officer with his execution must follow the provisions of the statute in levying on real estate, or no title passes to the

creditor. The Judge of Probate and the commissioners are just as much bound to comply with the statute, in their undertaking to transfer title from one heir to another. To each is given some discretion in some things, but the statute provisions are as obligatory on one as another.

Now, can the expression of satisfaction by the parties, of "the way and manner of dividing the property," have any effect on the title? Can it confer power on the commissioners or the Judge of Probate, which the law defining their powers and duties does not confer? Can they authorize either to omit what the law says they shall do to render their acts valid in transferring real estate from one heir to another?

The "approval" by the heirs, in this case, cannot make lawful a transfer or assignment, that, without it, is unlawful. Such assent may act upon the *discretionary* power of the Judge and of the commissioners, but cannot justify them in departing from what the law requires.

There is, then, no change of title. The assignment was merely void. Hence, no appeal was necessary. Where the record shows no legal transfer, no appeal is requisite. As a general proposition, it is true that a decree of a Judge of Probate, in a matter over which he has jurisdiction, is conclusive and binding unless appealed from.

The only remedy is by appeal. But it is not universally true. Like all general rules, it has its exceptions. A transfer or assignment of real estate, in a manner shown by the record not to be in accordance with the provisions of the statute, is one of those exceptions. *Smith* v. *Rice*, 11 Mass., 512.

It was the fault of the respondent, in not making payment, that has made it necessary to seek a remedy. When the time of payment came round, it was too late to appeal. The laches of the respondent has released the petitioners from any obligations to abide by the assignment, and they are at liberty to call in question its legality, as they now do by this petition for partition. *Dean* v. *Hooper*, 31 Maine, 107.

2. Take another view of the case. Suppose the assignment valid, made so, of course, by the mutual agreement of the parties, incorporated into the proceedings in probate, and occupying a place in the record. It is not simply an adjudication of the Judge of Probate. It is rather a contract of parties sanctioned by the Judge. Had the action of the commissioners and of the Judge been legal, without the approval of the parties, it would then have been an adjudication sanctioned by the parties. But, in whatever light it is regarded, it is subject to construction; whether contract or decree, or both combined, it must be construed by the same rules that apply in construing contracts.

The assignment is qualified by the stipulation that Joseph shall pay the other heirs $167,29, each, with interest annually, the payment to be made to the petitioners on the 1st day of April, 1839,—"and the above described property is to be considered as holden as collateral security for the payment of the above named sums severally." This must be construed as a condition *precedent*. The land is to be *holden* by the several heirs as their security. If the title passed *in presenti* they could not hold it. Joseph would hold it and own it. In a similar case, in many respects, *Thayer* v. *Thayer*, 7 Pick., 208, the Court says, "it does not appear that the money has either been paid or secured, and, until one or the other is done, the land does not pass."

No form of words is necessary to constitute a condition. It must always depend on the intention of the parties. Parsons on Contracts, 39.

A grant of land "for county site and county buildings" was held a condition subsequent. *Daniel* v. *Jackaway*, Freem., c. 59. Such construction should be adopted as will best carry out the intention and design of the provision in question and give it effect. *Merrill* v. *Gove*, 36 Maine, 346.

What better security, what more obvious and natural, than for the heirs to continue to hold their interest in the land as tenants in common until payment is made?

If the title passed *in presenti*, the heirs would be left with-

out security. Such a construction of the assignment would invalidate it, it being made without providing for any security for the payment, which the statute expressly requires of the Judge of Probate. The statute, in effect, provides that no such assignment, giving day of payment, shall be made without providing for sufficient security. The security in this case consists in retaining the title to the land until payment be made.

3. It may be susceptible of another construction. It may be regarded as an assignment to Joseph to take effect *in præsenti* on a condition *subsequent*.

If it is to be regarded as on a condition *precedent*, no title passes until the condition is performed. If, as on a condition *subsequent*, then the title passes at once, and, on failure to pay, or the breach of the condition, the title reverts, and the party becomes possessed of his previous interest in the premises.

Under such circumstances, viewing it as a condition *subsequent*, the question might arise as to the necessity of making entry for condition broken. This case shows no formal entry. But it does show all that is requisite to enable the petitioners to have partition. It shows the consent and admission of respondent to their taking the land. "There is the land," said he, "if you can't wait any longer, take the land. You hold the land as security." This was repeated from time to time. He thereby admitted that he held in subordination to them, offering to let them take the land, and thereupon they bring this petition for partition. Besides, they are tenants in common, and the possession of one tenant in common is the possession of the other. And the language used by the respondent was an admission that he held the possession as well for his co-tenant as for himself. No further entry was necessary to revest his tenancy in common, even if in a legal sense he had been out of possession.

Under our statute relating to the seizin necessary to maintain an action, the common law necessity of entry to revest the estate after the breach of condition subsequent, does not seem to exist. Certainly not in cases of tenants in common,

where the tenant in possession recognizes the right to possession in the other. It would be carrying out the common law rule after the reason for its adoption has ceased to exist.

Gould, for respondents, argued that the petitioners are not tenants in common. The premises had been assigned to Joseph Gleason, under the provisions of the statute. After the decease of the widow of Micajah Gleason, the heirs petitioned to the Judge of Probate for the appointment of commissioners to divide the premises in question. They were legally appointed and sworn, and proceeded to make the partition. In their report, they certify that, "not finding sufficient to *accommodate the whole*, and that a division *would be injurious*, we have set off to Joseph Gleason, the oldest son and heir," said estate. The statute provides that "when it cannot be divided *without prejudice* to the whole," &c. The terms used by the committee are equivalent to those of the statute. It is not essential that they should employ the exact language. It is sufficient if, in any form of words, it appear that the circumstances existed, which would authorize them to assign the whole estate to one of the heirs. This may be done, if it cannot be divided "without prejudice" to the whole. The committee say that a division "would be injurious" to the whole. Thereupon, they proceed to assign the whole to Joseph, and the assignment was *accepted* by him.

The committee determined "the proportionate share of the value" of the premises to each of the other heirs. And the Judge decrees as follows:—"And it appearing that the persons interested are satisfied therewith," (viz., the assignment of the whole estate to Joseph,) "I do therefore decree that the same be accepted and recorded." This is all the decree the statute required.

So far as the Court and committee acted within the authority conferred on them by the statute, the transaction was valid and binds the parties. Wherein they *exceeded* their powers, the award and decree had no force.

The statute requires the heir, to whom the whole is assign-

ed, to pay the shares of the others, or to give security therefor, to be paid in such time and manner as the Judge of Probate shall direct; not to be paid or secured in such time or manner as the committee should determine. They had no power over the time or manner of payment, nor over the manner or kind of security; and, so far as their report determines these matters, it is a nullity.

The Judge had no power to direct that he should give security on the same property, in the way of mortgage; but, if he had, it must be by mortgage and not by a conditional partition.

Either the land was divided or it was not. If it was divided, subject to a condition which the commissioners or Judge had no power to impose, then the condition is void, and the partition stands as though no condition was in it. Neither was it competent for the parties, by agreement, to thus stipulate for a lien or mortgage of the estate, except by deed. It was competent for them to agree to a partition, which they did.

The other heirs had a right to have their shares secured, before the partition was completed; but they waived this right, and relied upon Joseph's promise, signing the partition and procuring it to be completed.

But, if it be admitted that a lien or mortgage was thus created, to secure the payment of the several shares, it is a lien of each, on the whole property; not of each, on his original share, as the petitioners seem to regard it. The language of the report is, "and the above described property is to be considered as holden as collateral security for the payment of the above named sums severally."

If the petitioners have any remedy, it is by taking the land as a *whole*, not as tenants in common with respondent. If the petitioners are mortgagees of the property, jointly with the other heirs, to whom sums of money were to be paid, they are not tenants in common until an entry to foreclose. They cannot, therefore, claim partition. *Hammett* v. *Sawyer*, 12 Maine, 424.

The cases of *Thayer* v. *Thayer*, 7 Pick., 209; *Gordon* v. *Pierson*, 1 Mass., 333, and argument of *Parsons*, of counsel; *Rice & ux.* v. *Smith*, 14 Mass., 431; *Smith* v. *Rice*, 11 Mass., 507, and *Whitman* v. *Watson*, 16 Maine, 461, were commented on, in the argument of the questions of the legality of the assignment, the ratification of it by the petitioners, and a waiver of objections to it.

It cannot with any force be said, that when the petitioners signified their approval of the manner of dividing the property, that they assumed, and intended that the payment of the sum awarded to them should be secured before the report of the commissioners was accepted; because the time of payment, and the manner and kind of security were provided for, and stipulated in the report, and they approve the whole; that is, they agree to the assignment to Joseph being made, as therein stipulated; expressing themselves content with the award of the sums to be paid to them, and the security therefor which was therein provided. It was such security as they chose to accept; whether good or bad, valid or invalid, is of no importance to the present consideration. They had a right to accept bad security, (i. e., the legal power to do it,) or to waive all security. In the language of the Court, in *Smith* v. *Rice*, the indorsement on the report shows, "instead of a tacit or implied assent, an express agreement and a waiver of all objections to the proceedings."

The case furnishes strong reason for holding the reception of a part even of the money, as in Massachusetts it was held, that the reception of interest merely was a ratification.

If the partition can be construed as being upon the condition precedent, that condition was waived by the reception of a part even of the money. Here nearly the whole was paid.

It was further argued that the respondent had acquired a possessory title to the premises.

That the process can avail only a party who has seizin in fact, which is not the case of the petitioners. *Bonner* v. *Ken. Purchase*, 7 Mass., 475; *Rickard* v. *Rickard*, 13 Pick., 251;

Flagg v. *Thurston*, 13 Pick., 145; *Barnard* v. *Pope*, 13 Mass., 434.

If the respondent has not acquired title to the whole by the proceedings in Probate Court, as ratified by the parties, or by the acts of the parties, independent of those proceedings, then the respondents are entitled to betterments; in which case, this process of partition cannot be maintained. *Saco Water Co.* v. *Goldthwaite*, 35 Maine, 456; *Linscomb* v. *Root*, 8 Pick., 376; *Bailies* v. *Buzzey*, 5 Greenl., 153; *Tilton* v. *Palmer*, 31 Maine, 486.

The opinion of the Court was drawn up by

RICE, J.—The parties claim as heirs or the representatives of heirs of the late Micajah Gleason. The estate now sought to be parted was, after the decease of said Gleason, assigned to his widow for her dower. The widow had also deceased before the proceedings were had in the Probate Court, for the division of the estate now in controversy among the heirs of Gleason. November 26, 1836, "three discreet and disinterested freeholders" were appointed as commissioners by the Judge of Probate to divide the above estate.

On the 3d day of May, 1837, the commissioners made a report of their doings to the Probate Court, in which, after stating that, "not finding sufficient to accommodate the whole, and division would be injurious," they proceed to assign the principal part of the estate to be divided to Joseph Gleason, one of the respondents, and the oldest son of Micajah Gleason, and make compensation to the other heirs in money to be paid to them, at periods, then future, by the said Joseph, and then close their report in these words—"and the above described property is considered to be holden as collateral security for the payment of the above named sums severally."

This report was accompanied by the following certificate, which is signed by all the heirs, including the petitioners and the respondent Joseph Gleason.—

"We, the undersigned, heirs to the above named estate,

hereby signify our approval of the way and manner of dividing the aforesaid property."

The record of the Probate Court, held May 10, 1837, recites that "the within being returned as the division of the widow's dower within named, among the heirs of Micajah Gleason, and it appearing that the persons interested are satisfied therewith, I do therefore, decree that the same be accepted and recorded. "Nath'l Groton, Judge."

The first question presented is whether these proceedings were legally binding upon the parties interested in the estate.

By the provisions of § 31, c. 51, of statute of 1821, Judges of Probate were authorized to cause the real estate of deceased persons to be divided among the heirs or devisees by their warrant, directed to a committee of three discreet and disinterested freeholders, who should act under oath; and, when such real estate could not be divided among all the heirs or devisees or their legal representatives, without great prejudice to, or spoiling the whole, the Judge might assign the whole to one or so many of the heirs or devisees as the same will conveniently accommodate, always having due regard to the terms of any devise there may be in the case, and also preferring males to females, and among the children of the deceased, elder to younger sons; and, if any heir or heirs, devisee or devisees to whom any real estate should be so assigned, should not accept the same, or make or secure payments to be made as the said Judge of Probate should direct, then, and in such case, the same might be so assigned to one or more of the other heirs or devisees.

By section 33 of the same statute, it was further enacted that division of any such real estate, made as aforesaid, and accepted by said Judge of Probate, and recorded in the public office of the same county, shall be binding on all persons interested, *provided*, among other things, that before an order for such division should issue it should be made to appear to the said Judge of Probate that the several persons interested in such real estate, if living within the State, have had such notice of such partition as the Judge of Probate had

ordered, and had had an opportunity to make their objections to the same.

In the case under consideration, there is a want of technical accuracy, both in the report of the commissioners and also in the action of the Court of Probate thereon. The terms of the statute are not used by the former, in determining the necessity of assigning the whole estate to one of the heirs, instead of dividing it among all, nor does the Judge make a distinct and formal decree by which the estate is divided and the question of security determined. But, from their action, sufficient does appear to show that, in the opinion of the commissioners, the contingency contemplated by the statute, to authorize them to assign the whole estate to one of the heirs, existed, and although, in determining that point, they do not use the language of the statute, yet they use language which conveys, subtantially, the same idea. It is also apparent that the Judge of Probate, by accepting the report of the commissioners and ordering the same to be recorded, deemed that action tantamount to a decree, setting out in terms the same provisions. Whether these proceedings, thus informal or wanting in technical accuracy would, without the assent of the parties directly interested, be deemed sufficient, it is not now necessary for us to decide. But these proceedings, taken in connection with the written approval of all the heirs of the way and manner of dividing the property, and the long continued acquiescence of all parties interested therein, must be held to preclude those parties from calling in question, at this late day, the correctness of those proceedings. *Newhall* v. *Sadler*, 16 Mass., 122; *Smith* v. *Rice*, 11 Mass., 507; *Rice* v. *Smith*, 14 Mass., 431.

In the case of *Thayer* v. *Thayer*, 7 Pick., 209, cited by counsel, there does not appear to have been any security provided for the payment of the money to the other heirs by the party to whom the land was assigned. For that reason, the division, as to those who had not been paid, was held to be void.

The division in this case, for the reasons already assigned

being deemed valid. The next question arising has reference to the security provided for the benefit of the petitioners and other heirs, and the mode by which they may avail themselves thereof.

Was the charge upon the land assigned to Joseph, for the security of the money to be paid by him to the other heirs, in the nature of a condition precedent, or a condition subsequent?

A precedent condition is one which must take place before the estate can vest. Subsequent conditions are those which operate upon estates already vested and render them liable to be defeated. 4 Kent's Com., 125. Whether conditions are precedent or subsequent depends on the intention of the parties and the nature of the case.

In *Stark* v. *Smiley*, 25 Maine, 201, which was a case of a will, wherein the testator devised his estate to his son, charged with the payment of legacies and other charges, and concluded in the following language;—"therefore, as soon as Thomas Smiley, &c., (the devisee,) shall have paid all the lawful demands against my estate and the aforementioned sums to my children and Ebenezer Woodman, or to their and his heirs, and otherwise fulfilled this my last will and testament, he shall, by this instrument, be entitled to all my real estate and the privileges thereto belonging, in the towns of Winslow and Clinton in the county of Kennebec, and the saw-mill in the town of Winslow, to have and to hold the aforementioned real estate to him and his heirs for their use and benefit forever." This was held to be a condition subsequent and that the estate vested in the devisee immediately on the decease of the devisor.

In *Fisk* v. *Chandler*, 30 Maine, 79, the question before the Court arose on the construction to be given to a condition in a deed, which provided for the payment of certain notes and to hold the grantor harmless from a certain mortgage. The concluding words are as follows,—"then the foregoing deed is to remain good and valid, otherwise it is to be null and void, so far as to make good any non-fulfilment of the

above conditions." Held, that this was a condition subsequent, and that the grantor might enter for condition broken and hold possession of the premises as a pledge or mortgage.

Considering the situation of the parties in the case at bar, the acts of the Probate Court, and the subsequent acts of the parties interested, there can be no doubt as to their intention. It was evidently their intention that Joseph should have the land, and hold the same as an estate of freehold, subject to be defeated by the non-fulfilment of the conditions attached thereto in the report of the commissioners.

The condition, like that in *Fisk* v. *Chandler*, does not provide for an absolute forfeiture of the estate by a breach thereof, but authorizes the heirs, to whom money was to be paid, to reënter and hold the land as *collateral security* for the money due them.

Such being the character of the act of division, and such the rights of the parties under it, the only remaining question is whether the petitioners are in a condition to maintain this process for partition.

The evidence shows that, from the time of the division in 1837 to the present time, the respondent Joseph Gleason, or those claiming under him, have been in the actual and exclusive possession of the premises. The evidence also shows that he has not, until very recently, at least, claimed to hold it as an absolute and indefeasible estate, but subject to the right of the other heirs to reënter upon the estate and hold it as security for the money due them. He has not, therefore, matured a title in himself by disseizin. The right of reëntry is still open to the petitioners unless discharged by payment of the money due them from Joseph under the assignment.

By the provisions of c. 88, § 2, persons in possession or having a right of entry into real estate in fee simple for life, or a term of years, may maintain a petition for partition.

The petitioners do not sustain either relation. They are neither seized of the estate in fee simple, or for life, or for a term of years, nor have they the right of entry in such manner. They sustain rather the relation of mortgagees out of

possession, but with the right of entry to foreclose or hold possession for condition broken. Whether this right, as contended by counsel for the defendants, attaches to the whole estate, or to an undivided portion thereof, is a question not now before us for decision. The petitioners not being in a condition to maintain this process, according to the provisions of the report the *petition must be dismissed.*

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

COUNTY OF SAGADAHOC.

DAVID BROWN *& ux. versus* SOUTH KEN. AGRICULTURAL SOCIETY.

The South Kennebec Agricultural Society is an *aggregate* corporation, distinguishable from *quasi* corporations, in several essential particulars; and, like an individual, is responsible for injuries, resulting from a want of ordinary care and foresight; but the liability is corporate, to satisfy which only corporate property can be levied upon.

EXCEPTIONS from the ruling of CUTTING, J., and MOTION to set aside the verdict.

This was an ACTION ON THE CASE, brought by the plaintiffs to recover for damages alleged to have been sustained by the female plaintiff, by the giving way and falling of a portion of a building which was owned and used by the defendants, upon their fair grounds in Gardiner, on the 25th day of September, A. D., 1857.

The defendants admitted they were a corporation, duly organized under their charter.

They also admitted that the female plaintiff was injured

by the breaking down of the building erected by the defendants upon their grounds, at the time alleged in the writ, but denied that it was on account of any carelessness, neglect or fault of theirs, and contended that the injury was occasioned by unavoidable accident, for which they were in no way responsible.

The plaintiffs contended that the accident and injury were caused by reason of the insufficiency and unsuitableness of the building, and of the materials used in its construction.

The testimony introduced at the trial was fully reported, as to the condition of the building, the manner in which it was built, and the character of the materials used in building it; of the nature and extent of the injuries sustained by the female plaintiff.

One of the grounds of defence, as set forth in the specification of defence filed, was, that neither of the plaintiffs was lawfully within the enclosure of the defendants, or upon their grounds, or within their building, not having paid the sum of money required for admission thereto.

Upon this point, David Brown, one of the plaintiffs, testified "that he purchased a family ticket before the fair, and, also, that he purchased of John Stone, who acted as ticket seller at the ticket office, three other tickets, for which he paid 75 cents. That these three last tickets were bought the last day, and admitted himself, wife and daughter on the day of the accident. That Stone was acting as treasurer of the society on that day."

On cross-examination he stated, that he "bought a member's, or family ticket, at his house in Richmond, for which he paid one dollar; that, at the time he purchased the three tickets of Stone, on the last day, for himself, wife and daughter, he had his family ticket in his pocket, but did not exhibit it either to Mr. Stone or the gate keeper; that he and his wife and daughter all went in to the fair grounds on the morning of the 25th of September, by virtue of these tickets; all he did was to exhibit the tickets he purchased that day; that he and his wife went in and out two or three times that day, without

purchasing any other tickets; that there was a balloon ascension from the fair grounds on the said 25th of September; that, shortly after the fair, he called on the said John Stone and requested him to pay back to him the 75 cents, which he paid for the balloon ascension, and that said Stone did pay it back to him."

It was also in evidence, "that, on the day of the accident, there was a balloon ascension, and each person was charged twenty-five cents additional for a ticket to witness that exhibition."

The Judge was requested by the defendants' counsel to give the following instructions:—

1. That, in order to enable the plaintiffs to recover, they must prove the injury was occasioned solely by the gross carelessness or negligence of the defendants.

2. That if the falling of the building which caused the injury was occasioned by any hidden or latent defect in the timbers, unknown to the defendants, and which common care and prudence could not detect, the defendants are not liable.

3. That if the jury find that Mrs. Brown went in a second time under a twenty-five cent ticket, contrary to the regulations of the trustees, and was injured by the falling of the building, she cannot recover.

4. That, upon the facts proved in the case, the plaintiffs cannot maintain this action.

The first and fourth were not given, nor was the second in the language of the request.

But the Judge, among other things not excepted to, did instruct the jury that the defendants were only liable for the want of ordinary care; that, whether the defendants used ordinary care, prudence, skill and foresight in the erecting, maintaining and repairing said building, was a question for them to determine upon the testimony. That if they did exercise such care, the plaintiffs could not recover.

In connection with the third requested instruction which was given, the Judge told the jury, "that if Mrs. Brown was on the ground, and the society had a gate-keeper in charge,

they would be authorized to infer, unless controlled by the evidence, that she was rightfully there."

The verdict was for the plaintiffs.

To which rulings, instructions, and refusals to instruct, the defendants excepted.

Clay, in support of the exceptions, argued,—

That, upon the facts proved, this action cannot be maintained, and such should have been the ruling of the Judge presiding at the trial.

The Act incorporating the defendants does not confer upon the corporation the general powers, rights, duties and obligations of ordinary private corporations. The objects, duties, powers, rights and purposes are specified and defined in the Act. They are allowed to take and hold property, the income of which shall not exceed $3000 annually, to be applied to the advancement of agriculture, horticulture and the mechanic arts. It was not the intention to invest them with general powers incident to ordinary corporations, or impose upon them the general burdens and liabilities of private money corporations. The power to sue and be sued is incident to all corporations, and may be exercised, so far as is necessary to carry out the objects and intentions of the society, whether specially granted or not. 2 Kent's Com., 277; A. & A. on Corp., (3d ed.,) 19, 21, 32; *School Dist. in Rumford* v. *Wood*, 13 Mass., 193.

This power does not necessarily imply authority to maintain this action. The defendants are merely an association with a corporate capacity, for particular and specific ends, with the right to sue to enforce their contracts, and a liability to be sued for a violation of contracts and agreements made in pursuance of the authority conferred by their charter, and for no other purpose. Their rights, powers, &c., are similar to those of counties, towns, &c., usually called *quasi* corporations, against which no action will lie, unless expressly given by statute. *Russell* v. *The Men of Devon*, 2 Durn. & East, 667, 671; 2 Kent's Com., 278; A. & A. on Corp., 85, 566; *Hol-*

man v. *Townsend*, 13 Met., 297; *Hooper* v. *Emery*, 20 Maine, 246; see also, *Jackson* v. *Hartwell*, 8 Johns., 424.

How proper aggregate corporations are distinguished from *quasi* corporations, see *Riddle* v. *The Proprietors of Locks & Canals on Merrimack River*, 7 Mass., 169; *Adams* v. *Wiscasset Bank*, 1 Greenl., 361; *Foster* v. *Lane*, 10 N. H., 315; *Merchants' Bank* v. *Cook*, 4 Pick., 405.

This society is a corporation only in name. Its powers are exercised and held only for the public good. There are no private interests to be advanced. No one has any interest or right which he can sell or transfer. No dividends can be made, even if there is a surplus; all must be applied to the advancement of agriculture, &c., according to the terms of the charter. All the elements which go to make up a general body politic and ordinary corporation are wanting here.

It was only for the advancement of agriculture, &c., that this society was incorporated. For no other purpose could they organize or take and hold property; for no other object could they assess members or collect funds. R. S., c. 58, § 17. On the day of the accident there was a balloon ascension from the fair grounds. The exhibition of stock, agricultural products and implements, &c., was on the first and second days; on the third the member's ticket was to be given up, and, for the exhibition on the last day, a sum additional was charged. The plaintiffs were then admitted "by virtue of the tickets purchased on the last day, not for the purpose of attending the cattle show or fair, or any exhibition connected with, or belonging to, "agriculture, horticulture or the mechanic arts." The ticket was purchased to witness the balloon ascension, and nothing else; an object in no way connected with any object for which the society was organized. No liability attaches to the society, as a corporation, for any injury occasioned under such circumstances, whether the officers sanctioned such an exhibition or not, for, in so doing, they exceeded their authority. *Thayer* v. *Boston*, 19 Pick., 511; *Mitchell* v. *Rockland*, 41 Maine, 363; *State* v. *Great Works Mill Co.*, 20 Maine, 41.

Neither can a corporation subsequently ratify acts of its agents, which it could not have directly authorized them to do. *Hodges* v. *The City of Buffalo*, 2 Denio, 110.

The *third* requested instruction should have been given without any qualification. The plaintiffs were not lawfully there, because they were not there "in conformity with the regulations of the officers of the society." R. S., c. 58, § 17; and were liable to the penalty provided for in such case by 18th section of the same chapter.

Tallman & Larrabee, contra.

The opinion of the Court was drawn up by

CUTTING, J.—By a special law of 1853, c. 165, § § 1, 2, certain individuals, their associates, successors and assigns, were created a corporation by the name of the South Kennebec Agricultural Society, with power by that name to sue and be sued, use a common seal, make by-laws for the management of their affairs, not repugnant to the laws of the State, and to hold and exercise all the powers incident to similar corporations. And to take and hold property, real and personal, to an amount the income of which shall not exceed three thousand dollars, to be applied to the advancement of agriculture, horticulture and mechanic arts.

Under this statute the defendants were duly organized and subsequently erected a building seventy-two feet long, thirty-five feet wide and two stories high, in which to hold their annual fairs. And it appeared in evidence, *that*, on Sept. 25, 1857, while a fair was being held, the female plaintiff being in the lower story, the flooring above gave way and was precipitated upon her, causing a serious and permanent injury. And the jury, under the instructions of the Judge at *Nisi Prius*, in matters of law, having found that the injury was occasioned through the want of ordinary care on the part of the defendants in erecting, maintaining and repairing the building, returned their verdict in favor of the plaintiffs, and assessed damages in the sum of one thousand dollars. Upon

the evidence produced at the trial, the Judge was requested to instruct the jury that the plaintiffs could not maintain their action, which was declined, thus raising the question whether the defendants are by law responsible for injuries so occasioned.

If a natural person, on his own private account, had thus erected a building wherein to exhibit the productions of nature or art, and an injury had thus been sustained, the common law would have afforded an ample remedy. But it is here contended, that the defendants are a *quasi* corporation, or *quasi* as to liabilities; that, in the erection of the building, they were not in the execution of a power conferred or a duty enjoined by statute, and, consequently, no action lies against them, either at common law or by force of any statute. To sustain this proposition, *Russell* v. *The men of Devon*, 2 T. R., 667, is cited as a leading case, where it is held that at common law a private action could not be sustained against a *quasi* corporation for neglect to perform a public duty. And this rule has been considered applicable, by a series of American decisions, to all *quasi* corporations, such as counties, towns, parishes, school districts and the like in New England. *Eastman* v. *Meredith*, 36 N. H., 284, where PERLEY, C. J., in a very able and learned opinion, classifies, and, to a certain extent, reconciles the various decisions involving that question.

But are the defendants such a corporation? In the case first cited, Lord KENYON, C. J., concludes his opinion by remarking—"I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of Islington. But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate; but, if the county is to be amerced as a corporation, there is no corporate fund out of which satisfaction is to be made." So, in *Adams* v. *Wiscasset Bank*, 1 Maine, 361, MELLEN, C.

J., says,—"No private action, unless given by statute, lies against *quasi* corporations for a breach of corporate duty, having no corporate fund, each inhabitant would be liable to satisfy the judgment."

Again, in *Biddle* v. *The Locks and Canals*, 7 Mass., 187, the Court say,—"we distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers *without their consent.* These are in the books sometimes called *quasi* corporations; of this description are counties and hundreds in *England;* and counties, towns, &c., in this State. Although *quasi* corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law, yet no private action can be sustained against them for a breach of their corporate duty, unless such action is given by statute. *And the reason is*, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation."

The foregoing extracts from the decisions of eminent jurists, show the origin, elements, definition and immunities of *quasi* corporations, the mere limbs of the body politic, and absolutely necessary as subordinate members of the State. But the defendants are not such a corporation; the distinguishing characteristics are as follows, viz.:—

First. They were invested with particular powers, not without, but with their consent and on their application.

Second. They are not territorial; a voluntary subscription only entitles them to membership.

Third. They are authorized to hold a corporate fund, viz.: real and personal estate, limited only by the annual income; and, although the income is specifically appropriated, yet the capital is not, but may be subject to attachment and execution.

Fourth. The action must be brought against the corporation, *eo nomine*, and not against the corporators.

Fifth. The members in their individual capacity are not responsible.

Sixth. They are not intrusted with any of the ordinary attributes of sovereignty for the purpose of local government.

But, if the defendants cannot *draw* the sword, they can, when drawn and beat into a plowshare, *exhibit* it as a specimen of the mechanic arts. They are not a *quasi*, but an *aggregate* corporation, which, as defined, consists of several persons, united in one society, continued by a succession of members, and, being the mere creature of the law, possesses only those properties conferred by charter either expressly, or as *incidental to its existence, and best calculated to effect the object of its creation.* Ang. & Am. on Cor., § § 3, 29. And even the defendants' charter confers on them all the powers *incident* to similar corporations. But they cannot exercise any powers without the necessary facilities; and, hence, the necessity of a suitable building for the reception and exhibition of such articles as may be presented and duly entered. And a building cannot be declared *suitable*, unless it be *safe* for all persons who are permitted to enter. In the construction of such an edifice the law imposes ordinary care, which the jury have found the defendants failed to exercise; and that finding we cannot disturb without making aggregate corporations less responsible than individuals under like circumstances, which would be an act of judicial legislation.

The other rulings we find to be conformable to law; and the verdict sustained by the evidence.

Exceptions and motion overruled.

Judgment on the verdict.

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

HARVEY PREBLE *versus* RINALDO BROWN *& als.*

The right to take fish, in the tide waters of the Kennebec river, is a public and common right; and no one can maintain an exclusive privilege to any part of such waters, unless he has acquired it by grant or by prescription.

REPORTED by TENNEY, C. J.

This was an ACTION ON THE CASE, for an injury alleged to have been done by the defendants to the plaintiff's fishing, by the erection of a weir. The action was commenced on August 3, 1857.

It appeared in evidence, that all the records of the Kennebec Proprietors were placed in the hands of Ruel Williams, when they closed, in 1816, and that the deed of the right to Kennebec river was dated January 15, 1668.

The plaintiff put in a lease from M. S. Hagar to him, dated May 8, 1857, under which he claimed an exclusive right; also sundry deeds, by which said Hagar derived the right.

The plaintiff introduced testimony tending to show that, in the year 1812, he first erected his weir, and was employed in taking fish that year, during the fishing season. In 1836, again erected a weir, which he continued to use for seven or eight years in taking fish.

In 1855 and 1856, built his weirs and took fish without interference on the part of any one. The third season, defendants built their weir. Plaintiff forbade them. They placed their weir about fifty rods below plaintiff's. That thereby the plaintiff was injured.

After all the evidence had been introduced, for the purpose of presenting the questions of law, arising in this case, to the full Court, the Chief Justice ordered that the plaintiff become nonsuit; which was to be stricken off, and the action to stand for trial, if the plaintiff could maintain it, upon the evidence presented, which was fully reported.

[No written argument or brief of plaintiff's counsel is found with the papers in the case.]

Gilbert, for defendants.

The right of fishing in tide waters is a common right. 3 Kent's Com., 413; Angell on Tide Waters, 21, 22, and also, 124 to 140; *Coolidge* v. *Williams,* 4 Mass., 140; *Parker* v. *Cutler Mill Dam Co.,* 20 Maine, 353; *Moulton* v. *Libbey,* 37 Maine, 472; *Webster* v. *Sampson,* 8 Cush., 347.

Plaintiff has, and can have, no right of several fishery by grant from the crown. 2 Bl. Com., 39; Angell on Tide Waters, 23 to 26, and 142 to 144.

Nor by Colonial Ordinance of 1641; nor by prescription. *Frearey* v. *Cooke,* 14 Mass., 488; Angell on Tide Waters, 135; *Moulton* v. *Libbey,* cited above, which is decisive of this case.

The opinion of the Court was drawn up by

RICE, J.—This is an action of case for an alleged injury to the plaintiff's fishery, which is located in the Kennebec river, on what is denominated the "middle ground," opposite the farm of the plaintiff in Bowdoinham. There are two channels of the river, one on each side of this middle ground. At high water the ground is covered by the tide, but at low water it is uncovered and exposed. On this ground the plaintiff has erected his weirs for taking fish. Below this locus claimed by the plaintiff, and at a place below low water mark, the defendants have also erected weirs for taking fish, and the complaint is, that by reason of these weirs thus erected by the defendants, the fish, which otherwise would find their way into the weirs of the plaintiff, are either taken or diverted from them.

The right claimed by the plaintiff is that of a several fishery. He derives this right by virtue of a license from Marshall S. Hagar, who claims through sundry deeds from the Proprietors of the Kennebec Purchase. None of these deeds have been put into our possession, nor are we informed upon what provision therein the plaintiff relies. There is no evidence in the case which would authorize the inference that the right claimed had been acquired by prescription.

A several fishery is an exclusive one. No other person can lawfully fish within its bounds.

By the common law of England, all the subjects of the king have a common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where the tide ebbs and flows. *Weston* v. *Sampson*, 8 Cush., 347; *Moulton* v. *Libbey*, 37 Maine, 472.

The right of fishing in the sea, and in the bays and arms of the sea, and in navigable and tide waters, under the free masculine genius of the English common law, is a right public and common to every person; and if any individual will appropriate an exclusive privilege in navigable waters and arms of the sea, he must show it strictly by grant or prescription. 3 Kent's Com., 413. No such grant nor prescription is shown in this case.

The rights of the public to take fish in navigable waters as well between high and low water mark as in the deeper waters of the sea, have been so recently discussed in this State, in the case of *Moulton* v. *Libbey*, and in Massachusetts, in the case of *Weston* v. *Sampson*, cited above, in both of which the authorities were elaborately examined, that we deem it unnecessary further to extend this examination. The principles settled in those cases are decisive in this case. The rights of the parties to fish in the tide waters of the Kennebec, so far as these rights are disclosed to us by the case, are equal. The fish while floating in the tide waters are the property of the public. They become the private property of the party who first takes them from the water and appropriates them to his own use. *The nonsuit must stand.*

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

JOSEPH H. ALLEN *& al. versus* ENOCH M. AVERY.

Soon after the usual business hours of a bank, but before its officers had left, a notary public, at the request of the cashier, presented a note there due on that day, to pay which no funds had been provided by the maker, and demanded its payment; which being refused, the note was protested: — *Held*, that the demand was well made to charge the indorsers.

A note, payable in Boston, was there protested for non-payment; the indorsers residing in this State, a notice of its dishonor to the first indorser was transmitted to the second, who forwarded the same, properly directed, by the earliest mail of the next day: — *Held* to be a seasonable notice, each indorser of a note being entitled to one day to notify his preceding indorser.

If a note be made payable at either bank in a city, where there are numerous banks, the holder may present it for payment at either, without notice to the maker at which he will demand its payment.

REPORTED by CUTTING, J.

ASSUMPSIT on a promissory note of Foster & McFarland, made payable to the order of the defendant, and by him indorsed, dated Richmond, October 20, 1854, for eight hundred dollars at either bank in Boston, in three months. The note is also indorsed, "pay to Charles Sprague, Cashier, or order. Otis Kimball, Cashier."

The writ is dated February 16th, 1858.

The plaintiffs offered the protest of the notary public, by which it appears that, on the 23d day of January, 1855, at the request of said Sprague, cashier of Globe Bank of Boston, he went with the original note "to the Globe Bank, where the promisor was notified to pay the same, and inquired if funds had been provided at said bank to pay said note, and was answered that there were none; and the time limited in said note, and grace, having elapsed, notice was sent by him to the promisor, demanding payment, and to the indorser, requiring of him payment, also, by mail, to Bath, Maine, enclosed to Otis Kimball, cashier."

Otis Kimball, for plaintiff, testified that, at the maturity of said note, he was, and still is, cashier of the City Bank, Bath. The note was left at the bank for collection, and he seasona-

bly forwarded the same to the Globe Bank, which acts as the agent of the City Bank, in Boston. After the note had matured it was returned to him under protest. He received the notices named in the protest, and put them into the post office, in season to go by the first mail after he received them, one directed to the principal and the other to the indorser, at Richmond, where both of them resided. Could not remember the day he received the notices. It was in January, 1855. There was then but one mail daily. The mails were often interrupted.

The deposition of *Henry Clark,* the notary public, protesting said note, taken at the request of the plaintiff and filed in Court, was put into the case by the defendant; the material parts of which are, in substance, that during the month of January, 1855, and long before, he was a notary public, at Boston; that this note, (the one in said suit being presented,) was protested by him on the 23d day of said January, at the request of the cashier of the Globe Bank; that he demanded payment at bank, which was refused; that he sent notices of the demand and non-payment to the maker and indorsers, enclosed in an envelope addressed to Otis Kimball, cashier, &c., Bath, Maine, requesting him to forward them to the parties. The notices were deposited in the post office in Boston on the day they were written. The notices described the note, stated it was unpaid and protested, and that the holder looked to him for payment. It was between two and three o'clock that the note was presented for payment; generally make demand soon after two o'clock.

On *cross-examination.* The note was presented after two o'clock of that day; testifies from his record as to the day, having no other means of ascertaining it; has no recollection about it. The record was made on the day or the morning, before the protest was delivered; kept a record of letters delivered at the post office; the hour of closing the bank was then at two o'clock; at that time the banks stopped business for the day, receiving and paying money. Some of the officers usually remain after that hour.

The case was thereupon withdrawn from the jury, the parties requesting that the evidence should be reported for the decision of the full Court; with authority to render judgment on nonsuit or default according to the legal rights of the parties, and to draw inferences of fact, as a jury might.

F. D. Sewall, (with whom was *Bronson,*) argued:—that the certificate of the notary, with the testimony of Kimball, proved that all the steps necessary to charge the indorser had been taken; and cited R. S., 1857, § 4, c. 32; Act relating to protests of bills of exchange, of the laws of 1858; *Lewiston Falls Bank* v. *Leonard,* 43 Maine, 144; *Ticonic Bank* v. *Stackpole,* 41 Maine, 302.

The notices were properly sent to the last indorser. *Warren* v. *Gilman,* 17 Maine, 360.

The testimony of the notary removes any possible doubt that a demand was well made. *Berkshire Bank* v. *Jones,* 6 Mass. 524; *Woodbridge* v. *Bingham,* 13 Mass., 556; *Gilbert* v. *Dennis,* 3 Met. 405; Story on Prom. Notes, § 43; *State Bank* v. *Curned,* 2 Peters, 543; *Phipps* v. *Chase,* 6 Met., 491.

The Globe Bank being the holder of the note and authorized to deliver it up on payment, no special demand was requisite. *Warren* v. *Gilman,* 17 Maine, 36; Bayley on Bills, 263. The maker was entitled to the *whole* time of the business hours of the bank, in which to make the payment on the last day of grace; and a demand, immediately upon the expiration of the time for business, and while the officers of the bank were present was sufficient. The following authorities were cited, or referred to in argument:—*North Bank* v. *Abbott,* 13 Pick., 265; *Church* v. *Clark,* 21 Pick., 310; *Page* v. *Webster,* 15 Maine, 549; Chitty on Bills, 367; Story on Prom. Notes, § 232.

Larrabee, (with whom was *Tallman,*) for the defendant, contended that no sufficient demand of payment had been proved; nor any such notice of non-payment to the defendant shown as would render him liable as indorser. The testimony

of Kimball was uncertain and unsatisfactory. He cannot fix the date of the reception of the notice, or when put into the post office to be sent to defendant. He testified rather from what was his usual practice, in like cases, than from any distinct recollection of this particular case, which, in *Warren* v. *Gilman*, 15 Maine, 70, was held to be too uncertain to fix the liability of a party.

The notice of the notary does not show due presentment and dishonor. In his deposition, the notary states that he has no recollection of the transaction and only testifies from his record. The notice given to the indorser, as recited in the protest, is clearly insufficient. It does not contain any notice of the dishonor of the note or of its non-payment. It is only notice to the indorser requiring payment. It does not contain a notice of what all the authorities concur in considering indispensable, namely:—due presentment and dishonor. Story on Prom. Notes, pp. 350 and 351, and notes 2 and 3 and cases there cited; *Gilbert* v. *Dennis*, 3 Met. 495; *Pinkham* v. *Macy*, 9 Met., 174; Byle on Bills, 213, 215.

The case fails to show that the note was presented for payment during usual banking hours. No date is given when the note was sent to, or received at the Globe Bank. For aught that appears, it may have been after the business hours of the 23d of January, when it was too late to demand payment.

The note having been made payable "at either bank in Boston," where there is a great number of banks, the maker was entitled to due notice at which bank the note would be presented. *North Bank* v. *Abbott*, 13 Pick., 465.

A presentment and demand after banking hours,—"after the bank had stopped paying out and receiving," as the notary testifies, is not a seasonable demand to hold the indorser. *Parker* v. *Gordon*, 7 East, 385; *Elfred* v. *Teed*, 1 M. & S., 28; Byle on Bills, 166.

The case of *Flint* v. *Rogers*, 15 Maine, 67, will be found, on careful examination, not to be in conflict with the authorities just cited, that decision being based upon the special

facts in that case, without intending to change the rule of law as laid down by the authorities last cited.

In the case at bar, there is no evidence who were in the bank, on whom the demand for payment was made, or whether any one was there authorized to act for the bank. In *Flint* v. *Rogers*, the cashier was in the bank to give an answer, and, if the funds had been provided, to have applied them to the payment of the note.

The opinion of the Court was drawn up by

APPLETON, J.—The note, on which it is sought to charge the defendant as indorser, was lodged with the City Bank, Bath, for collection, and, by its cashier, was sent to the Globe Bank, Boston, where, not being paid at maturity, it was protested, and, on the same day, notice of demand and non-payment to the indorser, was forwarded by mail, enclosed to the cashier of the City Bank, who was the last indorser, by whom it was transmitted, the next mail, to the defendant, directed to him at his place of residence.

The counsel for the defendant interpose various objections to the plaintiffs' right to recover.

1. It is insisted that the protest, being after banking hours, is too late.

From the deposition of the notary, it appears that, a few moments after banking hours had closed, but while the bank was open and its officers were in attendance, at the instance of its cashier, he demanded payment, which was refused, and, being informed there were no funds provided, he protested the note, &c.

The maker of a note payable to a bank, has, unless in case of demand and refusal on the last day, in banking hours, the whole of the day in which to make payment. If not paid during banking hours, the note is dishonored. *Church* v. *Crane*, 21 Pick., 310. A presentment of a draft, payable at a bank, to the cashier, on the day of its maturity, but after business hours, and a refusal of payment, because the acceptor has provided no funds, is a sufficient demand to charge the in-

dorsers. *Flint* v. *Rogers*, 15 Maine, 65. Presentment of a bill out of the usual hours is sufficient, provided somebody be at the place and gives an answer. *Henry* v. *Lee*, 18 E. C. L., 273; *Bank of Utica* v. *Smith*, 18 Johns., 230.

2. It is objected that the protest does not show a sufficient notice to charge the indorser. But, if so, the defendant introduced the deposition of the notary public, by which it appears that, by the next mail after the protest, he sent to the last indorser notice of the demand and non-payment, thus bringing the case within that of *Gilbert* v. *Dennis*, 3 Met., 495.

3. The notice of the demand and non-payment was sent on the day of the protest, by mail, to the cashier of the City Bank, who testifies that, by the next mail, he forwarded the same, properly directed, to the defendant. Each indorser to a bill has one day in which to notify his preceding indorser. The notice to defendant was seasonably forwarded.

4. It was held, in *Page* v. *Webster*, 15 Maine, 249, where a note is made payable at either of the banks of a city, that the holder is not bound to give notice to the maker, at which of the banks the note will be presented for payment, when it falls due. The same question again arose in *Langley* v. *Palmer*, 30 Maine, 467, and received a similar decision. This question was not regarded, in *Page* v. *Webster*, as having been decided differently in Massachusetts; the case of *North Bank* v. *Abbott*, 13 Pick., 465, where a different opinion was intimated, not being deemed an authoritative decision of the question. But, in this case, it appears from the protest annexed to the deposition of the notary public, which the defendant offered as evidence, that the Globe Bank was where the promisor was notified to pay the note. The case is therefore not at variance with that of the *North Bank* v. *Abbott*.

Defendant defaulted.

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

BENJAMIN R. POTTER *versus* JESSE SMALL.

Where a mortgagee, after condition broken, entered upon the mortgaged premises, declaring his purpose to be to *foreclose*, (but neglected to record the certificate required by the statute,) he will not afterwards be allowed to maintain an action against one acting under the mortgager, for hay cut upon the premises, claiming that his entry was sufficient to entitle him to the rents and profits.

EXCEPTIONS from the ruling of CUTTING, J.

THIS is an action of TROVER, brought to recover of the defendant the value of ten tons of hay, cut and taken from a farm mortgaged to the plaintiff. The writ was dated March 19th, 1858. It was admitted that, at the time the hay in question was cut and taken from the farm, and up to the time of the trial, the plaintiff was mortgagee of the premises; that, at the time of the cutting and taking away, the condition of the mortgage had been broken, and that George W. Small was the mortgager.

The plaintiff called *Joseph D. Smullen*, who testified,—"I know plaintiff and the premises; plaintiff entered July 27th, 1857, for the purpose of cutting hay. He entered the house the same day; said he had a mortgage of the premises and that the condition of the mortgage had been broken, and he therefore foreclosed. He went to cutting the hay; no hay had been cut on the east side of the road, and only a little round the buildings. I saw one man cutting there afterwards. I saw hay taken away from the farm by persons other than the plaintiff and persons acting for him. Some hay was carried off. * * * * George W. Small made an attempt to get plaintiff out of the house."

Cross-examined.—"This was on 27th of July. Went with plaintiff in the early part of the day. In the forenoon we cut some of the grass on the east side of the road. The buildings are on the west side of the road. George W. Small's wife was in the house at the time. He was residing there. We mowed till about one o'clock before we went into the house.

I staid round there till about three o'clock. I left plaintiff there and his mother, who came after I went into the house. George W. Small's wife afterwards came there and was not permitted to go in until she gave assurance that she would leave. Mrs. Small, when we first entered the house, was collecting together hay about the house with a rake. When George came he made an onslaught on plaintiff standing in the door, who maintained his ground till I came away. We did not go through the gate, if we had, we should have gone in sight of Mrs. Small when we approached the house. She was then collecting hay near the house. George W. Small came and forbade my cutting the grass on the east side of the road. I was working under the plaintiff's direction."

There was other testimony tending to prove that the grass cut by the plaintiff, with that also cut by the mortgager, was taken by him to the defendant's barn; and also, as to the quantity. That the same being in the barn of the defendant, the plaintiff demanded the same prior to the date of the writ.

The presiding Judge ruled that this evidence was not sufficient to entitle the plaintiff to recover, and directed a nonsuit. To this ruling the plaintiff excepted.

J. S. Baker, in support of the exceptions, argued: — That the mortgagee having made an actual entry on the mortgaged premises for the purpose of taking the rents and profits, had a right to take them, consequently the right of the mortgager thereto ceased. 3 Kent, (4th Ed.,) 154, 156; *Blaney* v. *Beard*, 2 Maine, 132; *Hill* v. *Jordan*, 30 Maine, 367; *Allen* v. *Bicknell*, 36 Maine, 436; *Newhall & al.* v. *Wright*, 2 Mass., 138; *Goodwin* v. *Richardson*, 11 Mass., 469; *Reed* v. *Davis*, 4 Pick., 215; *Mayo* v. *Fletcher*, 14 Pick., 530; *Welch* v. *Adams*, 1 Maine, 494; *Keech* v. *Hall*, 1 Doug., 22.

It appears in evidence that the plaintiff, with his man, entered upon the mortgaged premises, and cut a part of the hay during the forenoon of the day of entry; that, afterwards, he attempted to take such further possession of the premises, and the house thereon, as would be effectual to foreclose his

mortgage. He was already on the premises for the purpose of taking the rents and profits; and any act which he did with reference to a foreclosure could not affect his right to take the rents and profits. There is evidence that he was resisted, but none that he was ejected. Even if the plaintiff had been forcibly driven from the premises, and not allowed to return, it would not affect his right to the rents and profits, nor defeat his right to follow the hay and recover it, or its value, from any person, into whose hands it might subsequently have gone.

He could not be upon the premises for the purpose of taking possession for foreclosure, in the manner contemplated by sec. 3, p. 3, c. 125, of R. S., then in force, without being in actual possession and intending to avail himself of all the advantages which actual possession would give him; an important item of which was the rents and profits. The right of the mortgager ceased when the plaintiff thus entered and claimed the rents and profits; he could have no right against the mortgagee before a fulfilment of the condition of the mortgage.

An entry to foreclose under the statute, if properly made, necessarily gives such possession as will entitle the mortgager to the rents and profits; and further, that an entry which will entitle a mortgagee to the rents and profits is not necessarily attended with all the circumstances required for a foreclosure. It has been decided in Massachusetts, that if the entry of the mortgagee is for the purpose of foreclosure, and is informal and invalid for that purpose, it is sufficient to entitle him to the rents and profits. *Sheppard* v. *Richards*, 2 Gray, 424.

The authorities all seem to concur in the doctrine, that it matters not how the mortgagee gets possession of the mortgaged premises. The possession when once obtained is legal. *Allen* v. *Bicknell*, 36 Maine, 436; *Miner* v. *Stevens*, 1 Cush., 485; *Hyatt* v. *Wood*, 4 Johns., 150.

That this was the right form of action, was cited — *Frothingham* v. *McKusick*, 24 Maine, 403. That here was a con-

version of the property, counsel cited *Fernald* v. *Chase*, 37 Maine, 299, and numerous other authorities.

Whether or not there had been a conversion was a question to be decided by the jury, from the evidence. *Fuller* v. *Town*, 39 Maine, 519.

Gilbert, contra.

The opinion of the Court was drawn up by

MAY, J.—The hay in controversy was cut upon premises of which the plaintiff was mortgagee. The condition of the mortgage had been broken; but the mortgager was then in possession, and had commenced cutting the grass at the time of the entry upon which the plaintiff bases his right to recover. The acts of the defendant were authorized by the mortgager. The question presented is, whether the entry proved gave to the plaintiff such a possession as will enable him to maintain this suit. We are fully satisfied that it did not.

The authorities cited for the plaintiff clearly show that a mortgagee may enter on the premises for the purpose of taking the rents and profits, even *before* a breach of the condition; and such was the statute at the time of the entry. R. S. of 1841, c. 125, § 2. So, after condition broken, he might have entered for the purpose of foreclosure, in either of the modes pointed out in section 3 of the same statute. Such also are the provisions of our present statutes. R. S. of 1857, c. 90, § § 2 and 3. But such an entry must be accompanied with evidence of the intention for which it is made. The declarations of the party making the entry, being part of the *res gestæ*, are usually this evidence. It was so in this case. It appears that, at the time of making the entry, the plaintiff said "he had a mortgage on the premises, and that the condition of the mortgage had been broken, and he therefore foreclosed." This is the only evidence of intention explanatory of the act. It is apparent, therefore, that he had no design to enter for the purpose of taking the rents and profits, under the second section of the statute. His

intention was to foreclose. An entry for this purpose, to be effectual, if not by consent in writing of the mortgager, or the person holding under him, must not only be open, peaceable and unopposed, but followed up by the certificate and record required by the statute, or otherwise it becomes a nullity. In this case this was not done. The plaintiff therefore acquired no rights by his entry. To permit him now, after such a failure on his part, to ascribe a new intention to his act, and to set up his entry for a different purpose, would be manifestly unjust. To do so would be, in effect, to cast reproach upon the law. The nonsuit must stand.

Exceptions overruled.

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

COUNTY OF KENNEBEC.

JONATHAN N. HARRIS *versus* SOMERSET AND KENNEBEC RAILROAD COMPANY.

Where a corporation is summoned as trustee, service of the writ by leaving a copy at the place of last and usual abode of the treasurer or other proper officer is sufficient.

But after the corporation has appeared, submitted to the jurisdiction of the Court and made disclosure, and judgment has been entered, it is too late to object to a service defective in such a particular.

Where A contracted with a corporation to build a railroad for a gross sum, to be paid monthly as estimates of the work done should be made, with a proviso that $29,000 of the whole sum should be for land damages, to be paid and settled by the corporation without unnecessary delay, so much of the land damages as had been actually paid by the corporation before being summoned as trustee of A, is to be allowed as a payment to A. The unsettled balance cannot be treated as paid to A, although long previously charged to him by the corporation.

Where the officer's return on a trustee writ shows that it was served on the trustee at a stated hour, a payment made by the trustee to his principal on the same day is to be regarded as subsequent, in the absence of proof to the contrary.

A contracted with a corporation to build a railroad for $287,000, 80 per cent. to be paid monthly on estimates of the work done, and $75,000 of the whole sum, including the 20 per cent. reserved, to be paid in stock, — time of payment not stipulated. A abandoned the contract without completing it, and the company was summoned as his trustee: — *Held*, that the company had a right to deliver an amount of stock proportioned to the work done, and did not waive that right by making full payment for several months in cash.

Where a railroad corporation was charged as trustee of an employee, whose claim was payable in stock, a tender of certificates of a sufficient number of shares duly signed, and filled out, except the name of the holder, but not separated from the treasurer's book, is sufficient, *it seems*.

SCIRE FACIAS. On REPORT by RICE, J.

The plaintiff was a creditor of John T. Cahill, and, as such, brought an action against Cahill, and summoned the defendants as trustees.

It appears by the defendants' disclosure, made at August term, 1857, that they had a written contract with Cahill and John Healey, dated August 9, 1853, for the construction of their railroad, by which the contractors were to receive $287,000, of which $75,000 was to be paid in stock at the par value. The work done each month was to be estimated by the engineer, and, within ten days after the contractors presented his certificate monthly, the corporation was to pay them "eighty per cent. of the amount then due for work specified in such certificate, and, when the whole work contracted for shall have been accepted as completed according to contract, the balance due shall then be paid to the contractors." The corporation was to settle all land damages, and to "deduct therefor from the payment to be paid to the said Healey and Cahill the sum of $29,000;" the corporation to use all reasonable diligence and dispatch in adjusting the damages, and to be holden for damages arising from delay by litigation concerning them. The 20 per cent. reserved monthly was to make a part of the $75,000 payable in stock.

Healey and Cahill did not complete the contract, but abandoned it after some months' labor under it.

At the time of the service of the plaintiff's writ, the corporation had charged them with the whole sum of $29,000 for land damages, and had paid on account thereof $13,917,15; and afterwards paid more than enough to make up the balance, prior to making their disclosure.

The trustee writ was served on the corporation October 10, 1854, at 6½ o'clock in the forenoon.

The engineer's monthly estimates of work done, including that of Oct. 4, 1854, amounted at that time to $139,022,13, of which 20 per cent., reserved monthly, was $27,802,40, and the balance $111,209,73. The corporation claimed to have paid to the contractors or their order $134,269,42, including $29,000 land damages charged, $11,067,55 paid Oct. 10th, after the service of the plaintiff's writ, and $1845,16, which they had agreed to pay to other parties prior to the service.

They had also paid the engineer $723,75. All the payments had been made in cash.

The corporation claimed to have sustained a loss of over $20,000 by the abandonment of the contract.

Amongst the papers accompanying the disclosure, was a schedule of the monthly estimates and payments up to October, 1854. In some months the payments were more, and in others less, than the estimates of work done.

On this disclosure, the Court adjudged the corporation to be trustees of Cahill, and judgment was entered, execution issued, and demand made by a proper officer.

The writ of *scire facias* against the present defendants, as trustees of Cahill, was dated October 23, 1857.

It was in evidence that, when the officer made demand on the treasurer of the corporation, on the execution against Cahill, the treasurer tendered him certificates of twenty-six shares of the stock of the company, which he refused to take. The certificates were in the treasurer's book, signed and filled out, except the name of the holder.

By agreement, the evidence was reported for the full Court to draw such inferences and make such decision as law and evidence should require.

J. Baker, for the plaintiff, argued that the land damages, $29,000, made no part of the monthly payments, but merely reduced the gross amount of the contract from $287,000, to $258,000. By the contract 80 per cent. is payable absolutely and unconditionally, without regard to the land damages. *Williams* v. *A. & K. R. R. Co.*, 36 Maine, 201. The payment of $11,067,55, after the service of the writ, was not to be included in ascertaining the indebtedness of the corporation when the writ was served. It is not pretended that the treasurer did not know of the service. The amount due the contractors when the writ was served was $16,292,09, of which one-half, $8146,04, was due Cahill. The interest of a joint contractor can be reached by trustee process. *Whitney* v. *Monroe*, 19 Maine, 42.

2. How is the amount due to be paid? The presumption of law is that it is payable in money. 18 Maine, 187; 25 Maine, 256; 35 Maine, 227; Cush. Tr. Proc., 33, § 61. The contract provides no other mode. $75,000, including the 20 per cent. reserved, is to be paid in stock, but when? If at the completion of the work, it does not affect this case. If to be distributed equally over all the payments, there was due to Cahill at the time of service $6303,00 in stock, leaving a balance of $1843,04, due him in money. But, if a proportion was payable each month in stock, the corporation might waive the privilege, and it appears they did so, by making all their payments in money. Having waived it, they lost it forever.

3. If the defendants claim to have been damaged by Healey and Cahill not completing their contract, the reply is that the monthly account shows that the corporation first violated the contract, they not having fully paid the estimate for July, August and September, 1854, by $2581,60. By the contract, the 20 per cent. reserve is the only fund to which the defendants can look for satisfaction of such damages.

4. The tender of the stock was insufficient. The certificates should have been filled with the plaintiff's name and offered to the officer. If part was due in money, both stock and money should have been tendered. If all in money, there was no valid tender made.

J. M. Meserve, for the defendants.

1. The trustee writ was not legally served. A copy should have been left *with* the treasurer or other officer, instead of at his place of abode. R. S., 1841, c. 114, § 43; c. 119, § 8. There being no service, all the payments made by the corporation prior to their disclosure are valid, and they are entitled to a discharge.

2. There was nothing due to Cahill at the service of the writ. The labor of the contractors amounted to $139,012,13, of which $36,327,21 was payable in stock, or $8524,81, besides the 20 per cent. reserved. They were entitled to de-

mand certificates of stock to the latter amount. They are not the less owners for not having certificates, the certificate being only evidence of ownership. The assumption that the corporation had waived their right to pay in stock by making payments in cash is unfounded, for there had been no demand and refusal, without which there could be no waiver.

The liability of the corporation to deliver certificates of stock under their contract does not make them trustees of Cahill. *Bigelow* v. *York & Cumberland R. R. Co.*, 37 Maine, 320. It was property which could be attached, and therefore trustee process will not lie. They were not liable as trustees for the 20 per cent. reserved, as it was not due and was contingent. *Williams* v. *A. & K. R. R. Co.*, 36 Maine, 201; *Dailey* v. *Jordan*, 2 Cush., 390.

The balance, $102,684,92, had already been largely overpaid, the payments amounting to $134,993,17, including $29,000, land damages, and $11,067,55, paid October 10. The $29,000 was as much a part of the contract price as any portion of it. There can be no doubt as to $13,917,15, paid prior to the service. It was a payment in effect to the contractors. The corporation being liable for the unpaid balance to the land owners, when the writ was served, it is contended that the whole sum of $29,000 should be allowed as paid. The contract stipulation that that sum should be paid to the land owners, operated as an order of the contractors in favor of those owners, accepted by the corporation. The $29,000 was charged by the defendants to the contractors a year and a half before the service, and they had acquiesced in it for that period.

As to the $11,067,55 paid Oct. 10:—if paid before the service, or before knowledge of the service, it was rightly paid. The service was by copy left at the treasurer's last and usual abode. The inference is that he was absent at the time. If absent, it may be justly presumed that he had no knowledge of the service prior to payments made the same day. That being the case, the payments made Oct. 10 are to be allowed to the defendants.

The question of tender becomes unimportant, there being nothing due to Cahill from the defendants.

The defendants having been examined in the original suit, and wrongfully charged as trustees, are entitled to costs. R. S., c. 86, § § 71, 72.

The opinion of the Court was drawn up by

TENNEY, C. J.—Healey and Cahill, the contractors to build and complete the road suitably for the laying of the rails, with certain exceptions, abandoned their operations before the duties undertaken were performed. Cahill being indebted to the plaintiff, was sued by him, and the company was summoned as his trustee, and made disclosure in the original action, by its president, Joseph Eaton, and was charged as such; and judgment was rendered against the principal defendant, and the goods and effects and credits he had in the hands and possession of the company, as trustee. Upon an execution issued thereon, and put into the hands of the sheriff of the county of Kennebec, a demand was made of the trustee for the goods, effects and credits so deposited, within thirty days of the rendition of the judgment. The company were proceeding, by its officers, to deliver certificates of twenty-six shares of their capital stock to the sheriff, who, acting under the direction of the plaintiff's attorney in the matter, declined to receive the certificates.

So far as the company were entitled to make payment in the stock, it does not appear that any controversy now exists touching the tender thereof. But, in this action, it is contended, that the company was indebted to the principal defendant in cash, at the time of the service of the original writ upon him, and, no cash having been in any manner offered to the sheriff at the time of the demand, the plaintiff is entitled to recover in this action.

A question is presented, and argued by the counsel for the defendants, whether any legal service was made upon the company, as trustee, in the original action. It is contended that there was not, and that the question is open. It appears

that an attested copy of the original writ was duly left by the officer *with the treasurer* of the company. By R. S., 1841, c. 114, § 24, where goods are attached, a separate summons shall be *delivered* to the defendant, or left at his *dwellinghouse* or *place of last and usual abode*, &c. By section 26 of the same chapter, it is provided, "in all cases where the process is by original summons, as against executors, administrators or guardians, in ejectment, dower, scire facias, error, review, and all other civil actions, wherein the law does not require a separate summons to be left with the defendant, the service thereof, by the proper officer, shall be sufficient, either by his reading the writ or original summons to the defendant, or by giving him in hand, or leaving at his dwellinghouse or place of last and usual abode, a certified copy thereof, &c. By section 43, in suits against corporations, the summons shall be served by leaving a copy of it with the president or clerk, cashier, treasurer, or any general agent or director, as the case may be, of the corporation sued.

Writs against corporations, which are summoned as trustees, shall be served on them as other writs against corporations. R. S., 1841, c. 119, § 8. The provision in section 26, of chapter 114, is general. And the mode of service, pointed out in section 43, relates to the persons on whom the service may be made, and was evidently not designed to change the mode provided in section 26. In comparing section 24 with section 26, it will be seen, that the latter section provides that, when "the law does not require a separate summons *to be left with the defendant*," the service thereof, &c. This shows that the words "to be left with the defendant" is the same thing as being "delivered to the defendant, or left at his dwellinghouse or place of last and usual abode," under section 24.

But, if the service was defective in the particular pointed out by the defendants' counsel, the appearance of the company, and submitting to the jurisdiction of the Court and making disclosure, and judgment being entered, would certainly obviate the defect, so far as the matter is now before us; and it cannot be considered, under the argument in the

case, that the Court shall render such judgment as the law and facts require, an open question.

The original disclosure was full, and thereupon we are to decide whether the plaintiff can prevail in this action of *scire facias*. The amount earned by the contractors is not in controversy. But the dispute is, touching the allowance of certain sums, claimed by the company as having been paid, before the service of the original writ; and if any thing was due from the company, was it in cash or stock?

The contract price for constructing the roads, according to articles of agreement, was the sum of $287,000, including the sum of $29,000 for land damages for the railroad, depots, station-houses, and other buildings. The railroad company contracted that they would settle all land damages, and deduct therefor, from the payment to be paid the contractors, the said sum of $29,000, and it was further agreed and understood that, in the settlement and adjustment of the damages aforesaid, the company shall use all reasonable diligence and dispatch, and, if any delay shall arise in the prosecution of the work, by reason of legal proceedings, in the settlement of said damages, the company shall not be holden for any damages on account thereof.

The plaintiff insists that the contract price was really the sum of $258,000, and the company were to settle the land damages. The company, on the other hand, insist that the whole sum of $29,000 should, in making up the payments made by the company, be allowed as paid. We think neither ground the correct one. As we have seen, the company were to be diligent in the settlement and adjustment of these damages, so that the contractors should not be delayed. And we see no reason for any objection to the allowance of such sum, on this account, as was actually paid before the service of the process upon the trustee. It was paid, and, by the contract, was to be deducted from the full contract price.

The balance of the land damages cannot be treated as actually paid by the company, when no part thereof had been paid. They were bound to pay these damages, if the road

was constructed, to the owners of the land, and unless payment was made seasonably, or the company had acquired title to the land, or had obtained license in some mode, the contractors might also be liable. It was not certain that the trustee would pay the balance. The portion of the $29,000, as land damages, not paid at the time of the service of the writ upon the company, cannot be treated as a payment in this process.

The treasurer of the company paid to the contractors on October 10, 1854, the day on which the trustee was served with the writ, the sum of $11,067,55. There is no evidence, whatever, that he had not knowledge of this service before the payment was made. The exact time of the service being stated in the return, is to be regarded earlier than the payment on the same day, without evidence of the particular time of day when the money was paid. *Fairfield* v. *Paine*, 23 Maine, 498. This payment cannot injuriously affect the plaintiff.

It is provided in the contract, that, on or about the first day of each month, the engineer shall estimate the quantity of work done, and give a certificate of the same, and, within ten days after the presentation of such certificate, the corporation will pay the contractors, in whose favor such certificate may be given, eighty per cent. of the amount then due for work specified in such certificate, and when the whole of the work contracted for shall have been accepted as completed according to the contract, the balance due shall be paid to the contractors.

In looking at the monthly estimates and payments, as they appear by the disclosure, it is manifest that, for a large portion of the time, the company paid in cash eighty per cent. found due by the certificates of the engineer. It is hence contended by the plaintiff that the company waived the right to make payment in stock, to the amount that they were authorized to do; and that the money was paid instead of stock, and the substitution cannot now be recalled.

By the contract, the contractors bound themselves to receive in payment $75,000 in stock at par value; and twenty

per cent. of the contract price, which was to be withheld each and every month, till the completion of the road, as security for the fulfilment of the contract on the part of the contractors, was to make a part of this sum, and to be paid in stock. This obligation to take, in the whole, $75,000 in stock, was never directly cancelled or modified. The contract is silent as to the time when stock should be paid in discharge of that portion of the monthly indebtedness, to be paid in stock. The sums due at the end of each month materially varied one from another. It was hardly to be expected that a stock certificate would be made each month for the exact sum which was to be so paid. If the company were willing to pay the eighty per cent. in cash, on each monthly certificate, it cannot now be treated as an act which binds the company absolutely. No consideration was paid therefor by the contractors; and it is in evidence that the stock in the market was far below par. We cannot doubt that the company were willing to pay, and the contractors were willing to receive, the part to be paid monthly, in cash; and, afterwards, that stock certificates should be delivered, in accordance with the stipulations in the articles of agreement.

According to the views expressed in the foregoing remarks, at the time of the service of the writ upon the trustee, the contractors had received more than six thousand one hundred and fifty dollars, in cash, which the company were entitled to pay in stock. But, at the same time, more than eight thousand five hundred dollars was due in stock from the company. From this sum, deducting the excess of cash actually paid, leaves a balance payable in stock, due the contractors, of a sum not exceeding two thousand three hundred and seventy dollars, which is short of that offered by the officers of the company to the sheriff who made the demand on the execution. The twenty-six shares of the stock are to be regarded as in the sheriff's hands, for the benefit of the plaintiff.

Judgment for the defendants.

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

JOSEPH W. PATTERSON, *Adm'r, in Equity, versus* JOHN YEATON.

A having taken a deed of land from B, and given a mortgage back, enters into possession; but, at a subsequent period, by a verbal agreement, A sells to B the right of redemption for a sum which B pays in hand; and A redelivers the deed to B, it not having been recorded, whereupon B enters upon the land, occupies and improves it, claiming to be the owner, and A, living for some years, repeatedly declares that he has sold the land to B: — *Held*, that this is insufficient to revest the title in B, the mortgage remaining uncancelled.

It seems, that the surrender or cancellation of an unregistered mortgage, or any instrument of defeasance only, revests the estate in the mortgager. And the surrender or cancellation of a deed not recorded, and a conveyance by the first grantor to a third person without notice, will give the latter a good title.

But the surrender of a deed to the grantor, leaving uncancelled a mortgage given to him to secure part of the purchase money, is not sufficient to revest the whole title in him.

As a court of equity, this Court has no power to compel a specific performance of a verbal contract for the sale of land, even although partly executed.

Nor, in law, can such a contract be held a valid defence against a party having an equitable right to redeem a mortgaged estate.

But so far as the purchaser has paid money in pursuance of the verbal sale, or made improvements on the estate by reason thereof, he is entitled to compensation.

BILL IN EQUITY.

It appeared by the bill and answer, that the respondent, Dec. 14, 1850, conveyed to Jefferson Pierce, the plaintiff's intestate, certain land in Vassalborough, and at the same time the said Pierce gave to the respondent a mortgage of the same land to secure the payment of certain sums therein named.

The plaintiff claimed by his bill to redeem the premises by fulfilment of the conditions of the mortgage, and called for an account of rents and profits received.

The respondent alleged, in his answer, that, on October 8, 1851, Pierce, having failed to fulfil the stipulations contained in the mortgage, sold to the respondent the right of redemption of the premises for the sum of $225, and gave him a release in writing, of the following purport:—

"Sold to John Yeaton all the right that I have this day in land belonging to me for 225 dollars, more or less. Received payment, "Jefferson Pierce.

"Oct. 8th, 1851."

The respondent, at the same time, paid the sum named in the release, and Pierce delivered to him the deed which the respondent had given to Pierce, Dec. 14, 1850, which deed remained unrecorded.

The answer further alleged, that this latter transaction was at Pierce's urgent request, and for the purpose of revesting the entire title to the premises in the respondent; that the respondent entered on the premises, and had ever since remained in possession; that he had expended a large sum of money in clearing the land, and erecting and repairing buildings thereon; and that the plaintiff had no right or lawful claim to redeem the premises.

The respondent afterwards put on file the written release above referred to, but subsequently obtained leave to withdraw it; when, on motion of the plaintiff, it was ordered to remain on file.

There was testimony from several witnesses, tending to show that Pierce, at different times and places, declared that he had sold all his interest in the premises to the respondent; and William S. Reed testified, amongst other things, that Yeaton, two or three weeks before Pierce went to California, (which was soon after the alleged release,) borrowed of Reed $200, and in his presence paid it to Pierce, and that Yeaton afterwards repaid the loan.

R. H. Vose, for the plaintiff, contended that the paper on file, purporting to be a release, was a palpable forgery. The admissions of Pierce that he had sold to Yeaton do not prove a legal sale. Parol evidence is not admissible as a substitute for a written conveyance. 2 Story's Eq. Jur., § 1531, p. 902. Any conveyance of interests in real estate must be made by deed duly executed. R. S., c. 72, § 1;

c. 111, § 1. Only a tenancy at will can be created by parol. R. S., c. 73, § 10.

A court of equity may compel the specific performance of written, but not of parol contracts. R. S., c. 77, § 8; *Wilton* v. *Harwood*, 23 Maine, 131.

J. M. Meserve, for the respondent.

The sale of Pierce's right of redemption to Yeaton, being a parol contract, must, from its nature, be proved by parol testimony. It is always competent to prove a payment by parol. 2 Greenl. Ev., 491. The respondent is called upon to account for rents and profits. Evidence of the parol agreement is admissible to protect him, and, if admissible for this purpose, is admissible for all purposes. Greenl. Cruise, title 32, Deed, c. 3, § 37; 2 Story's Eq. Jur., § § 760, 761.

The declarations of Pierce are evidence against him, and bind his representatives equally with himself. The whole is confirmed by Pierce giving up the deed to Yeaton.

Were the facts proved sufficient to convey the right of redemption? It was a contract between the parties themselves, free from suspicion of fraud, and fully executed on both sides. Yeaton entered into and remained in possession. His right was never disputed during Pierce's life. The agreement, payment and possession, are sufficient to pass the title in the equity of redemption.

The agreement is not within the statute of frauds. It has been performed on both sides, the purchase money paid, and the purchaser in possession ever since. In such a case, a court of equity will uphold it. 1 Hilliard on Vendors, 144. Parol agreements for the sale of lands are enforced when there has been a performance in part. Greenl. Cruise, Deed, c. 3, § § 27—32; 2 Story's Eq. Jur., § 759; 4 Kent's Com., 493; 1 Hil. on Vend., 145; Brown on Frauds, c. 19.

In this State, the Court can enforce specific performance of written contracts only. But, in the case at bar, the Court is not called on to enforce, but to repudiate a contract fairly made by both parties, fully executed, and where the purchaser

has paid the full value, occupied and cleared the land, built new and repaired old buildings, and paid the mortgages which Pierce was to have paid. Where a contract is free from fraud, and fully executed, the Court will not disturb it, especially so as to work a fraud on the other party. Brown on Frauds, 118. The statute of frauds does not apply to a contract fully executed. *Stone* v. *Dennison*, 13 Pick., 1.

The facts proved, showing conclusively that it was the intention of both parties to revest the title in Yeaton, the redelivery of the deed to him by Pierce was sufficient to effect the purpose. *Barrett* v. *Thorndike*, 1 Maine, 73; *Nason* v. *Grant*, 21 Maine, 160; *Holbrook* v. *Tirrell*, 9 Pick., 105; *Commonwealth* v. *Dudley*, 10 Mass., 403; Shep. Touch., 70; Brown on Frauds, 60; *Trull* v. *Skinner*, 17 Pick., 213.

The equity of redemption having been purchased by the mortgagee, he has the entire title, and the plaintiff can take nothing by his bill; and this is the only disposition of it which will do justice between the parties.

The opinion of the Court was drawn up by

MAY, J. — The right of the orator to redeem the premises described in his bill is fully established, unless the facts relied upon in the respondent's answer, and sustained by his proofs, show a valid defence. Said premises consist of ninety-five acres of land, conveyed by the respondent, on December 14, 1850, to the orator's intestate, and by him mortgaged back to secure the performance of a certain agreement then existing between the said parties. That agreement it is not contended has ever been fully performed.

The defence now urged is, that afterwards, on the eighth day of October, 1851, the respondent, at the urgent request of said intestate, purchased the right in equity to redeem said premises of said Jefferson Pierce, then in full life, and paid him the sum of $225, therefor, in full for said right, who thereupon gave a release to the said respondent in the following words: — "Sold to John Yeaton all the right that I have this day in land belonging to me for $225, more or less," dated

October 8, 1851, and signed by the said Pierce; and at the same time gave up to the respondent the deed then unrecorded, which said respondent gave to him of the premises described in the mortgage, and bearing even date therewith; all which was done with the purpose and intent of vesting the entire estate in said premises in said respondent. All this is directly alleged and sworn to by the respondent in his answer.

The answer further alleges, that said Pierce represented and declared to said respondent that said transactions would operate as a release of his right of redemption, and vest the whole title in said premises in said respondent, and that said respondent then and there believed that such would be their effect; and that, according to the respondent's best knowledge and belief, the said Pierce so understood the same, and afterwards in his lifetime admitted, represented and declared, to divers persons, that he had *so* sold all his right in said property to the respondent.

There is much testimony in the case tending to show that said Pierce did represent to several persons that he had sold all his interest in said premises to the respondent; but no such release as is set forth in the answer is produced. The one which was produced, the suggestion being made that it was fraudulent and forged, was withdrawn by the counsel for the respondent, but subsequently put into the case by the counsel on the other side, as tending to impeach the respondent's answer in other respects. Upon examination of the paper, we are satisfied that it is not genuine, and no such release as is alleged and sworn to was ever given. Under such circumstances, no part of the respondent's answer can be regarded as true, any further than it is corroborated by other evidence. *Falsus in uno, falsus in omnibus*, though not a binding maxim at law, is deserving of great weight in determining how much credit shall be given to the statement of a party or a witness.

The alleged release seems to have been originally the gravamen or gist of the defence. All the other facts seem to

have been regarded in the answer as corroborative of that. The answer alleges no other sale of the equity of redemption than such as was evidenced by the written release. The cancelling of the respondent's deed to the orator's intestate, and the subsequent statements by him in regard to the sale of all his interest in the premises to the respondent, tend strongly to show that some release in writing ought to have been given. If the surrender of the deed was intended as a cancellation of the conveyance, and to divest the intestate of his estate, it is remarkable that the mortgage depending upon it should not have been also given up or discharged. If the intestate had, in fact, parted with his estate, the mortgage had no longer any basis on which to stand. It is, therefore, improbable that the deed was given up with any such design.

The other testimony in the case shows that the orator's intestate frequently said that he had sold out his place to the respondent and got his pay; and one witness testifies that he saw $200 paid; and it also appears that said Pierce had a note for $25, dated October 8, 1851, signed by the respondent, which was subsequently paid to the indorsee of Pierce.

In view of these facts, it is contended in defence, that, notwithstanding the failure to show a written release as alleged, still the surrender of the deed from Yeaton to Pierce by the latter, under the circumstances in this case, revested the entire estate in the respondent, notwithstanding the mortgage was not given up or discharged, so that the orator's intestate thereby ceased to have any equity of redemption. The only evidence that the deed was in fact surrendered depends upon the respondent's answer, and the fact that he now produces the deed in court; and the only evidence that it was surrendered with the purpose and intent of revesting the title to the premises in the respondent depends upon his answer alone, except so far as the same may be incidentally corroborated by the statements of the intestate, that he had sold out to the respondent his interest in the place.

Assuming that the deed was surrendered for the purpose, and with the intention alleged, which, perhaps, may well be

doubted, we are not satisfied that such a transaction, under our law, would have the effect to revest the estate in the respondent. It is believed that, in all those cases in the books where the surrender and cancellation of deeds conveying lands have been held, as between the parties, to revest the estate in the grantor, the deeds have not only been unrecorded, but were surrendered soon after their execution and delivery, and the parties were in fact restored to the same position, or to what was equivalent, that they stood in before the conveyance was made. In the present case, the deed surrendered was but one part of a transaction, and while the conveyance to the mortgager was to be cancelled, his mortgage and liabilities thereon were left in full force. In some of the cases, the possession had not changed prior to the cancelling of the deed.

In the case of *Nason* v. *Grant*, 21 Maine, 160, cited in defence, the deed of conveyance and mortgage back, together with the notes, were all given up and cancelled. Had the surrender been of the mortgage, or any instrument of defeasance only, the estate would thereby revest in the mortgager. Not, however, as is said by SHAW, C. J., in the case *Trull, in equity*, v. *Skinner & al.*, 17 Pick., 213, "by way of transfer, nor, strictly speaking, by way of a lease working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence by which alone the claim could be supported; like the cancellation of an unregistered deed, and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet, taken together, such cancellation and conveyance make a good title to the latter by operation of law."

In the case of *Holbrook* v. *Tirrell*, 9 Pick., 105, PARKER, C. J., says, "that the mere cancellation of the deed, under which one holds title to real estate, does not divest the title or revest it in the grantor, seems to be abundantly settled by the cases cited in the argument;" and he particularly refers to the two cases from the Reports of Connecticut, vol. 4, p. 550, and vol. 5, p. 262. We find nothing connected with the

cancelling of the respondent's deed to Pierce, which, upon the principles above stated, can operate by way of re-conveyance or estoppel to prevent the orator in this case from setting up and maintaining his title to the equity of redemption.

Assuming, also, that the evidence in the case, independent of the alleged written release, satisfactorily establishes the fact of a parol sale of the intestate's right in equity of redemption, and the payment of the price agreed therefor, we know of no principle by which such a sale can be upheld, either in law or equity, under the circumstances of this case.

It is said the purchaser went into immediate possession; but this he was entitled to under his mortgage; and, so far as he may have paid any money in pursuance of the sale, or made any improvements upon the estate by reason of such parol contract or sale, he will be entitled to recover therefor, upon the principles settled in *Richards* v. *Allen*, 17 Maine, 296, provided such sale shall be repudiated and a redemption shall take place.

By the law of this State, no such verbal contract, even when accompanied by part performance, will enable this Court, when sitting as a court of equity, to compel a specific performance. *Inhabitants of Wilton* v. *Harwood*, 23 Maine, 131. This is conceded by the counsel in defence. Such, also, is the law in Massachusetts. *Parker & wife* v. *Parker & wife*, 1 Gray, 409.

No reason is perceived, if such a contract will not authorize this Court, on its equity side, to decree a specific performance of it when it has been partly performed, why the same facts should enable it to set up such a contract as a valid defence against a party having an equitable right to redeem an estate which he has mortgaged. The statute, which was in force when the alleged contract was made, forbids the exercise of any such power. R. S., c. 91, § 30. By that statute, it was enacted that "no estate or interest in lands, unless created by some writing, and signed by the grantor or his attorney, shall have any greater force or effect than an estate or lease at will; and no estate or interest in lands shall be granted, assigned or surrendered, unless by some writing sign-

ed as aforesaid, or by operation of law. The same provision is substantially reënacted in the R. S. of 1857, c. 73, § 10, with the omission, however, of the words "by operation of law." We know of no "operation of law," while the statute of frauds is in force, by which such a contract, or surrender of a deed, as is relied on in defence, can divest the holder of real estate of his title thereto, or vest it in another. The orator, therefore, is entitled to a decree, permitting him to redeem the premises described in his bill, and for his costs; and the case must be sent to a master, to hear and determine the amount to be paid for that purpose.

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

ZEBAH WASHBURN, *plaintiff in review, versus* WILLIAM BLAKE *and others.*

Where the cashier of a bank was employed to sell certain shares therein at a fixed price, but, before he had completed a sale, the bank was enjoined and proved insolvent, he is not responsible for the supposed value of the stock, no neglect on his part being shown in forwarding the sale.

Neither is he estopped to show the facts as to the proposed sale, although he had notified the holders that he supposed and had been informed that a sale had been effected.

Whether he may or may not have managed discreetly, as cashier, does not affect his liability in this behalf.

Although he was directed to forward the money or certificates of stock within three days, an injunction having been served on the bank on the third day, the owners of the stock were not endamaged by the certificate not being sent until several days afterwards.

ACTION OF REVIEW. ON REPORT by RICE, J.

Zebah Washburn was cashier of the Canton Bank in China. Blake, Bigelow & Co., of Boston, held a certificate of ten shares of stock in the bank, transferred by A. Pierce, Jr., in

blank and unrecorded. The important facts in the case are fully stated in the opinion of the Court.

On Dec. 1, 1856, Blake, Bigelow & Co., commenced an action against Washburn for damages for not selling their shares as he had undertaken, and accounting for the proceeds, with various other counts. They obtained judgment, March term, 1857, for $983,40, and costs.

The present action was brought by Washburn in review, and was tried August term, 1858.

After the evidence was adduced, the case was taken from the jury, with an agreement that the presiding Judge should report the evidence, and the full Court should draw such inferences as a jury might draw, and direct a nonsuit or default as the law and facts might require.

A. Libbey, for the plaintiff in review, argued that Washburn, not having sold the shares, could not be held responsible for them. Neither could he be held as purchaser. To hold him as purchaser, Blake & Co. should have returned the certificate with a transfer to him, the moment they received it. But Blake & Co. were not the legal holders of the stock, as the statute forbids any transfer of stock until the whole capital is paid in, and this was never done in the case of the Canton Bank.

Neither is Washburn liable for not returning a new certificate within three days after receiving Blake & Co's letter of November 13, for, before that time elapsed, the injunction intervened.

Williams & Cutler, contra.

1. Washburn is estopped to deny that the shares were transferable, having officially certified that they were so at their date, April 7, 1856. 1 Greenl. Ev., § § 207, 208. Besides, the capital stock was *substantially* all paid in at that date.

2. Washburn undertook, by his letter, to sell the shares for the usual commission. There is no reason why he should not be held to his undertaking.

3. His letter of Nov. 15th shows that he had sold them. It is too late for him to deny it, after the other party had acted upon it, as appears by their letter of the 18th. 1 Greenl. Ev., § § 207, 208. He had no authority to make a *conditional* sale, and cannot set up a condition which, in his letter of the 15th, he had suppressed.

4. Washburn's not complying with the directions in Blake & Co.'s letter of Nov. 13th, was an election to take the risk upon himself of any condition in that sale, and to account for the stock at the price named.

5. Washburn is liable under the money counts. Nov. 17, his son, and agent in the sale, wrote that he had sent the "money." Of course he had the money. In the same letter he promises to pay it "this week without fail."

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiffs in the original action, Messrs. Blake, Bigelow & Co., holding a certificate of ten shares in the Canton Bank, and being desirous of selling the same, on the 15th of August, 1856, wrote to the defendant to ascertain their value, to which he replied, informing them that, whenever the stock changed hands, it was at par. The defendant having, in his letter of Aug. 25, offered his services to sell the plaintiffs' stock, they, on the 26th of August, forwarded their certificate, transferred in blank, signed A. Pierce, with a request that he would return a new certificate in their name, or a check for the largest price which he could obtain, not less than $95, per share. On September 9, the defendant wrote that he had been unable to send the check as desired, but should probably be able to do it in a few days.

On the 1st of October, the defendant in the original action ceased to be cashier, and his son, Newell Washburn, was chosen in his place.

On the 13th of November, the plaintiffs wrote the defendant, that if he could not find a purchaser within three days at $95, per share, to send them a new certificate in their name, for the certificate in blank which they had sent.

On the 15th of Nov. the defendant, in answer, wrote that his son informed him some weeks ago, that he had sent $950, for the shares, and that "they were transferred to a man in this town."

On the 17th of November, Newell Washburn writes, that he supposed it was all arranged, and that he would see they should have the money "this week without fail."

An injunction issued from the Supreme Judicial Court on the 17th of Nov. and receivers were appointed, by whom the affairs of the bank were brought to a close.

On the 21st of November, the certificates of shares belonging to the plaintiffs were forwarded to them.

It appears that, about the first of October, a conditional sale of the stock had been made by Newell Washburn to one Russell; but, the conditions not being complied with, it was not carried into effect.

It appears probable that a sale would have been effected, about the middle of November, had it not been for the intervention of the injunction issued by this Court.

The evidence satisfactorily shows that the plaintiffs' stock was never transferred, and that the defendant has received no funds for or on account of it. No neglect is shown on the part of the defendant in not effecting the sale.

The funds of the bank appear to have been wasted, and its stock to have been of but little actual value.

The plaintiffs claim to recover on the ground that a sale had been effected, and that the proceeds of the same were in the defendant's hands. But they entirely fail to support either of these allegations.

Neither is the defendant estopped to show the facts as they exist. He may have reasonably expected a sale; but, as none was effected, no reason is perceived why he should be charged. Whether he may have managed the bank discreetly, as cashier, is nothing to the present inquiry. The most he has written is that he supposed and was informed that the stock had been sold. But no estoppel was thereby created.

In the last count, the defendant is sought to be charged for having violated the instructions given on the 13th of November, which were to return the certificates if a purchaser should not be found within three days from the receipt of the letter containing them. The certificates were returned November 21st. Allowing one day for the letter of the 13th of November to reach the defendant, the certificates could not have been sent till after the injunction on the 17th of November. The plaintiffs, at most, can only complain of a delay of three or four days in the transmission of their certificates. But no rights of theirs are shown to have been impaired by this delay. The stock was equally valueless on the 13th of November, when the instructions were given, and on the 21st of November, when the certificates were forwarded.

The result is that the original plaintiffs have failed to show any cause of action.

Judgment for the plaintiff in review.

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

ELISHA S. MILLS *& als. versus* BENJAMIN H. GILBRETH.

In an action against an officer for not safely keeping goods attached on a writ, instructions to the jury, that, where the officer has taken the goods into his custody, and has not stated in his return on the execution that they were taken from him without his fault, the burden is on him to show that he exercised ordinary care in keeping them, and he must satisfy the jury that they were lost without his fault, — are not as favorable to him as he has a right to demand.

The more reasonable rule in such a case is that, if the officer proves the loss of the goods, and the attendant circumstances, the burden of proof is then upon the creditor to show negligence.

In such a case, theft is not presumptive evidence of a want of ordinary care.

Where the evidence, as to the exercise of care by the officer, is evenly balanced, the presumption is that he has done his duty.

Mills *v.* Gilbreth.

Under c. 116, R. S. of 1857, an officer is not required to arrest a debtor on execution, unless a written direction to do so, signed by the creditor or his attorney, is indorsed thereon, and a reasonable sum for fees is paid or secured to the officer.

THIS was an action against the defendant, as sheriff of Kennebec county, for default of his deputy, Elbridge Berry, in not safely keeping goods attached by him on a writ in favor of the plaintiffs, against one Joseph S. Lambard, in not paying over money collected on the execution against Lambard, and in not returning said execution or satisfying it on Lambard's property, or executing it as he was bound by law to do.

On July 3, 1857, the plaintiffs put into Berry's hands their writ against Lambard, on which he attached jewelry and other property, valued at $2506,69. Judgment was obtained at November term, 1857; and execution for $1893,42, debt, and $12,56, costs, was seasonably delivered to Berry, with written directions on its back as follows:—

"Mr. Officer,—Seize and sell the property attached upon the original writ in this action. Plffs' orders. W'm P. Frye, plffs' attorney, by Bradbury, Morrill & Meserve."

No other instructions were given to Berry. He levied the execution on part of the property attached, sold it for $1049,71, and, after deducting his fees, made return on the execution that it was satisfied for $900, $500 of which he paid to the plaintiffs, in May, and $400 in August, 1858; but did not return the execution to the clerk's office until after the commencement of the present action.

Berry, called as a witness by the defendant, testified, amongst other things, that with the jewelry of Lambard he attached a safe; that Lambard told him it had but one key; that having been instructed by the plaintiff to store the jewelry in the safe in some place, he locked a part of it in the safe in August, and placed it in a well built, unoccupied brick store, put the safe key in his pocket, locked the store, and left the key in an office over the store; that he visited the safe a week or two after, but not again until December, when he discovered that most of the jewelry had been stolen, and

the safe left locked; and that, immediately on discovering the loss, he notified the plaintiffs thereof. There was testimony tending to show a want of ordinary care by Berry, and the contrary.

The defendant's attorney requested the Judge, (MAY, J., presiding,) to instruct the jury, 1st,—that, if the defendant or his deputy gave an account of the loss of the property, the burden of proof was on the plaintiff to show that the defendant was guilty of a want of ordinary care in keeping said property, and 2d, that theft is presumptive evidence of a want of ordinary care.

This the Judge refused, but instructed the jury, that Berry having returned the goods as attached on the writ, and having taken them into his custody, and not having stated in his return on the execution that they were lost or taken from him without his fault, it was for him to prove that he exercised ordinary care in keeping them, and to satisfy the jury that they were lost without his fault; that he was bound to take such care as men of ordinary prudence take of their own property in like circumstances, unless excused by the acts or directions of the plaintiffs or their attorneys; that, if he failed to satisfy the execution upon the property attached on the writ, he was bound to exercise due diligence to find other property of Lambard's in his jurisdiction, unless excused as aforesaid; and that, failing to find property sufficient, he was bound to arrest the debtor according to his precept, in default of which the defendant was liable for such damages as the plaintiffs suffered by such default, unless excused by some act or direction of the plaintiffs or their attorney.

The verdict was for the plaintiffs. The defendant excepted to the instructions of the Judge and his refusals to instruct.

C. Danforth, in support of the exceptions.

When judgment was rendered against Lambard, Jan. 7, 1858, the R. S. of 1857 were in force. No order was indorsed on the execution for the arrest of the debtor, when it was

delivered to Berry. The last instruction was plainly wrong. R. S., 1857, c. 116, § 5.

The goods having been stolen from Berry, and he having given an account of the loss as soon as known, the first requested instruction should have been given. There is no authority for requiring the theft to be stated in his return. It is for the plaintiff to show a want of ordinary care on the part of Berry. As a bailee, he was answerable for ordinary diligence, but is presumed to have done his duty until the contrary is proved, especially when the goods were stolen and immediate notice given. Story on Bailm., § § 213, 339, 410 and 454; *Platt* v. *Hibbard*, 7 Cowen, 500, note (a); *Beardsley* v. *Richardson*, 11 Wend., 25; 2 Kent's Com., 3d ed., 587; *Schmidt* v. *Blood*, 9 Wend., 268; *Minklan* v. *Rookfelle*, 6 Cowen, 276; 2 Greenl. Ev., § 584; *Wolfe* v. *Dorr*, 24 Maine, 104.

The second requested instruction should have been given. Theft is not presumptive evidence of negligence, but, on the other hand, excuses the bailee until shown to be owing to his fault. Story on Bailm., § 335.

It follows that the instructions given were incorrect.

The officer, having had no orders except those on the back of the execution, and having complied with them as far as he was able, was not obliged to look for other property or arrest the body. Howe's Prac., 136; *Goddard* v. *Austin*, 15 Mass., 133: *Turner* v. *Austin*, 16 Mass., 181; R. S., c. 116, § 5.

J. M. Meserve, contra.

The officer had attached property more than sufficient to satisfy the debt, and the execution was seasonably put into his hands, with orders to apply the property to satisfy it. He sold some property, and paid some money to the plaintiff, but did not return the execution, nor pay all the money collected, until after this action was commenced. His return, when made, does not show that any goods were lost. He gives no official account of any loss. The first requested instruction could not apply to such a case. The instruction given was as favorable as the law and the facts would justify.

The defendant received no damage from the refusal to give the second requested instruction. The plaintiffs did not claim that theft was presumptive evidence of want of care, but that the facts and circumstances in the case showed negligence on the part of the officer. The Judge was not bound to give instructions not appropriate to the case at bar.

The question of what is ordinary care is correctly answered by the Judge, in the instructions given. Story on Bailm., §§ 11—15.

It was not incorrect to instruct the jury that the officer, failing the property attached, was bound to seek other property of the debtor. He was so commanded in his precept. The plaintiffs could not know that the property attached would prove insufficient. In directing the officer to apply that property to satisfy the execution, they did not revoke the general order in his precept. There was no act or direction of the plaintiffs, which, fairly construed, would excuse the officer from obeying his precept.

The officer's duty to arrest Lambard, if he failed to find property sufficient to satisfy the judgment, appeared from the express terms of the execution itself. The property attached proving insufficient, he was bound to take other measures to satisfy the debt. What measures? Clearly, those indicated in his precept. If the plaintiffs suffered damage from his neglect, he was liable for it, unless excused by some act or direction of the plaintiff, which is not pretended.

The opinion of the Court was drawn up by

RICE, J.—This is an action against the defendant as sheriff of Kennebec county, for default of his deputy, Elbridge Berry, for not applying on an execution in favor of the plaintiffs certain goods which Berry had attached on the original writ. The defence was, that the goods had been stolen from a safe in which Berry had deposited them, between the time of the attachment and the time when the execution was put into his hands with directions to seize and sell them on said execution. That the goods were thus lost, the evidence put into

the case by the defendant tended to show, and also that Berry notified the plaintiffs of the loss immediately after the fact came to his knowledge. The plaintiffs charge that this was occasioned through the negligence of Berry.

The defendant requested the Judge to instruct the jury, that, if the defendant or his deputy gave an account of the loss of the property, the burden of proof was on the plaintiffs to show that the defendant was guilty of a want of ordinary care in keeping said property. This request was refused by the Judge, who instructed the jury, that, Berry having returned the goods in controversy as attached on the original writ against Lambard, and having taken them into his custody, and not having stated in his return, on the execution against Lambard, that they were lost or taken from him without his fault, the burden of proof was on him to show that he exercised ordinary care in keeping the same, and that he must satisfy the jury that they were lost without his fault.

Our attention has not been called to any rule of law which requires that the fact of loss should be included in or made a part of the officer's return on the execution. That, perhaps, might have been an appropriate mode of notifying the plaintiff of the loss. It certainly was not the only mode.

As to the burden of proof, in this class of cases, the authorities are not entirely accordant.

Chancellor KENT, 2 Com., 587, states the rule thus:—The bailee, when called upon for the article deposited, must deliver it, or account for his default by showing a loss of it by some violence, theft or accident. When the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care.

Judge STORY, in his work on Bailments, § 454, says,—In respect to depositories for hire, there seems to be some discrepancies in the authorities whether the *onus probandi* of negligence lies on the plaintiff, or of exculpation on the defendant, in a suit brought for the loss. In England, the former rule is maintained. In America, an inclination of opinion

has been expressed the other way; yet, perhaps, the weight of authority coincides with the English rule. For this, he cites numerous English and American authorities which fully sustain his assertions, and which it is unnecessary to cite.

In *Clark* v. *Spence*, 10 Watts, 335, ROGERS, J., in giving the opinion of the Court, states the rule thus: — "The rule is that, when a loss has been proved, or when goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust, until the contrary is shown. But to throw the proof of negligence on the bailor, it is necessary to show, by clear and satisfactory proof, that the goods were lost, and the manner they were lost. All the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods; and this throws the burthen of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs."

This presents the rule in as favorable a light, for the bailor, as the American cases will warrant; and would seem to be a reasonable rule. It leaves the burden of showing negligence, of turning the scale, on the bailor, and still compels the defendant, with whom a knowledge of the facts and circumstances attending the loss often rests, to disclose fully all those facts and circumstances. If, when these facts and circumstances are thus disclosed, and the evidence bearing upon the question of negligence is all out, the scale is evenly balanced, the presumption that the bailee does his duty will leave the case with him.

Tested by this rule, the instructions of the presiding Judge were not as favorable for the defendant as he had a right to demand.

The Judge also instructed the jury, that, if he failed to find property on which to levy plaintiff's execution, it was then Berry's duty to arrest Lambard according to the precept in his hand; and, if he did not do this, the defendant was liable for such damages as the plaintiff suffered in con-

sequence of such neglect, unless he was excused from doing so by some act or direction of the plaintiffs or their attorney.

There is no evidence that he was thus excused by the plaintiffs or their attorney.

It is provided by c. 116, of the R. S. of 1857, § 5, that no officer is required to arrest a debtor on execution, unless a written direction to do so, signed by the creditor or his attorney, is indorsed thereon, and a reasonable sum for his fees is paid or secured to him, for which he shall account to the creditor as for money collected on execution. No such direction was given.

At the time this action was tried, the above provision had recently been enacted, and had probably escaped the attention of the presiding Judge.

As to the second requested instruction, it was undoubtedly correct as a principle of law, and should have been given if there had been any facts in the case which called for it.

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

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

RUFUS BERRY *versus* GEORGE BILLINGS *and others.*

A presiding Judge is not required to define to the jury the meaning of words in common and ordinary use, or to which the law has attached no specific meaning.

What constitutes "unfaithfulness" on the part of commissioners appointed under a complaint for flowage, so as to invalidate their report, is a question of fact for the jury.

COMPLAINT FOR FLOWAGE. The issue before the jury was upon the report of the commissioners; and the respondents claimed to be allowed to introduce evidence to contradict or invalidate the report, on the ground of alleged "unfaithfulness" on the part of the commissioners. The meaning of the word was discussed by counsel, the respondents contending that it meant gross error in judgment, and the complainant that it implied conduct involving impeachment. To prove and disprove "unfaithfulness," several witnesses were introduced.

HATHAWAY, J., presiding, charged the jury; at the close of which the counsel for the respondents reminded him that he had not defined to the jury the word "unfaithfulness." The Judge replied, that he did not choose, generally, to give the jury definitions of words in common use, such as the word "unfaithfulness," the meaning of which the jury knew as well as the Court.

The verdict was for the complainant.

The respondents excepted to the ruling of the Court, and its refusal to instruct.

R. H. Vose, in support of the exceptions.

Unfaithfulness on the part of the commissioners was alleged, and, on its being proved, the jury might inquire into the question of damages. Hence, it became important to know the legal meaning of the word as here used. The respondents contend that it means gross error in judgment; the complainant that it implies moral turpitude. It has been the uniform practice of the Court, where a case may turn

upon the meaning of a statute, to explain the meaning to the jury, even without request. *Bryant* v. *Glidden*, 36 Maine, 36; *Same* v. *Same*, 39 Maine, 458.

J. M. Meserve, contra.

The Judge was not bound to give instructions not distinctly requested. *Stowell* v. *Goodnow*, 31 Maine, 538; *State* v. *Straw*, 33 Maine, 554; *Stone* v. *Redman*, 38 Maine, 578. Nor was he required to define the word if requested. The law has not attached any specific meaning to the word, and the Judge could not properly expound or define it. *Darling* v. *Dodge*, 36 Maine, 370. The respondents have sustained no injury by the Judge's not defining the word, and hence have no cause for exceptions. *Copeland* v. *Copeland*, 28 Maine, 525; *Dodge* v. *Greeley*, 31 Maine, 343; *Greenleaf's Lessee* v. *Birth*, 5 Peters, 132. There is no substantial difference between the definitions contended for by the opposing counsel. Any proof of "unfaithfulness" would impeach the commissioners' report.

The opinion of the Court was drawn up by

CUTTING, J.—The jury are presumed to understand the definition of words in common and ordinary use, and are not in attendance for the purpose of being instructed in that particular; and this, so far as it appears from the exceptions, was all the Judge was reminded that he had not done, and which he subsequently declined to do. If the Judge had defined the word "unfaithfulness," he might have been called upon to define the words of his own definition, and so have proceeded *ad infinitum*, or until his vocabulary had become exhausted. This is hardly to be expected of the Court, and, perhaps, not expedient in all cases; for, "*omnis definitio in jure civili periculosa est, parum est enim, ut non subverti possit.*"

But it appears, from the statement of the case, that the counsel for the respondent did not seek so much for a definition, as he did to ascertain from the Court whether unfaithfulness might be inferred from gross error in judgment, or, as

contended on the other side, there must be proof of a criminal intent. There may be different degrees of unfaithfulness, but the degree necessary to invalidate the report is not defined by the statute. It becomes, therefore, a question of fact for the jury, in their sound discretion, to settle from all the evidence bearing upon that point, as decided in *Ware* v. *Ware*, 8 Maine, 42, upon the question of sanity; and in *Darling* v. *Dodge*, 36 Maine, 370, upon the propriety of the Court expounding a term to which the law has attached no specific meaning. Consequently the controversy between the counsel becomes immaterial; the jury might have found unfaithfulness upon either ground, differing, it might be, in degree, but still none the less unfaithfulness. *Exceptions overruled.*

Judgment on the verdict.

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

ELIZA A. SPRINGER *versus* ELBRIDGE BERRY.

The statutes in force, before the Revised Statutes of 1857 took effect, authorized a married woman to lease, sell, convey and dispose of real estate held in her own right, by her separate deed, in her own name, as if she were unmarried.

She may hold an estate *in trust;* and where a portion of the estate is devised to her, and the remainder is held by her as trustee, with power to sell and convey the estate, she may maintain an action in her name alone, for a breach of contract by a purchaser in a sale thereof.

The statute of 1848, providing for her appropriate remedies "to enforce and protect her rights," is not to be construed as only intended to furnish separate remedies for the enforcement and protection of her separate rights *in the property itself.*

The general purpose of the several statutes indicates the intention of the Legislature to furnish to a married woman in her own name all the remedies which are essential to the enjoyment and use of her property in itself considered, and also such as are applicable to the enforcement of all such contracts as she is authorized by the statute to make in relation thereto.

Springer *v.* Berry.

Where a purchaser, at a sale by auction, fails to comply with the terms of the sale, and the property is afterwards re-sold for a less sum, he will be held liable to pay the difference in the two sales, together with the reasonable expenses incurred in making the second sale.

ON REPORT.

ASSUMPSIT to recover of the defendant the sum of one hundred and ten dollars as the difference in the two sales of certain real estate, in the city of Gardiner, with the expenses of the last sale. The date of the writ is November 7, 1857.

The plaintiff introduced evidence that *Joshua K. Osgood* was duly licensed as an auctioneer. He was then called as a witness, and testified that he sold the property described in the writ by auction at two different times, (giving the dates,) and immediately after such sale made a record thereof, which is signed by him. The record was read in evidence.

The deposition of *Spencer S. Harden* was read by plaintiff's counsel; from which it appears that the deponent, in the year 1857, was residing in St. Anthony, Minnesota; that he is the son of the plaintiff, who was then the wife of Moses Springer; that she authorized him by power of attorney to sell, and execute deeds to convey the property. Went to Gardiner, advertised this and other property for sale by auction on Saturday, October 10th, 1857. The estate described in the writ was sold to the defendant. On the next Monday, went to the office of an attorney to execute deeds of the property sold. While there, defendant came in, and was notified that deponent was ready to give him a deed. He replied, that "he should soon be at leisure and would fix up the business." Saw him on the next day, exhibited the deed executed, (which is annexed to the deposition;) he desired delay as he had not the money. It was proposed that the deed should be left with the attorney, that he might take it when he obtained the money, to which he assented. He made no objection to the terms of sale, which were cash, nor to deponent's authority. He said nothing of having made the purchase for any other person. A few days afterwards, he

informed deponent that he could not take the house, to pay the money down, as money was scarce and he could not get it without paying a high rate of interest, which he was unwilling to do. Saw him several times afterwards, and finally told him the property must be sold again at his risk.

Deponent further testified, that he never employed the defendant to bid for his mother, nor did he ever authorize any one to request him to do so; and that he has no interest in the transaction and was only acting for the plaintiff.

The plaintiff then introduced the power of attorney to said deponent.

Also copy of the will of Spencer Harden, the former husband of plaintiff, which will was approved on the first Monday of October, 1844, which, so far as applicable to this case, reads as follows:—

"*Third.*—I give, bequeath and devise to my said wife, after the payment of my debts and expenses, one-third part of all the rest and residue of my estate, real, personal and mixed, to hold to her, her heirs and assigns forever.

"*Fourth.*—I give, devise and bequeath to my said wife, her heirs and assigns, the remaining two-third parts of my estate, to hold in trust for the benefit of my two sons, Spencer S. Harden and Walter S. Harden, and their legal representatives, should either of my sons decease during the continuance of said trust. And I hereby fully authorize and empower my said trustee to give, grant, sell and convey, by deed or otherwise, at any time, all or any part of said trust property, and the same again to invest in such manner as she shall think proper. And I hereby direct my said trustee to pay over and expend, for the board, support and education of my said sons, during their minority, so much of the income or principal of said trust property as she may consider necessary. And, when either of my said sons shall arrive at the age of twenty-one years, my said trustee shall pay over to such son his proportion annually of the income of said trust fund, and so much of the principal thereof as she in her discretion may think proper."

Upon this evidence the plaintiff rested her case.

The defendant's counsel moved for a nonsuit, on the ground of the non-joinder of Moses Springer, who is admitted to be the husband of the plaintiff; also, that the plaintiff is not solely interested; which motion was overruled.

In defence, it was alleged, that the defendant bid at the sale by the request of the plaintiff's husband, and for the purpose of preventing the property from being sold at a sacrifice; that Harden, who was acting for plaintiff, and was her agent and attorney, had knowledge of the circumstances under which his bids were made. Several witnesses were examined by defendant, whose testimony tended to sustain these allegations.

The case was taken from the jury by consent of the parties, and, on their agreement that the evidence should be reported for the decision of the full Court—the evidence to be considered, subject to all legal objections,—the Court to draw inferences as a jury might, and render judgment according to the rights of the parties.

Danforth argued the case for the plaintiff.

Chadwick, for the defendant, made the following points:—

1. By the common law a *feme covert* cannot maintain such an action, unless joined with her husband. The exception sought to be established in this case, by c. 61, § 3, cannot obtain, for a *feme covert* may maintain suits at law only for the preservation and protection of her property and for the wages of her personal labor. Statutes changing the provisions of common law create no rights by inference; if they do, the inference is that this action cannot be maintained. Chapter 81, § 100; c. 105, § 7; c. 133, § 13 and c. 82, § 31, of R. S. of 1857.

2. If the plaintiff had any interest in the property sold, two-thirds of that interest was as trustee of her two sons, and a *feme covert* can be neither a guardian nor a trustee. If, while *sole*, she be appointed such, her coverture determines the trust. The want of proper plaintiff in actions on contract is an exception to the merits. *Hunt* v. *Fitzgerald*,

2 Mass., 509; *Baker* v. *Jewell,* 6 Mass., 460; *Converse* v. *Symmes,* 10 Mass. 377.

3. The plaintiff fails to show any privity on her part; the only proof being the declaration of her husband to the auctioneer, who says that "Moses Springer employed me to sell the property and no one else," and there is no evidence to show that said Springer was authorized to act as agent. If there is such evidence, then proof of his declarations, while discharging his duty, is admissible. *Gooch* v. *Bryant,* 13 Maine, 386; *Haynes* v. *Rutter,* 24 Pick., 242.

4. The record of the contract and the contract itself is impeached by the testimony of the auctioneer who made it, the advertisement of the second sale, the testimony of Charles Osgood and the defendant.

5. The first sale was a fraud upon the public, practised by the plaintiff's agent. Public policy requires that sales by public auction should be fair and open, and the plaintiff does not, in this respect, come into Court with clean hands. The illegality of the whole transaction is only paralleled by its dishonesty.

6. If every thing else was right and legal, the balance of testimony shows, that the first sale was not concluded by any tender of delivery of a deed or of possession.

7. There is not sufficient evidence of title in the plaintiff; indeed, there is *no evidence* whatever that the plaintiff ever owned an inch of the land which S. S. Harden sold, M. Springer advertised, and which the auctioneer pretended to sell.

The opinion of the Court was drawn up by

MAY, J. — That the auctioneer's record, or memorandum by him signed, contains upon its face all the conditions of the sale, together with a suitable description of the premises, and a statement of the fact that the defendant was the purchaser, is not denied. It also appears, from the evidence in the case, that the plaintiff, by her authorized attorney, within a reasonable time after the sale, made and tendered to the defendant,

in pursuance of said sale, a good and sufficient deed, and was ready to deliver it upon payment of the purchase money; and that the defendant failed, though often urged, to perform his part of the contract. Upon these facts, it is conceded that the plaintiff is entitled to recover, unless some of the grounds in defence can be sustained.

The first point taken in defence is that the plaintiff is a *feme covert*, and therefore cannot maintain this action without the joinder of her husband in the suit. That this objection would be fatal at the common law is very clear; but, it is contended that, by our statutes, applicable to this case, the rule of the common law has been changed; and that a married woman may now maintain an action in her own name alone, touching her own separate rights of property.

The case shows that the plaintiff, in 1844, upon the death of her former husband, by his will, became seized in her own right, of one third of the premises to which the contract of sale relates, and of the other two thirds in trust, for his two sons then living. Said will was duly approved and set up at a Probate Court, held on the first Monday of October in that year; and, by the express terms of it, the plaintiff, as trustee, was fully authorized and empowered to give, grant, sell and convey by deed or otherwise, at any time, all or any part of said trust property, and the same again to invest in such manner as she might think proper.

By the statute of 1844, c. 117, § 2, it was provided, that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her, notwithstanding her coverture, and she shall have, hold and possess the same *as her separate property*, exempt from any liability for the debts or contracts of the husband." This provision, by the statute of 1847, c. 27, § 3, was applied to all married women, whether married before or after the passage of that statute.

By the statute of 1848, c. 73, § 1, it was enacted that "any married woman who is seized and possessed of property, real or personal, as provided for in the Act to which this is

additional, *shall be entitled to the appropriate remedies, as authorized by law in other cases to enforce and protect her rights thereto;* and she may commence, prosecute or defend any suit in law or equity to final judgment and execution *in her own name,* in the same manner as if she were unmarried, or she may prosecute or defend such suit jointly with her husband."

By the statute of 1852, c. 227, § 1, "any married woman seized and possessed of property, real or personal, as provided in the Acts to which this is additional, shall have power to lease, sell, convey and dispose of the same, and to execute all papers necessary thereto, in her own name as if she were unmarried," &c. The statute of 1855, c. 120, § 1, is very similar to the one last cited, authorizing any married woman seized and possessed, in her own right, of any such real estate within this State, or of any personal property, to lease, sell, convey and dispose of the same, or any part thereof, *by her separate deed in her own name* as if she were unmarried.

The statutes which have been cited were all in force at the time of the alleged sale of the premises to the defendant, and when this suit was brought. Their general purpose is not only "to secure to married women their rights in property," as it is expressed in the title of the first statute passed upon this subject in 1844, above cited, but also to provide the modes and remedies necessary for the accomplishment of that end, without the aid, and against the interference of the husband. To accomplish this, they not only have deprived the husband of such rights to the wife's property, as vested in him by virtue of his marriage at common law, but the wife is to hold it free from all claim or control over it on his part. *Southard* v. *Plummer & al.*, 36 Maine, 64. So far as regards all property upon which these statutes operate, the wife is invested with a legal capacity to make all contracts for its conveyance, and to execute all necessary papers for that purpose, in the same manner as if she was sole and unmarried. Such property throughout all these statutes is treated as her separate property.

There seems also to be good reasons why she should be

entitled to all appropriate remedies in her own name for the preservation and protection of her estate, and also for the enforcement of such contracts as she is authorized to make for the management or sale thereof. Without these, her separate power of leasing or selling the estate may be rendered almost ineffectual. The husband by refusing to join with her in suits upon such contracts may deprive her of all remedy. He may thus greatly embarrass, if not prevent her power of alienation or of leasing her estates. Difficulties, thus thrown in the way of the enforcement of her contracts, would leave her without the power to compel a performance, or even to recover any damages for a breach. The statute of 1848, before cited, we think, was designed to furnish separate remedies commensurate with her separate rights, so far as such rights exist by force of the statute,

The statute of 1848 expressly provides for her all appropriate remedies "to enforce and protect her rights" to the property which is secured to her by the Act to which this statute is additional, and then proceeds to enact that she may commence, prosecute or defend *any* suit in law or equity in her own name. If, as is contended, the literal construction of this statute is only to furnish separate remedies for the enforcement and protection of her separate rights in the property itself, still such a construction, we think, is too narrow to meet the evident design of the statute. Its language being susceptible of a broader construction, we cannot doubt, when we look at the general purpose of all these statutes, that the Legislative intention was to furnish to a married woman, in her own name, not only all the remedies which are essential to the enjoyment and use of the property in itself considered, but also such as are applicable to the enforcement of all such contracts as she is authorized by these statutes to make in relation thereto. The word "rights," as used in the statute, seems to include something more than the mere right of property. It embraces such rights as spring out of its lawful management, or as are incident to its ownership and the power of disposition. This action falling within this principle may

be maintained, and the non-joinder of the plaintiff's husband is no defence.

Whether our present Revised Statute, c. 61, § 3, is susceptible of, or requires a different construction, it is not now necessary to determine, because, by the general repealing Act, at the close of the volume, § 2, all the then existing statutes are still in force "for the preservation of all rights and *their remedies* existing by virtue of them." We do not mean, however, to intimate that the statute should receive a different construction.

The objection that this action cannot be maintained, because the plaintiff had not the sole interest in the premises, is not sustained. The entire legal estate was in her, and she had the sole power of disposition under the will of her former husband.

The next ground of defence is that the contract of sale was not binding when made, because the rights and duties of the plaintiff, as trustee, had ceased by reason of her coverture with her present husband. It is contended that a married woman cannot be a trustee. No authorities are cited to sustain this position, and we are not aware that such is the law. On the contrary, it has been held that a married woman may transfer a trust estate by lease or release as a *feme sole*. She also may be authorized to act as the agent or attorney of another. 2 Kent's Com. 3d ed., vol. 2, p. 150; *Barnaby* v. *Griffin*, 3 Veasy, 266. No reason is perceived why a mother may not continue to be a trustee for her children, notwithstanding she may have married a second husband after her appointment. She has been so regarded in this State, and has been held entitled to recover the possession of the trust property after a second marriage. *Cole & wife* v. *Littlefield*, 35 Maine, 439. And, since the passage of the statutes "to secure to married women their rights in property," the reasons for her being such have not been diminished.

Again, it is said that the auctioneer was not authorized by the plaintiff to sell the premises. That he was employed to do so by the plaintiff's husband, and such employment sub-

sequently ratified by her agent, if it was not previously directed, fully appears.

It is further objected, that the first sale was a fraud upon the public on the part of the plaintiff's agent. If it were so, the defendant was a party to the fraud, and the only evidence to sustain it comes from him. But if the facts and circumstances testified to by him constitute such a fraud as to vitiate the sale, these, and each and all of them are absolutely denied by one witness, the plaintiff's agent, under oath. Under these circumstances we cannot say the fraud is proved. No suggestion of any such defence appears to have been made until after the commencement of this suit. Up to that time the only objection on the part of the defendant to the performance of his contract, so far as the evidence discloses, was his inability to get the money to do so.

The other objections suggested in defence do not appear to be sustained by the proof. The result is, that the plaintiff is entitled to recover, and the measure of damages should be the difference between the sum for which the property was struck off to him, defendant, and the amount which it brought at the subsequent sale, including the reasonable expenses incurred in making such sale. Such a rule seems to be sustained by the authorities cited for the plaintiff, and is in harmony with the dictates of reason. *Defendant defaulted.*

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

JACOB J. BOOKER *versus* ANSON G. STINCHFIELD.

Where, pending an action, the Court ordered that the plaintiff furnish an indorser of the writ before, or become nonsuit at, the next term, and the name of the plaintiff's attorney was put thereon as indorser, by a third person, who erroneously supposed he was authorized to do so, if the attorney afterwards prosecutes the action to trial, without informing the other party of the error, he will be considered as ratifying the indorsement, will be estopped from denying its validity, and held liable for the costs recovered against the plaintiff in that suit.

ON CASE STATED BY THE PARTIES.

The action is brought against the defendant as the indorser of a writ in favor of one Sarah Towns, against the present plaintiff, in which the defendant was the attorney of said Towns. Said action was entered at the August term in the county of Kennebec, A. D., 1855, and continued to the March term, 1856, when the Court ordered that the plaintiff furnish an indorser of the writ by the first of July then next, and, if she failed to do so, she should become nonsuit at the next term. There was also another action pending in favor of the said Towns against John Timlin *& ux.*, in which, also, the same order was entered on the docket. The defendant was her attorney in that action, also.

The defendant wrote the clerk of the Courts, from Boston, under date of June 27, 1856, as follows:—"Since leaving home, I happened to recollect that there was an order of the Court that the writs in the cases of *Sarah Towns* v. *John Timlin & ux.*, *same* v. *Jacob J. Booker*, should be indorsed before the first of July. The first is good and we are sure of recovering; the latter, doubtful. Be sure to indorse the former, by all means. You can do so, by writing my name upon the writ, which you are hereby authorized to do, and I will ratify the same as my indorsement. * * * * Don't allow the first of July to pass without doing it."

This letter was received on the 28th of June by the clerk, who wrote the defendant's name on each of the writs as an indorser.

The action was tried at the next term, and the verdict was for the said Booker. The defendant was the counsel of said Towns, at the trial of the action, and filed exceptions, which were overruled by the full Court, and judgment ordered on the verdict. Execution for the costs of the defendant, in that action, (the plaintiff in this,) was duly issued and placed in the hands of an officer, who returned that he made search for the said Towns, and for property belonging to her wherewith to satisfy the execution, but could find neither within his precinct. And that he made a demand on A. G. Stinchfield, indorser on the original writ, to turn out, expose, and deliver to him, goods, property or money of his, wherewith to satisfy the execution and all fees, which he refused to do.

Bradbury, Morrill & Meserve, for plaintiff.

Stinchfield, pro se.

The opinion of the Court was drawn up by

MAY, J. — In the original action, Sarah Towns against the present plaintiff, the then plaintiff was ordered, at the *Nisi Prius* March Term of this Court, A. D., 1856, to furnish an indorser to her writ by the first of July then next, and, upon failure to do so, she was to become nonsuit at the next term. No reason is stated upon the docket for the making of the order, but, in the absence of any proof to the contrary, this Court will presume that the presiding Judge had legal cause therefor. The present defendant was the attorney of the plaintiff in that suit, and all the facts necessary to charge him as indorser of that writ appear in the present case, provided said writ was properly indorsed by him, or by his authority.

The defendant's name was seasonably placed upon the writ by the clerk of the Court; but his authority to place it there is now denied. The defendant's letter of June 27, 1856, does not seem to contain any such authority; but he must have well known that such indorsement had been made, and that the defendant in that suit, instead of moving for a nonsuit in pursuance of the previous order, was relying upon

the faith of it. Neither the genuineness of his signature, nor the authority of the clerk in making it, appear to have been questioned or denied by the defendant, until after the termination of the suit. The defendant, under such circumstances, must be held to have ratified or adopted the indorsement as his own. The rule of law which will not permit a party, who stands by in silence, and sees another acting to his injury, under the belief that his signature to any instrument is binding, afterward to repudiate such signature, is a sound one; and, upon the facts in this case, we think the defendant is estopped to deny the validity of the indorsement upon the original writ. *Forsyth* v. *Day & al.*, 41 Maine, 382, and same case, 46 Maine, 176. The plaintiff, therefore, is entitled to recover in this suit all the costs which were recovered by him against the plaintiff in the former action, with interest from the time of such judgment. *Defendant defaulted.*

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

ALEXANDER S. CHADWICK *versus* ANDREW MCCAUSLAND *& al.*

If a road has been so long used for the travel of foot passengers that the public have acquired an easement in the land over which it passed, the town, as an incident to that right, may make such repair thereof as may be necessary to render it safe and convenient for travelers on foot, by leveling the land and building sidewalks thereon.

And if, after the public had acquired such a right to the road, the town should lay out another near it, that would not operate a discontinuance of the old road, if the record is silent upon the subject; but the public easement would remain unaffected by the new location.

Nor would the line of one whose land is bounded by the road, be changed by the new location; for the establishment of a road cannot give him title to land, in which, before, he had none.

EXCEPTIONS from the ruling of RICE, J.

This is an action of TRESPASS *quare clausum* against the

defendants, for entering upon a parcel of land described in plaintiff's writ as bounded northerly by a certain road. The action was commenced before a justice of the peace, and removed to this Court by the pleadings. The writ and pleadings, and the original location of said road, are a part of the case.

Also, the plan of the premises made by David Garland, a surveyor appointed by the Court, and the original plan of Solomon Adams, referred to in plaintiff's deed, are made a part of the case.

The defendants introduced evidence tending to prove that the public had acquired the right to travel over the *locus in quo* on foot. It was also proved that the *locus in quo* is within the limits of the highway as fenced out by the abutters.

The Court instructed the jury that, if the public had acquired such right, as incident to that right, the defendants, under direction of the town, would have the right to make such repairs, by leveling the land and laying sidewalks thereon, as were necessary to make the same safe and convenient for travelers on foot.

The plaintiff introduced a record of a new location of the road, establishing the line of the same by definite metes and bounds, made by the selectmen of Farmingdale, and accepted by the town in 1852; which record is made a part of the case, and may be presented and read to the Court. The plaintiff also introduced evidence to prove that the *locus in quo* was south of the road described in said location, and adjoining to the south line of said road.

The Court instructed the jury that said record would not affect the plaintiff's rights in this case, and that the town of Farmingdale, by establishing a new location of their road, would not thereby surrender any rights to the plaintiff, which the public had acquired by long use to travel on foot over the *locus in quo;* and that the rights of the plaintiff, under his deed, were to be determined by the condition of things as they existed at the date of this deed, so far as the way in dispute is concerned.

The verdict was for the defendants, and the plaintiff excepted. Neither of the papers, plans or records referred to in the bill of exceptions, nor the argument for plaintiff, is found among the papers in the case.

Chadwick, for plaintiff.

Danforth, for the defendants, contended that the first instruction given was clearly correct. *State* v. *Wilson*, 42 Maine, 25; *Williams* v. *Cummington*, 18 Pick., 312; *Sprague* v. *Wait*, 17 Pick., 309. To the other instructions, he cited, *Kean* v. *Stetson*, 5 Pick., 492; *Bliss* v. *Deerfield*, 13 Pick., 102; 17 Pick., 309, before cited; *Small* v. *Sacramento N. & M. Co.*, 40 Maine, 274.

The opinion of the Court was drawn up by

TENNEY, C. J.—Copies are referred to in the bill of exceptions, as a part thereof, which are not before the Court. But they do not appear essential to a correct disposition of the case.

The acts complained of by the plaintiff, as a trespass of the defendants, are understood to have been performed in repairs upon a road, under municipal authority. Evidence was introduced tending to prove that the road had been long used for the travel of foot passengers, so that the public had an easement upon the land over which it passed.

The first instruction complained of was, "that if the public had acquired such right, as incident to that right, the defendants, under the direction of the town, would have the right to make such repairs by levelling the land and laying side-walks thereon, as was necessary to make the same safe and convenient for travelers on foot." This instruction is sustained by the authorities cited by the defendants' counsel.

Assuming that the road, attempted to be shown as laid out in 1852, was legally located near the one alleged to be established by *user*, the Court cannot necessarily treat the latter as discontinued thereby, when the record is silent upon that

subject, consequently the public easement would remain as before.

The land described in the deed to the plaintiff would not be affected in its boundaries by the location of the road laid out in 1852. If the northern boundary in that deed was by the road first referred to in the exceptions, and the plaintiff's land extended to the centre of that road, that boundary would undergo no change by the location of the new road. The establishment of a road cannot give title to one in land to which he had none before. *Exceptions overruled.*

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

MOSES WELLS *versus* SOMERSET & KENNEBEC RAILROAD COMPANY.

It is provided by § 5, c. 81, of R. S., of 1840, that in locating railroads, "no corporation shall take any meetinghouse, dwellinghouse or public or private burying ground, without the consent of the owners thereof," — *Held*, that the term dwellinghouse, as here used, means only the house, and includes no part of the garden, orchard or curtilage.

The right of eminent domain confers upon the Legislature authority to take private property, for public uses, when the public exigencies require it, subject only to that provision of our Constitution which exacts just compensation; and a dwellinghouse is no more exempt than any other species of real estate, when the Legislature, in the exercise of that right, determines that the public exigencies require it.

EXCEPTIONS from the ruling of RICE, J.; *also, on* MOTION *of defendants to set aside the verdict.*

This was an ACTION OF THE CASE for entering the plaintiff's close and erecting thereon a bridge. The various questions of law, upon which the Judge at *Nisi Prius* gave instructions to the jury, were argued by

Bradbury, Morrill & Meserve, for the defendants, and by

J. Baker, for the plaintiff.

It was contended by the counsel for the plaintiff, that the instruction that the defendants could not so locate upon the plaintiff's land connected with his dwellinghouse as necessarily to deprive him of the reasonable use thereof as a dwellinghouse, was correct. It was a necessary part of the dwellinghouse. R. S., of 1840, c. 81, § 5, also c. 51, § 1. Instructions more favorable would render the statute provision nugatory. The word is used either in its proper or technical sense, and either will carry with it the land necessary to its use. Bouvier's Law Dic., "*House;*" R. S., c. 1, § 4; 13 Met. 109; 2 Greenleaf's Cruise, 642; 27 Maine, 357, 360; 3 Mason, 280 and 284; 1 Sumner, 500.

From the view taken by the Court of this instruction, further reference to the other questions of law, the evidence reported and the arguments of counsel relating thereto, becomes unnecessary.

The opinion of the Court was drawn up by

CUTTING, J. — The defendants, on the trial, contended *that* the premises in controversy, at the time their road was located, were owned by one Frederick Wingate, to whom they have paid the land damages; *that* the whole width of their road was located North of the Northerly line of the plaintiff's land; consequently the dividing line of the two lots became a question of fact, and much evidence, touching that point, was submitted to the jury. The case finds that several deeds, plans and locations used at the trial are submitted, but none have been furnished, and, from the view taken, they become unnecessary.

It was claimed by the plaintiff that a portion of the road was located on his lot, and so near to his dwellinghouse as seriously to incommode him in its occupancy. Upon this point the Judge instructed the jury, "*that* the defendants could not take the plaintiff's dwellinghouse, nor so locate upon his land connected therewith, as necessarily to deprive him of the reasonable use thereof as a dwellinghouse, and, whether they

had so done, was a question for them to determine." This ruling raises a question as to the construction of R. S. of 1840, c. 81, § 5, under which the location was made, and which provides that "no corporation shall take, as aforesaid, any meetinghouse, dwellinghouse, or public or private burying ground, without the consent of the owners." The correctness of that part of the instruction which related to the dwellinghouse is not controverted, but only the subsequent part which refers to the inconvenient proximity of the road to the house.

It is contended, by the plaintiff's counsel, that the word "house" is used either in its popular or technical sense, and will carry with it the land necessary for its use; and, to this point, is cited *Bouvier's* definition, sustained by numerous authorities, that "in a grant or demise of a house, the curtilage and garden will pass," and hence, it is argued, that whatever passes under the term house is not within the defendants' control by force of their charter or any law of the State. And, further to sustain this view, R. S., c. 1, § 4, is referred to, which provides that "words and phrases are to be construed according to the common meaning of the language. Technical words and phrases, and such as have a peculiar meaning, are to be construed as conveying such technical or peculiar meaning."

If the word dwellinghouse have a technical meaning, it has also a common meaning,—such as, "a building inhabited by man." *Bouvier.* "The house in which one lives." *Webster.* We think the Legislature, in the enactment of our statutes, must have understood the term dwellinghouse as having a common and not a peculiar or technical meaning; otherwise burglary may be committed by a felonious breaking and entry in the night time into a garden or curtilage, or a civil process may be served, by leaving a copy in the debtor's garden or door yard, as his last and usual place of abode. Indeed, the plaintiff cannot contend for a technical construction without impeaching the ruling which he attempts to uphold. His doctrine would prohibit the defendants from locating upon the curtilage, the garden, and, according to *Bacon's* definition, the

orchard of the plaintiff, a doctrine which might exclude any railroad track from entering or passing through cities, villages or any densely populated place. Such has never been the cotemporaneous construction of, or practice under, the Act.

The right of eminent domain is an attribute of sovereignty, and confers upon the Legislature authority to take private property for public uses, when the public exigencies require it, subject only to that provision in our constitution which exacts just compensation. By this fundamental law a dwelling-house is no more exempt than any other species of real estate, when the Legislature shall resolve that the public exigencies require it. Hence the statute authorizing "the pulling down or demolishing any building to prevent the spread of fires," &c. Hence, "any railroad corporation may take and hold so much real estate as may be necessary for the location, construction and convenient use of said road," without the consent of the owner, except a meetinghouse, dwellinghouse, or public or private burying ground. And, we have seen that the term dwellinghouse, as used in the statute, means only the house, and includes no part of the garden, orchard or curtilage. But the ruling excepted to not only excludes the house, but also so much of the adjoining land as is necessary for its reasonable use; whereas the statute makes no such exemption. Our neighbor's landmarks may be as readily removed by an erroneous construction of a statute as by physical force, and, should the law be settled in conformity with the instruction, every railroad corporation would be left to the mercy of the owners of dwellinghouses situated in the vicinity of the locations; for, if the company have taken land without consent, necessary for the reasonable use of the house, it has exceeded its authority, as much so as though it had taken the house itself, and its daily use is a daily trespass, subjecting the corporation even to an indictment for erecting and continuing a nuisance. Every individual whose land has thus been taken might institute suits, and raise issues of fact for the jury, as to whether too great encroachments had been made upon their

dwellings. The right of eminent domain, thus exercised, would become a farce, and a railroad, to be permanent, should be located in a wilderness. And, hence, we perceive the wisdom of the Legislature in making no such exemptions—creating no such uncertainties, and laying no such foundation for endless litigation; while, on the other hand, ample provision is made to obtain indemnity for such encroachments, and it has been the uniform practice, if we mistake not, of the County Commissioners, having jurisdiction over the subject matter, to assess damages proportionate to the injury sustained. *Vide Dodge* v. *County Commissioners of Essex*, 3 Met., 382.

Exceptions sustained,—

Verdict set aside, and

New trial granted.

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

ISAAC CLOUGH *versus* JAMES F. CROSSMAN.

Where a defendant filed, as a specification of his defence, that he "will plead the general issue, and require the plaintiff to make out his case," and the plaintiff demurred thereto, as being insufficient, the demurrer was sustained, and the specification adjudged bad.

EXCEPTIONS from the ruling of HATHAWAY, J.

The writ contains several counts for distinct and different, wilful and malicious trespasses.

The defendant filed as "a specification in brief of the nature and grounds of his defence" as follows:—"The defendant will call upon the plaintiff to make out his case; he will plead the general issue." To which the plaintiff filed a demurrer, alleging that the specification and matter therein contained are insufficient to entitle the defendant to a trial, &c., and prayed judgment.

The Judge, presiding at *Nisi Prius*, adjudged the specifications sufficient and overruled the demurrer; and the plaintiff filed exceptions.

J. Baker, in support of the exceptions, argued that the specifications were not sufficient to entitle the plaintiff to a trial, within § 18 of c. 82, of the R. S. A specification is something more than the general issue. *Hart* v. *Hardy*, 42 Maine, 196. Here the specification is less, instead of more than the general issue. There is no denial of any of the allegations in the writ.

Had the plaintiff proceeded to trial on this specification, and "made out his case," what assurance had he that the defendant would not confess and avoid, would not have taken an independent ground of defence that would justify his acts, which the plaintiff would not be prepared to meet. Nothing in the pleadings would preclude him from making such a defence. The plaintiff was entitled to know, *on the record*, just what denials, avoidances and justifications he was to meet at the trial.

The legitimate way to take advantage of the insufficiency of specifications is by demurrer. R. S. c. 82, § 18.

The case was submitted without argument for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—R. S., c. 82, § 18, among other things, provides that—"in all civil actions, if the defendant appears, he shall, at least fourteen days before the next term after his appearance, file with the clerk a brief specification of the grounds of his defence, and the plaintiff may demur to such specifications, and the demurrer shall be disposed of as in other cases."

And by Rule 9 of this Court—"Parties filing specifications of the nature and grounds of defence shall in all cases be confined, on the trial of the action, to the grounds of the defence therein set forth; and all matters set forth in the writ

and declaration, which are not *specifically* denied, shall be regarded as admitted for the purposes of the trial."

In 1856, in the case of *Ames* v. *Palmer*, 42 Maine, 197, a similar statute received a judicial construction, wherein the Court adjudged that — "more was required, (referring to specifications,) than a mere statement that the plaintiff had no claim. The plea of the general issue, which could be filed at any time before the trial commenced, would indicate this."

And, now long after the promulgation of the statute, the rule and the decision, we are met, in the case at bar, with the following, so called, "specifications," viz. — "The defendant will call upon the plaintiff to make out his case; he will plead the general issue." The ruling of the Judge must have been *pro forma.*

We shall endeavor to administer the law as we find it, and especially a law so *beneficial in practice.*

Exceptions sustained.
Specifications bad.

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

WARREN LOUD *versus* AMBROSE MERRILL.

In an action upon a promissory note, though the suit is by an indorsee against an indorser, and the note is payable in another State, no damages for protest are allowed, as upon bills of exchange.

THIS was a suit by an indorsee against an indorser of a promissory note for $5000, payable at the Suffolk Bank in Boston. In disposing of the case, the clerk was inadvertently directed to allow the plaintiff damages for the protest, as upon a bill of exchange. See *Loud* v. *Merrill*, 45 Maine, 516.

Upon being informally presented again by counsel, and

argued upon that point, the Court were unanimously of the opinion, that promissory notes, though negotiated, were not within the provisions of § 35, c. 82, of the R. S. of 1857, relating to that subject; and no such damages were allowed.

J. H. Williams, for plaintiff.

J. W. Bradbury, for defendant.

JONATHAN GILMAN *versus* CHARLES PEARSON.

By the statutes of 1857, (R. S., c. 82, § 21,) it is the right of the defendant to have the time fixed by the Court, within which the plaintiff may accept his offer to be defaulted for a specified sum.

If not accepted within the time fixed, and the action is afterwards tried, the defendant will not be bound by his offer; but will be entitled to all the advantages of it, so far as it may affect the costs.

If no time has been fixed by the Court, for its acceptance, the offer is not void for that reason; and if, on trial of the action, the jury shall find that there was due to the plaintiff, at the time of the offer, a sum not greater than that for which the defendant offered to be defaulted, the plaintiff will not have costs after the offer was made, but will be held to pay the defendant his costs after that time.

And the defendant will be entitled to costs, in case the offer shall be accepted by the plaintiff before trial, though no time has been fixed by the Court for its acceptance.

EXCEPTIONS from the ruling of RICE, J.

ASSUMPSIT to recover back $200, paid towards the purchase of land, and to recover damages, for a breach of contract for the sale of the same land.

At the August term, 1859, the defendant made an offer in writing to be defaulted for the sum of $235, debt or damages, which was entered on the docket. It does not appear, from the docket, that the Court fixed any time in which the plaintiff was to accept the offer.

At the trial of the action, at the March term, 1860, the presiding Judge instructed the jury to render a verdict for

the plaintiff for so much money as he proved he had paid, with interest thereon, from the time of payment; and also, for such damages as he had suffered by a breach of the contract, if they were satisfied that the same had been broken.

The jury rendered a verdict in favor of the plaintiff for $240,52, and a special verdict, that there had been no breach of the contract by the defendant.

The plaintiff claimed costs up to the time of the trial. The defendant contended that the plaintiff was not entitled to tax his costs after the offer of default, but, that he was entitled to his costs against the plaintiff, after that time.

The clerk disallowed costs for the plaintiff after the offer of default, and allowed the costs taxed by defendant from the time of his offer; which judgment was affirmed by RICE, J., and the plaintiff excepted.

Clay, in support of the exceptions, argued that, as the verdict does not show *how* the jury came to their decision—upon what counts it was based—the Court cannot go behind the record to ascertain what particular items, claimed by the plaintiff, were allowed by the jury.

It does not appear, from the verdict, that the jury found there was not due to the plaintiff, at the time of the defendant's offer, an amount greater than that for which he offered to be defaulted.

The defendant has not so conformed to the statute, (c. 82, § 21, of R. S. of 1857,) as to entitle him to its benefits. There was no "time fixed by the Court in which the plaintiff should accept the offer." Until this is done and the plaintiff is notified of the time, by an entry upon the docket, he may disregard it altogether. Till then, the offer is incomplete; it is not such an offer as the statute contemplates.

If the defendant would take his case out of the general rule that the prevailing party shall recover his costs, he must show that he has complied, in every respect, with the statute making his case an exception to the general provision of law.

The offer, not being such as the statute required, was bind-

ing on neither party. It could have been withdrawn at any time before it was accepted. *Hunt* v. *Elliot*, 20 Maine, 312.

Danforth, contra.

The special verdict shows that the plaintiff recovered nothing for breach of contract. The general verdict, then, was for the sum of $200, claimed, and interest. If the interest on the sum offered, from the time of the offer to the time of the verdict, be deducted from the verdict, the balance will be less than the offer. The result will be the same if we deduct the interest for $200, for the same time, so that, in any event, whether the interest be deducted from one sum or the other, the plaintiff failed "to recover a sum *as due* at the time of the offer, greater than the offer."

The clause of the statute providing for a time in which the offer should be accepted is not connected with the provision as to costs, and has no effect upon its construction. The latter clause has the same effect as though the other was left out.

The opinion of the Court was drawn up by

DAVIS, J. — Before the statute was changed, in 1857, when the defendant had offered to be defaulted for a specified sum, it was the right of the plaintiff, at any time before the trial, to accept the offer, and the defendant was bound by the acceptance.

By the statute of 1857, R. S., c. 82, § 21, it is the right of the defendant to have the time fixed by the Court, within which such offer shall be accepted by the plaintiff. If so fixed, the plaintiff must accept it within the time, or the defendant is not bound by it. After the time expires, the defendant, though not bound by any acceptance, still has the advantage of the offer, so far as it may affect the costs. The object of the Legislature probably was, to offer an inducement for the settlement of controversies without a trial. The defendant may offer more than he believes to be due, in order to save the trouble and expense of preparing for trial. And if his offer is not accepted within the time fixed, he may then

prepare for trial, and have all the advantages of his offer, without being bound by it.

But if a defendant makes such an offer, and does not have the time for its acceptance fixed by the Court, it is not void for that reason. The only disadvantage he thereby incurs is that of having his offer accepted at any time before trial. If not accepted, the offer has the same effect in one case as in the other. If the plaintiff does not recover a sum greater than that offered, he is entitled to no costs accruing after the offer is made, but must pay costs to the defendant.

Exceptions overruled.

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

JOSEPH W. PATTERSON *versus* SAMUEL STODDARD.

The defendant, under a verbal agreement to purchase certain real estate of the plaintiff, went into possession thereof. He failed to pay at the time stipulated, and afterwards voluntarily abandoned the premises. Though there was no agreement to pay rent, it was held that he sustained the relation to the plaintiff of tenant at will.

The occupation having been beneficial to him, the law will imply a promise on his part, when he took possession, to pay for the use of the premises, if he failed to fulfil his part of the contract.

In such case, assumpsit for use and occupation is the appropriate remedy.

REPORTED by RICE, J.

THIS was an action of ASSUMPSIT for use and occupation of certain real estate.

There was no evidence in the case except the testimony of the plaintiff; the material part of which was, that in the spring of 1853, he made a verbal bargain to sell the defendant a farm which he owned in Hallowell. The price agreed on was to be paid in two or three months. At the expiration of the time, the defendant could not pay. He remained in possession two years; cut about twelve tons of hay each

year. A reasonable rent for the two years would be $150. The defendant voluntarily abandoned the place in January, A. D., 1856, when the plaintiff took possession of it.

If, upon the evidence, the Court, exercising jury powers, should be of opinion that this action is maintainable, the defendant is to be defaulted, to be heard in damages; otherwise the plaintiff is to become nonsuit.

Vose, for the plaintiff, argued that this form of action was the only remedy of which the plaintiff could avail himself. In all essential particulars, it was identical with the case of *Gould* v. *Thompson*, 4 Met., 224.

Stinchfield, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The defendant made a verbal contract with the plaintiff for the purchase of certain real estate, and, with his permission, went into the occupation thereof. Neither party was liable to the other for not performing his part of this contract.

After remaining in possession two years, the defendant voluntarily abandoned the premises; and the plaintiff has brought this action of assumpsit for the use and occupation thereof.

There was no agreement on the part of the defendant to pay rent. And if he had been ready to pay for the place, and the plaintiff had refused to convey it to him, he would not be liable for the use and occupation of it. But he sustained the relation to the plaintiff of tenant at will; and the plaintiff was ready to convey the premises to him, but he neglected to pay therefor. The occupation was beneficial to him; and, in order to do justice between the parties, the law will imply a promise on his part, when he took possession, in case he should fail to fulfil his part of the contract, to pay for the use of the premises. The defendant must therefore be defaulted, to be heard in damages.

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

STATE *versus* AUGUSTUS P. STEVENS.

Under statute of 1858, c. 33, § 14, on a warrant authorizing a search for intoxicating liquors, kept for illegal sale, and the arrest of the keeper, when such liquors are found, the fact that such liquors having been found is to be proved before the magistrate by competent evidence under oath, and not by the return of the officer.

Under § 20 of the same statute, if the officer is prevented from seizing the liquors by their being destroyed, he may arrest the keeper, in which case he must make return on the warrant of his being so prevented, and how, and, as near as may be, the quantity destroyed; but, before the magistrate, these facts are to be proved by evidence under oath, and not by the return.

It is not necessary that the officer should make return of the fact and manner of the destruction of the liquors, before arresting the keeper.

Where an officer returned, on his warrant, that he found "a demijohn containing one gallon, more or less, of what I called St. Croix Rum," which the keeper destroyed before he could seize it, whereupon he arrested the keeper and took him before a magistrate for trial; the person who, by violence, prevented the officer from seizing the liquor, and ascertaining its quality with certainty, cannot object that his return is not sufficiently certain.

THIS was a complaint made before a justice of the peace, on which a warrant was issued in due form, directing the sheriff or other officer to search the premises of the defendant in Waterville, for intoxicating liquors, intended for sale in this State, in violation of law, "and, if there found, to seize and safely keep the same, and to apprehend the said Augustus P. Stevens forthwith," and bring him before a proper magistrate, "to answer to said complaint, and to do and receive such sentence as may be awarded against him." The officer executed the warrant, and made the following return:—

"Kennebec, ss.—June 14, 1859. By virtue of this precept, I have entered the within named premises, and therein searched for intoxicating liquors, and found one demijohn, containing one gallon, more or less, of what I called St. Croix rum; also sundry bottles, jugs, tumblers, decanters and barrels; but, in attempting to remove said demijohn, the within named Stevens attempted to prevent me from so doing, and the same was broken in the scuffle, consequently I am unable

to return said demijohn and liquor before the justice. I have also arrested the within named Stevens, and, on this fifteenth day of June, have him before J. H. Drummond, Esq., one of the justices in and for the county of Kennebec.

"C. R. McFadden, *Deputy Sheriff.*"

On the trial before the magistrate, Stevens was convicted, and appealed. The appeal was entered and tried, and a verdict was rendered affirming the decision of the magistrate.

The counsel for the defendant submitted a motion in arrest of judgment, for the following reasons:—

1. Because, as appears from the complaint, warrant, and officer's return thereon, the magistrate had no jurisdiction of the case, so far as the defendant was concerned.

2. Because the officer had no authority, by law or by the warrant, to arrest the defendant or hold him for trial, unless he should first find, in the premises searched, intoxicating liquors; and his return does not show that he found any such liquors there, nor any facts authorizing the arrest.

3. Because the defendant was by force illegally dragged before the magistrate, and put upon trial, in violation of his just rights, as appears by the papers in the case.

The motion was overruled by the presiding Judge, RICE, J., and the defendant excepted.

J. M. Meserve, in support of the exceptions.

The offence of keeping intoxicating liquors, with intent to sell them contrary to law, is within the jurisdiction of a justice of the peace; but the jurisdiction does not attach unless such liquors are found in the place searched. No liquors being found, the justice has no power over any person charged with keeping them. Stat. 1858, c. 33, § 14, clauses 1 and 2. Nothing is to be presumed in favor of his jurisdiction.

Neither had the officer authority to arrest Stevens, no liquors having been found. The warrant does not direct him to make any arrest unless liquors are "there found." He searched the place designated, and found no liquors. His return is the only evidence of what he found. In that, he

no where says he found any, though he found "a demijohn, containing one gallon, more or less, of what he called St. Croix rum." There is no evidence that it was rum, although he called it so. If he chose to "call" water or vinegar St. Croix rum, that does not make it so. Such a return would not render him liable for a false return, although the liquor found was proved to be water.

It must appear, affirmatively and clearly, by the officer's return, that the intoxicating liquors were found, before the defendant could be arrested or tried. Section 20 does not authorize the defendant's arrest, unless the liquors described in the complaint and warrant are found and destroyed. Here no liquors are shown to have been found.

C. Danforth, County Attorney, contra.

Although the officer could not arrest the defendant, until he had found intoxicating liquors on the described premises kept for illegal sale, his return is not the proper evidence of the fact. It is one of the ingredients of the crime, and to be proved by testimony before the magistrate. The officer is to act upon the facts as he finds them; the magistrate as they are proved. The officer returns that he has found liquors he supposes to be intoxicating. If they are proved before the magistrate to be so, he acts accordingly. The whole question turns on the proof before the magistrate; and with that we have nothing to do here, as the verdict is conclusive. *State* v. *Robinson*, 33 Maine, 564.

Section 14 of the statute confirms this view, by requiring that the Court, before conviction, shall be of opinion, from the evidence adduced, that the liquors were kept for illegal sale. The officer's return would be no evidence before the magistrate of such a fact.

The officer did not seize any liquors. He was prevented by the defendant's destroying such as he found. Section 20 provides for such cases. If this section requires the officer to make return of the facts, he has done so. The liquors being destroyed, the officer could not return them, but did return

the facts. It was then for the magistrate to ascertain from competent testimony, whether the liquors were intoxicating, as well as other facts.

The warrant directed the officer, after finding the liquors, to do two things, to seize the liquors, and to arrest the keeper. The liquors having been destroyed, he could do but one, and this he did. This course was authorized by the statute, § 20. The law puts the destruction in place of the seizure.

But, in this stage of the case, the Court has nothing to do with the officer's return. The judgment is not in any degree founded upon it. Here is a legal warrant, with all the necessary allegations to constitute a crime; a conviction has been had before a magistrate, an appeal taken, and a verdict rendered on trial of the appeal, showing that the allegations in the warrant were proved. The appeal waives all informalities before the justice. *Commonwealth* v. *O'Neil*, 6 Gray, 345; *State* v. *Gurney*, 37 Maine, 156. It is now too late to go behind the verdict. *State* v. *Hobbs*, 39 Maine, 212.

The opinion of the Court was drawn up by

Rice, J. — The complaint and warrant are based upon § 14, of c. 33, of the laws of 1858, "for the suppression of drinking houses and tippling shops," and are drawn with technical accuracy. Under the provisions of this section, the officer holding such warrant was authorized to enter and search the premises described, and, in case liquors were found therein, to arrest the owner or keeper, and have him forthwith before the magistrate for trial.

The right of the officer to arrest the owner or keeper depends upon the fact, that the liquors described in the complaint are found in his possession in the place to be searched; but that fact is to be proved before the magistrate by competent evidence, under oath, and not by the return of the officer.

Section 20 of the same chapter also authorizes the officer to arrest the alleged owner or keeper of liquors, if he is prevented from seizing them by their being poured out or

otherwise destroyed, and he is also to make return upon the warrant that he was prevented from seizing said liquors by their being poured out or otherwise destroyed, and to state in his return, as near as may be, the quantity that was poured out or destroyed. This return, however, is not the evidence on which the owner is to be tried. The fact, that the liquors were poured out or destroyed, furnishes a basis which authorizes the arrest, which fact must be proved, as other facts, by competent testimony on oath.

But it is contended that the return must first be made preliminary to and as authority for the arrest. Such is not the requirement of the law, nor would it be a reasonable provision. The officer, with a legal warrant in his hands, is making search for liquors described in his precept. His object is to seize such liquors, if found, but he is prevented by their destruction before his face by their owner or keeper. His duty then is, at once, to arrest the keeper and have him before the magistrate, and his return will give the reason why he does not also have the liquors in custody, to wit: because they have been destroyed.

It is further objected that the officer does not return that he found any intoxicating liquors on the premises of the defendant, but that he found a "demijohn containing one gallon more or less, of what I called St. Croix rum;" whereas he should have stated in affirmative language, if such were the fact, that he found intoxicating liquors.

Perhaps the return is not in the most approved language. But, as we have already seen, the rights of the defendant do not depend upon the return, but upon other evidence; and, besides, it is not for the defendant, who, by violence, prevented the officer from seizing the liquors found on his premises by their destruction, and thereby rendered it impossible for him to determine with certainty their quality, to object that his return is not sufficiently certain. He cannot be permitted thus to set the officers of the law at defiance, and then come coolly into a court of justice, and cavil at, and take advantage of his own wrongful acts. If he will volun-

tarily, and by violence, obstruct and resist the ministers of the law, in the legal discharge of their duties, he must not complain if he is dragged before the constituted tribunals to answer for his unlawful conduct.

Exceptions overruled, and
Judgment on the verdict.

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

MARY W. SOUTHWICK *and others versus* PRINCE HOPKINS *and others.*

In a suit on a bond in the name of joint obligees, a paper under seal, signed by one of the plaintiffs, denying any authority for the use of his name in the suit, and forbidding its further prosecution, but containing no words showing an intention to discharge the cause of action, will not operate as a release.

Where the party signing the paper had, previous to the commencement of the suit, assigned all his interest to the other obligees, they had a right to use his name in the action, and he could not interfere for any other purpose than to require indemnity against the costs.

ON REPORT of the evidence by RICE, J.

DEBT on a bond. PLEA *non est factum,* with a brief statement, setting forth a paper signed by Mary W. Southwick in bar of the further prosecution of the suit.

The plaintiffs introduced the bond declared on, bearing date June 2, 1852, given by the defendants to the plaintiffs, binding the obligors, in consideration that the obligees had released to them all claim to the accounts, notes and demands of the late co-partnership of Southwick & Hopkins, and had paid the sum of $2500, to said Hopkins, to indemnify the obligees against all demands due from the said firm. The obligees were the widow and daughters of Jacob Southwick, late co-partner in the firm, but now deceased, and Mary W. South-

wick was his administratrix. It was admitted by the defendants that the conditions of the bond had been broken prior to the commencement of the suit.

In defence, the defendants introduced the following instrument, which is the same referred to in their brief statement:—

"Whereas I have this day been informed that an action has been brought in my name, and that of Eliza W. Longfellow, Maria Colburn and Wales R. Stockbridge, against Prince Hopkins, Edward S. Weeks and Eben Hawes, which action is made returnable to the next term of the Supreme Judicial Court, to be holden at Augusta, within and for the county of Kennebec, on the third Tuesday of August next:—

"This is to notify all whom it may concern that I never authorized or gave my consent in any way or manner to the commencement of said action, and I hereby forbid the same from being any further prosecuted in my name.

"Given under my hand and seal, at Vassalborough, the 28th day of July, A. D., 1858. "M. W. Southwick. [Seal.]

"Attest: Josh. Perkins."

The plaintiffs then introduced an indenture, dated June 2, 1852, between Mary W. Southwick, one of the plaintiffs, of the first part, and Eliza W. Longfellow, Maria S. Colburn and Margaret T. Stockbridge, the other plaintiffs, and their husbands, N. Longfellow, A. Colburn and W. R. Stockbridge, of the second part, by which the said Mary W. Southwick released to the other parties all her right to dower, and all other right and claim in the estate of her deceased husband, Jacob Southwick; in consideration of which, the parties of the second part agree to secure to her, for life, the homestead of the deceased in Vassalborough, and also ten acres of woodland, and to pay her six hundred dollars a year, to secure the payment of which $10,000 was to be deposited with certain named trustees.

It was admitted by the defendants that said Eliza W. Longfellow, Maria S. Colburn and Margaret T. Stockbridge, in addition to the $2500 mentioned in the bond, had paid of the debts of the firm of Southwick & Hopkins, the further sum

of from $1600 to $2000, which was in judgments recovered against the administratrix, and that Mary W. Southwick had paid no part of said debts.

The case was taken from the jury, and reported to the full Court, with the agreement that if, upon so much of the evidence as was legally admissible, the action could be maintained, the defendants were to be defaulted and to be heard in damages; otherwise the plaintiffs to be nonsuit.

A. Libbey, for the plaintiffs.

The admission of the breach of the conditions of the bond shows that the plaintiffs have a right of action.

The paper signed by Mary W. Southwick is no defence. It is not a discharge of the right of action, nor an accord and satisfaction. Mrs. Southwick merely denies that she authorized the suit, and forbids its further prosecution in her name. If available at all to the defendants, it is too late after pleading the general issue.

Mrs. Southwick has no interest in the bond in suit. The bond was given to secure the estate of Jacob Southwick against liability for the debts of the firm of Southwick & Hopkins. On the day of its date, Mrs. Southwick assigned to the other plaintiffs all her interest in the estate. They have paid all of the debts of the firm which the estate has had to pay. Mrs. Southwick has paid none of them. The assets of the estate assigned to them have thus been reduced some $2000, by means of the defendants' not fulfilling their contract. Mrs. Southwick had no authority to discharge the suit. The other plaintiffs are the parties in interest, and have a right to use her name to enforce their rights. *Lunt* v. *Stevens*, 24 Maine, 534.

R. H. Vose, for the defendants.

The paper signed by Mrs. Southwick is technically a release. 7 Com. Dig., tit. *Release*, A (1.) A release may be by express words, or act in law. Co. Lit., 264. No particular words are required. Being under seal, a valid consideration is implied.

Immediately after she knew of the commencement of the action, she gave the defendants a paper, denying having authorized the use of her name, and forbidding the further prosecution of the suit. This she had a legal right to do. A release under seal discharges all the obligors in the bond. *Walker* v. *McCalloch*, 4 Greenl., 421. In *Lunt* v. *Stevens*, 24 Maine, 534, the paper given was similar, but was held insufficient, because *not* under seal.

In England, where a nominal plaintiff, or one of several plaintiffs, releases an action *in fraud* of the party in interest, the courts set aside the release. In Massachusetts, they have never assumed such power. *Eastman* v. *Wright*, 6 Pick., 323; *Wilson* v. *Mason*, 5 Mass., 411. If one party to a contract refuses to join in a prosecution, the others have a remedy against him by a special action on the case.

It is well settled that a release by one of the joint obligors discharges the whole.

The opinion of the Court was drawn up by

MAY, J.—This action is brought in the name of four plaintiffs, the obligees of the bond declared on, a breach of which is admitted. Mary W. Southwick, one of the plaintiffs, had no knowledge of its commencement, and, immediately after, under her hand and seal, forbid its further prosecution in her name. It is now contended that the paper which is pleaded by the defendants operates as a release of the action. The paper must receive a construction according to its manifest intent. It does not appear to have been made to the defendants, although it may be regarded as containing a notice to them that the action was brought without the authority or consent of this particular plaintiff. Its principal object seems to have been to direct the other plaintiffs to surcease the suit. It contains no words showing an intention to discharge the cause of action. In this respect, it is entirely unlike the writing relied upon in *Lunt* v. *Stevens*, 24 Maine, 534, cited in defence. In that case the paper, if it had been under seal, might have operated as a re-

lease of the action, because it purported on its face "to be a discharge of the same." It is true that a release need not contain any express or technical words to that effect. It will be sufficient if the instrument, being under seal, manifests a purpose or object which can be effectuated only by construing it as a release. The paper relied on in this case manifests no such purpose. It is not a release of either the bond or the suit.

On the contrary, when we consider the relation of these plaintiffs to each other, and that the protesting plaintiff had, in effect, transferred to the other plaintiffs her entire interest in the bond, by allowing them to pay all the money now sought to be recovered, we cannot doubt that the purpose of the paper was to protect the party signing it against any liability for the costs which might arise in the suit. Such a construction is in harmony with the equitable rights of the parties. She only forbids the further prosecution of the suit "*in her name*," and this limitation may indicate an intention on her part not to interfere with the rights of the other plaintiffs to proceed in their names. The three plaintiffs who instituted the suit, having, in consequence of the existing arrangements between them and the other plaintiff, paid all the debts of the firm of Southwick & Hopkins, and the bond having been given to indemnify them against said debts, were alone interested in the fund to be recovered; and, for the purpose of recovering the same, may well be regarded as the assignees of the bond.

The law recognizes assignments of choses in action, and, for the protection of the equitable rights of the assignees, authorizes them to bring an action in the name of the assignor; and the assignor cannot lawfully interfere with the prosecution of the suit, if at all, certainly for no other purpose than to require indemnity against the costs; and the law protects these equitable rights so far that even payments to the assignor, after notice of the assignment, constitutes no defence to such a suit. *Eastman & al.* v. *Wright & al.*, 6 Pick., 316.

We are, therefore, of opinion, in view of all the facts in the case, that this action can be maintained; and, according to the agreement of the parties, the defendants are to be defaulted, and heard in damages before the Judge at *Nisi Prius.*

Defendants defaulted, and heard in damages.

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

CITY OF AUGUSTA *versus* INHABITANTS OF CHELSEA.

In an action by one town against another for supplies furnished to a pauper, the defendant town cannot file in set-off a demand against the plaintiff town for the support of paupers belonging to the latter.

A demand for the support or relief of paupers originates solely in positive provisions of the statute, and has in it none of the elements of a contract, express or implied.

THIS was an action to recover for supplies furnished to certain paupers belonging to Chelsea. The liability of the defendants was admitted.

The defendants filed in set-off an account against the plaintiffs for supplies furnished to paupers of Augusta. The settlement of the paupers, their necessities and the supplies claimed to have been furnished, were admitted.

It appeared in evidence that supplies were furnished by Chelsea to one Bruce, a pauper of Augusta, commencing in January, 1857, in which month due notice was given by the overseers of the poor of Chelsea to those of Augusta.

In August, 1857, an action was brought by Chelsea against Augusta to recover for the supplies furnished, which was settled in August, 1858, and the amount sued for paid.

In the mean time the supplies to Bruce, by Chelsea, had continued from time to time, but no new notice had been given.

There was much evidence as to an alleged verbal promise, on the part of the overseers of the poor of Augusta, or some of them, to pay for the supplies last mentioned, at or before the settlement of the action brought by Chelsea. There was also testimony tending to show verbal notice of the supplies furnished to Bruce, in conversation between the two boards of overseers.

The case was submitted to the full Court, on report of the evidence by RICE, J., with the agreement that, if the account filed in set-off is admissible, the two accounts should be adjusted by the clerk; if not, the account in set-off was to be withdrawn, a default entered, and the defendants heard in damages before the clerk.

J. Baker, for the plaintiffs, argued that a set-off of any kind cannot be allowed in actions not founded on judgment or contract. Stat. 1821, c. 59, § 19; 1841, c. 115, § § 24, 28, 32; *Pierce* v. *Boston*, 3 Met., 520. In R. S., 1857, c. 82, § 46, the language is changed, but not the meaning. *Hughes* v. *Farrar*, 45 Maine, 72. If any set-off can be allowed in actions of this nature, the one filed is inadmissible. R. S., c. 82, § 47; *Hall* v. *Glidden*, 39 Maine, 445. The support of paupers is a liability created by statute, which statute provides the remedy. R. S., c. 24, § § 24–29. The remedy is by notice and action within two years, and not by set-off. When a statute creates a liability, and furnishes the remedy, no other remedy can be used. *Hovey* v. *Mayo*, 43 Maine, 322; *Commonwealth* v. *Howes*, 15 Pick., 233; *Boston* v. *Shaw*, 1 Met., 130; *Brown* v. *Lowell*, 8 Met., 172; *Baird* v. *Wells*, 22 Pick., 212; *Kelton* v. *Phillips*, 3 Met., 62. But if this account in set-off could be allowed in any circumstances, it is inadmissible in the present case, for want of the statute notice. R. S., c. 24, § 24. After suit brought for supplies to the same paupers, the present supplies were furnished, but no new notice given. This neglect bars the claim. *Hallowell* v. *Harwich*, 14 Mass., 188; *Walpole* v. *Hopkinton*, 4 Pick. 358.

S. Lancaster, for the defendants.

The statute of set-off, being intended to prevent the necessity of cross actions, should have a liberal construction. *Richards* v. *Blood*, 17 Mass., 66; *Witter* v. *Witter*, 10 Mass., 224.

The account filed in set-off is based on a contract implied by law, and made express by agreement. The plaintiffs, by the conduct and declarations of their officers, waived the statute notice. *Embden* v. *Augusta*, 12 Mass., 307; *Shutesbury* v. *Oxford*, 16 Mass., 102; *York* v. *Penobscot*, 2 Greenl., 1; *Unity* v. *Thorndike*, 15 Maine, 182.

The counsel then reviewed the law of set-off, to show that the Legislature had been disposed to favor and extend the privilege, commencing with 6 Geo. 2, c. 2, followed by stat. 1784, c. 28, § 12; 1793, c. 75, § 4; 1821, c. 59, § 19; 1841, c. 115, § 27; 1857, c. 82, § 47.

The opinion of the Court was drawn up by

DAVIS, J.—The demand of the plaintiffs against the defendants is not disputed. The defendants, having a demand against the plaintiffs, which is also for the support of paupers, have filed it in set-off in this action.

No demand can be filed in set-off unless it is founded on a judgment, or an express or implied contract. The demand of the defendants in this case, according to the testimony, does not rest upon any special contract. They claim to recover on the ground that they bring themselves within the statute provisions. Such a demand, for the support or relief of paupers, is not founded upon a contract. The liability originates solely in positive provisions of statute, and has in it none of the elements of a contract, express or implied.

According to the agreement of the parties, the account in set-off is to be withdrawn, and the defendants are to be defaulted, to be heard in damages before the clerk.

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

THEODORE RIPLEY *versus* WILLIAM D. CROOKER *& als.*

In a contract between A, "of the one part," and B, C and D, "of the other part," in which A agrees to build a vessel of certain dimensions, and B, C and D to pay certain sums at stipulated times for eleven-sixteenths of the vessel, the liability of the parties of the second part is joint, and not several.

Words set against the signatures of B, C and D, indicating the proportional share of each in the vessel, will not affect their joint liability, nor vary the construction of the contract.

Proof of a custom in the vicinity for persons building a vessel together, each to be responsible for his own share only, is inadmissible to modify a written contract.

Payments made by one of the part owners towards his share, and receipted for as such by the builder, the receipts not being under seal, will not sever the indebtedness, nor affect their joint liability for a balance unpaid.

The rule that one part owner of a vessel aggrieved by another must resort to a bill in equity for redress, applies only to cases relating to her earnings or disbursements, where no settlement has been made or account stated between them.

An action at law may be brought by one party to a contract for the building of a vessel, against another party to it, for a breach thereof, although the plaintiff and defendant are to be part owners or tenants in common.

ON AN AGREED STATEMENT OF FACTS.

ASSUMPSIT on an account annexed, and for a balance alleged to be due jointly from the defendants to the plaintiff, for building five-eighths of the ship Adrianna in 1854–5, under the following contract:—

"Memorandum of agreement made and concluded upon by Theodore Ripley, of Hallowell, Maine, on the one part, and William D. Crooker, Samuel Swanton, 2d, and David Crooker and Isaac Preble, all of Bath, on the other, to wit:—

"The said Ripley agrees to build and complete a good ship of about eleven hundred tons, to be built at Hallowell, and to be commenced the next week and completed ready for sea as soon as possible, to be rigged at Bath; and it is binding on him to be particular to charge all the bills, which he pledges to do in good faith, to arrive at her cost; and for his services is to receive one dollar each register tonnage, with two

hundred dollars for use of yard, steambox, and yard tools and shores, &c., and is to receive five thousand per month on eleven-sixteenths, commencing payment the first day of July next, and so on monthly, not to exceed five payments, and when completed the balance to be paid in five and ten months, reckoning interest on rigging bill, iron bill, and Kendall, Richardson & Co.'s bill, should these bills become due previous to the five and ten months payments, no interest to be calculated otherwise but at the bills. And the second parties agree to pay the said Ripley five thousand dollars per month, commencing the first of July, and so on monthly, not to exceed five payments, to the ship's completion ready for sea, when her cost by the bills is to be estimated, and the materials to be bought at the best advantage for cash, save the iron bill, and rigging, and Kendall, Richardson & Co.'s bills, which, if they become due previous to five and ten months after her completion, the interest on said bills are to be added to the balance to be paid in notes at five and ten months—all other interest not to be reckoned.

"Recapitulation:—Payments, five thousand dollars per month to her completion ready for sea, say $25,000, and the balance in notes at five and ten months; not to be more than five payments in cash monthly.

"Three-eighths,	William D. Crooker.
"One-eighth,	Samuel Swanton, 2d.
"One-eighth,	David Crooker.
"One-sixteenth,	Isaac Preble.
	Theodore Ripley.

"Witness to all the signatures:—Howard P. Wiggin.

"Bath, May 31, 1854."

The plaintiff introduced his own deposition, testifying, amongst other things, that he commenced building the Adrianna immediately after the contract was executed, and completed her on or before March 20, 1855. The whole cost was $70,795,93, a fraction over $65,43 per ton, government measurement. He made up an account of the cost, and exhibited it to the defendants, and they approved it, but said

they were short of funds, and would pay as soon as they could. When the ship was about finished, the owners all came on board at Bath, and witness delivered her to them, and they accepted her. At first, the defendants made their payments according to the contract, but afterwards failed to do so. The witness proceeded to state the amount paid on each of the shares of the defendants, and the amount due on each. Witness further stated that he was put to great inconvenience by the defendants not paying according to the contract.

The defendants introduced the deposition of Samuel Swanton, 2d, who testified, amongst other things, that he agreed to build one-eighth of the ship Adrianna; that Ripley called upon him from time to time to make payments on account of one eighth, and gave him receipts for the payments made; and that Ripley never claimed of him pay for any more than one-eighth. He further testified, that, so far as he knew, it was a custom on the Kennebec river, for each part owner of a vessel to build his part; that he did not know of any other custom; that it was the understanding when this ship was built; that it was talked over when the contract was made, and each one was to pay his own bills, and no one have any thing to do with any part except his own; and that the ship was not built according to the terms of the contract as to seaworthiness.

They also introduced the deposition of David Crooker, whose testimony was similar to that of Swanton with regard to the understanding, the payments made, the receipts given, and the custom on the river in building vessels where there are several owners.

The defendants further introduced six receipts given by Ripley to Swanton, D. Crooker and W. D. Crooker for their respective payments, the payments made by Swanton and by D. Crooker being described as "on account of his one eighth," and those by W. D. Crooker "on account of his three-eighths," of the ship which Ripley was building.

It was agreed, that, if the Court was of opinion that the action could be maintained in its present form, the defend-

ants should be defaulted, and an auditor appointed to ascertain and report the damages; but, if not, a nonsuit was to be entered.

A. G. Stinchfield, for the plaintiff, argued that the contract between Ripley and the defendants was either joint and several, or joint, and that each of the defendants was liable for the full amount due. In joint contracts, as well as joint and several, each one of the parties is liable for the undertaking of all, and execution obtained in an action against all may be satisfied from the property of either. *Ward* v. *Johnson*, 13 Mass., 148; *Robertson* v. *Smith*, 18 Johns., 477; 1 Johns., 319. To separate the responsibility, and apportion the liability of the parties, distinct words must be used to that effect. *French* v. *Price*, 24 Pick., 13; 7 Maine, 171.

In the case at bar, the contract provides for entire payments of $5000, per month, and not for proportional payments by each party.

If the undertakings of the defendants were separate, one or more of them might fail to pay, and the contractor be obliged to build the ship for the rest at a heavy loss. Is it to be supposed that he was to finish the vessel in eighths or sixteenths? Could he say to a party, I will finish your sixteenth, but must leave the balance unfinished?

The contract warrants the construction given, and cannot be enlarged or varied by parol testimony. 2 Kent's Com., 757, 9th ed. If ambiguous, the language is to be construed most strictly against the parties using it. Bacon's Maxims, No. 3; 2 Kent, 758; *Carlton* v. *Tyler*, 16 Maine, 392; *Agricultural Bank* v. *Burr*, 24 Maine, 265.

In answer, it is alleged that the numbers set against the defendants' signatures limit their liability. But the limitation is, at most, but an implied one, and not such an explicit statement in the body of the contract as should affect other parties than themselves.

As to the hardship of the case, it is more equitable that the joint owners should suffer for each other's default, than to throw the whole burden upon the builder.

The defendants having accepted the ship, it is now too late to allege unseaworthiness. If the plaintiff did not build it according to the contract, the defendants had the option to rescind the contract, or to accept the performance with its defects. Having chosen the latter course, they are liable for the full amount stipulated to be paid. *Everett* v. *Gray*, 1 Mass., 101. The contract must be rescinded in reasonable time, if at all. 26 Maine, 350. Only a party guilty of no default or violation is entitled to rescind a contract. Story on Contracts, 1080, 3d ed.

If the defendants have any claim for reduction, it must be sought in a special action of the case.

It is said that the plaintiff, being a joint owner, should have brought a bill in equity. It is true that joint owners cannot ordinarily sue each other, except on liquidated demands; but they may waive their ordinary relations, and bind themselves by special agreement, and, on special promises, may sue each other. Abbott on Shipping, 780. The present suit is on a special written contract.

The contract is to explain itself. The acceptance of proportional payments from the several defendants did not limit their liability, if the plaintiff did not agree so to accept them as to discharge each from further liability as his share was paid. The testimony does not show such an acceptation. Ripley accepted payments as the several owners made them. It was not for him to say how they should pay, if the payments were actually made.

A contract cannot be varied even by the acts of the parties themselves. Once joint, it is always so, unless changed by an instrument as formal as itself, executed by all the parties. The words annexed to the signatures are no part of the contract, but simply a memorandum made by the signers for their own benefit.

The contract contains in itself all that is necessary to make it certain and unambiguous.

If inadmissible evidence has been received, the Court, in a case submitted, may reject it, and regard only such as is

legally admissible. The rules, as to the admission or exclusion of evidence, apply only to jury trials, where inexperience may be misled by testimony illegally received.

F. D. Sewall, for David Crooker.

The contract is not joint, but several. If joint on its face, by the contemporaneous acts of the parties to it, it was severed, as appears by Ripley's deposition, and the receipts put into the case. It was entered into and performed with reference to a well established custom on the river with regard to the building of vessels by part owners.

The writing is loosely drawn, but taken in connection with the proportions prefixed to the signatures, it shows the separate liability of the defendants. From the body of the instrument, the rights and obligations of the parties to it cannot be determined. Apparently it provides for building the whole ship for the defendants; but this is not claimed by the plaintiff. The proportions are not stated in the instrument, but are explained by the signatures with the proportions prefixed, which alone show the true relation of the parties.

This is at most a simple contract, and to be construed according to the intent of the parties. Chitty on Contracts, 75, 84; Com. Dig., Title, Agreement; *Littlefield* v. *Winslow*, 19 Maine, 394; 2 Parsons on Contracts, 14.

The undertaking of the parties of the second part to pay $5000, per month, is apparently joint, but is explained and modified by the shares prefixed to the signatures. The whole is equivalent to an arrangement to pay so much in the proportions set against their names.

The plaintiff in his deposition admits, in substance, that he kept separate accounts with the part owners, and his statement of the balance due on each share shows that he did not consider them jointly liable for the whole unpaid balance. The receipts in the case confirm the same view.

If the contract was originally joint, the parties have severed it by treating it uniformly as several, thereby discharg-

ing the joint liability. *Holland* v. *Weld*, 4 Maine, 255; *Baker* v. *Jewell*, 6 Mass. 460.

The contract being ambiguous and obscure, may be explained by the testimony as to how it was treated by the parties, and as to the custom on the river of each part owner being liable solely for his share. *Macy* v. *Insurance Co.*, 9 Met., 363.

The plaintiff has mistaken his remedy, which is equity, and not law. The parties are all part owners, and can maintain no action against each other, unless for liquidated damages. 3 Kent's Com., 213; *Dodge* v. *Hooper*, 35 Maine, 536; *Maguire* v. *Pingree*, 30 Maine, 508; *Hardy* v. *Sproule*, 33 Maine, 508.

The action is no more based on a special promise, than if one of the part owners was sailing the vessel under an authority from the others. The aggrieved party must resort to a suit in equity.

Tallman & Larrabee, for W. D. Crooker, argued that the manner in which a contract is executed must be considered, in giving construction to its provisions, and that the action of the several parties under the contract explains the intentions they had in its inception.

The opinion of the Court was drawn up by

MAY, J. — The contract set forth in the writ, is of two parts. In its direct terms, it is between the plaintiff "on the one part," and the defendants "on the other." Its language is too unequivocal in its meaning to admit of any other construction than that of a joint undertaking, on the part of the defendants, to pay for the eleven-sixteenths of the ship built for them, at her cost, in the manner and at the times stipulated in the contract. The contract contains no words fairly indicative of a several liability by each of the defendants for particular parts of the ship; but, on the contrary, the defendants together agree to pay the entire price which was to be paid, for that portion of the ship which they together

agreed to take, and which the plaintiff agreed to build for them.

The fact, that words indicative of the proportional part of the ship which each defendant was to take were set against the name of each, does not change the construction of the contract, nor in any way affect the joint liability of the defendants. Such words do not sufficiently show an intention to limit the liability of each defendant to his proportion of the ship, and cannot, therefore, control the general language used in the contract, so far as the plaintiff is concerned. They may, however, like the word surety or sureties appended to some of the signatures upon a note, serve to show the relations subsisting between the parties of the second part of the contract; but they cannot be permitted to subvert, or even modify the unambiguous terms of the contract, as made by the parties themselves.

It is contended, in defence, that the terms of the contract are modified by the proof in the case, tending to show the existence of a custom on the Kennebec river for persons engaged in the building of vessels each to be responsible only for his own share. In the case before us, the contract is in writing, and there is no proof that any of its words are by usage or custom understood to be used in any other than their ordinary sense. The custom which is attempted to be proved does not reach this case. To allow such a custom to modify the written contract of the parties would be to set it up against their express agreement and manifest intentions, which the law will not permit. See *Metcalf* v. *Weld & al.*, just decided in Massachusetts, and reported in the Law Reporter, vol. 23, No. 9, p. 561.

Again, it is said that both the plaintiff and the defendants have always treated this contract as several and not joint; and it fully appears from the evidence that payments have been made by the defendants severally, and receipts given by the plaintiff therefor, which clearly indicate that such payments were made by each defendant towards his particular share of the ship, and were so received. If the contract was doubtful

in its construction, such facts might well aid the Court in determining the intention of the parties in making it; but, in a case like this, where there is no ambiguity in its terms, it is not perceived how the subsequent conduct of the parties can change the plain meaning of the contract, or take away the appropriate remedy thereon, unless such conduct amounts to a severance of the joint liability, or consists of acts which may fairly operate as a release from such liability. But, where several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt. Such receipt, not being under seal, is neither a severance of the indebtedness, nor an effectual release; and, notwithstanding such receipt, the parties to the contract will remain jointly bound, to the extent of what is unpaid, in the same manner as if no such specific payment had been made. *McAllister & al.* v. *Sprague & al.*, 34 Maine, 296.

It is further urged that, notwithstanding the contract may be joint, the only remedy upon it is by a bill in equity. We do not so understand the law. The fact that the contract relates to the building of a ship, of which the plaintiff and defendants are to be tenants in common, does not deprive the plaintiff of his remedy by an action at law for such breaches thereof as may be proved to exist. The rule that equity must be resorted to by part owners of a vessel for the adjustment of the affairs between them, applies to cases relating to *her earnings and disbursements*, when no settlement has been made or account stated between them; but does not apply to cases of contract growing out of the original construction of the vessel, notwithstanding the builder is a part owner, any more than to promissory notes given by the purchaser to such builder for a specific portion of the vessel. Such contracts do not relate to the use and management of the vessel, and therefore are not within the reason of the rule which requires a party to proceed in equity. In such cases, an action at law is the appropriate remedy. Such action may also be maintained between part-

ners in similar cases. Parsons' Mercantile Law, p. 182, note 2, and p. 183, note 1.

The result is, that the defendants are to be defaulted, and, by the agreement of the parties, an auditor is to be appointed to assess the damages. *Defendants defaulted.*

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

NATHANIEL S. STIMPSON *versus* MONMOUTH MUTUAL FIRE INSURANCE COMPANY.

Where a policy of insurance against fire, issued by a mutual company, has been assigned, the assignment ratified by the company, and a new premium note given, and the assignee, by the terms of the charter or by-laws, thereby becomes a member of the company, he may, in case of loss, maintain an action on the policy in his own name.

Where the by-laws of an insurance company require the assured to give notice in writing of a loss, within sixty days, a letter written by an agent of the company, at the request of the assured, giving notice of the loss, and sent in due time, is a sufficient compliance with the requirement, although the fact of its having been written at his request does not appear in the letter.

ASSUMPSIT on a policy of insurance against loss by fire on buildings in Windsor.

The policy, dated September 13, 1854, was in favor of Joseph Marson, and for the term of four years, and was assigned by him to the plaintiff, Nov. 7, 1855, and the assignment ratified by the directors of the defendant company, Nov. 16, 1855.

The plaintiff introduced a deed from Marson to himself, dated Oct 10, 1855, but executed and delivered on the day of the assignment of the policy.

The buildings were burned October 22, 1857.

Thomas C. Davis, called by the plaintiff, testified that he

had been the agent of the defendants for six years prior to the loss; that he received Marson's application for insurance, and obtained his policy; that, after the assignment, he forwarded the policy to the defendants for their ratification; and that, after the loss, he wrote and sent by mail immediately, at the request of the plaintiff, the following letter to the defendants, to which he received no answer:—

"*W. Wilcox, Esq.*, Sir:—I regret that I am under the necessity of informing you that the barns of Harrison Gray, and the dwellinghouse and barn of N. Stimpson, were burned on the night of the 22d ult.

"Mr Stimpson's policy was transferred from Joseph Marson. I have waited to receive the number of their policy, but have not. Some other property was destroyed at the same time, evidently the work of an incendiary, but we have not been able to obtain sufficient proof to accuse any one as yet.

"I sent you some money a short time since, but received no return, though I have received returns of the applications sent at the same time. "Yours, T. C. Davis.

"Windsor, Nov. 3, 1857."

Washington Wilcox, secretary of the company, called by the plaintiff, testified, that he received the foregoing letter, he could not say when, but he presumed in due course of mail; that the company received no other notice from the plaintiff, but he had a letter from Stimpson after March term, 1858, inquiring when they would pay his claim. He further testified that, at the time the policy was assigned, the defendants received a new note signed by the plaintiff, and that they also retained and now had the note signed by Marson.

The plaintiffs introduced the following letter:—

"Mut. Ins. Office, Monmouth, May 20th, 1858.

"Sir:—I am directed by the Board of Directors, that, at a meeting of said Directors on the 14th instant, the following vote was passed unanimously:—

"*Voted*, To disallow the claim of Nathaniel S. Stimpson,

of Windsor, because, in the opinion of the Directors, the loss he sustained was grossly careless or fraudulent.

"Washington Wilcox, *Secretary.*

"Nathaniel S. Stimpson, Windsor."

The plaintiff stopped here, whereupon the presiding Judge, MAY, J., ordered a nonsuit to be entered. The plaintiff excepted.

George Evans, for the plaintiff, argued that the action is rightly brought and may be maintained by the plaintiff in his own name. As assignee of the policy, he became a member of the company. The transaction created a new contract of insurance between the plaintiff and the company. *Wiggin* v. *Suffolk Ins. Co.*, 18 Pick., 145; *Foster* v. *Equ. Ins. Co.*, 2 Gray, 219; *Kingsley* v. *N. E. Ins. Co.*, 8 Cush., 400; *Wilson* v. *Hill*, 3 Met., 69. In *Fogg* v. *Mid. Ins. Co.*, 10 Cush., 345, the plaintiff failed because the assignment was imperfect, amounting only to an order to pay the amount in case of loss to the plaintiff, and no new note had been given by the assignee. The case of *Pollard* v. *Somerset M. F. Ins. Co.*, 42 Maine, 221, on examination, will not be found in conflict with the position here taken.

In New York, it has been held that, in case of assignment of a policy to secure a mortgage, the action should be in the name of the assignor. *Conover* v. *Ins. Co.*, 3 Denio, 254; *Jessel* v. *Wil. Ins. Co.*, 3 Hill, 88. But, in case of absolute conveyance, and assignment of policy, the suit must be in the name of the *assignee. Mann* v. *Herkimer Ins. Co.*, 4 Hill, 187.

In *Bowditch M. F. Ins. Co.* v. *Warren*, 3 Gray, 415, the want of a premium note, given by the assignee, was the turning point. In *Folsom* v. *Belknap Ins. Co.*, 10 Foster, 231, there was no provision in the charter or by-laws, authorizing the assignee to become a member of the company. Not so in the case at bar.

2. The notice of loss, given to the defendants by Davis, was sufficient. *Qui facit per alium, facit per se.*

Policies are to receive a liberal construction. 2 Parsons' Mer. Law, 480; *Talcut* v. *Mar. Ins. Co.*, 2 Johns., 130; *Lawrence* v. *Ocean Ins. Co.*, 11 Johns., 241; *Child* v. *Sun M. Ins. Co.*, 3 Saund., 26; *Barker* v. *Phenix Ins. Co.*, 8 Johns., 307.

The defendants made no objection for want of due and proper notice, but placed their refusal to pay on other grounds. This was a waiver of the objection of defective notice. *Hatch* v. *Frank. Ins. Co.*, 1 Cush., 265, and cases cited; *Clark* v. *N. E. M. F. Ins. Co.*, 6 Cush., 345, and cases cited; *Underhill* v. *Agawam Ins. Co.*, 6 Cush., 441; Angell on Ins., § 246.

J. Baker, for the defendants.

1. This action cannot be maintained, because the policy is a written contract between the defendants and Marson, and has no apt words of negotiability, as to order, bearer, holder or assignees. No action can, therefore, be maintained in the name of the assignee. *Pollard* v. *Som. Ins. Co.*, 42 Maine, 221; *Jessel* v. *Wil. Ins. Co.*, 3 Hill, 88.

If the assent of the defendants to the assignment, and taking a new note from the plaintiff, is a new promise by the defendants, by which the plaintiff is subrogated for Marson, the action should have been special assumpsit on the new promise, and not on the policy.

2. No notice was given of the loss within sixty days, as required by the by-laws. A notice is a condition precedent to the right to recover. Angell on Ins. § 226. The member suffering the loss is to give the notice. The plaintiff gave none. If he could give it by agent, the agent's authority should be stated in the notice.

The letter of Davis was a letter of information from the defendants' agent. It did not purport to be from the plaintiff, or written at his request. The company had no right to infer that it was, and did not.

The notice is important, as important action is to be based upon it. The directors are to act upon the notice, and adjudicate the amount of loss. To do this, they must know

that the notice was from the plaintiff. The objection is, not only that the notice is deficient, but that it is no such notice as the directors were bound to act upon.

3. It is said that notice was waived by the action of the directors in May, 1858. But where the courts have held notice to be waived, there had been an attempt to give notice, however defective. Here the plaintiff had not attempted to give any notice. Consequently, there could be no waiver.

Where there has been a defective attempt, and the company do not notify the insured of the defects, but place their refusals on other grounds, this is held to be a waiver, because it deters him from perfecting his performance. But this does not apply to the case at bar. Here the action of the directors was long after the sixty days had expired, and it was too late for the plaintiff to cure the defective notice or give a valid one.

The power of the directors is limited, and they could not bind the company by acts not within their authority. *Eastman* v. *Carroll Co. Ins. Co.*, 45 Maine, 307; *Hale* v. *M. M. F. Ins. Co.*, 6 Gray, 169. The sixty days having expired without notice, the contract was dead. The directors could not revive it. They could not decide to pay the loss without notice. Could their refusal to pay, in whatever language couched, revive a dead contract?

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action of assumpsit, founded on a policy of insurance, made by the defendants to one Joseph Marson, dated September 13, 1854, for four years, and assigned by said Marson to the plaintiff, Nov. 7, 1855, which assignment was duly assented to, ratified and confirmed by the defendants, Nov. 16, 1855, by receiving of the plaintiff a new premium note, agreeably to their by-laws. Joseph Marson conveyed the buildings insured, with the land on which they stood, to the plaintiff, on the same day that he assigned the policy. The deed bears date, October 10, 1855, but it takes effect from the time of its delivery, and not from

the time of its date. The buildings insured were destroyed by fire, October 22, 1857.

Upon the whole evidence put into the case by the plaintiff, the presiding Judge ordered a nonsuit. We suppose,—

1st. Because this action cannot be maintained in the name of the assignee.

It is apparent from the facts proved that the plaintiff is the real party, that Marson has now no interest in the policy of insurance, in the property insured, in the cause of action or in this suit.

It will greatly promote the convenience of assignees, under such circumstances, in cases of losses by fire, to be enabled to maintain actions on policies duly assigned to them, in their *own names.* And such a construction should be given to the law as will enable them to do so, unless there is some insurmountable legal objection. It will greatly relieve the assignors and their representatives, also. "*Argumentum ab inconvenienti* is forcible in law."

Upon the facts stated in the writ, and an examination of the charter of the company, and its by-laws, I have arrived at the conclusion that the action, if maintainable, can be maintained in the name of the plaintiff.

The writ states the whole case, from which a promise may be fairly deduced or implied, to pay the plaintiff as assignee of the policy, the amount of his loss. It was a promise in the first instance to Marson, but a promise in the *alternative;* that is, a promise upon certain contingencies, to pay, not him, but his assignee; and those contingencies have happened. The action is founded on the policy, but not on the policy alone. The Act of incorporation, its purposes and object, as well as the by-laws of the company, are to be taken into consideration. The second section provides—"That all and every person, who shall at any time become interested in said company, by insuring therein, and also their respective heirs, executors, administrators and *assigns,* continuing to be insured therein as hereafter provided, shall be deemed and taken to be members thereof, for and during the terms speci-

fied in their policies, and no longer, and shall at all times be concluded and bound by the provisions of this Act."

The ninth section provides that, "When the property insured shall be alienated by sale, or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be cancelled," &c.

It also provides, *however*, "that the grantee or alienee having the policy assigned to him, her or them, for his, her or their proper use or benefit, upon application to the directors, and with their consent, within thirty days after such alienation, on giving proper security to the satisfaction of the directors, for such portion of the deposit or premium note as shall remain unpaid, and, by such ratification and confirmation, the party causing the same shall be entitled to all the privileges and subject to all the liabilities to which the original party insured was entitled and subjected under this Act." By the proceedings had in this case the plaintiff became a member, and Marson ceased to be a member of the company. "The parties assumed towards each other the relation of insurer and insured." 18 Pick., 145; *Ib.*, 160. This is not inconsistent with the charter and by-laws, but in accordance with both.

The right of one, not a party to the original contract, to maintain an action in his own name, "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate," says BIGELOW, J., in *Brewer* v. *Dyer*, 7 Cush., 340, "but, upon the broader and more satisfactory basis, that the law operating on the acts of the parties creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

In *Fogg* v. *Middlesex Mut. Fire Ins. Co.*, 10 Cush., 345, the plaintiff, who sued as assignee, failed in his suit because there was no legal assignment of the policy. No new premium note had been given. But the right of the assignee to maintain an action in his own name, where the assignment has

been perfected and ratified, is most distinctly recognized by SHAW, C. J.

In the case of *Pollard* v. *Somerset M. F. Ins. Co.*, 42 Maine, 221, the agreement of the parties rendered the decision of this question unimportant, and it was not decided.

The Court say, however, in that case,—"In the absence of any provision in the charter or by-laws of a mutual fire insurance company, whereby the assignee becomes a member of the company, the action, in case of loss, must be in the name of the assured with whom the contract was made," and cite 10 Foster, 231. In this case, the assignee does become a member of the company by the terms of the charter, upon giving a new premium note, its acceptance and ratification of the assignment by the directors.

2. Was the notice actually given sufficient?

Thomas C. Davis testified that he was the agent of the defendants; that he received and forwarded the application from Marson for the insurance and obtained the policy; and, that after the assignment was made, he forwarded the policy to the defendants for their ratification, and that, after the loss, he wrote a letter to W. Wilcox, at *the request of the plaintiff*, and sent it by mail immediately after, but never had any answer from the company acknowledging the receipt thereof. The letter makes a part of the case, and is dated Nov. 3, 1857.

Washington Wilcox, secretary of the defendant company, testified that he received the letter above referred to, could not say when, but supposed it was received in due course of mail. We may take it for granted, or as proved, that the notice, such as it was, was given and received within sixty days from the time of the loss. By section 7 of the charter, the insured "shall, within sixty days next after such loss, give notice thereof in *writing* to the directors, or some one of them, or to the secretary of said company." Davis may properly be regarded as the agent of the plaintiff *pro hac vice*, notwithstanding he was also the agent of the defendants. It is

apparent that he undertook to act as such, and the plaintiff relied upon him to do so. And he did so act, and gave notice, and all the notice necessary to enable the defendants seasonably to look after their rights, and to ascertain their duty and obligations, in the premises. He was not a stranger to the defendants. They could well rely upon the truth and accuracy of the statements contained in his letter. Nor was it necessary that he should state, in his letter to them, that he wrote at the request of the plaintiff. They could well understand this, and, without doubt, did so understand it. In their communication by W. Wilcox, secretary, of the 20th of May, 1858, to the plaintiff, they place their refusal to allow his claim upon the ground that "the loss he sustained was grossly careless or fraudulent," and not upon the ground that there was any deficiency in the notice of loss.

This is the *issue* they have evinced a willingness to meet, and we can see no good and sufficient reason in law why they should not be required to meet it.

Exceptions sustained,—
Nonsuit set aside, and
New trial granted.

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

STATE *versus* THOMAS S. BARTLETT, *Appellant.*

In the allegation in a complaint of the time when an offence was committed, the word "year," by force of R. S., c. 1, § 4, rule 11, will be construed as meaning "year of our Lord."

In a complaint and warrant for searching a certain place for intoxicating liquors kept and deposited for illegal sale, the description of the place to be searched is sufficiently certain, if it be such as would be required in a deed to convey a specific parcel of real estate.

Where the complaint described the premises as formerly owned by A, and the warrant as formerly owned by B, the repugnant words will be rejected as unimportant, if, independent of them, the description given is sufficient clearly to designate the place to be searched.

Where intoxicating liquors are alleged in the complaint and warrant to be kept and deposited in a certain "south store," and such liquors are, on search, found in a chamber or second story over the same store, instructions to the jury that they would judge from the evidence in the case, with *their knowledge and experience as practical men* as to how stores on the ground floor and rooms over them are generally used by merchants, whether the chamber or second story was in fact a part of the said store, is erroneous, as susceptible of being construed to authorize the jury to act upon their own knowledge or experience as evidence.

THIS is a complaint and warrant for search and seizure, under the Act of 1858, for the suppression of drinking houses and tippling shops, § 14. The complaint was made to the Municipal Court for the city of Augusta, and warrant issued, Oct. 14, 1859. The case was tried in that Court, and judgment given against the defendant, from which he appealed.

On trial of the appeal before MAY, J., Nov. term, 1859, the defendant's counsel moved the Court to quash the complaint and warrant, because, 1st, that it was not sufficiently alleged in the complaint, when the defendant deposited and kept intoxicating liquors for sale; 2d, that the warrant was issued without any sufficient complaint being first made to the magistrate; and 3d, that the description of the place to be searched, as set forth in the complaint, was not specifically described in the warrant.

The motion was overruled, and the defendant excepted.

The complaint set forth, that certain competent persons

named therein, "on the fourteenth day of October in *the year eighteen hundred and fifty-nine,* in behalf of said State, on oath, complain, that they believe that on the first day of April *in said year,* at said Augusta, intoxicating liquors were and still are kept and deposited by Thomas S. Bartlett of Augusta, in said county, in the south store in the brick building situate on the east side of Water street in said Augusta, formerly owned by Arno Bittues, deceased, said south store in said building being now occupied by said Thomas S. Bartlett, and the cellar under said south store," &c.

The warrant described the place to be searched for intoxicating liquors alleged to be kept and deposited by the defendant for unlawful sale, in the same words used in the complaint, except that the name of the former owner was designated as "Arno *A.* Bittues."

The evidence for the government tended to show that certain intoxicating liquors were found, by the officer serving the warrant, in the second story of the south half of a brick building on the east side of Water street in Augusta, and that the south store, on the ground floor in the said building, was occupied by Bartlett; and there was evidence tending to show that there was a passage, by stairs, from the ground floor to the second story, where the said liquors were found, and that the said second story was occupied by the said Bartlett for the purpose of storing and keeping the said liquors and other goods similar to those in the lower story.

The defendant's counsel contended that it was incumbent upon the government to prove that the liquors were kept and deposited by the defendant in the precise place described in the complaint; that the chamber, or second story, where the liquors were found, was not part of the said south store; and that the government must prove that the building in which the liquors were kept, deposited and found, was formerly owned by Arno Bittues, as described in the complaint.

On these points, the Court instructed the jury, in substance, that it was incumbent on the government to prove that intoxicating liquors were kept and deposited by the defendant in

the precise place described in the complaint; that the officer serving the warrant would be confined in his search to the said place, and that, in order to be entitled to a verdict against the defendant, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the said second story, or chamber was, in fact, a part of the said south store; and that they would judge from the evidence in the case, with their knowledge or experience as practical men, as to how rooms or stores on the ground floor and the rooms above in the second story are generally used by merchants, whether the said second story or chamber was, in point of fact, a part of the south store described in the complaint; that the government must satisfy the jury that the building in which the liquors were found was the same building described in the complaint; but that it was not incumbent upon the government to prove that the said building was formerly owned by Arno Bittues, as alleged in the complaint, if they were satisfied, from the other description in the complaint, testified to by the witnesses, that the building in which the said liquors were deposited and found, was, in point of fact, the same building described in the complaint.

The verdict was against the defendant; and to the foregoing rulings and instructions the defendant excepted.

The defendant, in his own proper person, after verdict against him, and before judgment, moved the Court that judgment on the verdict should be arrested, and he discharged therefrom, for the following reasons: —

1. Because it was not sufficiently alleged in the complaint when the defendant kept and deposited the said intoxicating liquors for sale.

2. Because the warrant, on which the search was made, and by virtue of which the liquors were seized and the defendant arrested, was issued by the Judge of the Municipal Court for said Augusta, without any sufficient complaint having been made to the said Judge, as the statute requires.

3. Because the place to be searched, where intoxicating liquors are alleged to have been deposited and kept, as de-

scribed in the complaint, is not specifically described in the warrant, but the place which the officer is commanded to search, by the said warrant, is a place other than that specifically described in the said complaint.

This motion was overruled by the Court; and the defendant excepted thereto.

A. Libbey, in support of the exceptions.

1. The instruction to the jury, "that they would judge from the evidence in the case, with their knowledge or experience as practical men, as to how rooms on the ground floor and rooms above in the second story are generally used by merchants, whether the said second story or chamber was, in point of fact, a part of said store," was erroneous, in authorizing the jury to find from their knowledge or experience as to how merchants generally use stores.

If jurors know facts bearing upon the issue to be tried, they must testify to them under oath as other witnesses. *Manley* v. *Shaw*, Carr. & Marsh., 361; *Anderson* v. *Barnes*, Coxe, 203; *McKain* v. *Love*, 2 Hill, 506; *Clark* v. *Robinson*, 5 B. Munroe, 55.

In a criminal case, the accused has a right to be confronted by the witnesses against him. Const. of Maine, Bill of Rights, § 6; *State* v. *Robinson*, 33 Maine, 564.

2. The instruction "that it was not incumbent upon the government to prove that the said building was formerly owned by Arno Bittues, as alleged in the complaint," was erroneous. The Constitution of this State, Bill of Rights, and the Act of 1858, § 14, require the place to be searched to be specially designated in the complaint and warrant. The description is material, and must be proved as alleged. It is as material in this process, as the description of the thing stolen in an indictment for larceny. *State* v. *Noble*, 15 Maine, 476; *State* v. *Jackson*, 30 Maine, 29.

3. The complaint and warrant are defective, and judgment should be arrested. The complaint does not sufficiently allege the time of the commission of the offence. *Commonwealth* v. *Mc'Loon*, 5 Gray, 91.

The complaint describes the place to be searched as the south store, &c., formerly owned by *Arno Bittues.* The warrant describes the place as the south store, &c., formerly owned by *Arno A. Bittues.* The Act of 1858, § 14, requires the special designation of the place to be searched to be set out in the *complaint* and *warrant.* The description is material and should be the same in both.

By the warrant, the officer is commanded to search a place other than the place described in the complaint. There was no complaint praying for a warrant to search the place designated in the warrant, and, therefore, the warrant was issued without any lawful complaint therefor.

Drummond, Attorney General, contra.

1. The place to be searched is sufficiently described. The description must be as certain as that in a deed. *State* v. *Robinson,* 33 Maine, 564. In the description in the warrant the place is sufficiently described, without referring to the former ownership. If so, the case comes within the maxim, *Falsa demonstratio non nocet.*

2. To the objection that the era to which the year refers is not stated, the answer is, that this is the form prescribed in the statute, and, by the Revised Statutes, the word "year" is to be construed as "year of our Lord," when used as a date. R. S., c. 1, § 4, clause 11.

3. The instructions to the jury were substantially correct. Juries are presumed to know what every body knows, and are expected to act upon that knowledge. *Comm.* v. *Peckham,* 2 Gray, 514.

This was the purport of the instructions given to them on this point.

The opinion of the Court was drawn up by

RICE, J.—Objections are made, in a motion to quash, and also in a motion in arrest of judgment, to the complaint and warrant in this case. It is objected that the complaint, which described the offence as having been committed in the year "eighteen hundred and fifty-nine," is defective, in that it

does not state in what era this year occurred. Under the authority cited by the defendant, *Commonwealth* v. *Mc'Loon*, 5 Gray, 91, this defect would be deemed fatal. But by c. 1, § 4, clause 11, R. S., it is provided that the word "year," used for a date, means the year of our Lord. This cures that defect.

It is also objected that the place to be searched, and in which said intoxicating liquors are alleged to have been kept and deposited, as set forth and described in said complaint, is not specifically described in said warrant.

The place to be searched is described in the complaint as "the south store in the brick building situated on the east side of Water street in said Augusta, formerly owned by *Arno Bittues*, deceased, said south store in said building being now occupied by said Thomas S. Bartlett, and the cellar under said store."

In the warrant, the description is in all respects the same, with the exception that the name of *Arno A. Bittues* is used in the place of *Arno Bittues*.

By § 5, art. 1, of the Constitution of this State, it is provided that no warrant to search any place, or to seize any person or thing, shall issue, without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause, supported by oath or affirmation.

In *State* v. *Robinson*, 33 Maine, 564, it was decided that that cannot be considered as a special designation of the place, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. Or, to state the proposition affirmatively, the Constitution requires that the warrant shall contain as specific a description of the place to be searched as would be required to convey a specific piece of real estate, in an instrument of conveyance.

Tested by this rule, the objection cannot prevail. The substance of the objection is that there is repugnance between the description in the complaint, and the description in the

warrant, in the name of the person who formerly owned the store to be searched.

In giving construction to a deed, where several particulars are named, descriptive of the premises, if some be false or inconsistent, and the true be sufficient of themselves, they will be retained, and the others rejected. *Vose* v. *Handy*, 2 Mass. 322; *Wing* v. *Burgess*, 13 Maine, 111; *Abbott* v. *Pike*, 33 Maine, 204.

The complaint and warrant must be construed together, and if the descriptive words are sufficient clearly to designate the place to be searched, independent of the repugnant words, the latter will be rejected. On examination, we are of opinion that such is the fact.

It may be observed that the description of the place to be searched is merely preliminary, and does not constitute a description of the offence alleged to have been committed, nor does it describe the elements of which the offence is composed, and hence does not fall within those strict technical rules which apply to criminal pleadings.

The foregoing constitute the substantial objections to the complaint and warrant, as presented by the motions to quash, and in arrest of judgment.

On the trial, there was evidence introduced by the government tending to show that certain intoxicating liquors were found by the officer serving said warrant, in the second story of the south half of a brick building, on the east side of Water street in Augusta, and that the south store on the ground floor of said block was occupied by the defendant; and there was also evidence tending to show that there was a passage by stairs from the ground floor to the second story where said liquors were found, and that said second story was occupied by said defendant for the purpose of storing and keeping said liquors and other goods similar to those in the lower story.

On this part of the case, the Judge instructed the jury, that they must be satisfied from the evidence, beyond a reasonable doubt, that said second story or chamber was a part

of said south store, and that they would judge from the evidence in the case, with their knowledge or experience as practical men as to how rooms or stores on the ground floor and rooms above in the second story are generally used by merchants, whether said second story or chamber was, in point of fact, a part of said south store described in said complaint.

To this instruction, exceptions are taken. There does not appear to have been any evidence in the case tending to show what was the usage of merchants as to the occupation of rooms in the second story of buildings, the lower rooms of which were occupied as stores; nor that any such usage existed in fact. Nor was there any evidence as to the knowledge or experience of the jury upon that subject.

It was probably the intention of the Judge to limit the jury to a consideration of the evidence in the case, viewed or construed in the light of their knowledge or experience as practical men in such matters. The language used is, however, susceptible of a different construction; a construction which would authorize, and perhaps require, the jury to act upon their knowledge or experience, as evidence in this case. Indeed, such seems to be its natural construction. On this point, therefore, the jury may have been misled, and have based their verdict as well upon their personal knowledge and experience as upon the evidence legitimately in the case. To have done so, would have been clearly erroneous. For this cause, the *exceptions are sustained, and a new trial granted.*

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

STATE *versus* THOMAS S. BARTLETT, (*Claimant,*) *Appellant.*

Where, upon a warrant authorizing search for and seizure of intoxicating liquors as being kept and deposited for illegal sale, such liquors have been seized and libelled, a person who appears generally, and files his claim to the said liquors or a part of them, thereby waives any defect in the monition and notice.

Either the records of inferior Courts, or duly authenticated copies thereof, or the original papers on which they are founded, are competent evidence.

Upon trial on a libel against intoxicating liquors seized as being kept for illegal sale, the original complaint and warrant are admissible in evidence.

The testimony of the officer who seized and libelled the liquors, as to their identity, is unobjectionable.

THIS was a LIBEL, by J. L. Heath before the Municipal Court for the city of Augusta, against certain intoxicating liquors, a part of which were claimed by the defendant. It was tried in the Municipal Court, and judgment rendered against the defendant, from which he appealed.

Before trial of the appeal, the defendant moved that the libel and process be quashed, because of certain objections to the warrant on which the liquors were seized, to the officer's return thereon, and to the libel. The Court, MAY, J., presiding, overruled the motion, and the defendant excepted.

The case was tried on the libel and the defendant's claim. To make out the case, on the part of the government, the County Attorney offered an original complaint and warrant issued by S. Titcomb, Judge of the Municipal Court for the city of Augusta, dated Oct. 14, 1859. The warrant was for search and seizure, under the 14th section of the Act of 1858. It had been executed by the officer to whom it was directed, and by him returned to the said Judge, and the defendant in that process had been tried and convicted in that Court, and appealed.

The complaint and warrant, and the officer's return thereon, were objected to by the defendant, but admitted.

J. L. Heath, called by the government, testified that he was the officer who had the warrant, and made the search

and seizure, and identified the liquors mentioned in his return as the same described in the warrant, and seized by him by virtue thereof. This testimony was objected to by the defendant, but admitted.

The jury returned a special verdict against the defendant. To the ruling of the Court, the defendant excepted.

After verdict, and before final judgment thereon, the defendant moved that judgment be arrested, because of sundry objections to the warrant on which the liquors were seized, and also for the following reasons:—

1. Because said libel does not state the date of the warrant, by virtue of which said liquors were seized, and in no way identifies or refers to said warrant. It does not allege when said liquors were seized, nor when they were intended for sale in violation of law. It does not allege who was the keeper or possessor thereof at the time of seizure.

2. Because, if every allegation contained in said libel affirmed by said verdict of the jury be true, it does not appear that said intoxicating liquors were kept and deposited for the purpose of sale in violation of any existing law of this State.

3. It does not appear that the Judge of the Municipal Court gave, or caused to be given, the requisite notice required by law on said libel.

The Court overruled the motion, and the defendant excepted.

The libel, monition and verdict were made a part of the case. The libel alleged that the liquors libelled were seized by the libellant, "by virtue of a warrant duly issued by Samuel Titcomb, Judge of said Court," but the date of the warrant is not given, nor any further description of it. The monition and notice were in due form, but no return or other evidence of the posting thereof was exhibited.

A. Libbey, in support of the exceptions.

1. The original complaint and warrant were not admissible. The warrant had been executed and returned to Court,

and judgment had been rendered on the complaint. They had become matters of record. The legal evidence of their contents is a copy of the record. 1 Greenl. Ev., § 521; *Frost* v. *Shapleigh,* 7 Greenl., 236; *Holden* v. *Barrows,* 39 Maine, 135.

2. The judgment should be arrested. It is a well established rule of criminal law, that, if a complaint or indictment does not contain allegations sufficient to show that an offence has been committed by the defendant, judgment must be arrested.

The libel in this case is in the nature of a criminal process. The forfeiture of the liquors is in the nature of a penalty against the owner. It is declared a criminal process by Act of 1858, § 4.

The verdict merely affirms that the liquors were intended for unlawful sale, as alleged in the libel. The libel does not contain allegations sufficient to show that the liquors should be forfeited. It does not show when said liquors were kept and deposited and intended for unlawful sale, nor when they were seized.

If it should be said that the warrant is a part of the process, and that that contains the necessary allegations; the answer is that the complaint and warrant are in no way referred to in the libel so as to make a part of it. There is nothing in the libel to identify the warrant on which the liquors were seized, nor to show when the warrant was issued. None of the allegations in the complaint and warrant are affirmed by the verdict.

3. The complaint and warrant are defective.

4. The liquors cannot be decreed forfeited, because there was no notice given by the Judge of the Municipal Court. *State* v. *Robinson,* 33 Maine, 564.

Drummond, Attorney General, contra.

The defendant, having appeared to defend, cannot complain of want of notice. *State* v. *Miller,* Penobscot County, 1859, not yet reported.

A motion in arrest of judgment does not apply to this case. R. S., c. 82, § 26. This is a civil, not a criminal case. It is not on a sworn complaint. It is not in the name of the State, but of an individual. No person is arrested or charged with any crime. The questions raised are merely whether the claimant owned the liquors, and, if so, whether they were or were not intended for unlawful sale. The Court is to hear evidence offered by either libellant or claimant. If the claimant fails, the libellant may recover costs. The claimant may appeal, and must recognize as in civil cases.

But, if such a motion could be entertained in any similar case, it cannot in the case at bar. The issue was tried, not on the libel alone, but on the claim and libel. Stat., 1858, c. 33, § 16. The claim not being made a part of the case, the Court will not adjudicate upon it.

It is objected, that the libel does not show the time of seizure, and the time when the liquors were intended for sale. The officer is required "immediately" to libel the liquors. Sec. 18. Consequently the date of the libel shows the time sufficiently. The claim should fix the time, and, if so, all the proceedings relate to that date.

The objection, that the libel does not show who was the keeper or possessor of the liquors, cannot avail. If intended for unlawful sale, whether by the claimant or any one, they are to be condemned. *State* v. *Miller*, before cited.

The original complaint, warrant and return are competent evidence. 1 Greenl. Ev., § 513; *Matthews* v. *Houghton*, 11 Maine, 377; *Chase* v. *Hathaway*, 14 Mass., 222.

The opinion of the Court was drawn up by

RICE, J. — This case comes before us on motions to quash, and in arrest of judgment. So far as the motion to quash, and the motion in arrest of judgment, are based upon alleged defects in the complaint and warrant, they have already been considered in the case of *State* v. *Bartlett, Appellant*, *ante*, p. 388, and cannot prevail for reasons there stated.

These motions also include objections to the sufficiency of the libel, monition and notice.

The statute, c. 33, laws of 1858, under which the liquors in controversy were seized, contemplates that liquors may be found in the custody of one person, but may be owned and intended to be used for lawful or unlawful purposes by other persons. It therefore provides for the punishment of the persons who keep or have in their possession liquors with intent to sell the same unlawfully. It also provides that the owner of the suspected liquors, or those entitled to their possession, may come in and defend them against the charge of being intended for sale in violation of law.

These two proceedings, though originating in the same preliminary charge, are, in the end, entirely distinct; one terminating in a judgment in which the *status* of the liquors is determined; the other, in a judgment, in which the guilt or innocence of the party having such liquors in custody is determined.

The party having the custody of the liquors is brought before the Court on the warrant, and is thereby distinctly notified of the charges against him, and is thus placed in a position to be called on to make his defence.

The liquors, on the other hand, may be owned by other parties, who are ignorant of any charge having been made against them. To the end, therefore, that all parties interested may have knowledge of the proceedings against such liquors and an opportunity to defend their rights, the fifteenth section of the Act above referred to requires that the officer seizing such liquors, shall, immediately after seizure, libel the same, and that the magistrate, before whom the warrant is returnable, shall thereon issue his monition and notice of the libel, therein giving notice to all parties interested, of the charges against the liquors, and of the time and place appointed for the trial of the question whether said liquors were intended for unlawful sale or otherwise.

Under this notice, any person may come in, and, on filing

his claim to the liquors or any part of them, as provided in the statute, may be heard on the question of the forfeiture or non-forfeiture thereof. If, on the trial, such claimant shall make it appear that he was entitled to the liquors libelled, or any part thereof, and it shall not appear that they were intended for unlawful sale, it will become the duty of the magistrate to deliver such liquors to the claimant; otherwise to declare them forfeited.

The libel, monition and notice, are required to give notice to all parties interested, that the liquors have been seized under a charge that they were intended for sale in violation of law. This libel and notice should, undoubtedly, be so specific in its description of the process on which the seizure was made, of the liquors seized, of the charge against them, and of the time and place of seizure, that a person interested may thereby be notified with reasonable certainty of their identity, and the circumstances under which they are held. If the libel and notice should not be sufficient for these purposes, and the liquors should be decreed forfeited, because no claimant appeared, it might admit of a doubt whether the owner would be bound by such decree.

But where a claimant appears, and duly files his claim, and thereupon is admitted to defend, and is heard upon the libel and the claim, which hearing involves all questions as to the legality of the original seizure, he then has availed himself of all the rights and privileges which the law contemplates. He may not be obliged to come in on an insufficient notice. But the notice being designed for his benefit, he may waive any defects therein, if he choose so to do. By appearing generally, and filing his claim, he thereby elects to waive defects in the notice. *State* v. *Miller*, not yet reported.

The only remaining question arises upon the exceptions. At the trial, the original complaint and warrant, with the officer's return thereon, were offered in evidence by the government, and admitted by the Court, against the objections of the defendant.

The case was originally cognizable by the Judge of the

Police Court for the city of Augusta. In that court, all the original papers were entered, and became matter of record. The judgment of that court was against the claimant, and the liquors were decreed forfeited. From that judgment the claimant appealed, and the statute required that he recognize with sureties, as in civil cases, from said magistrate. It then became the duty of the appellant to produce, in the appellate court, a copy of the record and of all the papers filed in the case, except depositions or other written evidence or documents, the originals of which should be produced.

The presumption is, that the records of inferior courts are regularly made up, and, though such records, or duly authenticated copies thereof, are deemed evidence of the highest character, and cannot be explained or contradicted by parol testimony or extraneous documents, that fact does not exclude the original papers on which such records are founded. Either are competent evidence. *Day* v. *Moore*, 13 Gray, 522.

The testimony of the witness Heath, as to the identity of the liquors, was unobjectionable. *Exceptions overruled.*

Judgment on the verdict.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT.

1859.

COUNTY OF FRANKLIN.

WILLIAM GOULD *versus* YORK COUNTY MUTUAL FIRE INSURANCE COMPANY.

Where A permitted his son B to use his name in buying and selling goods, and the business was transacted in the name of A & B, the goods being in fact wholly owned by B, this does not so affect the legal rights of other parties as to render void a policy of insurance effected on the goods in the name of B.

Where it is provided in the application for insurance, which is made a part of the policy, that any concealment of the condition or character of the property will make the policy void, if the applicant represented the property free from incumbrance, when there was at the time a mortgage upon a part of it, this was a breach of the contract, and the policy was void, and this, whether the false representation were by mistake or design.

And where a policy of insurance covered a store and the goods in it, and the property was represented to be unincumbered, when, in fact, the store was under a mortgage, the policy is void as to the goods as well as the store, the contract being entire, and the incumbrance affecting the company's lien for the payment of the premium note and assessments.

Where an applicant for insurance represented that no cotton or woollen waste or rags were kept in or near the property to be insured, and it appeared that at the time of the fire 1500 pounds of paper rags were in the store, this does not avoid the policy, it not being shown that the representation was untrue when made, and neither the policy, charter or by-laws of the company providing that the keeping of such articles shall invalidate the insurance.

ASSUMPSIT on a policy of insurance for three years, in favor of the plaintiff, upon a store and goods in Wilton, dated Dec. 30, 1856. By the terms of the policy, the application and description of the property was made a part of the contract. Amongst other inquiries contained in the application were the following:—

"Is cotton or woollen waste, or rags, kept in or near the property to be insured?" Answer, "No."

"If the property is incumbered, state for how much and to whom. State the true title and interest." Answer, "None."

The store and goods were burned Oct. 24, 1857. The plaintiff gave notice to the defendants, and furnished them a schedule of the property lost, and complied with the requirements of law and of the policy. The writ was dated May 1, 1858.

It appeared in evidence, that Benjamin Gould, the father of the plaintiff, prior to April, 1856, kept and sold goods in the store in question, using plaintiff's name with his own, by consent; that, at that time, the plaintiff bought the stock in trade, and thenceforward, was the sole owner of the goods until they were burned, using his father's name by his consent, and doing business in the name of B. & W. Gould.

The defendants introduced a mortgage to William Hall, dated Dec. 17, 1856, conveying the store and the lot on which it stood, together with a dwellinghouse, to secure a debt to Hall, a part of which remained unpaid at the time of the fire.

The plaintiff testified, that he signed the mortgage without reading it, and was not aware that it embraced the store, until, on the day preceding the trial, he discovered it by examining the record. The defendant introduced testimony tending to prove that the plaintiff knew the contents of the mortgage when he executed it.

The plaintiff testified that, at the time of the fire, he had fifteen hundred pounds of paper rags in the store, which he had taken in from time to time.

The defendants' counsel requested the Court, HATHAWAY, J., presiding, to instruct the jury that, if the goods insured

were bought in the name of B. & W. Gould, and partly on credit, it would constitute such a fraud or breach of warranty as would avoid the policy; and that purchasing goods in the name of the firm made them partnership goods. These instructions were not given; but the jury were instructed that the fact that the plaintiff used his father's name, by his consent, in purchasing goods, they being, in fact, the sole property of the plaintiff, would not affect the legal rights of the parties to this suit.

The plaintiff's counsel requested the Court to instruct the jury, that, if they were satisfied that the store insured, and the land connected therewith, were included in the mortgage to Hall by mistake, and that the plaintiff had no knowledge or information of their having been so included until the present term of Court, the existence of the incumbrance would not necessarily prevent the plaintiff recovering the amount insured on the store. The Court did not so instruct the jury, but instructed them, that, if the facts were as contended for by the plaintiff, he could not recover any thing for the loss of the store, but might recover for the goods. If, however, the false representation, with regard to the mortgage, was made fraudulently, the whole policy would be void, and he could recover nothing for either store or goods.

The defendants requested the Court to instruct the jury, that, if rags were kept in the store insured, and containing the other property insured, during the time embraced in the policy, or any portion of the time, the policy was void. These instructions the Court declined giving.

The verdict was for the plaintiff for the amount insured on the goods only.

The defendants filed exceptions.

John N. Goodwin, in support of the exceptions.

The evidence shows that B. Gould and the plaintiff were partners, and the goods partnership property. The Act of incorporation, by-laws and application, require a full statement of the condition of the property to be insured, and that the

true title to it shall be stated. The plaintiff represented the property to be owned by himself, and unincumbered. The interrogatories in the application were carefully framed, not to ascertain the secret understanding between the applicant and another, but in whom the title was openly and publicly represented to be, and what rights the company would have in enforcing assessments. If the goods were bought and the business carried on in the name of B. & W. Gould, this constitutes them partners, and the property partnership property, as far as regards all others except themselves. In case of insolvency, the partnership creditors would take the property, and the defendants, having a claim against W. Gould only, would have no remedy.

A false representation affecting the title to the property is material, and avoids the policy. *Davenport* v. *N. E. Mut. Fire Ins. Co.*, 6 Cush., 340; *Wilbur* v. *Bowditch Mut. Fire Ins. Co.*, 10 Cush., 446. Such a representation makes the policy void, although not made with the knowledge of its falsity, nor with intent to deceive. *Smith* v. *Bowditch Co.*, 6 Cush., 448; *Vose* v. *Eagle Ins. Co.*, 6 Cush., 42; *Barrett* v. *Union Ins. Co.*, 7 Cush., 175.

Any incumbrance or defect of title which deprives the company of its lien renders the policy void. *Battles* v. *York Co. Mut. Fire Ins. Co.*, 41 Maine, 208. No lien could attach to the goods so long as the firm owed debts.

The instruction that, if the plaintiff made the false representation as to the incumbrance on the store, unintentionally and in good faith, he would be entitled to recover the insurance on the goods, was erroneous. Although the store and goods were described and valued separately, yet one deposit note was given on the whole insurance. Assessments made, must be made on the note as a whole, and not on each article insured. The lien is on every article insured for the whole assessment. Act of incorporation, § 7. The store and goods were equally liable. Misrepresentation as to the title of either affects the collection of assessments on the whole policy. Personal property is constantly changing;

hence the lien on the real estate is the principal security. A false representation, as to the incumbrance on the real estate, avoids the policy as to both real and personal. *Brown* v. *People's Ins. Co.*, 11 Cush., 280. In this case, it was admitted that the misrepresentations made were not made wilfully or with intent to defraud.

The plaintiff represented that rags were not kept in or near the property to be insured; and the application stated expressly that property containing or contiguous to manufacturing risks would "not be insured in this class at any rate." Underwriters class rags with cotton and woollen waste, as manufacturing risks. If, as the plaintiff testifies, he had 1500 pounds of rags in his store, he had wilfully violated the conditions of his policy, and it was for that reason void.

If, in applications for insurance against fire, whatever is material to the risk is not correctly set forth, the policy will be void. *Marshall* v. *Ins. Co.*, 7 Foster, 157.

John S. Abbott, contra.

The opinion of the Court was drawn up by

TENNEY, C. J.—The goods covered by the policy were owned by Benjamin Gould, the father of the plaintiff, prior to April, 1856, when they were purchased by the latter, and were entirely his property. While they were owned by the father, according to the evidence, the business was done in the name of B. & W. Gould, the son consenting that his name should be so used. After the purchase, goods were bought and business carried on by the son in the name of B. & W. Gould, the father consenting thereto. The case contains no evidence that any part of the goods was purchased on credit. The Judge was requested to instruct the jury, that, if the goods were bought in the name of B. & W. Gould, and partly on credit, it would constitute such a fraud, or breach of warranty, as would avoid the policy; that purchasing the goods in the name of the firm constitutes them partnership goods. These instructions were not given; but the jury were in-

structed, if the father authorized the plaintiff to use his name, as he did use it, in the purchase of goods, and the goods were in fact the sole property of the plaintiff, the use of the father's name would not affect the legal rights of the parties. The evidence touching the ownership of the goods is not in the least in conflict with the representations in the application or the terms of the policy; and there is nothing in that evidence which tends to show that the risk of the company was in any degree increased. The instructions requested were properly withheld, and those given upon this point free from error.

The policy refers to the application as part thereof, and it is made subject to the provisions and conditions of the charter and by-laws, and the lien on the interest of the person insured, in any personal property or building covered by the policy, and the land under said building. It is provided, in the application, that any concealment of the condition or character of the property will make the policy void. The 14th interrogatory in the application is,—"If incumbered, state for how much and to whom. State the true title and interest." The answer to this interrogatory is, "None."

It is in evidence that, at the time of the application and the issuing of the policy, there was upon the real estate insured a mortgage, on which there was due the sum of two hundred dollars. This answer was manifestly material and became a warranty by the terms of the contract. *Battles* v. *York Co. Mut. Ins. Co.*, 41 Maine, 208. This was a misrepresentation, and a breach of the contract, and, by the instructions of the Judge, the policy was absolutely void, so far as it referred to and covered the real estate insured. This part of the instructions was correct.

But the jury were further instructed that, if the misrepresentation was made fraudulently, the whole policy was void, and the plaintiff could recover nothing; but, if the representation that the store was free from incumbrance was made inadvertently, in good faith, he believing it to be true, and he had no knowledge to the contrary till the day before the commencement of the trial, then said erroneous representation

would not avoid the policy of insurance upon the goods insured, and that he would be entitled to recover for the goods insured, according to the terms of the agreement, as stated in the policy. Exceptions taken to the latter portion of these last instructions are relied upon.

The company had a lien on the land and the store which contained the goods, and upon the goods themselves, not only for the payment of the note given for the premium, but for the payment of assessments made on account of losses. In the policy and the application, no distinction is made between an incumbrance for a small sum compared with the value of the real estate insured, and a sum which is nearly or quite equal to the whole value, in relation to the question whether the policy is avoided by such misrepresentation. In the latter case, supposed, the company would hold a position far less favorable than in the former, as to the goods insured, as well as to the real estate. In a policy like the one in question, the real estate insured is security for the goods covered by the same policy; and, if the real estate, as owned by the assured, is of little or no value, it can be security for the intended purposes only in proportion to the insurable interest of the applicant.

Is there ground for the distinction made by the Judge, as to the intent with which the misrepresentation was made, in its effect upon the insurance of the goods?

It is immaterial, in regard to misrepresentation in obtaining insurance, whether it is made fraudulently or by mistake or accident, the effect is the same. A policy obtained by misrepresentation is, in legal intendment, no insurance at all; it has no legal effect. *Clark* v. *N. E. Mut. Ins. Co.*, 6 Cush., 342.

In *Carpenter* v. *American Ins. Co.*, 1 Story, 57, STORY, J., says,—"A false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance, underwritten on the faith thereof, whether the false representation be by mistake or design." "The representation, made by an agent in procuring a policy, is equally fatal,

whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived. They execute the policy on the faith of statements material to the risk, which turn out to be untrue. The mistake is therefore fatal to the policy, as it goes to the very essence of the contract." The same principle was laid down by Lord MANSFIELD, which has not been denied to be correct. He says,—"Although the suppression should happen through mistake, without any fraudulent intention, yet still, the underwriter is deceived and the policy is void, because the risk run is vastly different from the risk understood and intended to be run at the time of the agreement." *Carter* v. *Boehm*, 3 Burr., 1905, 1909.

The policy was void by reason of the misrepresentation in regard to the incumbrance, irrespective of the question whether it was fraudulent or made through an honest misapprehension of the facts; and, by the terms of the policy, including the application, charter and by-laws, which make a part thereof, it became void. The contract being entire, and one premium note given, the lien for the security of the same was affected by the erroneous answer. *Richardson* v. *Maine Ins. Co.*, decided by this Court in 1859, not yet reported; *Brown* v. *People's Mut. Ins. Co.*, 11 Cush., 280.

The plaintiff testified that, at the time of the fire, some 1500 pounds of paper rags were in the store, which were destroyed; these he had taken in from time to time. The defendants requested the Judge to instruct the jury that, if rags were kept in the store insured, and which contained the other property insured, during the time said property was insured by the defendants, the policy would be thereby avoided. 2. If rags were so kept during any portion of the time the same were insured, it avoids the policy. These instructions were not given.

The 8th question put to the plaintiff, in the application, is, "Is cotton or woollen waste, or rags kept in or near the property to be insured?" The answer is, "None." It does not appear, affirmatively, that this answer was untrue at the time

it was made. And no provision is found in the policy, or the charter and by-laws, that, if such articles shall thereafterwards be kept, the policy shall be avoided.

Exceptions sustained,—
Verdict set aside, and
New trial granted.

RICE, APPLETON, GOODENOW, and DAVIS, JJ., concurred.

NATHANIEL B. WINSLOW *versus* JAMES J. MORRILL *and others.*

Where a part of one town has been set off by Act of the Legislature to another, with a proviso that the part so set off shall pay their proportion of certain debts and liabilities of the town from which they are separated, to be assessed and collected in the same manner and by the same persons as though the Act had not passed, this does not authorize the assessment and collection of a separate tax on that section for the payment of its proportion.

In such a case, the inhabitants of the territory set off cannot be required to pay their proportion of the liabilities sooner than the other part of the town, but are entitled to be assessed at the same time and in the same manner.

Assessors having no power to assess the inhabitants of another town for property situate in that town, but the persons set off are to be treated, under the provisions of the Act, as still inhabitants of the original town, for the purposes of the assessment.

TRESPASS. ON REPORT by HATHAWAY, J.

The defendant Morrill was collector of taxes in the town of Strong, and the other defendants were the assessors, for the year 1857. The action was brought April 5, 1858, for trespass in the assessment and collection of a tax against the plaintiff, he being an inhabitant of New Vineyard.

By a special Act of the Legislature, passed March 28, 1856, certain territory, with the inhabitants thereon, was set off from Strong, and annexed to New Vineyard. The second section of the Act provided as follows:—

"The inhabitants of the territory hereby set off, shall be

holden to pay all the taxes which have been legally assessed upon them; and also their proportion of all the corporate debts and liabilities of said town of Strong, at the time this Act shall take effect, including their portion of the expense of completing the bridge across the Sandy river, in said town of Strong, voted to be built and now in process of construction, by said town; and also their portion of the expense of opening and making passable a certain county road extending from the river road, so called, on the west side of said river, in said town, in a westerly direction, to the west line of said town, located and accepted within two years last past, by the county commissioners for the county of Franklin; *provided*, the same is not discontinued, to be assessed according to the valuation of said town for the year eighteen hundred and fifty-five; and taxes already assessed, as well as those hereafter to be assessed upon said inhabitants so set off, may be collected in the same way and manner, and by the same persons, as if this Act had not been passed."

The plaintiff was an inhabitant of that part of Strong which was annexed to New Vineyard.

It appeared in evidence, that, after the passage of the special Act, the inhabitants of Strong caused an estimate of the liabilities embraced in the Act to be made, amounting to nearly $8000; and, at a town meeting held March 9, 1857, the town voted "to raise the sum of six hundred dollars, to be assessed on the inhabitants of that part of New Vineyard which formerly belonged to Strong, and was set off agreeably to an Act entitled an Act to set off certain lands from the town of Strong, and annex the same to the town of New Vineyard, approved March 28, 1856."

The assessors, in accordance with this vote, made a separate valuation of the territory in question, and assessed upon the polls and estates embraced in the valuation the sum of $617,69, including overlayings, and committed the same to J. J. Morrill, collector of taxes for the town of Strong for that year, for collection. Included in the tax, thus assessed and committed, was the sum of $23,50 assessed to the plaintiff.

This sum was demanded of the plaintiff by the collector and afterwards paid, and this action of trespass brought.

The defendants pleaded the general issue, with a brief statement, setting forth their official character, the Act of the Legislature, the vote of the town, &c.

The case was taken from the jury, and submitted to the full Court, with power to render judgment by nonsuit or default, according to the legal rights of the parties, on so much of the evidence as was legally admissible; and, if by default, then for the amount of taxes and costs paid by the plaintiff, and interest thereon.

S. Belcher, for the plaintiff, argued that the town of Strong could not assess on the polls and estates set off except as they assessed in the same proportion on the polls and estates remaining in Strong. Nor could they assess and collect the proportion of the part set off by installments, as they attempted to do. If Strong has any claim upon that territory, the proper remedy is not by taxation, but by some mode by which both parties may have a voice in ascertaining the equitable amount to be paid.

Towns derive all their powers from legislative enactments. The tax complained of was not voted for a legal object.

The assessment being illegal, both the assessors and collector are personally liable. 12 Maine, 378; 2 Maine, 375; 15 Mass., 144; 15 Pick., 44.

P. M. Stubbs and *O. L. Currier*, for the defendants, contended that the Legislature, in dividing towns, have the power to equalize the burdens as they have done in this instance, and the plaintiff, having enjoyed the benefit of the change made by the Act, is bound by its provisions. The Courts should give such a construction to the Act as will enable the town of Strong to execute it. *Brewster* v. *Harwich*, 4 Mass., 280. Where a statute creates a power, and prescribes the mode of executing it, it can be executed only in that mode. *A. & M. Turnpike* v. *Gould*, 6 Mass., 44. A statute is to be construed according to its intent. *Gove* v. *Brown*, 3 Mass.,

540; *Pease* v. *Whitney*, 5 Mass., 380; *Stone* v. *Pierce*, 7 Mass., 458; *Gilson* v. *Jenney*, 15 Mass., 205.

In § 2 of the Act to set off part of Strong, the Legislature evidently *intended* to charge the part set off with their proportion of the debts and liabilities of Strong, and to provide for the assessment and collection of the amount.

Private statutes should be construed as the parties understood them at the time. How this was understood, is shown by the fact that $800 were assessed on the plaintiff and other inhabitants of the same territory in 1856, and the whole voluntarily paid.

The assessors, acting in the discharge of their duty, are not personally liable. R. S., 1841, c. 14, § 56; *Powers* v. *Sanford*, 39 Maine, 183; *Trim* v. *Charleston*, 41 Maine, 504; *Patterson* v. *Creighton*, 42 Maine, 367, 380. Nor the collector. § 8; *Sprague* v. *Bailey*, 19 Pick., 436; *Ford* v. *Clough*, 8 Maine, 334.

The case does not show that the assessors assessed upon this territory *faster* than upon the polls and estates remaining in Strong; but, if so, it was by the consent and choice of the plaintiff and his associates in procuring the separation to be made. The assessment was to be made on the valuation of 1855, and, therefore, the sooner made the less inconvenience would be suffered.

The opinion of the Court was drawn up by

APPLETON, J.—By the private Act passed March 28, 1856, c. 635, § 1, a portion of the territory of the town of Strong was set off to and made a part of New Vineyard.

By § 2, it is provided that "the inhabitants of the territory hereby set off shall be held to pay all the taxes which have been legally assessed upon them," * * * * and "their proportion of all the corporate debts and liabilities of Strong at the time this Act shall take effect," including certain expenses of bridges and roads, and "to be assessed according to the valuation of said town for 1855, and taxes already assessed, as well as those hereafter to be assessed, upon said inhabi-

tants so set off, may be collected *in the same way and manner, and by the same persons,* as if this Act had not been passed."

By the Act of annexation, the plaintiff, who resided upon the territory thus set off, became an inhabitant of New Vineyard.

The assessors of one town have no right to assess the inhabitants of another town for their real or personal estate situated in the place of their residence. The assessors of Strong cannot assess the inhabitants of New Vineyard. The right to assess and collect, so far as they exist, must arise from the peculiar circumstances of the case.

If the plaintiff is liable to be assessed for the liabilities of Strong, mentioned in § 2, it is only because, for certain purposes, he is still to be regarded as an inhabitant thereof.

Assuming then, that, for certain purposes, it was the intention of the Legislature, that those residing upon the territory set off were to be regarded as still remaining inhabitants of Strong, till the debts and liabilities specified in § 2 should be assessed and paid, it is apparent that the assessment, as made, and its attempted collection, are not within the authority conferred by the statute.

All assessments, as well those then existing as those thereafter to be made, are to "be collected *in the same* way and manner, and by the same persons, as if this Act had not been passed." The collection implies a precedent assessment. The collection is to be made as if no Act had been passed. But if the Act had not been passed, it would not have been competent for the assessors to make an assessment upon a portion of the inhabitants, leaving the residue not assessed. If a tax for general objects is to be assessed, the assessment must be upon all, not upon different portions of the inhabitants, and payable at different times. The assessment should have been made without regard to the separation and consequent annexation. Instead of doing this, the assessment seems to have been upon the inhabitants of the territory set off, and not upon all the inhabitants of Strong.

If it be competent for the Legislature to confer the author-

ity given, and it seems to have been done in repeated instances, it is very clear that it has not been pursued. The assessment, in its terms, was fractional. But if this can be done, one portion of the inhabitants may be compelled to pay sooner than the residue. Those set off were entitled to be included in an assessment, in the same manner as the other inhabitants. This has not been done. The defendants fail, therefore, in their justification. *Defendants defaulted.*

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

ENOCH CRAIG *versus* BENJAMIN H. GILBRETH.

Possession of personal property is sufficient to entitle the possessor to maintain an action of *trespass* against a mere wrongdoer, who shows no title.

The declarations of an agent, made, not at the time of, or accompanying any act done for the principal, but at a subsequent time, and in the absence of the principal, are not admissible as evidence against the principal.

TRESPASS for taking and carrying away certain machinery from a shop in Winthrop, Dec. 10, 1857. Plea, general issue.

The plaintiff claimed under a mortgage of the property to himself, from Leonard E. Craig, dated Sept. 28, 1856, and recorded Oct. 2, 1856. The mortgage was produced on the trial, and also two notes secured therein, one for $500, and the other for $200. The plaintiff testified that but $200 had been paid on the debt secured.

It was in evidence that, at the time of the attachment, Leonard E. Craig was in possession of the property as the agent of the plaintiff.

The defendant introduced a mortgage from Leonard to one Rounds, dated and recorded July 16, 1857.

The defendant was sheriff of Kennebec county. He offered to introduce an execution sued out by one Cummings against

Leonard E. Craig, and to prove that the property had been sold and the proceeds applied to satisfy said execution. This evidence was excluded, except that the fact of the sale at auction, and the prices received, were allowed to be stated.

The defendant introduced T. J. Burgess, who testified, subject to the plaintiff's objections, that, in the summer of 1857, whilst Leonard was selling the property as agent for the plaintiff, he told the witness that he "had received, for what he disposed of, more than $600 in cash."

The verdict was for the defendant.

To the various rulings and instructions of the Court, principally in relation to the mortgages before mentioned, the plaintiffs excepted. As the case turned on other points, these instructions, and also the elaborate arguments of counsel with regard to them, are omitted.

The plaintiff also moved that the verdict be set aside, as being against the weight of evidence, and the law as stated by the Judge.

The evidence was reported at length by HATHAWAY, J.; but neither of the mortgages alluded to is found amongst the papers.

John S. Abbott, for the plaintiff.

The defendant does not justify as an officer. He pleads the general issue, without any brief statement.

The testimony of Burgess was improperly admitted. There being no evidence of any judgment in favor of Cummings, the oral testimony of Burgess, as to the sale at auction, should have been excluded. *Purrington* v. *Loring*, 7 Mass. 392.

The declaration of Leonard E. Craig, made nearly a year after his mortgage to the plaintiff, and when he was not present, were not binding on the plaintiff, and were erroneously admitted.

The possession of the plaintiff, by his agent, L. E. Craig, was sufficient to enable him to maintain this action.

It is not shown that the defendant or his deputy represents any creditor of Leonard, or returned the writ on which the

goods were attached; nor that Leonard was indebted to Cummings. In this state of facts, what is it to the defendant whether the mortgage notes were paid or not?

George Evans, for the defendant, reviewed the evidence, and contended that the mortgage debt due to the plaintiff had been fully paid.

The opinion of the Court was drawn up by

RICE, J.—Trespass for taking and carrying away a certain lot of machinery, &c. The case comes up on report and exceptions. The plaintiff is understood to claim title to, or the right to have possession of, the articles sued for, by virtue of a mortgage from one Leonard E. Craig to him, dated Sept. 28, 1856, and recorded Oct. 2d, 1856. It is also understood that the defendant claims to justify as an officer, having attached the property on a precept, Dec. 9, 1857, in favor of one Cummings, and against the said Leonard E. Craig. The mortgage is not made part of the case. We are consequently ignorant of its terms. Nor do the pleadings show that the defendant justifies as an officer; nor is there any evidence that, at the time of the attachment of which complaint is made, Cummings had any existing legal claim against Leonard E. Craig.

The case does show, however, that the plaintiff had possession of the property in controversy, by his agent, Leonard E. Craig, at the time of the attachment. That possession was sufficient to entitle him to maintain trespass against a mere wrongdoer, a naked trespasser, in which light the defendant stands before us.

It also appears in the case, that the plaintiff took his mortgage to secure the payment of a note for $500. To show that this note had been paid, the defendant was permitted to prove by Mr. Burgess, subject to plaintiff's objection, that Leonard E. Craig, who was the agent of the plaintiff, and, as we infer, had charge of the property covered by the mortgage to the plaintiff, said that "he had received, for what he

had disposed of then, (summer of 1857,) over six hundred dollars in cash." These declarations, under the rule laid down by a majority of this Court, in *Bank* v. *Steward*, 37 Maine, 519, were erroneously admitted.

Objections have also been taken to other instructions, based, however, principally upon the mortgages referred to in the case. These mortgages not being before us, we are unable to determine whether those objections are well taken or otherwise,

Exceptions sustained—
Verdict set aside, and
New trial granted.

TENNEY, C. J., and APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

ELIZA ANN HUNTER *versus* FREDERIC V. STEWART.

In an action of the case against a common carrier for an injury arising from his negligence, only such damages can be recovered as necessarily result from the wrongful act, unless special damages are alleged and proved.

An unmarried woman receiving an injury by the neglect of a common carrier in whose carriage she was upset, cannot recover damages on account of her prospect as to marriage being impaired by the injury, such damages not being specially alleged in the writ, nor sustained by the evidence.

THIS was an ACTION OF THE CASE against the defendant as a common carrier. The defendant was a stage proprietor, and carried passengers for hire, and, amongst others, the plaintiff, a young, unmarried female, over the road where, Aug. 8, 1857, she received an injury. There was evidence, more or less conflicting, as to the care exercised by the defendant; as to his driver, horses and coach; as to the condition of the road; and as to the extent and probable permanency of the injury sustained by the plaintiff. There was no evidence as to whether the plaintiff contemplated marriage.

Amongst other instructions, the presiding Judge, TENNEY,

C. J., stated to the jury that, if satisfied the injury sustained by the plaintiff would be lasting, they might consider whether her prospects as to marriage would thereby be impaired, and, if so, might allow such damages as they judged would arise from this cause, if any.

The jury rendered a verdict for the plaintiff, and the defendant excepted to these and other instructions given by the Judge.

J. S. Abbott, in support of the exceptions, as to the last point, cited *Hamlin* v. *Gr. N. Railway Co.,* 38 Eng. L. & Eq. R. 335; *Railway Co.* v. *Aspell,* 23 Penn. State R., (11 Horn,) 147; *Curtis* v. *Roch. & Syr. Railroad Co.,* 20 Barb. N. Y., 282; *Hadley* v. *Haxendale,* 26 Eng. L. & Eq., 398; *Furlong* v. *Billings,* 30 Maine, 491; *Alston* v. *Huggins,* 2 Spear, 536; *Stevens* v. *Lyford,* 7 N. H., 36; *Hemmenway* v. *Nord,* 1 Pick., 524; *Ford* v. *Mason,* 20 Wend., 210; 7 Petersdorff's Ab., 594.

The consequences which, though natural, did not necessarily follow, must be specially alleged. 2 Greenl. Ev., § 278.

Samuel Belcher, for the plaintiff, argued that the instructions given were sufficiently favorable to the defendant. Story on Bailments, § § 593, 594, 596, 598–601 and 602; Greenl. on Ev., § § 221, 222.

The plaintiff is entitled to recover all the damages she suffered from the wrongful act of the defendant. The jury might consider all the circumstances belonging to the act, and tending to the plaintiff's discomfort; and award all the damages of which the act was the efficient cause, including prospective damages. Greenl. on Ev , § § 267 to 268, inclusive.

If the damages allowed were increased by the instructions objected to, the jury must have found that, from the wrongful act of the defendant, she received a lasting injury, of such a nature as to impair her prospects of marriage, and that she actually suffered damages in this respect, of which the wrongful act of the defendant was the cause. It is immaterial

whether she contemplated marriage; if the act of the defendant doomed her to celibacy, or impaired her prospect of marriage, she thereby suffered serious damage. It is the right and privilege of young ladies to marry at a proper age. Marriage is a divine ordinance, and a fundamental social institution. 2 Kent's Com., 74; 15 Mass., 1.

In actions like this, there can be no fixed rule of damages, and Courts do not interfere with the verdict of a jury, unless the damages given are manifestly excessive. 19 Mass., 361.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of the case against a defendant for negligence as a common carrier, by reason of which the carriage, in which the plaintiff was riding, was upset, whereby she received great bodily injury, &c.

The plaintiff was unmarried, but the declaration contained no allegation of any special damage arising from the actual or probable loss of the preferment which the law implies in the relation of marriage. Nor was there any evidence tending to prove that she was, or had been engaged, or had ever contemplated marriage.

The damages arising from the negligent acts of the defendant were either general or special. General damages are such as naturally arise out of, or are connected with the injury complained of. Special damages are such as are superadded to, and do not necessarily flow from, the injurious acts of the defendant. The latter, to prevent surprise, must be specially set forth in the declaration. 7 Petersd. Abr., 594. "In general, it is true," remarks COULTER, J., in *Hart* v. *Evans*, 8 Barr., 14, "that when special damages are claimed for an alleged tort, they ought to be set out in the *narr*, either as inducement or distinct ground of superadded damages. But when the damages arise necessarily and inevitably from the tortious act, it would seem to be unnecessary; the tortious act being itself the gravamen of the action, and the necessarily resulting injuries being only the measure of damages." * * * "In an action for false imprisonment, evidence that the plain-

tiff was stinted in his food, when confined, or suffered in health thereby, cannot be received without being specially alleged; because these things do not necessarily result from the illegal confinement. *Lowden* v. *Goodrick*, Peake's N. P., 46.

The case of *Laing* v. *Colder*, 8 Barr., 497, is directly in point. This was a suit against the defendant for negligence as a common carrier, whereby the plaintiff's arm was broken. The declaration was for damages arising from pain, loss of time and expenses. The plaintiff offered to show the number of his family, and that they were dependent upon him for support, and that, in conseqence of this injury, he became embarrassed, but the evidence was rejected. In delivering the opinion of the Court, BELL, J., says,—"The evidence was rightly excluded. The plaintiff went for general damages, under the common allegation *ad damnum*. Damages which *necessarily* result from the act complained of are properly termed general damages, and may be shown under the common allegation; for the defendant must be presumed to be aware of the necessary consequences of his conduct, and, therefore, cannot be taken by surprise in the proof of them. But damages that do not necessarily flow from the principal act, though possibly attendant upon it, are denominated special. * * * Now injuries to the person consist in the pain suffered, bodily and mentally, and in the expenses and loss of property they occasion.

"In estimating damages, the jury may consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted; for these may be classed among the necessary results. But alleged damages sustained by the plaintiff from the circumstance of his being the head of a family dependent upon him, have no necessary connection with the injury done to his person. Such damages may or may not follow a temporary disability. They do not necessarily attend upon it." Special damages, such as are possible only, must be set forth.

The jury were instructed, that "if they should be satisfied that the injury sustained would be lasting, they were at

liberty to consider whether her prospects for being well married would not thereby be impaired; and, if so, they were at liberty to allow such damages in this respect as they are satisfied would arise from this cause, if any."

Now the loss of marriage may be of itself a special ground of action. In the present case it was not alleged in the declaration, nor sustained by the proof. It does not necessarily arise from a bodily injury, though it might be consequent thereupon. The defendant had no notice that damages would be claimed for any such cause, and, therefore, could not be prepared to prove or disprove its existence. As damages have been given for a special injury, having no necessary connection with the wrongful acts of the defendant, and neither set forth in the declaration nor established by the evidence, the exceptions must be sustained.

Exceptions sustained, and verdict set aside.

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

FRANCIS G. BUTLER *versus* BENJAMIN B. MACE.

A claim for the specific performance of a contract for the purchase of real estate is not within the jurisdiction of referees, acting under the provisions of R. S., c. 108, although formally submitted by both parties.

AWARD OF REFEREES.

The plaintiff claimed that the defendant should "pay for and take and purchase of him" certain lands at a price named, and fulfil the stipulations of a bond given to him by Mace, dated April 27, 1852.

This claim was submitted, under the statute, to referees, who awarded "that the said Francis G. Butler, having executed a deed of conveyance of certain land to the said Benjamin B. Mace, which the said Mace had previously, by his

memorandum in writing, by him signed and sealed, bound and obligated himself to purchase, do receive of the said Benjamin B. Mace, the sum of $92,26 cents, debt or damage," with costs, &c.

This award was presented in Court, and the plaintiff moved its acceptance. The defendant objected for several reasons, one of which was the referees exceeded their powers in requiring him to purchase real estate, or to pay for real estate he had not purchased.

The Court, HATHAWAY, J., presiding, rejected the award, and the plaintiff excepted.

Samuel Belcher, for the plaintiff.

The submission and award being in proper form, the presumption is that the referees have done their duty, and their report should be accepted. 35 Maine, 135. They have the same authority as if appointed under a rule of Court. Stat., 1857, c. 108. In the absence of proof, the Court will not assume that they have exceeded their powers.

The claim of the plaintiff that the defendant should pay him for certain lands, according to a bond given by the defendant, might well be the subject of a personal action. In the absence of proof of the contents of the bond, the Court will not assume that a personal action could not be maintained on it. *Buck* v. *Spofford*, 35 Maine, 526. The plaintiff offered a deed, and demanded his pay. He performed every thing required on his part, and asked the defendant to fulfil his part.

The Court will not adjudicate on matters submitted by the parties to another tribunal. The referees have decided only what was submitted to them. Mace waived any objections by consenting to the reference and appearing before the referees. 10 Pick., 275.

Hannibal Belcher, for the defendant.

The plaintiff's claim is, in substance, that the defendant shall perform specifically the stipulations of a bond previously given by him, binding himself to purchase certain lands of the

plaintiff. As the title to the lands comes in question, the plaintiff's claim cannot properly be the subject of a personal action. His only remedy is before a court of equity. R. S., c. 77, § 8.

The jurisdiction of referees is limited by the statutes; and, as this claim was one not coming within the statute provisions, the whole proceedings were erroneous. *Henderson* v. *Adams*, 5 Cush., 610.

The referees recite, in their award, that the plaintiff has executed a conveyance of certain lands. By so doing, they decide upon the title to the lands conveyed, which they had no right to do. *Fowler* v. *Bigelow*, 8 Mass., 1; *McNear* v. *Bailey*, 18 Maine, 251.

The opinion of the Court was drawn up by

RICE, J.—The demand submitted to the referees was a claim for the specific performance of a contract for the purchase of real estate. R. S., c. 108, provides for the submission of that class of controversies, which may be the subject of a personal action, and on which a judgment may be entered up on the award of the referees by the Court sitting as a Court of law. R. S., c. 108, § 6. Had the claim in this case been for damages arising from the non-fulfilment of that contract, the case might have been different.

The specific performance of a contract can only be enforced in this Court, sitting as a Court of Equity, under provisions of c. 77, § 8, clause 3d. The proceedings in this case are not under that provision of the statute, and were not within the jurisdiction of the referees acting under the provisions of c. 108. *Exceptions overruled.*

TENNEY, C. J., and APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

STATE *versus* BENJAMIN LEARNED.

In a complaint that intoxicating liquors are kept at a certain place intended for sale contrary to law, it is sufficient to authorize the forfeiture of the liquors, if it be shown that they are there kept with such intent, although it is not alleged or proved by whom they are so intended for sale. But the person charged as thus keeping liquors cannot be convicted, unless it be alleged and proved that they were *by him* unlawfully deposited, or intended for sale in violation of law.

Although a complaint is in the form prescribed in statute of 1858, c. 48, and is therein declared to be "sufficient in law for all the cases arising under the aforesaid Act, (c. 33,) to which they purport to be adapted," yet, if it does not describe any offence punishable by c. 33, it cannot be sustained.

Whilst the Legislature has power to modify and simplify the forms of criminal process, it cannot make valid and sufficient a complaint or indictment in which the accusation is not "formally, fully and precisely set forth," so that the accused may know of what he is alleged to be guilty, and be prepared to meet the exact charge against him.

The form of complaint prescribed in c. 48, that intoxicating liquors are kept and deposited for unlawful sale, is not sufficient to authorize the conviction of the person having them in his keeping, without an allegation that they are intended *by him* for sale in this State in violation of law, or deposited and kept by him to be so sold by some other person, or with intent to aid or assist some person in the unlawful sale thereof.

THIS was a complaint against the defendant for having, on Jan. 15th, 1859, in his cellar in Industry, where then was his dwellinghouse in which he lived, since burned, "intoxicating liquors kept and deposited" by him, he not being authorized by law to sell said liquors, "and that said liquors then and there were intended for sale in this State in violation of law, against the peace," &c. There was evidence tending to show that the defendant had in his keeping certain intoxicating liquors, and other evidence tending to prove that he had never sold any of the liquors. The verdict was "guilty."

The defendant filed a motion in arrest of judgment, because, amongst other reasons, the complaint did not allege that the liquors were kept by the defendant *with intent* to sell them in this State in violation of law, or with intent that they should be so sold by any person, or to aid or assist any person in such sale.

J. H. Webster, with whom was *H. E. Dyer*, in support of the motion, argued the several points embraced therein; but, in the view taken by the Court, the case turned upon a single point.

The *County Attorney*, for the State.

The opinion of the Court was drawn up by

KENT, J.—The defendant, after conviction, moves in arrest of judgment, because, as he alleges, the complaint on which he was tried does not set forth any offence against the statute. He avers that he may have done all the acts specified in the complaint, and not necessarily have violated any provision of the law; and that no man can be compelled to answer to a charge involving a criminal offence until the same is fully and formally set forth. The complaint is based upon the Act of 1858, c. 33,—"for the suppression of drinking-houses and tippling shops." That statute contemplates several offences, and several distinct modes of proceeding against the offenders and the liquor, which is the subject matter of the enactment. It is an offence to manufacture it, except under certain restrictions. It is an offence to sell it, unless as a duly appointed agent. It is an offence to deposit it, or have it in possession, with intent to sell it within this State in violation of law, or with intent that the same shall be so sold by any person, or to aid and assist any person in such sale.

The statute further provides that such liquor kept and deposited may be proceeded against *in rem*, and upon due proof may be forfeited and confiscated.

It is important to observe that the statute, by section 12, and several sections next following, provides for a union of two prosecutions in one process, viz., a process *in rem* against the liquors, and a charge of an offence against the person in whose keeping they are found. The liquors must be libelled, and notice must be given to all persons to intervene by claim, if they see fit. The right to claim, or to con-

test on the question of forfeiture of the liquors, is not confined to the person named in the complaint. This right may be claimed by any and all persons who duly become parties.

But the charge in the original complaint of a personal nature, involving an accusation against the individual named, can only be made against the person who is declared to be the keeper or depositor, with the unlawful intent; and can only be sustained by proof that the liquors were found in his possession or deposit, and that he kept them *with the unlawful intent* named in the 12th section.

The two processes thus united seem to be, in many respects, distinct. The portion that relates to the forfeiture may be prosecuted to final judgment, although the *person* charged may be acquitted. The ground of *forfeiture of the liquors* is, that they are intended for unlawful sale in this State, by some person named or not named, known or unknown. If there is sufficient evidence that the liquors are intended for unlawful sale in the State, it is not necessary to prove by whom, or by what individual the sale is intended.

But the *person* charged as thus keeping liquors cannot be convicted simply from the fact that the liquors are found in his possession, or that they were intended for unlawful sale by somebody. He may be an innocent depositary. He can only be a guilty one, under this statute, by having this possession *with an intent on his part* to sell the same in this State in violation of law, or with the intent that the same should be *so* sold by any person, or with intent to aid or assist any person in such unlawful sale; the *intent* being, under section 12, an essential element, in either case, in the offence charged against the individual.

The first question before us is whether any such offence is set forth in this complaint. It charges that, at a certain time and place, "intoxicating liquors were and still are kept and deposited by the respondent in a certain place or places; that he was not authorized by law to sell said liquors in the places specified; that said liquors then and there were and now are intended for sale in this State, in violation of law."

It will be observed that it is not alleged, as required by § 14, that the liquors are "*unlawfully* kept or deposited." The word "unlawfully," which is a most important word in defining an offence, is omitted in this complaint. If this word had been inserted, it might, perhaps, have been sufficient to charge the defendant, as his keeping could only be unlawful when accompanied by the intent to sell, or to aid in selling.

There is no allegation that the possession was such as rendered it unlawful. It might have been free from any just imputation of any design to sell, or to aid in selling. Mere possession of intoxicating liquors is no legal crime or offence against the statute. It is true, that it is alleged that the liquors were intended for unlawful sale in this State. But *by whom* intended? It is not charged that *the defendant* had such intention. This allegation may be sufficient to justify proceedings *in rem* against the liquors; but it does not charge the person in possession with any offence. It is not a crime in any one to be in possession of liquors, even if another person may intend to sell them unlawfully, if the depositary had no such intention himself, and no intent that they should be so sold by any person, or to aid in such selling.

The defendant might be justly chargeable with all that is set out, and yet not be guilty of any of the offences described in the statute.

There may be some confusion introduced in construing these provisions, if we do not keep constantly in mind the fact that the charge against the liquor, and the charge against the individual,—or the charge *in rem* and the charge *in personam*,—are distinct and independent. The offence of the individual is set forth in section 12, and consists, as before shown, of an act and an intent. The *act* is a depositing or keeping intoxicating liquors by the person named; the *intent* is a purpose on his part to sell, or that some other person should sell, or to aid in selling the same liquors in violation of law. This section 12 does not say that it shall be an offence in an individual to deposit or keep liquors *intended* for unlawful sale in this State; but it must be *with an intent* on his part so to

sell, &c. If the word "intended" had been used in the 12th section unqualified, it might have been urged with some plausibility, at least, that the offence by the person was consummated, by proof of an intention by any one to sell unlawfully, however innocent the depositary may have been. But it might, even in that case, have been doubted whether the Legislature could have intended to punish, as a criminal, a man who had been innocent of any intent to do wrong, or to aid any one in violating the law. It was said in an early case in this State, by C. J. MELLEN, (*Sanford* v. *Emery*, 2 Greenl., 5,) "that, although the statute is silent as to the *motive* with which a person may carry a pauper into a town in which he has not a legal settlement, and there leave him; still, the *unlawfulness of the intention* is the essence of *the act*, and gives it the character of an offence against the statute." This is the principle that lies at the foundation of all just penal and criminal codes.

The Legislature, that enacted the law now in question, was careful to avoid even the imputation of an intended violation of this great principle of right and justice. In their desire to suppress or prevent what they deemed grievous evils and public nuisances, and corrupting practices, they were not unmindful of the rights of the citizen, but carefully distinguished between what might constitute a ground for forfeiture of the *offending thing*, and what might be a crime in *a person* in possession of it. They, therefore, most significantly changed the form of expression, from "with intent," in the 12th section, to "intended," in the 13th. The first of these sections applying solely to the offence of the individual, the other to the *offence of the liquors*, if that which causes so many offences in others may be itself denominated an offender.

The liquor itself, however, if an offender, cannot have a will, purpose or intent. It is enough, if any person has an intent to sell it unlawfully. If it is "intended" for unlawful sale, whether by the person named or any other person, it may be forfeited; and, as against the liquor, this complaint may be sufficient. The magistrate, by the subsequent sections,

is, in relation to the liquor, to determine whether it was kept and deposited for unlawful sale. But, in reference to the charge against the individuals, § 14, he is to determine if the said liquors were, or not, deposited and intended for unlawful sale *by the person or persons* named in the complaint. Can a magistrate convict "the person or persons," and sentence them for depositing or keeping *with intent*, when no such intent is alleged against him or them? To illustrate the points involved in this case, suppose that A comes to B, who keeps a storehouse, in which various persons deposit goods, and A says, "I have three barrels of vinegar, which I wish you to keep on deposit for me a week, or until I call for them." B takes them, and deposits them in his cellar. They are marked "Vinegar," and have every appearance of containing that article; and it is proved, beyond doubt, that B really believed them to be filled with vinegar. In fact, they contained intoxicating liquors, which A intended to sell in this State, in violation of law, and he deposited them with B, to conceal them from the officers of the law. A process is issued, charging exactly as this complaint does, that intoxicating liquors were, and still are, kept and deposited by B, in a place described. This fact is unquestioned. It is then alleged that said liquors then and there were, and now are, intended for sale in this State, in violation of law. This fact is unquestionable and clearly proved, that *A* did thus intend. Now, under such a complaint and such facts proved, could *B* be convicted? Would the record show any statute offence?

It is no answer, to say that B might show his innocence. No man is bound to prove innocence until a crime, in all its essential particulars, is distinctly charged, and, at least, made out *prima facie* against him. How would it be on demurrer? Might not the accused safely admit all that is charged in this complaint, and yet successfully contend that no statute offence is set out?

But it is urged that this complaint is in the form set forth in chap. 48, of the laws of 1858. Upon inspection, such appears to be the fact. That statute provides that "the

forms," set forth in that Act, "shall be deemed sufficient in law for all the cases arising under the aforesaid Act, (c. 33,) to which they purport to be adapted."

The defendant, admitting that this complaint is in the form set out in the Act, denies the right of the Legislature to prescribe a form which, in fact, charges no crime, and holds the accused bound to answer to such a charge, and liable to be convicted upon proof of matters not alleged.

We do not doubt the power and right of the Legislature to prescribe, change or modify the forms of process and proceedings in all civil actions, and to determine what shall be deemed a sufficient allegation, in form or substance, to bring the merits of a case before the Court. But, in criminal prosecutions, the exercise of this right is limited and controlled by the paramount law in the Constitution. It has for centuries, since the declaration in *Magna Charta*, been the boast of the common law, that it protects with jealous care the rights of the accused. It not only secures a speedy and impartial trial by jury, but it requires that no person shall be held to answer, until the accusation against him is formally, fully and precisely set forth,—that he may know of what he is accused, and be prepared to meet the exact charge against him. This right of the respondent has ever been regarded as sacred and essential to the protection of the individual citizen. In all the changes of forms, and in the principles and practice of the law, this right has remained untouched and unchanged. The people have not been willing to leave it without the express sanction of the Constitution. In the Declaration of Rights, it is set down as one of the rights of the accused, "in all criminal prosecutions, to have a right to demand the nature and cause of the accusation, and have a copy thereof; and that he shall not be deprived of his life, liberty, property or privileges, but by the judgment of his peers, or the laws of the land." Or, as it is expressed in the Constitution of the United States, "without due process of law." This "law of the land" is not simply the existing statute law of the State, but, as has been often decided, it is

the right of trial according to the process and proceedings of the common law.

"By the process and proceedings of the common law, the accused has the right to know the charge in the whole form and substance against him, to contest it, and, if not proved to the satisfaction of a jury, to demand an acquittal." *Saco* v. *Wentworth*, 37 Maine, 172. Will any one maintain that the Legislature might dispense with a *written* accusation, or enact that any written charge, however vague or indefinite in its terms, should be sufficient? That, for instance, a general charge, that the accused had violated the law, should be sufficient to hold a man to answer to any crime, from a simple assault to murder?

We do not intend to say that the Legislature may not modify or simplify the forms in criminal proceedings, provided the essential matters which clearly set forth an offence, and which, being proved, constitute the offence, are retained. The case before us does not require us to determine how far the Legislature may go in substituting a general description of an offence for minute specifications. What we do decide is, that the Legislature cannot dispense with the requirement of a distinct presentation of an offence against the law. It cannot compel an accused person to answer to a complaint which contains no charge, either general or particular, of any offence.

The form, and this complaint which follows it, it will be observed, does not make a general charge of a violation of a particular statute, or a particular section, but undertakes to charge specifically all the acts complained of. These acts, as we have shown, do not constitute any offence in the person charged.

Is it not most clearly a violation of the rights of the individual, under the Constitution, to compel him to answer, under this complaint, for matters not specified, and to suffer punishment for acts never presented, either generally or specifically, in any written accusation, or in any record? It would present the absurd record of a case where a person is *sen-*

tenced to punishment for matters which the record itself shows are no offence against the law.

Useless forms, and redundant expressions, and minute specifications, may, doubtless, be dispensed with. But the essential rights of the citizen would be impaired, if men could be tried and sentenced for matters not set out clearly and distinctly on the record. It is a right belonging to the humblest to meet his accuser face to face, and to know that whereof he is accused. If, to effect what is deemed a desirable end, the salutary, and protective, and long established doctrines of our laws may be dispensed with, the precedent may be drawn in to sanction, at some other time, the usurpations of tyranny, or the punishment of innocent men, obnoxious to the ruling powers,—and who could only be convicted by an arbitrary and complying Court, disregarding or overruling the requirenents of law in this matter of distinct allegation of all material charges. It is not matter of form, but matter of substance, that is in question. No matter, that it is essential to set forth to show that an offence has been committed, can be mere matter of form. When our Legislature, some years since, enacted that motions in arrest of judgment should not be entertained, they were very careful to confine the provision in terms to "*civil* actions;" thus plainly indicating that no relaxation of the protective rules that had long existed in criminal cases was to be allowed.

We cannot believe that the Legislature, in enacting the form in question in this case, intended to dispense with any essential allegation, or designedly to infringe the constitutional right of the accused. We have no doubt that, in their desire to simplify and condense the forms, they unintentionally omitted the few words which are necessary to set forth the offence.—That this was an unintentional omission is manifest by reference to the forms next following this, of the warrant, based on the complaint, and the recognizance. In both these forms the allegation is distinctly made of an *intent* on the part of the person named, to sell the liquors. But in the form of the libel, *in rem*, against the liquors, the allegation is general

that they were "intended for sale," not naming any particular person as having this intent.

The statute, (c. 48,) does not require the use of these forms; it simply provides them, to be used if preferred. The insertion, into the form as it now stands, of a distinct allegation that the liquors are unlawfully kept and deposited by the person named, and that they are intended *by him* for sale in this State, in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale thereof, (as the case may be) would probably render the complaint sufficient. Perhaps the omission of the words "are unlawfully" kept, would not be fatal, if the acts charged distinctly made out a case within the statute.

The exceptions must be sustained, and
Judgment arrested.

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

EDWARD CREHORE *versus* CHARLES PIKE *and others.*

Where a bond was given, under R. S., 1841, c. 123, § 8, and c. 124, § 13, on application for a review and stay of execution, conditioned that the obligors should pay the first judgment, "if such shall be the final judgment on review," and the verdict on review was for increased damages, and the Court rendered judgment against the original defendant for the excess, and for costs of review, all of which he paid, but did not pay the original judgment; — it was *held*, in a suit on the bond, that the judgment on review was, in effect, though not in terms, an affirmation of the original judgment, and a refusal to pay the latter was a breach of the conditions of the bond.

It seems that, under those statutes, the bond did not cover the judgment in review for the excess and costs.

On suggestion that the excess of the second verdict over the first consisted of accruing interest, the Court, unless the parties agree, will refer it to a Judge at *Nisi Prius* to determine what part of the excess was interest, if any, and to make an equitable deduction from the interest to be recovered in the suit on the bond.

DEBT ON BOND. ON REPORT by TENNEY, C. J.

IT appeared that the bond was given by the defendant Pike, with the other defendants as sureties, for the purpose of procuring a stay of execution on a judgment recovered by Crehore against Pike, in order that the latter might bring an action of review.

The condition of the bond was:—"That, whereas judgment was rendered against said Pike, in an action of assumpsit in favor of said Crehore, for the sum of one thousand seventy-eight dollars and two cents debt, and cost taxed at one hundred and five dollars and eleven cents, by the consideration of the Justices of the Supreme Judicial Court, begun and held at Farmington, within and for the county of Franklin, on the third Tuesday of October, A. D., 1852, and, by adjournment from day to day, on the twenty-third day of October, A. D., 1852;—and said Pike has applied by a petition that a review may be granted in said action, and that the Court grant or order a stay of execution upon the judgment:—Therefore, if said Pike shall well and truly pay the said Crehore the amount of said judgment, if such shall be the final judgment on the review, with interest thereon from the date of this bond up to the time of rendition of judgment in the action on this bond, at the rate of twelve per cent. annually, then this deed shall be null and void; otherwise, to remain in full force and virtue."

On trial of the action of review, before a jury, October term, 1854, a verdict was rendered for the original plaintiff, against Pike, for $1110,50. Exceptions were filed to the rulings of the presiding Judge, but afterwards overruled, and the following judgment was rendered.

"It is therefore considered by the Court here, that the said original plaintiff, having recovered on the review a greater sum for debt or damages than was awarded to him on the original judgment, recover judgment and execution against the original defendant, for the excess, to wit, the sum of one hundred and twenty-three dollars and seventy cents, and his costs on the review, taxed at $143,86."

Execution was issued on this judgment, and the amount was paid by Pike, leaving the amount of the first judgment unpaid.

This action was brought on the bond to enforce payment of the original judgment.

The case was reported, the full Court to render such judgment as the law and facts require.

John S. Abbott, for the plaintiff, argued that the judgment in the action of review was in exact conformity with the provisions of the statute. R. S., 1841, c. 124, § 9.

J. H. Webster, for the defendants, contended that the judgment on review had been fully paid, and that no suit could now be maintained on the bond.

The meaning of the statutes of 1841, c. 123, and c. 124, is obscure. The condition of the bond follows the exact words of the statute, and requires the obligors to pay "the amount of said judgment, if such shall be the *final judgment* on the review," &c.

Technical words in the statute are to be construed according to their received technical meaning. *Ex parte Hall*, 1 Pick., 261; *Smith* v. *Horsum*, 6 Mod., 143; Bac. Abr. Stat., J. 4. The term "final judgment" has a well defined technical meaning. It is the judgment of Court which puts an end to the action. All that precedes it is mere recital. 3 Black., 395. The "final judgment" on the review was for $123,70, and costs of review, and that has been paid. There is no allusion to the former judgment, except by way of recital. There is no affirmation or decree concerning it. Whether the verdict of the jury would have authorized an affirmation of the former judgment or not, the Court has not done it. The plaintiff, by taking judgment in this form, remitted the balance, or waived any rights he might have had under a proper judgment. *Whitwell* v. *Burnside*, 1 Met. 39.

The sureties on the bond bound themselves to pay the first judgment, if such should be the final judgment on the review.

Such not appearing to be the final judgment on the review, they are discharged.

The construction the plaintiff contends for would give him 6 per cent. interest on the first judgment, in addition to 12 per cent. on the judgment on review, which the Legislature never could have contemplated. On examination, it will be found that the verdict on the review increased the original judgment only by adding the interest accrued.

Abbott, in reply.

The judgment on review conforms to the statute provision, and affirms the original judgment in effect, although not in language. *Dunlap* v. *Burnham,* 38 Maine, 113; Howe's Practice, 532; *Billerica* v. *Carlisle,* 2 Mass., 159.

There is no evidence that the increased judgment on review was based on accruing interest. But if such were the case, the Court cannot examine it in this action; the judgment is to be taken as legal until reversed on *error.*

The opinion of the Court was drawn up by

KENT, J. — This is a suit upon a bond, given upon an application for a review and stay of execution; and the only questions are, whether the condition of the bond has been broken, so that the defendants are liable, and, if so, for what amount shall they be held. In the suit of the present plaintiff against Charles Pike, the plaintiff obtained a verdict and judgment thereon for $1078,02 damages, and $105,11 costs. Thereupon Pike applied for a review and a stay of execution, which stay was granted upon his filing the bond in suit. A review was also granted, and, upon trial of the review, the original plaintiff recovered a greater sum for debt or damage, than was awarded to him on the original judgment.

The record of the judgment in the review is, "that the original plaintiff, having recovered on the review a greater sum for debt or damages than was awarded to him on the original judgment, recover judgment and execution against the original defendant for the excess, to wit, the sum of one

hundred and twenty-three dollars and seventy cents, and his costs on the review."

The condition of the bond in suit is, (after reciting the first judgment and the application for a review and supersedeas,) that "said Pike shall well and truly pay to said Crehore the amount of said judgment, if such shall be the final judgment on review, with interest thereon from the date of this bond up to the time of rendition of judgment in the action on this bond, at the rate of twelve per cent. annually."

The defendant Pike has paid the amount of the execution rendered on the judgment on review for the excess and costs of review before stated. He and his sureties on the bond object to the plaintiff's recovery in this suit, on the ground that the final judgment on review contains no affirmation of, adjudication, judgment or decree, concerning the original judgment reviewed. They contend that the judgment is not, in terms or by necessary implication, "that said Pike shall well and truly pay to said Crehore the amount of the first judgment;" and that therefore the condition of the bond has not been broken, and could not be until such express judgment is given.

It is evident that the bond and the judgment in review are both in exact conformity with the statute requirements. (R. S. of 1841, c. 123, § 8, and c. 124, § 13.) If the plaintiff cannot recover on the bond, it must be because the requirements of the statute are insufficient, when strictly pursued, to give the security intended.

In giving a construction to the language of the condition, it is material to take into consideration the facts recited in the bond, and the intention of the Legislature in fixing the terms of the condition.

The original plaintiff obtains a judgment. He is entitled to the fruits of that judgment, an immediate issue of an execution to enforce without delay the payment of the amount which that final judgment has awarded to him. The defendant petitions for a review. This he may do, and obtain it, if he shows good cause, without filing any bond. The bond is

required, when he asks that the payment may be delayed until the termination of the proceedings in review. The law says, you can have that indulgence, and we will stay the execution as you request, but the plaintiff is not to be denied his present rights to have immediate execution and payment, without ample security by bond, with sureties, that his present judgment shall be paid in full, with twelve per cent. interest, unless you on review show that he was not entitled to the judgment. The bond is required to give that security; and the condition is that the original judgment shall be paid, if such should be the final judgment on review.

What did the parties understand by this condition? They must be held to have had knowledge of the law. That law plainly points out the nature and extent of the final judgment in review, in case the result should be, as it was in this case, viz., that the *judgment* and execution shall be for the *excess* and cost. It also distinctly provides that the original judgment in cases of review shall generally be given without any regard to the former judgment, except in the two cases named:—1st, where the sum originally recovered is reduced, and 2d, where it is increased; and in each of these cases the original judgment remains, the judgment in review being for the amount of the excess or diminution. In case of diminution, and when the former judgment has not been satisfied, there may be a set-off of one *judgment* against the other. But both are distinct judgments. If the plaintiff in review obtains a verdict and judgment in his favor, and thus establishes the fact that the former judgment was entirely unjust, and ought not to have been rendered, the Court will regard the first judgment, if it has not been paid, as nullified; or rather, will, in effect, cancel it, or regard one judgment as practically off-set against the other, to prevent circuity of action. *Dunlap* v. *Burnham*, 38 Maine, 112.

It must be remembered that the question, in the case before us, does not arise in a suit upon the former judgments, as in *Dunlap* v. *Burnham;* nor upon any questions as to the excess, or the costs, or a claim for an off-set. The only question

is what is the fair construction of the condition of this bond which the defendants signed. All other matters have been disposed of.

We are of opinion, that the condition, construed in connection with the recitals, and the statute, and the knowledge and intentions of the parties, is that, if the final judgment on review shall show, by fair intendment, that the original judgment was not erroneous, but was rightly recovered and ought to be paid by the defendant in that suit, then these defendants will "well and truly pay it, with the specified interest."

The final judgment on review does expressly state that the original plaintiff did recover, on review, a greater sum, for debt or damages, than was awarded to him on the original judgment, and gives thereupon judgment and execution for the excess and costs. This, it seems, was the only judgment that could be rendered by the Court, under the statute of 1841; and does show that the original judgment was right, and ought to be paid.

It will be observed, upon examination, that the language of the condition is, not to pay "the amount of the final judgment *on review*," as required by the Revised Statutes of 1857, but to pay the amount of the *original* judgment. This bond did not cover the judgment on review for the excess and cost. The recent statute seems to require a bond which shall cover both the original and final judgment on review, and may require hereafter a modification of the terms of the final judgment in review, to charge the signers of a bond given in conformity with the requirements of c. 89, § 4, of R. S. of 1857. The bond in question, however, is conditioned to pay the original judgment, if such shall be the final judgment on review. We have seen that this final judgment could, by the law which all the parties understood, no otherwise decree, as to the original judgment, than by recital of the fact as in this case.

It is said, in the argument, that the increase in the amount of the second verdict was only the accruing interest on the first, and that we have sufficient evidence before us that such

was the fact. If we have, we do not perceive how that fact can affect the question of maintaining the action on this bond. It might affect the question of costs on the review, and whether there was in fact an increase or diminution of the original damages. It is not contended that, in this case, there was any diminutiou of the original verdict, as in 2 Greenl. 397, *Kavanagh* v. *Atkins*. The only claim is that the original verdict was taken as the basis, and interest added. In any view, the original judgment remains *intact*, undiminished, and justly due; and the plaintiff here claims nothing for the excess, or costs of review.

It would seem, if it was clearly established that the difference between the first and second verdicts was only the interest on the same sum found as damages by both juries, that the excess, which has been paid, was a part of the interest, at six per cent. on the original debt. If so, then the original plaintiff will, as contended by defendant, obtain interest for a portion of the time, at 18 per cent., in case he has judgment now for the whole time since the date of the bond to the present time, at 12 per cent. But we have not sufficient facts before us to enable us to determine whether the excess was for interest or not. The plaintiff, probably, knows how the fact was, and must determine for himself whether justice and fair dealing does, or does not, require him to consider and allow the whole or a portion of that excess, as part payment of the interest. If parties do not agree on this amount of interest, the fact may be ascertained by a Judge at *Nisi Prius*, who may determine if the difference between the two verdicts was merely interest, and if so, that excess may be deducted from the amount of interest to be recovered in the suit.

Judgment for the plaintiff, for the amount of eleven hundred and eighty-three dollars and thirteen cents, and interest on that sum, at twelve per cent. per annum, from October 25, 1852, to the day of the rendition of this judgment on the bond in suit.

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

FRANKLIN C. DAVIS *versus* SUMNER RUSSELL.

A railroad corporation, as soon as their track has been located, may take immediate possession.

The owner of land taken for the road by such location, failing to agree with the company as to his damages, may, at any time within three years, apply to the county commissioners, who shall estimate his damages, and, if requested, require the corporation to give security for their payment; whereupon the right of the corporation to enter upon the premises, except for making surveys, is suspended until the security is given.

But where no application has been made to the county commissioners to estimate the damages, an action of trespass, brought within three years after the location, against the company or its agent, cannot be maintained.

ON REPORT by HATHAWAY, J.

THIS was an action of TRESPASS *quare clausum fregit*, the plaintiff being the owner of one undivided twelfth part of certain premises in Farmington, and naming the other co-tenants in the writ, according to the provisions of the Revised Statutes of 1857, c 95, § 14. The trespasses are alleged to have been committed from Jan. 1, 1858, to Sept. 9, 1858. Plea, the general issue, with a brief statement alleging that the acts were done as the servant of the Androscoggin Railroad Company, who claimed to own the premises.

The plaintiff, as also the other co-tenants, derived their title from the will of Sylvanus Davis, who having deceased, said will had been duly proved.

There was testimony tending to show the acts of trespass, or a part of them, alleged in the writ.

The defendants introduced an instrument under seal, dated June 20, 1856, given by Edward P. Davis to the Androscoggin Railroad Company, by which said Davis, in consideration of fifty dollars acknowledged to have been paid to him by said company, covenanted to give them on demand a good and sufficient deed of the same premises on which the alleged trespasses were committed. Edward P. Davis owned three undivided twelfth parts of the premises.

Edward P. Davis, called by the plaintiff, testified that he signed the agreement, after being urged to do so, because oth-

er land owners in the vicinity had given a right of way across their land; but that his mother, who owned eight-twelfths of the premises, did not assent to the contract.

The defendant introduced the location of the road, and called A. B. Crosby, who testified that he made the location, and located the depot on the land in question.

John B. Jones, called by the defendant, testified that he saw Davis' mother, when he made the bargain with Davis, and she said she would join in the deed. He further stated that he, as one of the directors of the company, had repeatedly demanded a deed of Edward P. Davis, but had obtained none.

Mrs. Tarbox, the mother of the plaintiff and of E. P. Davis, called by the plaintiff, testified that, when called upon by Jones, she repeatedly refused to give the land; that she never read the writing given by her son, but told him to do what he pleased with his own part; and that she afterwards directed him to forbid the defendant occupying the land.

The plaintiff and E. P. Davis both forbid the defendant occupying the land in June, 1858.

The company built their depot on the premises, the defendant aiding more or less.

The testimony having been adduced, the case was withdrawn from the jury, and the evidence reported, for the full Court, with jury powers, to enter such judgment as law and evidence may require.

John S. Abbott, for the plaintiff, argued that the paper signed by E. P. Davis conveyed no title to the land, nor was there any evidence tending to show title in the company, or any defence to the action.

J. H. Webster, for the defendant.

The plaintiff and his brother E. P. Davis, at the time the latter gave the railroad company a bond to convey the premises, were in exclusive possession, as admitted by their mother. By the bond of E. P. Davis, he gave the company immediate possession of the premises. The case finds that they con-

tinued to occupy the land, without objection, until June, 1858. On these facts, can this action be maintained?

At least, the company obtained possession of E. P. Davis's three-twelfths of the land, and became co-tenants of the other owners. Can one co-tenant maintain trespass against another, unless it be for waste?

The time limited for the company to file its location had not elapsed when this action was brought. The location was made in June, 1856, and trespass could not be brought if the damages were assessed within three years thereafterwards. R. S., c. 51, § 5. The action was prematurely brought.

The *locus in quo* was taken, under the statute, by the location made in June, 1856.

Abbott, in reply, argued that E. P. Davis's agreement was a mere undertaking, when called upon, to give the company a deed of the premises. It gives them no right or permission to occupy immediately.

Section 4 of c. 51, R. S., provides that the company shall not enter upon land taken for railroads, except to make surveys, until the location is filed, and the damages assessed and secured. It is not shown that the location has been filed. The damages have not been assessed or secured. The occupation of the premises by the company is, therefore, unauthorized.

The opinion of the Court was drawn up by

DAVIS, J. — This is an action of trespass *quare clausum fregit*. The defendant justifies as servant of the Androscoggin Railroad Company. The writ is dated September 9th, 1858. The railroad was located June 13th, 1856.

Where land is taken by a railroad corporation, under the provisions of their charter, they have a reasonable time to make compensation to the owner. And, though they enter into immediate occupation, they are not trespassers, unless guilty of unreasonable delay in making payment to the owner. *Cushman* v. *Smith*, 34 Maine, 247.

There are various provisions of statute, enacted at differ-

ent periods, designed, not to supersede or abridge the remedies which the owners of lands so taken had at common law, but to provide remedies more speedy and certain.

As soon as a railroad is located, the corporation have the right to take possession. If they do not agree upon the damages with any owner of land taken by them, such owner, at any time within three years, may apply to the county commissioners to estimate the damages sustained by him. And the commissioners, if requested by the owner, shall require such corporation to give security for the payment of all such damages and costs. Thereupon the right of the corporation to enter upon such land, except for making surveys, is "suspended," until such security is given. And when the proceedings are closed, payment must be made to the owner within thirty days after it is demanded. R. S., 1841, c. 81; Stat., 1853, c. 41; R. S., 1857, c. 51.

Although these statute provisions are designed to furnish the owners of lands so taken for public use with cumulative remedies, and not to take away such as they had before, they have an important bearing upon the question of unreasonable delay, or negligence, on the part of the corporation. The owner of the land has three years within which to pursue his remedies under the statutes. If the agents of the corporation are unable to agree with him, it is for *him*, and not for *them*, to apply to the county commissioners. The statutes plainly imply that, by such application alone, shall the right of the corporation to enter upon the land be "suspended." Until then, at any time within the three years, whatever other liabilities may rest upon the corporation, or upon their agents, they are not liable in *trespass*.

The plaintiff in this case did not resort to the remedies provided by the statutes. And, as the three years from the date of the location had not expired when the suit was commenced, the action was prematurely brought. According to the agreement of the parties, a *nonsuit must be entered*.

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

SYLVANUS HAMMOND, JR. *versus* DANIEL W. LUDDEN.

Before secondary evidence should be admitted, to prove the contents of a note in suit, there should be reasonable certainty of its loss; and that certainty is not shown, until it appears that the note is not in the possession of any of the persons, in whose hands there is reason to suppose it may have been.

EXCEPTIONS from the ruling of GOODENOW, J.

ASSUMPSIT on a promissory note of which the defendant was the maker and the plaintiff the indorsee. It was alleged by plaintiff that the note had been lost, or had fallen into the hands of the defendant since the action was instituted.

To account for the non-production of the note at the trial, and to entitle the plaintiff to prove its contents to the jury, he offered testimony. The part thereof material to the question of law arising in the case, appears in the opinion of the Court.

To the admission of parol evidence, to prove the contents of the note, the defendant excepted.

Washburn, (with whom were *Record & Walton*,) for plaintiff.

Ludden, (with whom was *Fessenden*,) for defendant.

The opinion of the Court was drawn up by

APPLETON, J.—The loss of a note must be proved, before evidence of its contents can be received. In this case, it appears, from the testimony of John P. Hodsdon, "that the defendant and one French came into a blacksmith's shop where he was at work, and wanted to see the notes; that he took the notes out of his pocket and laid them down on his forge, and turned round to sharpen some drills, for which a man was waiting; that, while sharpening the drills, defendant and French left the shop, remarking that they would not stop then, they were in a hurry; that, after sharpening his drills, he looked for the notes and they were gone; that he gave no one license to take them, and did not know what had become of them; that he looked in his shop for them, but could not find

them; that he had never inquired of defendant, or any one else, for the notes, and had not seen them since."

For aught that appears, the notes might have been in the hands of the plaintiff. They might have been in the hands of the defendant, who was neither notified to produce them, nor examined on the subject. French may have them, but no questions were asked him. Of the four persons, who were present at the time of the alleged loss, inquiries have been proposed to but one. The note, probably, was not lost. Before there can be reasonable certainty of its loss, all who were present should be examined.

Exceptions sustained.

TENNEY, C. J., and RICE, DAVIS, and KENT, JJ., concurred.

NOTE BY GOODENOW, J. — The evidence was sufficient to render it probable that the note was taken from the possession of Hodsdon by the defendant and French, in such manner as to render them liable criminally. Had the fact been otherwise, the defendant could have repelled the presumption by the testimony of himself and that of French. This he neglected to do. The plaintiff was not present at the interview referred to, by the witness; the other person present, was in no way connected with the note, and had no interest in having it destroyed.

French appears to have been the companion, if not the adviser, of the defendant. He, as well as the defendant, called upon the witness for the purpose of *seeing the note*.

Under the circumstances, it seeme to me unreasonable to require the plaintiff to produce either the defendant, French, or the other persons, who happened to be present at the shop of the witness, before he should be allowed to prove the contents of the note, by secondary evidence.

STATE *versus* JOHN PILLSBURY.

An indictment, alleging that the respondent was a common seller, &c., on the first day of July, A. D., 1858, *and on divers days and times between that day and the day of finding an indictment* in October following, is not bad, although offences committed during a portion of that time are punishable under the Act of 1856, and during the remaining portion, under the Act of 1858.

The phrase "*and on divers days,*" *&c.*, may be rejected as surplusage.

Or the attorney for the State may enter a *nol. pros.* as to offences committed after the law of 1858 took effect.

On such an indictment the respondent may be convicted under the Act of 1856, but not, *it seems*, under the Act of 1858.

EXCEPTIONS from the ruling of HATHAWAY, J.

The case is sufficiently stated in the opinion of the Court.

H. L. Whitcomb, for respondent.

The indictment alleges in a single count that the respondent was a common seller from July 1, 1858, to Oct. 1, 1858. The Act of 1858 went into operation July 15, 1858, and the Act of 1856 was continued in force for the punishment of offences previous to that date. The indictment alleges an offence under the Act of 1856, and one under the Act of 1858, and, as the penalties for being a common seller are different in the two Acts, the indictment is bad for duplicity. *State* v. *Nelson,* 8 N. H., 163; 2 Mass., 163; 2 Chitty's Crim. Law, 253.

If the indictment is adjudged good, the Court cannot determine under which Act to sentence the respondent.

Appleton, Attorney General, for the State.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an indictment against the defendant as a common seller of intoxicating liquors, found October term, 1858, charging that he, "at Avon, in said county of Franklin, on the first day of July in the year of our Lord one thousand eight hundred and fifty-eight, and on divers other

days and times, between said first day of July aforesaid, and the day of finding this indictment, without any lawful authority, license or permission, was a common seller of intoxicating liquors, against the peace," &c.

To this indictment there was a demurrer and joinder, and judgment overruling the demurrer. To this judgment exceptions were duly taken.

The demurrer admits the facts duly alleged in the indictment. The defendant was then, on the first day of July, 1858, a common seller of intoxicating liquors contrary to the statute of 1856, which was in force and still is, for the purpose of punishing his offence and offences of others in like kind offending. "Divers other days," &c., may be rejected as surplusage, or the Attorney for the State may enter a *nol. pros.* as to offences which were committed after the law of 1858 took effect, to wit, on the 15th of July, 1858. *Commonwealth* v. *Stedman*, 12 Met., 444.

The defendant is not injured by this course. If the facts would have furnished him with a defence, he could have gone to the jury. He could have required the government to elect whether to proceed against him under the statute of 1856, or the statute of 1858. If they had elected to proceed under the statute of 1856, we are not able to see why they should not have prevailed. If they had elected to proceed under the statute of 1858, they might have encountered insurmountable obstacles. *Commonwealth* v. *Pray*, 13 Pick., 359.

Exceptions overruled.

TENNEY, C. J., and RICE, APPLETON, DAVIS, and KENT, JJ., concurred.

ISAAC BEEDY *versus* DAVID M. MACOMBER.

Where the title to a chattel depends upon whether a prior sale by one of the parties to a third person was absolute or conditional, the declarations of that person, made against his own interest, and before he disposed of his title, are admissible to show the character of the sale.

A mortgager of chattels has such an interest in the mortgaged property, that his declarations, disparaging his title, may be proved by one who claims title against him and his vendee.

Whether the declarations of a former owner were made to prevent his creditors from attaching the property, or in good faith, is a question entirely for the jury.

TROVER for a horse.

It was admitted that the defendant bought the horse in question in 1855, and was the owner and possessor until August or September, 1858, when he sold or disposed of it to one Dakin. The evidence was conflicting, whether the defendant sold the horse to Dakin absolutely, or bargained to sell to him on certain conditions, retaining the title in himself. The question was put to the jury, and they returned a special verdict that the sale was unconditional.

The plaintiff had the horse of one Bachelder, in October, 1858, in exchange for another horse. Afterwards, on claim and representations of the defendant, the plaintiff surrendered possession of the horse to him; but subsequently, and before this action was brought, demanded it of the defendant and the defendant refused to give it up to him.

There was no evidence of any title to the horse in Bachelder, except as derived from Dakin. As to the question whether Bachelder did derive title from Dakin, the defendant, called as a witness by his counsel, testified, without objection, that he saw on the records of the town clerk in Temple a record of a bill of sale or conveyance of the horse in controversy from Dakin to Bachelder.

The defendant offered in evidence declarations of Dakin, that he did not own the horse, but that it belonged to Ma-

comber, and was to remain his until paid for. This testimony was excluded by the Court, MAY, J., presiding.

There was evidence as to other acts of Dakin and Bachelder, tending to show ownership of the horse, and instructions were given by the Court as to the rights of the parties under such circumstances as the evidence tended to show, and also, as to the measure of damages. These are omitted, as the decision was not affected by them.

The verdict was for the plaintiff, and the defendant filed exceptions to the ruling of the Judge.

J. S. Abbott, in support of the exceptions, argued that the declarations of Dakin, touching his ownership and title, were wrongfully excluded. That such declarations of the vendor, under whom the plaintiff claims title, while said vendor was in possession of the horse, should have been received, has been often settled. On account of the exclusion of this testimony, the verdict should be set aside.

The counsel proceeded to argue other points, but it is not important to report them, as the case turned on the single point of the exclusion of the evidence offered.

H. L. Whitcomb, contra.

The questions proposed to Dakin were properly excluded by the Court:—1st, because they were leading, and suggested the answer to the witness;—2d, because they were the declarations of third persons, which in all such cases are excluded, for various reasons. 1 Greenl. Ev., § 124.

It is true that, under certain circumstances, the declarations of the assignor of property, made *while he was the owner of the property*, may be given in testimony to defeat the title of those claiming under him; but, if such declarations were made after the assignment by him of said property, they are clearly inadmissible. *Hatch* v. *Dennis*, 10 Maine, 244.

In *Holt* v. *Walker*, 26 Maine, 107, the Court expressly say, that the "declarations of a person while in possession as the *owner* of personal property, may be received to affect

the title of those claiming under him; but if, at the time of making such declarations, he has parted with his interest, it is otherwise." The property, at the time of making the declarations, must not only be in the possession of the one making them, but he must have a "complete and entire control over it, as *his property*." *Russell* v. *Doyle*, 15 Maine, 112; 1 Greenl. Ev., § 190.

There are many cases reported, in this and other States, where the declarations of the payee of a negotiable note, made while the interest in said note was in him, are admissible evidence to be given in a suit by the indorsee against the maker; but, if the property in said note is not in the payee at the time, such declarations should be excluded. *Russell* v. *Doyle*, before cited.

In the case at bar, it was shown by the plaintiff, (if such was proper testimony,) that the horse was conveyed to Bachelder by Dakin, by a written bill of sale, properly recorded in the town clerk's office in Temple. After said conveyance, Dakin might have been permitted by Bachelder to retain the possession of the horse for a time; but that would not make his declarations admissible in regard to the purchase by him of the defendant, as all the cases before cited show.

But this rule applies only where there is an identity of interest between the assignor and assignee; and such identity is deemed to exist, where the assignee has acquired a title with actual notice of the true state of the title of the assignor, as qualified by the admissions in question, or where he has purchased a title already stale, or otherwise infected with circumstances of suspicion. 1 Greenl. Ev., § 190, and cases there referred to.

In the same section, the author says that "the declarations of a former holder of a promissory note negotiated before it was due, showing that it was given without consideration, though such declarations were made while he held the note, are not admissible against the indorsee;" for the rights of an innocent person holding under a good title are not to be cut down by the statement of a former holder, who, through fear

that his horse might be attached by his creditors, might have been induced to deny his title when interrogated in relation to it.

In this case, if the title which the plaintiff derived or intended to derive from Dakin was defective, the case shows no such fact, neither did the evidence at the trial show it; and consequently, the rule does not apply, unless the plaintiff had actual notice of the state of the assignor's title, or took the property under circumstances calculated to raise suspicion, so that the rule of *caveat emptor* would apply.

Another reason, which clearly excludes these declarations, is, that they were made after Dakin had parted with his real beneficial title in the horse to Bachelder. The case clearly shows, by implication, that all these statements which the defendant attempted to draw out of witnesses, as having been made by Dakin in disparagement of his title, were so made (if at all) after he had sold the horse to Bachelder, though he might have had the naked possession at the time of his conversation with Pease; for he then stated he did not own the horse, meaning that he had sold it to Bachelder. *Dennison* v. *Benner*, 41 Maine, 332; remark of C. J. SHEPLEY, in *Fisher* v. *True*, 38 Maine, 537.

If the owner of property does make statements disparaging his title, in order to deter his creditors from attaching it, I am unable to discover any good rule why such declarations should be admitted to prejudice the title of his assignee, who claims under no other title than that derived from such declarant.

If Dakin had not parted with his interest, at the time of making the declarations attempted to be proved, the burden was upon the defendant to show that fact; for the general rule is that all declarations of third persons are inadmissible; and, if a party wishes to avail himself of an exception to that rule, he should first prove all facts which entitle him to its benefit.

The opinion of the Court was drawn up by

DAVIS, J.—This is an action of trover for a horse. It was admitted that the defendant owned the horse until August, 1858, when he sold him, absolutely, or conditionally, to Dakin. The defendant claims that the sale was on the condition that the horse should remain his property until paid for. Not having received his pay, he took the horse from the plaintiff.

Dakin transferred the horse to Bachelder, probably by a mortgage bill of sale, as it appears that it was recorded, and Dakin still retained possession. The case does not show *how long* he retained possession, nor in what way, or for what consideration, the horse afterwards came into the possession of Bachelder. But the plaintiff purchased him of Bachelder, in October, 1858. Nor can there be any doubt, though the counsel for the plaintiff disclaimed it at the trial, that whatever title Bachelder had was acquired from Dakin.

In order to prove that the sale to Dakin was a conditional one, and that the horse was to remain his (the defendant's) property until paid for, the defendant offered to prove the declarations of Dakin to that effect while the horse was in his possession. This evidence was excluded by the Court.

The counsel for the plaintiff contends that it was properly excluded, because Dakin had transferred his interest to Bachelder, and, therefore, though in possession, was not the *owner*. But the case does not show *the date* of the bill of sale to Bachelder. It was for *the plaintiff* to prove that it was given *before* the admissions of Dakin, if he would have them excluded.

And, even if the bill of sale was given before the admissions, that did not render them inadmissible, if it was a *mortgage*. The only test as to the admissibility of such declarations, made by a vendor while the property is in his possession, is that of a *subsisting interest therein*, so that the admissions are made against interest. A mortgager of chattels has such an interest in the mortgaged property, that his declarations disparaging his original title may be proved by one who claims title against him and his vendee.

It is suggested that the declarations of Dakin were made in order to prevent his creditors from attaching the horse. But that was a matter entirely for the jury.

Exceptions sustained.
New trial granted.

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW, and KENT, JJ., concurred.

NOAH BURNHAM *versus* JESSE ROSS.

By R. S., 1857, c. 83, § 1, and c. 82, § 97, in actions of trespass *quare clausum fregit*, and all actions where the title to real estate is at issue, according to the pleadings or brief statement filed by either party, the plaintiff is entitled to full costs, although he recovers less than twenty dollars damages. — GOODENOW, J., *dissenting*.

The Supreme Judicial Court has original as well as concurrent jurisdiction, with justices of the peace, of actions of trespass *quare clausum*, although the damages demanded are less than twenty dollars.

The plaintiff's declaration is a part of the pleadings.

THIS was an action of TRESPASS *quare clausum fregit*, for breaking and entering the plaintiff's close, with counts for cutting and carrying away pine trees, &c. The verdict was for the plaintiff for $5,87 damages. The presiding Judge, GOODENOW, J., ordered the clerk to make an entry on his docket, restricting the plaintiff to costs equal only to one quarter of the amount of damages recovered. The plaintiff excepted.

H. L. Whitcomb, for the plaintiff.

The general provision of law gives full costs to the prevailing party. *Ellis* v. *Whittier*, 37 Maine, 548; *Lawrence* v. *Ford*, 44 Maine, 427. Any statute modifying this rule is to be strictly construed. In a new or revised statute, a doubtful meaning is to be construed favorably to the previous law.

The reasonable construction of the former and present statute is, that this Court has original jurisdiction of all actions involving the title to real estate. In actions of trespass *quare clausum*, the plaintiff must allege and prove title in himself.

The plaintiff's declaration is a part of the "pleadings," as is the bill in equity proceedings. Story's Eq. Pleading, § 4 and note; 1 Chitty's Pleading, 215; Gould's Pleading, c. 1, § § 2 and 3.

In trespass *quare clausum*, the declaration and the general issue pleaded, put the title in issue. All actions which put in issue rights to real estate, are real actions. 7 Pick., 152; 10 Pick., 473.

The restriction to quarter costs is limited to actions which should have been brought before justices of the peace. But here the plaintiff has his election to bring his suit before either court. *Morrison* v. *Kittridge*, 32 Maine, 100, is decisive of this point.

The action having been commenced before the last revision took effect, the costs should be taxed under the statutes of 1841. Repealing Act of 1857, § 2; *Sawyer* v. *Bancroft*, 21 Pick., 211.

R. Goodenow, for the defendant, cited the language of the Revised Statutes of 1857, c. 83, § 1, and argued that justices of the peace have original and not concurrent jurisdiction in all actions where the damages do not exceed $20, and that this action should have been brought before a justice, and then, if either party requested, removed to the higher Court. In that case, the plaintiff would have recovered full costs. In *Lawrence* v. *Ford*, 44 Maine, 420, MAY, J., says, that the amount of judgment recovered, if, as in this case, not over $20, determines whether the action should have been brought before a justice of the peace.

It is not the policy of the law to encourage bringing actions for a merely nominal trespass in the highest Court, thereby increasing costs *ad libitum*, which the defendant, however

willing to pay the plaintiff his actual damages, has no power to avoid.

In the case at bar, if the action had been brought before a justice of the peace, the defendant could have settled it by paying the actual damages and costs to small amount, without being dragged into expensive litigation.

The opinion of the Court was drawn up by

APPLETON, J.—It is provided by R. S., 1841, c. 116, § 1, that "every justice of the peace" * * "shall have original and exclusive jurisdiction of all civil actions wherein the debt or damages demanded do not exceed twenty dollars; excepting *real actions, actions of trespass on real estate, actions for disturbance of a right of way, or of any other easement,* and all other actions where the title to real estate, according to the pleadings with brief statement, filed in the case by either party, may be in question," &c.

By R. S., 1857, c. 83, § 1, every justice of the peace has "original and exclusive jurisdiction of all civil actions, including prosecutions in which his town is interested, where the debt or damages demanded do not exceed twenty dollars, except those in which the title to real estate, according to the pleadings or brief statement, filed in the case by either party, is in question," &c.

It is apparent that the words in italic in the Act of 1841, which are omitted in the revision of 1857, were stricken out for the purpose of condensation. The expression, "except those in which the title to real estate, according to the pleadings or brief statement filed in the case by either party, is in question," includes the very cases for which special provision is made in the revision of 1841. It embraces in its generality "real actions, actions of trespass on real estate, actions for disturbance of a right of way or of any other easement," as well as "all other actions, where the title to real estate, according to the pleadings or brief statement, filed in the case by either party, may be in question."

The word "pleadings" includes the declaration as well

as the plea filed. "Pleading is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action or the defendant's ground of defence; it is the formal mode of alleging that on the record which would be the support, or defence of the party in evidence." 1 Chitty on Pleading, 217; Stephen on Pleading, 2. "The pleading begins with the *declaration* or count, which is a statement on the part of the plaintiff of his cause of action." Stephen on Pleading, 38. "The mutual altercations, which constitute the pleadings in civil actions, consist of those formal allegations and denials, which are offered on one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it," &c. Gould on Pleading. The action in the present case is trespass *quare clausum fregit*. The plaintiff asserts title to real estate, which thereby is "in question." *Crocker* v. *Black*, 16 Mass., 448.

So far as relates to the jurisdiction of magistrates, the law is neither changed, nor intended to be changed.

By R. S., c. 77, § 3, the Supreme Judicial Court "has the jurisdiction, civil, criminal and appellate, of the former District Court, and may exercise it as that Court was authorized to do, or as the laws prescribe." It will not be questioned, that the District Court had original as well as concurrent jurisdiction with a justice of the peace, and that this suit might have been commenced before either tribunal, and that the plaintiff in either court would have recovered full costs. *Morrison* v. *Kittridge*, 32 Maine, 100; *Sutherland* v. *Jackson*, 32 Maine, 80.

By R. S., 1857, c. 82, § 94, it is enacted that, "in all actions, the party prevailing shall recover costs, unless otherwise specially provided."

It is insisted that a special provision limiting costs in a case like the present is to be found in R. S., 1857, c. 82, § 97, which provides, that "if it appears on the rendition of judgment that the action *should* have been commenced before a municipal or police court or a justice of the peace, the plaintiff shall not recover for costs more than one-quarter

part of his debt or damages." This section is but a reënactment of R. S., 1841, c. 151, § 13, with the modification in relation to costs when towns are parties, as provided by statute 1842, c. 31, § 20. But so far as relates to the present inquiry, c. 151, § 13, received a judicial construction in *Sutherland* v. *Jackson*, 32 Maine, 80, and in *Morrison* v. *Kittridge*, 32 Maine, 100; and it was there determined, in a case like the present in principle, that the plaintiff was entitled to full costs, notwithstanding he recovered less than twenty dollars damages.

The construction given to the Act of 1841, must be regarded as applicable to R. S., 1857, c. 82, § 97, since the same language is used in both Acts, and, by its use, the Legislature must be regarded as affirming the meaning given to it by this Court in the cases before alluded to.

The result is, that the plaintiff is entitled to full costs.

Exceptions sustained.

TENNEY, C. J., and CUTTING, DAVIS, and KENT, JJ., concurred.

GOODENOW, J., dissenting,—I do not concur. In my opinion, the R. S., of 1857, changed the law in relation to costs in actions *quare clausum;* and there were obvious and strong reasons why it should be changed to avoid vexatious suits.

BURNHAM v. ROSS, and MAXWELL v. POTTER.

MEMORANDUM BY KENT, J. — I understand that, before the recent revision of the statutes, it was perfectly well settled, in all actions, whether real actions, or for trespass *quare clausum*, or on the case, or in any other form, where, by the *plaintiff's showing, in his writ and declaration, the title to real estate* MIGHT be brought in question by defendant, or where such title must be established as the foundation of the claim of the plaintiff, that the District Court, or now, the Supreme Court, had concurrent jurisdiction, although the damages demanded were less than $20; and that such cases did fall within the exceptions of the statute giving exclusive jurisdiction to justices of the peace of cases under $20.

It followed that such cases were not those which "upon rendition of judgment appear to be of the class which should have been originally brought before a justice of the peace;" and, therefore, full costs were allowed to the plaintiff in those cases.

The question in these cases is not one of jurisdiction strictly, but of costs. The *ad damnum* or damages demanded in both cases exceed $20. c. 83, § 1. This Court *prima facie* has *jurisdiction*. The statute does not oust *jurisdiction* of the case, when upon rendition of verdict or final judgment it appears that the real damage recovered is less than $20; but it punishes the party for bringing into this Court such a case, by limiting his cost to one quarter of the damages. The very fact that this Court can render judgment in such a case for less than $20, damages, and the one-quarter costs, shows that we have jurisdiction fully, where the damages *demanded* in the writ are over $20.

The question here, however, is, on what principles are the costs regulated. In all, except the specified cases, when it appears at the rendition of judgment that less than $20 damages are recovered, it is a case which should have been brought before a justice of the peace, and quarter costs only are allowed.

Should these actions have been brought before a justice? Under the former statute and decisions, it is not doubted that they would have been properly brought here, and full costs would be taxed.

Has the statute of 1857, c. 83, § 1, changed the former rule? If it has, it is a very important change. At first view, it looks as if some change was intended, beyond a mere condensation, as the particular cases named in the statute of 1841, c. 116, § 1, are omitted entirely, and the general expression only retained, with a change of *tense*. In the statute of 1841, the language is, "where the title to real estate *may be* in question," according to the pleadings of either party. In the recent statute, the language is, where the title, according to the pleadings, &c., *is* in question.

It is contended that the title is not in question until called in question by the defendant; that the declaration is no part of the "pleadings or brief statement," and that a possibility that the title may be called in question is not the fact intended.

If the writ and declaration are a part of the pleadings, then, strictly speaking, when the plaintiff alleges title to real estate in himself as the foundation of his action, the title is in question.

It will be observed that the new statute omits "*real actions*" with the rest. The only restriction, against bringing real actions before a justice, is now found in the general language of the recent statute. How would it be if, in a real action, a disclaimer only was pleaded and contested and found for plaintiff, as to costs? The law, and the practice under it, have now been so long established and practiced upon, that unless it clearly appears that a change was intended, I am inclined to hold to the old construction. If the Legislature wish to change it, they can do so by a new statute. I do not think that the omission of specified cases, and the change of tense, are sufficient to justify the great change contended for.

COUNTY OF ANDROSCOGGIN.

TIMOTHY DOWNING *versus* JACOB HERRICK.

Although the statutes, which confer upon justices of the peace the power to fine and punish persons standing convict of certain crimes and misdemeanors, do not, in express terms, authorize them to include the costs of the prosecution, as a part of the sentence, still, their authority to do so may be clearly implied from other provisions of the criminal code.

The omission in the statute of 1858, c. 33, § 26, to require that costs of prosecution should constitute a part of the sentence, when it was made obligatory to do so in other sections of the same chapter, shows that therein it was designed to be submitted to the discretion of the magistrate, to include them or not in the sentence, as in other statutes previously existing.

As no action will lie against a justice of the peace for an error of judgment, while acting honestly, and within the scope of his jurisdiction as a court, in a judicial proceeding, he cannot be held liable for issuing a mittimus, by force of which the plaintiff was imprisoned, which was to make effectual his judgment so rendered.

REPORTED by TENNEY, C. J.

THIS was an action of TRESPASS for assault and false imprisonment by defendant, who justifies as a magistrate.

The plaintiff proved that he was committed to jail, in Auburn, on August 31st, 1858, on defendant's warrant of commitment, and was there detained until after October 6th, 1858.

The presiding Judge ruled, *pro forma*, that the warrant, with the previous papers and record in the case, constituted a sufficient justification, and a defence to plaintiff's action.

Whereupon the plaintiff became nonsuit, with the stipulation that if, in the opinion of the full Court, the warrant and other papers in the case did not constitute a justification and defence to plaintiff's action, then the nonsuit should be set aside, and the action stand for trial; otherwise it shall stand.

From the papers in the case, it appears that the defendant,

acting as a magistrate, sentenced the plaintiff to thirty days imprisonment in the county jail, for the crime of drunkenness, having found him guilty thereof, on complaint duly made. And, in addition to the sentence of imprisonment, imposed upon him the payment of the costs of the prosecution, as a part of the sentence,—and, in default of the payment of the same, he should be imprisoned thirty days longer.

The plaintiff contends that so much of the sentence as related to the payment of costs was erroneous, and that his imprisonment therefor was unauthorized and illegal.

Goddard & Goodenow, and *B. Dunn*, for the plaintiff, argued that the jurisdiction and powers of justices of the peace are derived exclusively from statute provisions, (*Martin* v. *Fales*, 18 Maine, 28,) and no presumptions are to be made in favor of their jurisdiction. *Gurney* v. *Tufts*, 37 Maine, 132. Defendant must show affirmatively that the imprisonment of the plaintiff, by his order, was authorized by law.

The statute on which the defendant relies for his justification—c. 33, § 26 of the laws of 1858—authorizes no such sentence as the defendant pronounced, and, consequently, no such warrant as he issued. The maximum penalty it imposes, on conviction, is an imprisonment for thirty days. It does not authorize either fine or costs. If the plaintiff failed to pay the costs, the effect of the sentence was his imprisonment for an additional thirty days.

"It was his duty to have pursued the words of the statute. The difference is a material one, and it gives the party committed a right of action against the magistrate." *Robinson* v. *Spearman*, 3 Barn. & Cress., 493. See also, *Grunder* v. *Raymond*, 1 Conn., 45.

The act was a ministerial one, and not judicial, and for that reason the magistrate is liable to an action of trespass, at the suit of the party injured. 1 Chitty's Plead., 354, Note 37, Phila. ed., 1855.

The defendant having thus commanded, by his mittimus, the imprisonment of plaintiff for a period exceeding thirty

days, in the event of his inability to pay costs, *in violation of law*, his mittimus was therefore illegal and void; the whole imprisonment becomes one continuous trespass, from beginning to end, and renders him liable in damages to the plaintiff for the entire period of 36 days, dating from the day of commitment to the day of the purchase of the writ in this case.

Record, *Walton* and *Luce*, argued for the defendant, making the following points:—

1. That the authority to add costs, as a part of the sentence in all misdemeanors, is clearly inferred from the statute, (R. S., c. 132, § § 16, 18, 19); that the usage has so long prevailed it should not now be changed.

2. That an action will not lie against a magistrate for an erroneous judgment, while acting honestly and in a subject matter within his jurisdiction. *Yates* v. *Lansing*, 5 Johns., 282; *Hammond* v. *Howell*, 1 Mod., 184; 2 Mod., 218; *Yates' case*, 4 Johns., 317; *Yates* v. *Lansing*, 9 Johns., 395. See *Morrison* v. *McDonald*, 21 Maine, 550.

3. That no more liability attaches to the magistrate, while acting in his ministerial capacity, than in his judicial capacity; and that any distinction between the two is inapplicable to the case at bar.

The opinion of the Court was drawn up by

TENNEY, C. J. — The conviction of the plaintiff, by the defendant, at a justice court held by him as a magistrate, duly qualified as such, was under the statutes of 1858, c. 33, § 26. No power is expressly conferred upon a justice of the peace to impose the payment of costs, upon conviction of a violation of that section, as a part of the sentence, though in other sections of the same chapter, it is not only provided that he may include them in the sentence, but it is made imperative that he shall do so.

It is believed to have been, for a long time, a common practice with justices of the peace, in criminal prosecutions, wherein they had power to sentence the convict to pay a

fine, or be imprisoned, to add thereto the payment of the costs of prosecution, notwithstanding no provision was made in the respective statutes therefor, or in any general statute touching the jurisdiction of justices of the peace. Statutes for the punishment of persons convicted of simple larcenies, where the property stolen was of small value, and assaults and batteries not of an aggravated character, are examples. No statute in the revised code of 1841, or of that of 1857, has been cited, in which provision is made expressly, that to the fine imposed upon a person convicted by a justice of the peace, *may* be added the costs of prosecution, in the discretion of the justice. Still, the power to do so is clearly implied in other provisions of the same codes.

In R. S., of 1841, c. 152, § 10, it is provided if any person convicted of any offence, before any justice of the peace, be ordered by such justice to pay the costs of prosecution, as a part of his sentence, and shall comply with such order, the justice may retain his own fees, and pay over the other fees to the officer, witnesses, &c. Section 12, contemplates that the sentence of a justice of peace may include the costs of prosecution. By § 27, all fines imposed by justices of the peace, to the use of the State, and all costs accruing to the State in such prosecutions, shall be paid into the county treasury, &c.

Chapter 170 of R. S., of 1841, defines the criminal jurisdiction of justices of the peace. Section 2, of that chapter, gives the power to justices of the peace to punish by fine, not exceeding ten dollars, &c., persons convicted of assaults and batteries, &c., when the offence is not of a high and aggravated nature, &c. By section 7, the justice of the peace may try all offences within his jurisdiction, &c., and sentence all persons convicted thereof, according to law. By § 8, an appeal is allowed to the person aggrieved at the sentence of a justice of the peace. And the appealing party is required to recognize, &c. By § 10, if he fail in the performance of the conditions of the recognizance, after proceedings prescribed, the sentence of the justice may be affirmed with *additional*

costs. The appeal is allowed in those cases where the statute has not expressly provided that the payment of costs constitutes a part of the sentence to be passed by a justice of the peace.

R. S. of 1841, c. 156, treats of larcenies and the receiving of stolen goods, by persons having knowledge that they were stolen. And it is therein provided, that, upon conviction of the accused, before a justice of the peace, the punishment shall be by fine and imprisonment. But this statute is silent, touching the power of the justice to order the payment of costs, and the person so convicted is allowed the right of appeal, according to law, bringing the case within the provisions of c. 170, in relation to appeals.

The provisions referred to, with others, in the R. S. of 1841, are substantially reënacted in the revised code of 1857, as in c. 132, and it is quite manifest, in both, that the Legislature assumed that the power exercised by the defendant existed.

The omission in the statutes of 1858, c. 33, § 26, to require that costs of prosecution should constitute a part of the sentence, when it was made obligatory to do so in other sections of the same chapter, shows that therein it was designed to be submitted to the discretion of the magistrate to include them or not in the sentence, as in other statutes, previously existing.

But a further answer to this suit is, that the defendant, in the trial of the plaintiff, and in passing sentence upon his conviction, was acting in a case where he had jurisdiction of the subject matter, conferred upon him as a justice of the peace, by the statute, acting in a judicial capacity, and wherein he was required to keep a record of his doings. Nothing in the exceptions tends to show, in any degree, that he was influenced by dishonest purposes, or that he intended to violate the law, under which he professed to act; or that he knew or had reason to suppose, that, in passing sentence, he was transcending his lawful authority. And it is not pretended,

that he designed to do any thing inconsistent with a faithful discharge of his duty.

It is a well settled doctrine of the law, that not only Courts of general jurisdiction are not liable to answer personally for their errors in judgment, the protection to such being absolute and universal, but, with respect to inferior Courts, they are protected in like manner, when acting within their jurisdiction. "And it was held by LITTLETON, J., and not denied, that an action of assault and battery would not lie against a justice of the peace, for what he did as a judge of record. 9 Edw. 4, 3, pl. 10. And the same principle was afterwards more solemnly advanced by all the Judges in 21 Edw. 4, 67, pl. 49. They all concurred in opinion, that, for what a justice of the peace did *in the session* he was not amenable."

This question is very elaborately treated by KENT, C. J., in *Yates* v. *Lansing*, 5 Johns., 282, cited for the defendant. And, among the closing remarks is the following: — [To render the defendant liable in an action of trespass] "there must be the *scienter* or intentional violation of the statute; and this can never be imputed to the judicial proceedings of a Court. It would be an impeachable offence, which can never be averred or shown, but under the process of impeachment."

The defendant not being liable to answer personally, in an action like the one before us, acting within the scope of his jurisdiction, as a Court in a judicial proceeding, he cannot be liable for issuing his mittimus to make effectual the judgment which he had rendered against the plaintiff.

Nonsuit to stand.

RICE, APPLETON, GOODENOW, and DAVIS, and KENT, JJ., concurred.

JOSIAH KNIGHT, *Ex'r, versus* HENRY BROWN *& al.*

The provisions of § 83, c. 82 of R. S., include executors on the estate of one in prison under sentence of death; and the defendant was properly excluded as a witness on the trial of the action.

EXCEPTIONS from the ruling of GOODENOW, J.

THIS was an action of ASSUMPSIT, commenced by George Knight, as the indorsee of a promissory note of which the defendants were makers.

Pending the suit, Knight was convicted of a capital offence, and, at the time of the trial, was in prison, under sentence of death. Before the trial, these facts had been suggested and entered upon the docket; and Josiah Knight, who had been appointed executor on his estate, appeared and was allowed to prosecute the suit.

On the trial of the action, to prove that the note had been paid, the defendants' counsel offered Henry Brown, one of the defendants, as a witness, but, the plaintiff objecting to the admission of the witness, the Court excluded his testimony. The defendants excepted, the verdict being against them.

Goddard & Goodenow argued in support of the exceptions.

Record, Walton and *Luce, contra.*

[In the papers sent up, and in the docket record of this Court, this action is entitled *George Knight* v. *Henry Brown & al.*]

The opinion of the Court was drawn up by

KENT, J. — This action, according to the facts stated in the exceptions, should be entitled, "*Josiah Knight, Executor of George Knight,* v. *Henry Brown & al.*" The defendant Henry Brown offered himself as a witness; the plaintiff objected because the action came within the exception in § 83 of c. 82. It is clearly, on the face of the record, a case where one of the parties is an executor, and the witness

offered is a party. The defendant contends that the case should be taken out of the exception of the statutes, because the executor is not the executor of a "*deceased*" party. The case finds that George Knight is under sentence of death and confined in pursuance thereof, and that Josiah Knight is his executor and not the executor of a person actually deceased or naturally dead. The plaintiff replies that he is civilly dead, and that the executor was legally appointed and that the case is one where an executor is a party.

By § 25 of c. 65, R. S., it is provided that, when any person, by due course of law, is under sentence of death or of imprisonment in the State prison for life, and confined in pursuance thereof, he shall be deemed in law, from the time of such imprisonment, to all intents and purposes, as civilly dead, and his estate shall be administered upon and distributed, and his contracts and relations to persons and things affected in all respects as if he was dead."

This language is too plain to admit of any doubt, when applied to a case like this. All the legal rights, consequences and relations, which would arise or exist in case of the natural death of a person, must follow upon a sentence and imprisonment, such as is set forth in the above section.

In this case, it seems that an executor has been appointed and has become the party plaintiff, in pursuance of the provisions of the above section.

The earnest and elaborate argument of the counsel for the defendants might very properly be urged upon the Legislature, if a proposition to change this law was before that body. We can only administer the law as we find it.

Exceptions overruled.

Judgment on the verdict.

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

JOHN QUIMBY *versus* NATHAN MORRILL.

In an action against the maker of a written contract, which he defends on the ground that the contract was without consideration, the burden of proof is upon him, if, in the writing, there are words that import a consideration.

The defendant, being called by his own counsel as a witness, and having testified in the case, the opposite party, on cross-examination, was allowed to examine him as to his *intentions* in signing the writing.

EXCEPTIONS from the ruling of TENNEY, C. J.

THIS was an action of ASSUMPSIT, in which the defendant is declared against as guarantor of a certain note described in the writ.

The note was overdue when the defendant signed the writing on the back of it, in these words:—"January 12, 1857. For value received, I hereby guaranty the payment of the within note, waiving demand and notice."

It was contended by the defendant, at the trial, that there was no sufficient consideration for the writing to render him liable to pay the note; and, on this point, testimony was offered by each party.

The defendant's counsel contended, and requested the Judge presiding to instruct the jury, that the burden of proof was upon the plaintiff, to satisfy them there was a consideration for the guaranty; but he declined to give that instruction, and ruled that the burden of proof was upon the defendant to show a want of consideration, — the words "for value received," in the guaranty, importing a consideration.

The defendant was called by his counsel as a witness, and testified. On cross-examination, this question was propounded to the witness, and allowed by the Court, against the objection of the defendant's counsel:—"Did you not intend to be bound by the guaranty when you made it?"

There was also a motion filed by the defendant's counsel to set aside the verdict, as against law and evidence.

Fessenden & Frye, argued in support of the exception and motion.

Record & Walton, contra.

GOODENOW, J., announced the opinion of the Court.

From an examination of the evidence in the case, as reported, we are of opinion that the jury were justified in finding the consideration sufficient to render the defendant liable to pay the note. *The motion to set aside the verdict must be overruled.*

The burden of proof was clearly on the defendant. And though a witness cannot, generally, testify as to his *intention* in signing a written contract, and the defendant would not have been allowed to do so, against the objection of the plaintiff, it is not for the *defendant* in this case to complain.

Exceptions overruled.

INHABITANTS OF WEBSTER *versus* JOSEPH SANBORN.

The payment of a promissory note, which was given in the year 1857, for intoxicating liquors, sold by the licensing board of a town, to a person by them licensed to sell in the town, being unauthorized by § 1, c. 255 of the laws of 1856, cannot be legally enforced.

Nor does the fact, that the parties supposed they were acting in accordance with the provisions of the law, change or affect the legal rights of the parties.

ON REPORT of the case, as made by the parties.

This is an action of ASSUMPSIT against the defendant, as maker of a promissory note, dated March 7th, 1857, for the sum of $32,23, payable to the plaintiffs, on demand. The writ is dated the 12th day of April, A. D., 1858. The note in suit was read in evidence.

In defence, Sanborn, the defendant, was called, and testified that he signed the note in suit; that, in 1856, he was licensed, upon his own application made in writing, to sell spirituous liquors in that town for one year, and gave bonds; that the

liquors were to be furnished him by the licensing board, through R. D. Jones, who was a member of that board, at cost prices in Portland, and without any charge for freight from Portland to Jones' store, in Webster, or expenses of purchasing them, said Jones being also an agent for the sale of liquors in the same town, for the same year; that he, (defendant,) was to have $25,00, for his services, $4,50, for hauling the liquors from Jones' store to the defendant's place of business, and 4½ per cent., for leakage, and that he was to take the liquors at the guage marks on the casks; that, about ten days previous to the following March meeting, Mr. Maxwell, one of the selectmen, came and wanted to settle with the defendant for the liquors sold, that he might report to the town at the next meeting; that he, (defendant,) told him he could not settle, as the liquor was not all sold, and his time, by the license, had not expired, but did finally settle with the board; that, when they did settle, they went all over the proceedings; that they first settled for the amount of the liquors, and then the profits. That the note in suit was given by him for what Jones said was the balance due the town at the time the note was given. Jones said if he, (defendant,) would sign the note, and it was not right, he would make it right. The defendant further testified that nothing was due the town at the time the note was given; that it was given for what Jones told him was the balance due for the liquor sold.

The plaintiff in interest offered to introduce testimony tending to show that, in granting license to this defendant, and furnishing him with liquors, and fixing the prices at which the various kinds were to be sold, and agreeing with defendant upon the compensation he was to receive, and appropriating the profits of such sales, after paying the expenses, for the benefit of the town, they honestly believed in so doing they were acting agreeably to, and by authority of the statutes of 1856, and were only discharging a duty, and exercising a right which was vested in them, pursuant to the law aforesaid, as officers of the town, and nothing more.

A nonsuit was entered by consent, to be taken off, if, in the opinion of the full Court upon the evidence introduced, and, upon the facts offered to be proved by the plaintiff, the action can be maintained.

Morrill & Hill, for the plaintiff in interest, contended, that there was nothing in the Act of 1856, c. 255, which in any way prohibits a town from furnishing persons licensed to sell liquors with the means of obtaining such liquors as they may need for sale, upon such terms as may be agreed upon. The statute, so far as relates to the liquors owned by the town, is simply *directory*, and does not *prohibit* a transaction as disclosed in the case at bar.

The arrangement was entered into by the parties in good faith, with no intention of violating any of the provisions of the law; the defendant has availed himself of the benefits arising therefrom, and ought not now to be permitted to set up, as a defence, that the contract was for an illegal consideration.

Record, Walton & Luce, for the defendant.

The opinion of the Court was drawn up by

RICE, J. — The note in suit was given for intoxicating liquors and the profits from the sale thereof, which were sold to the defendant by the licensing board of the town of Webster, in violation of § 1, c. 255, Laws of 1856.

The Act of 1856, c. 255, authorized towns by their selectmen, &c., to dispose of such liquors as they then had on hand to persons authorized by the Act to sell, provided such liquors were thus disposed of within sixty days after the Act took effect. It did not, in any case, authorize towns to enter into a general traffic in intoxicating liquors through their licensing boards or otherwise.

No action can be maintained for the price of the liquors

thus sold in violation of law. The ignorance of the parties of the provisions of the statute will not vary the result.

The nonsuit must stand.

TENNEY, C. J., and APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

RETIAH D. JONES, *Guardian, Appellant from decree of Judge of Probate, versus* DANIEL LARRABEE, *Executor.*

The word "disinterested" was inserted in the Statute of Wills, (R. S., 1857, c. 74, § 1,) to prevent the changes in the law of evidence applying to their attestation.

It is there used in opposition to the word "interested" as applicable to a witness.

A will is duly attested, notwithstanding one of the attesting witnesses is named therein as executor.

ON EXCEPTIONS.

This was an appeal from a decree of the Judge of Probate for Androscoggin county, allowing and approving the last will and testament of Walter Jordan, deceased.

The will was attested by James Weymouth, Sargeant Whittum and John L. Jordan, and was dated Nov. 15, 1858.

James Weymouth was named in the will as executor, and John L. Jordan was the brother of the testator.

The reasons of appeal were:—that the will was not executed in the presence of three disinterested and credible witnesses; and that the will was void because it was not executed in conformity to the provisions of the statute.

The presiding Judge ruled, *pro forma*, that the will was duly executed and affirmed the decree of the Judge of Probate; and the appellant excepted.

N. Morrill, for appellant.

At the time of the date of the will, and the decease of

said Walter Jordan, the R. S. of 1857, c. 74, § 1, was in full force and not repealed, which, among other things, requires that a will shall be subscribed, in the presence of the testator, by three *disinterested* and credible attesting witnesses.

Whether a will is properly executed, is to be decided according to the laws of the State in which the property is, that are in force at the date of its execution. U. S. Dig., vol. 3, tit. Wills, § 27 & 28, page 670; *Kerr* v. *Moore*, 9 Wheaton, 566; *Mullen* v. *McKelvey*, 5 Watts, 399; U. S. Dig., vol. 14, tit. Wills, § 56, page 593; *Doane* v. *Hadlock*, 42 Maine, 72.

The competency of an attesting witness to a will relates to the time of the attestation, and must be determined upon the state of facts existing at that time. U. S. Dig., (supplement,) vol. 5, tit. Wills, § 141, page 952; *Taylor* v. *Taylor*, 1 Richardson, 531; *Patten v. Tallman*, 27 Maine, 17.

John L. Jordan was not a *disinterested* witness.

The word "*disinterested*," as used in the statute referred to, (R. S., c. 74, § 1,) will admit of, and can have only such definition and signification as is provided by law, and that definition and signification is fixed by the R. S. of 1857, c. 1, § 22, and it is not perceived how courts can be authorized to consider it as having any other meaning. By doing so, it is respectfully urged, they must disregard the provisions of that section.

The word "*credible*," as applied to attesting witnesses to wills, has, by numerous decisions, been held to mean *competent*, according to the laws in force at the time of attestation, and the word "*competent*" means "*having necessary legal qualifications.*" Worcester's Dictionary; *Hawes* v. *Humphrey*, 9 Pick., 350; *Haven* v. *Hilliard*, 23 Pick., 10.

The appellant in this case further contends, that James Weymouth, one of the attesting witnesses to the will, was an incompetent witness, because he was named as one of the executors of the will, and, although he relinquished his trust as executor, after the will was filed for probate, yet the statute does not provide any remedy, in cases of this kind, by which

he could purge himself from any interest, so as to be made a legal witness; but, on the contrary, the R. S. of 1857, c. 82, § 80, seems to establish the position here taken. 1 Greenl. Ev., 394; U. S. Dig., vol. 10, tit. Wills, § 50, page 436.

If it is contended that "disinterested" means *not pecuniarily interested*, the answer is, that the statute (c. 1, § 22) expressly provides that, when a person is required to be *disinterested*, a relationship to either of the parties, within the sixth degree, will disqualify.

Fessenden & Frye, for appellee.

Separate opinions were delivered by APPLETON, J., and GOODENOW, J.

Opinion by

APPLETON, J.—By R. S., 1857, c. 74, § 1, wills to be valid must be subscribed in the presence of the testator "by three disinterested and credible attesting witnesses."

By "credible witnesses," in the statute of wills, is meant competent witnesses. *Hawes* v. *Humphrey*, 9 Pick., 350; *Haven* v. *Hilliard*, 23 Pick., 10.

The objection taken to the due attestation of the will in question mainly relied upon, is, that John L. Jordan, one of the attesting witnesses, was the brother of Walter Jordan the testator.

It is urged that "disinterested" means more than the mere absence or negation of pecuniary interest on the part of the attesting witness to the will sought to be approved, and that the same construction is to be given to the meaning of the word in R. S., 1857, c. 74, § 1, as is established in the chapter defining the rules of construction, c. 1, § 22, and that, consequently, the subscribing witness being within the degrees of kindred therein specified, was not a competent witness, and that the will not having been duly attested is void.

The rule of construction referred to is in these words:—"when a person is required to be disinterested or indifferent in a *matter* in which *other persons* are interested, a relation-

ship to *either* of such persons by consanguinity or affinity within the sixth degree by the rules of the civil law or within the degree of second cousin inclusive, *except by the written consent of the parties*, will disqualify."

The question to be determined is whether the attestation of a will is one of those *matters* "in which other persons are interested," in which the attesting witness is required to be disinterested or indifferent within the meaning given to the words in R. S., 1857, c. 1, § 22.

The words disinterested and indifferent are both used. The *matters* in which disinterestedness and indifference are required are of a judicial character, where impartiality is required on the part of the person acting, as in case of magistrates, jurymen, appraisers, commissioners, &c. The authorities referred to in the margin are of this description. In *Spear* v. *Robinson*, 29 Maine, 531, the justice of the peace, before whom the writ was returnable, was held not to be disinterested or indifferent within § 22, because he had married a sister of the plaintiff. In *Bard* v. *Wood*, 30 Maine, 155, it was decided that a magistrate related to the parties within the prohibited degree could not hear the disclosure of a poor debtor, though he was equally related to debtor and creditor, without their consent. In *Hardy* v. *Sprowle*, 32 Maine, 310, the same rule of disqualification was held applicable to a juryman, and the verdict was set aside on account of the relationship of one of the jurors to one of the parties to the suit. When the rights of others are to be determined, the statute requires that those by whom they are to be decided should be disinterested and indifferent.

The "matter in which other persons are interested" is one to which there are parties to whom is given the power to remove this disqualification by their "written consent." The will is an instrument in which the testator's interest will have ceased when it becomes effective. As long as he lives, it is ineffectual to pass a title or confer rights. It is only effective when death intervenes. The testator is not a party interested within the purview of this section. The statute

refers to persons interested, to parties adverse in interest, to "*either*" of whom the relationship of "the person required to be disinterested or indifferent" in the matter in question will operate as a disqualification. The testator is not a party whose rights may be in jeopardy and from whom "written consent" is to be obtained.

Neither are the devisees or legatees under the will the parties whose "written consent" is to be given. They may not be, and usually are not known to the attesting witness. The necessary implication from the section is, that those who are to consent are present, conusant of the matters in which they are interested, and, consequently, may give or withhold "their written consent" as they deem expedient. But the legatees and devisees are not thus present, nor ready to give their consent.

By the common law, interest, on the part of a witness, was a ground of exclusion. As the term "credible" was held to mean "competent," all the grounds of exclusion known to that system of jurisprudence, as interest, infamy, &c., were included in the term "incompetent." When the rules of evidence were altered by the Legislature, interest was no longer a reason for the exclusion of testimony. While the Legislature, by R. S., 1857, c. 82, § 78, affirmed the previous alteration of the law as to interested witnesses, they did not deem it expedient to abrogate the common law on the subject of evidence with respect to wills. Hence, by § 80 of the same chapter, it is provided, that "nothing in section seventy-eight shall in any manner affect the law relating to the attestation of the execution of last wills and testaments, or of any other instrument which by law is required to be attested." To give further effect to this idea, and to remove all doubt, the word "disinterested" was inserted in c. 74, § 1, on wills. It is there used as opposed to interested when applied to a witness by the common law, and in that sense only.

Relationship, to either of the parties to a suit, is deemed, by the civil law, a sufficient reason for the exclusion as a witness of a person so related.

But such is not the common law. The rude and exclusionary rules of a barbaric age are every where giving place to the increasing intelligence and refined civilization of modern society, and it cannot for a moment be imagined that the Legislature, which has reënacted the needed and important changes already made in the law, by which interest, whether of a party or a witness, has ceased to be a ground of incompetency, would introduce for the first time the more rigorous and restricted principles of the civil law.

The attesting witness is not a person required to be disinterested and indifferent, within the meaning of R. S., 1857, c. 1, § 22. The attestation of a will is not a "matter" in which, nor are the testators, devisees or legatees parties by whom, the written consent referred to in the section, is to be given.

It is next objected that James Weymouth was not a competent witness, because he was named one of the executors in the will, notwithstanding he has relinquished his trust. It was determined, in *Sears* v. *Dillingham*, 12 Mass., 358, that a will to which the executor therein named was an attesting witness may be proved by the other witnesses. The executor was a credible witness, within the statute, at the time of his attestation. In England, an executor, or trustee, who takes no beneficial interest under the will, is held a competent witness. 3 Starkie's Ev., 1690; *Bettison* v. *Bromley*, 12 East, 250. In Scotland, where the executor was one of the attesting witnesses, it was held that "the testament was null as to his appointment, though it would stand in other respects." Tait on Evidence, 84. *Exceptions overruled.*

CUTTING, and KENT, JJ., concurred.

Opinion by

GOODENOW, J.—This case came into this Court by appeal from a decree of the Judge of Probate, approving and allowing the will of Walter Jordan.

The will bears date November 15, 1858. Walter Jordan

died in the month of November or December, 1858. It was presented for probate in May, 1859. It was attested by James Weymouth, Sargeant Whittum and John L. Jordan. James Weymouth was named one of the executors and relinquished or declined the trust after said will was presented for probate, and before it was approved.

John L. Jordan was an own brother of said Walter Jordan, the testator, but not a legatee or devisee. It is contended, by the appellant, that James Weymouth and John L. Jordan were not "disinterested" witnesses at the time said will purports to have been executed, and that the same is therefore void.

The Judge, presiding at *Nisi Prius*, ruled as matter of law, that both witnesses were disinterested, and affirmed the decree of the Judge of Probate and ordered the case remanded. To all which the appellant excepts.

"The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action." "It must be a present, certain and vested interest, and not an interest uncertain, remote and contingent." 1 Greenl. Ev., § 390.

The word "disinterested," as used in the statutes, R. S., c. 74, § 1, could not have been intended to make the great change in the rule of evidence contended for by the appellant. The interest of James Weymouth, who was named as executor, at most, was uncertain, remote or contingent. It was never vested, as he declined the trust, before he testified. John L. Jordan, the brother of the testator, never had any pecuniary interest in the will, as he was neither a devisee or legatee; and could not, in any event, claim as heir, as the testator left children. *Exceptions overruled.*

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

INHABITANTS OF LEWISTON *versus* INHABITANTS OF FAIRFIELD.

The allegation, in a complaint, that a person is "*an idle, ungovernable boy, and a habitual truant,*" describes no offence under any statute of this State.

Magistrates have no authority to sentence a boy to the State Reform School, for breach of the by-laws of a town, for a term exceeding one year.

A complaint, in no manner alluding to the by-laws of a town, cannot be sustained by virtue of those by-laws.

If the process by which a boy is committed to the Reform School is void, the town from which he was committed cannot recover sums paid for his support at that school from the town of his legal settlement.

ON FACTS AGREED. This was an action of debt, to recover the amount paid by the plaintiffs to the superintendent of the State Reform School, for the support of a boy whose settlement was alleged to be in the defendant town.

Under appropriate specifications of defence duly filed, the defendants denied that the boy had been legally committed to the Reform School.

The complaint, (a copy of which is given in the margin,*) warrant and mittimus upon which he was committed, and the by-laws of Lewiston were made a part of the case. The contents of the mittimus are stated in the opinion.

Several questions were made in reference to the by-laws, but, in the view of the case taken by the Court, they became immaterial, and the statement of them is omitted.

Fessenden & Frye, for plaintiffs.

To what extent can the inhabitants of Fairfield be permit-

* COPY OF COMPLAINT. — "To John Smith, Esq., one of the justices of the peace, within and for the County of Androscoggin.

"Hiram K. Thompson of Lewiston, in said county, in behalf of the State of Maine, on oath complains that Charles E. Thompson, of Lewiston, in said county, a youth under the age of sixteen years, is an idle, ungovernable boy, and a habitual truant against the peace of the State and contrary to the form of the statute in such case made and provided. Therefore, the complainant prays, that the said Charles E. Thompson may be apprehended and held to answer to this complaint and further dealt with as the law directs."

ted to go back into the matter preliminary to payment of the sum named, in order to avoid being answerable to Lewiston?

Are they to be allowed to go into all the preliminary proceedings, and, if the statute in all respects has not been complied with in every particular, no matter how trivial, by magistrate, superintendent, and any and all who have any duties to perform, can they set up these things in defence of this action, or, if Lewiston has paid the sum sought to be recovered upon demand of the proper officer, is it not recoverable of defendants?

These preliminary matters, it is urged, cannot be gone into. Lewiston when called upon paid. That town could not have been called upon, on demand made, to have made an examination of all the proceedings of the justice to see they were correct, before making payment to the Reform School. The superintendent, having the mittimus of the magistrate, makes a demand, and it must be paid. Nor can any town, under like circumstances, be called upon to make an examination of all the preliminary proceedings, before complying with the requisition of the superintendent of the Reform School in such a case as this.

It is, therefore, contended, that no illegality in the preliminary proceedings can release Fairfield from the payment of the amount claimed; that Lewiston, having paid the expense upon demand of the legal authority, and Fairfield, having admitted the settlement of the person for whom the expense accrued, is estopped from going into an examination of all the proceedings in the first instance.

Thompson, having been committed, the selectmen of Lewiston notified, Lewiston can do nothing but pay.

But, the statute cited, authorizes a sentence to the Reform School. The alternative punishment, if unauthorized, does not vitiate the sentence.

Thompson was never confined in jail, and that part of the sentence is surplusage, and can be of no consequence, inasmuch as it was never carried into effect.

It is not contended that there is any statute or by-law of

Lewiston, authorizing confinement in the county jail or the Reform School for truancy, but the statute of 1858, c. 37, Public Laws, especially authorizes a commitment to the Reform School for that offence.

The statute expressly says, (§ 21,)—"When any boy between the ages of eleven and sixteen years is convicted of larceny, when the property stolen does not exceed one dollar in value, of assault and battery, malicious mischief, malicious trespass, Sabbath breaking, riotous conduct, disturbing the peace, embezzlement, cheating by false pretences, vagrancy, *truancy, or* of being a common runaway, drunkard, pilferer, night-walker, *or* of having violated any police or municipal regulation of a town punishable in the county jail or house of correction, the Court or justice may sentence, &c. Now "*or*" is a disjunctive conjunction, and it is not intended by the language above quoted, to say that "truancy" or "vagrancy" are violations of the police or municipal regulations of the town, which are to be punished in the manner set forth, but they are distinct offences which are to be punished, *as well as any violation* of the police or municipal regulations punishable in the county jail or house of correction. They are enumerated as distinct offences. If this were not so, and it was intended by this Act to punish only violations of the police or municipal regulations of a city or town punishable in the county jail or house of correction, and to enumerate the whole list of offences as such violations of police or municipal regulations, the statute would have read "or of having violated any (*other*) police or municipal regulation," &c. Hence, it seems, that there is no necessity for a by-law of the town to justify the magistrate in taking jurisdiction of this offence.

Snell, for defendants.

The complaint purports to be based upon the *Statute;* and not upon any by-law of Lewiston.

It is a well settled rule of criminal pleading that a complaint for breach of a by-law of a town must set forth the by-law.

But there is no statute, which makes being "an idle, ungovernable boy, and a habitual truant," an offence.

The mittimus, therefore, confers no authority whatever, for the superintendent of the Reform School to receive and detain young Thompson in custody.

There was no legal claim against the plaintiffs; they paid of their own motion, and not for the support of a person "*committed for some crime,*" as the statute requires in order to make them liable.

By such a payment, they could create no liability on the part of the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiffs bring this action to recover the amount paid by them on account of one Charles Thompson, who had been sentenced to the Reform School, for the term of two years, by John Smith, the magistrate before whom he was brought for trial, upon the complaint of his father, on the charge of being "an idle, ungovernable boy, and an habitual truant."

The settlement of Thompson in the defendant town, the payment by the plaintiffs of the amounts sued for to the superintendent of the State Reform School, and due notice to the defendants are admitted.

It is insisted in the defence, among other grounds, that the complaint, judgment and warrant of commitment show no offence, and that, consequently, the proceedings were entirely unauthorized and void.

Formal defects in the proceedings should not be permitted to defeat the plaintiffs' claim. But an entire want of jurisdiction on the part of the magistrate—an illegal conviction for a non-existent offence, is not a mere technicality and cannot be regarded as such.

The mittimus of the magistrate, after the usual direction to the Sheriff, &c., proceeds as follows:—"Whereas Charles E. Thompson of Lewiston, in said county of Androscoggin, *a youth under the age of sixteen years,* hath this day been convict-

ed before me, John Smith, Esq, one of the justices of the peace, &c., upon the complaint on oath of Hiram K. Thompson of said Lewiston, in said county, in which the said Thompson complains that Charles E. Thompson of Lewiston, in said county, on the third day of November, A. D., 1858, at Lewiston aforesaid, in the county aforesaid, *is an idle, ungovernable boy, and is a habitual truant*, against the peace of the said State and *contrary to the form of the statute in such case provided*—for which offence the said Charles E. Thompson hath been sentenced by me, the said justice, to the State Reform School, *for the term of two years*, or to be imprisoned in the county jail in Auburn, in the county of Androscoggin, for the term of ten days," &c.

By R. S., 1857, c. 11, § 12, "towns may make by-laws, not repugnant to the laws of the State, *concerning habitual truants and children between six and fifteen years*, not attending school, without any regular and lawful occupation, and growing up in ignorance, as are most conducive to their welfare and the good order of society; and may annex a suitable penalty, *not exceeding twenty dollars*, for any breach thereof; but said by-laws must be first approved by a Judge of the Supreme Judicial Court."

By § 13, it is provided that towns shall appoint persons to make complaint for violation of the by-laws established by virtue of the preceding section.

By § 14, the "magistrate, in place of the fine aforesaid, may order children, proved to be growing up *in truancy* and without the benefit of the education provided by law, to be placed for such periods of time as he *thinks expedient* in the institution of instruction, house of reformation, or other suitable situation provided for the purpose under the authority conferred by § 12."

By statute of 1858, c. 37, § 2, authority is given the magistrate, when any person is convicted of "*truancy*, or having violated any police or municipal regulations of any city or town, punishable in the county jail or house of correction," to sentence the offender to the Reform School, &c.

It is apparent that there is no punishment provided by statute for the offence described in the complaint and mittimus. Indeed there is no offence set forth and defined, either in the Revised Statutes or in the subsequent legislation of the State, such as is the subject matter of the official action of the magistrate.

There is nothing in the statutes conferring jurisdiction on the magistrate to issue the process in question.

Under the authority conferred upon towns, the plaintiffs have made by-laws relating to "habitual truants."

By § 1 of these by-laws, "any child between the age of ten and fifteen years, without any regular and lawful occupation, who shall, except in case of ill health, habitually neglect to attend school, or become an habitual truant, growing up in ignorance, upon conviction thereof, shall be fined not less than one nor more than five dollars."

By § 2, "instead of the fine mentioned in § 1, any justice before whom such child may be for trial, may, at his discretion, order such child convicted upon the foregoing section to be committed to the Reform School, for a term not exceeding *one* year."

But the proceedings before the magistrate are not based upon any by-law of the town of Lewiston. No allusion is made in any way thereto. And, if the proceedings had been under those by-laws, the magistrate had no authority to sentence for a longer period than *one* year. So far as relates to the term of imprisonment, the sentence might as well have been for life as for *two* years.

The mittimus and other proceedings, not being warranted by the statutes of the State, nor the by-laws of Lewiston, the sheriff had no authority to commit nor the superintendent to receive. The plaintiffs were under no obligation to pay, and, having paid voluntarily, they cannot recover.

Plaintiffs nonsuit.

TENNEY, C. J., and CUTTING, GOODENOW, DAVIS, and KENT, JJ., concurred.

CHARLES MAXWELL *versus* SAMUEL POTTER.

In an action of trespass, if the defendant neglects to tender an issue, and the parties go to trial without any issue joined, and the plaintiff recovers a verdict, as upon the general issue, it will not be disturbed for this cause, on the defendant's motion.

In actions of trespass *quare clausum fregit*, the plaintiff prevailing recovers full costs, though the damages are less than twenty dollars.

ON EXCEPTIONS to the ruling of MAY, J., and on MOTION to set aside the verdict.

This was an action of TRESPASS *quare clausum fregit*. The declaration was in the usual form. The specifications of defence denied all the material allegations in the declaration, except the plaintiff's title to the *locus in quo*, which was expressly admitted.

The parties went to trial without any issue joined, and the jury rendered a verdict for the plaintiff for the sum of $2,87, *as upon the general issue.*

After verdict the counsel for defendant moved to set it aside, because no issue of law or fact had been joined. This motion was overruled, and judgment on the verdict ordered with full costs. To this ruling and order the defendant excepted.

Goddard & Goodenow, for the defendant.

I. The case finds that no issue of law or fact has ever been tendered or joined. Of course, then, no "issue" is presented to the jury, and their verdict of "guilty" can have no legal or binding effect on the defendant. No judgment can be rendered by the Court on such a finding of the jury. No principle is better settled than that there must be an "issue" presented, i. e., some "single certain material point *issuing* out of the pleadings of the plaintiff and *defendant*," before there can be a legal trial by jury. Without such issue, duly formed and presented, the right of trial by jury cannot exist. Whether it was the fault of the defendant's counsel, or of the

plaintiff's counsel, or the fault of neither, that no plea was ever filed or tendered in the case, and therefore, none joined by the plaintiff's counsel, though it may be a question of curiosity, the *fact* cannot be disputed, that this case went to the jury, and they rendered their "verdict" upon it, without having any issue whatever before them.

If the counsel on either side are to blame for the omission to form an "issue," laches would seem quite as much imputable to the plaintiff as to the defendant. For, to the plaintiff belongs the opening of the case to the Court and jury, and it is certainly incumbent on him to show that there is some point for the Court or jury to determine, and so it would be his business to see that the issue is seasonably framed. But we need not discuss that question, for the case shows, conclusively, that no judgment can be rendered on the finding of the jury in the case at bar.

Enough must appear on the record to entitle the party to judgment on his verdict, otherwise a re-pleader will be ordered by the Court, on motion of either party. *Gerrish* v. *Train*, 3 Pick., 124, and this, too, no matter if the party making the motion committed the first fault in pleading, by which the "immaterial issue" was occasioned. And, in *Eaton & al.* v. *Stone*, 7 Mass., 312, Judge PARKER remarks, "It may be necessary for the Court to look into the whole of the pleadings, to see whether a judgment can be rendered; for it may be, although the defendant in this case has no right to a re-pleader, yet the pleadings on the part of the plaintiff *do not show any thing, on which he can be entitled to judgment.*" We would also refer to the case of *Magoun* v. *Lapham*, 19 Pick., 419, and cases there cited by Judge MORTON, to the effect that "where the pleadings are so defective that no valid judgment can be rendered upon them, the Court, in order that the parties may be restored to their legal rights, and justice be done them, will award a re-pleader." The case at bar is a novel one, and without precedent in the books, so far as we have investigated, but it is certainly much more *defective* in pleadings, and "immaterial" in issue, than any which we have

examined above, for here we have *no plea whatever* by defendant, and *an entire absence* of any "issue" framed by plaintiff and defendant.

II. The plaintiff is not entitled to full costs. The title to real estate was not in issue, and he recovered but $2,87, damages. The statute contemplates that the title to real estate will not be put in question unless it is raised by the defendant's plea or brief statement. See R. S., c. 83, § 2.

Record, Walton & Luce, for plaintiff.

The opinion of the Court was drawn up by

APPLETON, J. — This was an action of trespass *quare clausum fregit.* The defendant seasonably filed specifications of defence, in which he denied the commission of the alleged trespass. The cause proceeded to the jury, who rendered a verdict in favor of the plaintiff, without the defendant's filing the general issue or any special plea.

By R. S., 1857, c. 82, § 18, "the general issue may be pleaded in all cases, and a brief statement of special matter of defence filed *or* a special plea, or, on leave, double pleas in bar may be filed." As no special pleas were filed, and, as a brief statement of special matter of defence was filed, the defendant must be considered as having elected to proceed to trial in the first of the alternative modes prescribed by § 18; that is, upon the general issue and a brief statement. The verdict was as upon the general issue.

But, it seems, neither the general issue nor any special plea was filed. The defendant now moves the verdict be set aside and new trial granted, "because no issue, either in law or in fact, was ever tendered or joined by either of said parties, before said verdict or since."

The counsel for the plaintiff could not join any issue because none had been tendered. It was the duty of the counsel for the defendant to tender such an issue as he should deem expedient for the preservation of the rights of his client. Neglecting to do his duty, he claims that the verdict

be set aside, because there was no joinder of an issue not tendered. *Usually*, the party aggrieved moves to set aside a verdict, because of some error on the part of the Court, or some misconduct of the jury or of the opposing counsel, by which he may have been or thinks he may have been prejudiced. Here the defendant, without showing that he has been injured by the verdict, moves that it be set aside, because he neglected to do what the law requires of him. He seeks to take advantage of his own neglect. It would be a reproach to the law if he were permitted to do it. It would encourage negligence and reward inattention.

In *Whiting, in error*, v. *Cochran*, 9 Mass., 532, the Court say,—"if, however, it were true that the plaintiff below had neglected to join the issue tendered, and had gone to trial, and the defendant had appeared and defended the action before the jury, the verdict would have been good and the judgment to be supported." In *Stevens* v. *Bachelder*, 28 Maine, 219, there was no joinder of the issue, but the Court held the omission no sufficient cause to set aside the verdict. So, in *Babcock* v. *Huntington*, 2 Day, 392, it was held after a trial to the jury, on the plea *not guilty*, and a verdict for the plaintiff, that the omission of a *similiter* afforded no reason for arresting the judgment. But, in all these cases, there was no issue joined, and it was the fault of the plaintiff that this was not done, as an issue had been tendered, yet the Court refused to disturb the verdict, even at the instance of the party without fault.

But there are decisions of Courts of the highest authority on the very questions presented. It was held in *Sauerman* v. *Wickerly*, 17 S. & R., 116, that, after going to trial upon the merits, the Court will not reverse the judgment because there is no plea nor issue and blanks are left for dates and sums in the declaration. "To reverse," says GIBSON, J., in *Carl* v. *Commonwealth*, 10 S. & R., 365, "for a mere formal defect of this sort, after a trial on the merits, would be a grievance; and to avoid it, once for all, we will lay hold on the most trifling circumstance." After trial on the merits, the Court will not

reverse a judgment on the grounds that there were blanks in the declaration for dates and that there was no plea or issue joined. *Cullum* v. *Andrews*, 6 W., 516; *Long* v. *Long*, 4 Barr., 31. The defendant fails to show that he has been harmed by reason of the irregularity of which he was guilty, and, if he had been, it would have been the result of his own negligence. The verdict is in due form, and no satisfactory reason is perceived for its disturbance.

It is not necessary to consider whether the irregularity might not have been cured by requiring the defendant's counsel to file a plea, and the plaintiff's to join, nor whether counsel refusing to comply with such order would not be held liable as for a contempt of Court.

It has been decided, in the case of *Burnham* v. *Ross*, that the plaintiff is entitled to full costs.

Exceptions overruled. —
Judgment on the verdict with full costs.

TENNEY, C. J., and CUTTING, DAVIS, and KENT, JJ., concurred.

GOODENOW, J., concurred in overruling the exceptions, but dissented from the opinion of the Court upon the question of costs.

CHARLES V. BUTLER *& al. versus* MARY K. MILLETT.

The affidavit of a nominal plaintiff, made after an assignment of the cause of action, is not admissible as evidence in favor of the defendant.

A declaration, containing only a count "for balance of account," may be amended by filing, by leave of Court, a bill of particulars.

But, *it seems* that leave to file a bill of particulars does not authorize an enlargement of the plaintiff's claim.

When the bill of particulars filed exceeds in amount the sum claimed in the declaration, the verdict will not be set aside on that account, if the plaintiff will remit the excess.

ON EXCEPTIONS to the rulings and instructions of GOODENOW, J.

THIS was an action of ASSUMPSIT, to recover "balance of account" due from defendant to plaintiffs for meats and groceries, amounting to $81,00. No account was annexed to the writ, and, at the return term, plaintiff had leave to file a bill of particulars, amounting to $81,62. At this April term, defendant moved, orally, that the writ abate, because of variance between the account in the writ, and the bill of particulars filed, which motion was overruled.

The plea was the general issue, with specifications of defence of payment. Defendant also filed an account in set-off, which was a part of the case. The defendant alleged that one M. O. Butler, acting as the agent of Charles V. Butler, one of the plaintiffs, on the 19th day of Octoter A. D., 1857, settled the account in suit with the defendant, and gave a receipt in full, in the name of the firm of Butler & Dakin, by off-setting an account of the defendant against said M. O. Butler, for house rent, and that Charles V. Butler ratified and approved said settlement.

Defendant called for plaintiffs' books, which were produced, by which it appeared that, under date of Oct. 19, 1857, was a credit "by house rent for M. O. Butler, $81,62," upon the Leger, but no such entry on Day-Book.

Defendant called L. H. Dakin, one of the plaintiffs, who

testified that he was a partner of C. V. Butler, one of the firm of Butler & Dakin, that M. O. Butler acted for said firm to a certain extent, employed in taking care of the meat department of their business; that Charles V. was only occasionally in the store; that M. O. Butler did not purchase any goods for their firm to his knowledge; that said firm usually received pay for their bills monthly from the mill folks, but not always; that said firm made an assignment of the books and accounts to Daniel Tarbox, the plaintiff in interest; that, after the 19th of October, said Dakin & Tarbox made a thorough examination of the book accounts of said firm, and that Mrs. Millett's account was not then balanced on the Ledger, and that he never balanced said book, nor gave any person authority to do so; that the credit on the Ledger is in the handwriting of M. O. Butler's son; that, after the books were assigned, said son was employed by Mr. Tarbox to foot up said books; that witness never authorized M. O. Butler to settle said account in any way by rent of house; that he, (witness,) sold out said firm goods October 20 or 21, and that M. O. Butler said if he had any thing to do with it, it should not be so. Charles V. Butler was not in town, when witness sold out.

Plaintiff introduced assignment from Butler & Dakin to Daniel Tarbox, dated Oct. 19, 1857, of all accounts upon their books.

The defendant offered in evidence the following receipt, but the presiding Judge ruled the same inadmissible:—

"Lewiston, Oct. 19th, 1857.

"Received of Mrs. Millett, eighty-one dollars and 62–100 in rent of house I now occupy, being in full for account.

"For Butler & Dakin to date.

"Butler & Dakin, per M. O. Butler."

The defendant also offered the affidavit of Charles V. Butler, one of the plaintiffs, sworn to April 7, 1860, before a justice of the peace in Massachusetts, which was ruled inadmissible.

This was all the evidence in the case.

The presiding Judge instructed the jury that the evidence was not competent to prove the authority of M. O. Butler to settle and discharge the account of the plaintiffs against the defendant, or to prove that his acts in discharging it were legally ratified by them.

The verdict, being for the plaintiffs, the defendant excepted.

H. G. Cilley, for defendant.

Fessenden & Frye, for plaintiffs.

The opinion of the Court was drawn up by

KENT, J. — The principal question in this case is, whether the affidavit of Charles V. Butler, offered by defendant, was properly excluded. It is clear that it could not be introduced as the testimony of a witness. It has no caption and no certificate, except one of the administration of the oath.

It is urged that it was admissible as the confession of a party. This is a correct proposition, if he was a party whose interests were liable to be affected by his admissions when made. If he was but a nominal party, having no interest in the event of the suit, they were not admissible. *Foster* v. *Fifield,* 29 Maine, 138.

In this case, it appears that, prior to the institution of the suit, and prior to the time of giving the affidavit, the plaintiffs had assigned this, with other accounts, to one Tarbox, for a valuable consideration. The plaintiffs had no residuary or remaining interest in the debt.

The question does not turn upon the point whether the admissions related to matters connected with the claim when owned by the nominal plaintiff, but whether the admissions were made when he had such interest, and when it was against his interest to make them.

The deposition of the plaintiff might have been taken by defendant. There is less reason for extending the rule as to admissions made by nominal parties since the law was passed allowing the parties to be admitted as witnesses for or against themselves.

There is no valid objection to the admission of the bill of particulars. It has been a long established practice. But it may be questionable whether this leave to file a bill of particulars, authorized any enlargement of the claim. The difference is only sixty-two cents, which plaintiff may remit.

The affidavit being inadmissible, it is very clear that the Judge properly instructed the jury, that the evidence was not sufficient to prove the authority of M. O. Butler to act as agent, or to show that his acts were legally ratified.

Exceptions overruled.

Upon plaintiffs' remitting sixty-two cents of the verdict, judgment to be entered on verdict thus diminished.

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW, and DAVIS, JJ., concurred.

OLIVER B. MARSTON *versus* JOHN MARSTON.

Under a devise of all the testator's property to O, "after his mother shall cease to be my widow, providing he shall live on the place, and carry it on till that time in a workmanlike manner," the devisee loses all his rights, if, during the time his mother remains the testator's widow, he voluntarily quits the place, and neglects to carry it on.

ON REPORT by MAY, J.

WRIT OF ENTRY.

A question was made in relation to an amendment of the writ, but it became immaterial, in the disposition of the case.

The defendant pleaded the general issue, which was joined. The specifications of defence and brief statement were,— "That the title and possession of the demanded premises are in him, the said defendant, and not in him, the plaintiff. And that the defendant's title to the demanded premises is paramount to that of the plaintiff's.

The plaintiff claims under the third item in the will of his

father, Isaac Marston, which is copied in the opinion. It was admitted that the place, described in that item and in the writ, was the property of said Isaac Marston, at the time he made his will and till his decease, which event happened in May, 1834. It was admitted that the will was duly probated soon after the death of said Isaac.

The defendant offered to prove, that the plaintiff in the latter part of the fall of 1834, left and abandoned the demanded premises, and moved out of town, and has never since that time, in any manner whatever, carried on or managed, or controlled the premises, nor procured the same to be done; that he so left and abandoned the premises of his own free will and accord, and against the will and solicitations of his mother and the rest of the family; that since that time she, the said Polly Marston, managed said farm with the aid of the other children, until the defendant became of age, and has paid out to the several legatees, mentioned in said will, the amount therein bequeathed to them; that, in 1841, she paid to the plaintiff the sum of fifty dollars, which sum he received as, and for his share of and in the property of the said Isaac Marston, and for which he gave his receipt, of which the following is a copy: —

"Livermore, May 18th, 1841.

"Received of Polly Marston, fifty dollars, it being my share with the other heirs of the estate of Isaac Marston.

(signed) "Oliver B. Marston."

The defendant offered further to prove that, at the time the plaintiff went away in the fall of 1834, the said Polly Marston paid him for his services on the farm, which he performed from the time of his father's death to the time he went away in the fall of 1834; that the defendant has lived with his mother on the premises, and has carried on and managed the same under her direction and as her tenant since he became of age.

The proposed offer was rejected by the Court, in order that the full Court might first determine the true construc-

tion of the will, and also how far the defence offered is open to this defendant.

If the facts offered to be proved by defendant constitute a defence, the action was to stand for trial.

If they do not constitute a defence, and if, upon the evidence and facts in the case, the plaintiff is entitled to prevail, judgment was to be rendered accordingly.

John S. Abbott and *M. S. Ludden*, for plaintiff, maintained that the third item in the will gives the plaintiff the right of possession; and that the facts offered to be proved by defendant were inadmissible *under the pleadings*.

Record, *Walton* and *Luce*, for defendant, argued that the facts offered to be proved were admissible to disprove the plaintiff's allegation of seizin, and cited 2 Greenl. Ev., § 556.

The opinion of the Court was drawn up by

Davis, J. — On the thirteenth day of November, 1833, Isaac Marston made and executed his last will and testament, of which the following is a copy: —

"First, — I give and bequeath unto my beloved wife, Polly Marston, the income of all my property so long as she remains my widow.

"Second, — I give and bequeath unto my son George Marston, fifty dollars, to be paid in three years.

"Third, — I give and bequeath unto my son Oliver B. Marston, all my property after his mother shall cease to be my widow, providing he shall live on the place and carry it on till that time in a workmanlike manner; and if the income of the farm should be more than is necessary to support the family, to be divided equally between the above named Oliver B. and his mother; otherwise to have one dollar.

"Fourthly, — I give and bequeath unto Nancy B. Marston, my daughter, on the day of her marriage, if she shall marry, one hundred and fifty dollars, in household furniture, and a privilege in the house and boarding, so long as she sees fit,

while she lives single, or her lifetime, providing she labors in the family. I also give and bequeath unto my son, John Marston, fifty dollars when he shall arrive at the age of twenty-two, providing he shall be in the employ of Oliver B. Marston until he shall come of age, and is to have suitable clothing, schooling, doctoring and nursing, otherwise to have one dollar. I also give and bequeath unto my son, Joseph D. H. Marston, fifty dollars, provided he lives in the employ of Oliver B. Marston until he shall become twenty-one years old, the above sum to be paid when he arrives at the age of twenty-two, and is to have suitable clothing, doctoring, nursing and schooling. I also give and bequeath unto my son, Isaac Marston, fifty dollars, providing he shall live in the employ of Oliver B. Marston until he shall be twenty-one years old, and is to have suitable clothing, doctoring, nursing and schooling, the above sum to be paid when he is twenty-two years old. I also give and bequeath unto my son Theodore Marston, when he shall be twenty-two years old, fifty dollars, providing he shall live in the employ of Oliver B. Marston until he shall be twenty-one years old, and is to have suitable schooling, clothing, doctoring and nursing. I also give and bequeath unto my son William B. Marston, when he shall arrive at the age of twenty-two, fifty dollars, providing he shall live in the employ of Oliver B. Marston until he shall become twenty-one years old, and have suitable schooling, doctoring, nursing and clothing while in his employ. I also give and bequeath unto my daughter, Mary Marston, one hundred dollars in furniture, when she shall marry and a privilege of schooling, doctoring, clothing and nursing, and living in the house so long as she lives and labors in and for the family of my son Oliver B. Marston. I also give and bequeath unto my son, James Marston, fifty dollars when he shall arrive at the age of twenty-two years old, and is to have suitable clothing, schooling, doctoring and nursing during said time, providing he shall live and labor in the family of my son Oliver B. Marston until he is twenty-one years old, and if the aforenamed John Marston, Joseph D.

H. Marston, Isaac Marston, Theodore Marston, William B. Marston and James Marston, do not comply with the foregoing, then they shall have one dollar each, and no more, and lastly, as to all the rest, residue and remainder of my estate, I give and bequeath to my said beloved wife, Polly Marston, whom I hereby appoint sole executrix of this my last will and testament."

There are no clauses in the will repugnant to each other; nor do we think there is any difficulty in ascertaining the intention of the testator.

Beginning with the second and fourth clauses, we find that the children were to have the privilege of living at home, where they were to be supported in health or sickness, and educated. The daughter, upon her marriage, and the sons upon arriving at a certain age, were to receive certain specified legacies. These, except the one made in the second clause, were upon condition that they should remain at home, and labor in the family. If they chose to leave home, they were to receive nominal legacies only.

Whether, in certain possible contingencies, it would have been possible to carry out all these provisions, it is not material to inquire. No question is raised under these clauses of the will.

By the first clause, the *income* of all the property was given to the mother, so long as she should remain a widow. That she took it *cum onore*, with the liability to pay the legacies, she has admitted, and has paid them as they became due. So that no questions are raised upon these matters. Though the alternative legacy to Oliver B. Marston, the plaintiff, was but one dollar, she paid him fifty dollars, the same that was paid to the other sons.

By the third clause, the said Oliver was to have all the property, after his mother should cease to be a widow, if he should live on the place, and carry it on, until that time. By the facts agreed it appears that neither of these contingencies has occurred. The mother has not ceased to be a widow; and the plaintiff, instead of living on the place, and carrying

it on, left the premises, of his own free will and accord, after having been paid for all the services he had performed. He thereby forfeited all right thereto under the will. And he now has no rights therein, except as one of the heirs, whenever the title of the mother ceases, by death or otherwise.

According to the agreement of the parties, *the case is to stand for trial.*

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW and KENT, JJ., concurred.

COUNTY OF OXFORD.

WILLIAM THOMAS *versus* PEREZ T. RECORD.

In a deed of warranty, immediately following the description of the land conveyed, the grantor inserted a provision, "I give the said S. T. R., (grantee,) this deed on the following conditions, to wit, the said S. T. R. shall maintain myself and my wife for and during the term of our natural lives," &c.: *Held*, that such provision constituted a deed on condition: —

That, for a breach of the condition, the grantor or his heirs may enter and take advantage of the breach, though there be in the deed no right of entry expressly reserved.

In such case, where there is no collusion between the parties to the deed, an execution creditor of the grantee will acquire no title to the premises, by a levy thereon.

REPORTED by GOODENOW, J.

WRIT OF ENTRY, to recover possession of a parcel of land in the town of Hebron.

The demandant claims under a levy, made on April 18, 1857, of an execution in his favor against Samuel T. Record. He also put into the case an office copy of a deed from the

defendant to said Samuel T. Record, which deed is of the date of August 30th, 1849. The land demanded in this action is the same which the execution was levied upon, and is a part of the estate embraced in the deed.

The defendant offers to prove by said Samuel T. Record, if the testimony is admissible against the plaintiff's objection, *that* he has been unable to provide for and support his father and mother according to the conditions of the deed; *that* he has left the farm which the defendant conveyed to him; *that* defendant has demanded of him support of himself and wife, according to the terms of the condition named in the deed, which he has refused to do or cause to be done for a long time, to wit, since the month of May, 1857.

The defendant offered to prove that, on the 19th day of January, 1858, he entered personally upon the premises, for the purpose of revesting the estate in himself, cut wood and timber growing thereon, and performed other acts of ownership upon the same; and has ever since continued in the possession and occupation thereof.

If the full Court should be of opinion, upon the evidence in the case, that the plaintiff is entitled to recover, and that no material part of the testimony offered by the defendant is legally admissible, judgment is to be rendered for the plaintiff; otherwise, the case is to stand for trial.

The conditions recited in the deed, before referred to, will be found in the opinion of the Court.

J. J. Perry, for plaintiff.

"In construing deeds, grants should be taken most forcibly against the grantor." 21 Maine, 69.

The defendant's deed vested in Samuel T. Record the fee in the premises, and he had the legal estate at the time of the levy. It is not a deed of gift. The consideration named is the acknowledged receipt of $475. The maintenance of the defendant and his wife is no part of the consideration.

The parties *intended* that the sale should be absolute. It was not their intention that the conveyance should be con-

tingent. The language of the deed indicates this. It contains these words—"meaning and intending to convey to the said Samuel," &c. And he covenants "to *warrant* and *defend* the premises forever against the lawful claims of all persons," whereby he is estopped to show want of title in himself, (15 Mass., 307); and, consequently, want of title in his grantee.

Clearly the deed is not one of mortgage.

The attempt of the defendant to revest the estate in himself is manifestly a collusion between him and Samuel T. Record to defraud the plaintiff, who is a creditor of the latter. It was not until after the plaintiff had recovered judgment against S. T. Record, that the defendant took possession of the premises. Until then the parties to the deed treated it as an absolute conveyance.

The "conditions" contained in the deed are not that, if the grantee fails to perform this or that thing, the deed shall be void. Nor in case of failure to perform on the part of the grantee he shall reconvey. The conditions are not to be construed as reservations or exceptions, for they have no such meaning. They were inserted in the deed to create a personal liability on the part of the grantee to support the defendant and his wife. If Samuel T. Record has failed to perform his agreement, made with the plaintiff, he has his remedy against him.

The evidence offered by the defendant is inadmissible. Parole evidence is not admissible to show that a deed, absolute upon its face, was intended as security, or to vary or alter the terms of a deed. 7 Maine, 435; 18 Maine, 146.

Virgin & Dunnell, for the defendant.

1. The deed given by the defendant to his son, Samuel T. Record, is but a deed on condition, and the condition is a condition subsequent. In support of this proposition, counsel, in argument, cited 2 Greenl. Cruise, 729; Shep. Touch., 121; 4 Howard, 353; Bac. Ab., Condition A; *Mich. State Bank* v. *Hastings*, 2 Doug., 225; *Gray* v. *Blanchard*, 8 Pick.,

284, and cases there cited; *Tallman* v. *Snow*, 35 Maine, 342; 6 Greenl., 106; 4 Kent's Com., 7th Ed., 136, note E; Com. Dig., Condition A.

2. The testimony offered in defence was admissible; otherwise the defendant could not show that the title was in himself, or that he had observed all the steps necessary to become seized of his first estate, and thereby avoid all intermediate charges and incumbrances, such as the levy of the execution, by virtue of which the plaintiff claimed the right of immediate possession. Shep. Touchstone, c. 6; *Gray* v. *Blanchard*, before cited.

The opinion of the Court was drawn up by

RICE, J.—The defendant was the original owner of the land demanded. On the 13th day of August, 1849, he conveyed the same to Samuel T. Record, by deed of warranty. That deed contains the following provision immediately following the description of the land conveyed,—"I give the said Samuel T. Record this deed on the following conditions, to wit, the said Samuel T. Record shall maintain and support myself, the said Perez T. Record, and Asenath Record, wife of the said Perez T. Record, for and during the term of their natural lives, and shall, at all times, furnish them with suitable and proper support, and shall treat them with kindness, and, in all respects, conduct towards them as is the duty of a son to his parents."

There are still further conditions, not, however, material to this issue. The deed contains no provision for reëntry.

The demandant claims by virtue of a levy upon a portion of the estate against Samuel T. Record.

Does the language in the deed constitute a condition? There can be no doubt that such is the fact. In the language of the Court, in *Gray* v. *Blanchard*, 8 Pick., 284,—"The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was probably the intent of the parties." The conditions are consistent with the

nature of the grant; not incompatible with any rule of law; not requiring any thing immoral, and not inconsistent with public policy. Nor is there any evidence of fraud or collusion between the defendant and Samuel T. Record, in the case as presented.

It is usual in the grant, to reserve in express terms to the grantor and his heirs a right of entry for breach of condition; but a grantor, or his heirs, may enter and take advantage of a breach, though there be no such clause of entry in the deed. 4 Kent's Com., 123; *Gray* v. *Blanchard*, 8 Pick., 284.

The evidence offered was competent and pertinent. The action will, therefore, *stand for trial.*

TENNEY, C. J., and APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

JOHN C. GERREY *versus* ALBERT D. WHITE.

It is not necessary, to the validity of a mortgage of personal property, that the instrument be under seal; and, if the sealing be omitted, though the writing be in the form of a *deed*, it will not be for that reason invalid.

ON AN AGREED STATEMENT OF FACTS.

This was an action of TRESPASS, against the defendant, who was sheriff of the county of Oxford, for the act of his deputy, in attaching and selling certain personal property on an execution against one *Barker*, the same having been attached, on the original writ, on the 9th day of October, 1858.

From the case, as made by the parties, it appears that, on the 30th day of September, 1858, the said Barker conveyed the property before named to the plaintiff in mortgage, which on the same day was recorded. The mortgage instrument contained the following:—"In witness whereof, I, the said Barker, have hereunto set my hand and seal," &c. But no

seal was affixed. A few hours after the attachment, the mortgager added a seal to the mortgage, and it was then recorded as a sealed instrument. No fraud was to be imputed to the plaintiff in the transaction.

It was contended for the defendant, that, inasmuch as the mortgage was intended to be made by *deed*, it was not operative as such, until it had been sealed; which was not until after the attachment of the property had been made. That if the mortgage is to be regarded as a simple contract perfected, when the seal was affixed the simple contract was merged in one of a higher nature.

Hastings, for the plaintiff.

Haskell, for the defendant.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action of trespass against the defendant as sheriff, for the act of his deputy in attaching and selling the property named in the writ as the property of one Samuel W. Barker, but which property the plaintiff claims by virtue of a mortgage, duly executed, but without a seal, except as appears hereafter.

"It is agreed that the mortgage from Barker to the plaintiff had no seal upon it, neither at the time of the attachment of the property, or at the time it was recorded, Sept. 30, 1858. That the property was attached as aforesaid on the ninth day of October, 1858, at five o'clock, P. M. That the plaintiff caused a seal to be affixed to said mortgage at 7 o'clock, P. M., October 9, 1858, and the same noted on the record at the same time."

It is admitted that no fraud is to be imputed to the plaintiff. It was imprudent in him to attempt to affix a seal to his mortgage after an attachment had been made by the defendant's deputy, and to change the record accordingly. Without this admission, we might have inferred that the transaction was fraudulent. He caused the record to speak of an instrument under seal, when in fact, it was not under seal. It

was a misapprehension of his rights and of his duty, without any evil intention. His title under the mortgage was perfect without this addition of a seal, which was probably omitted by mistake, and was earlier in point of time than the attachment, and, therefore, paramount to that of the attaching creditor. According to the agreement of the parties, the defendant must be *defaulted to be heard in damages.*

TENNEY, C. J., and RICE, APPLETON, DAVIS and KENT, JJ., concurred.

LYMAN RAWSON *versus* GILMAN TUEL.

TROVER for the conversion of a yoke of oxen. It appears from the agreed statement of facts, that the defendant had the oxen of one *Frye.*

The plaintiff testified, that, on the 17th day of January, 1854, said Frye agreed to purchase the oxen of him for eighty-five dollars; that he gave to him a negotiable note for that sum, payable in six months, with interest, and in the note it is stipulated as follows:—"And the oxen, for which this note is given, to remain said Rawson's until this note is paid." That, on the 5th of October, 1854, the said Frye paid fifty dollars, and an indorsement of the same was made upon the note; and, on the 7th of September following, was paid and indorsed the further sum of ten dollars; that he had demanded the oxen of defendant, who told him he had sold them. Before the demand was made upon the defendant, he brought a suit upon the note, which was still pending; that the officer who served the writ returned thereon an attachment of real estate.

For the defendant it was contended that, the plaintiff having received sums in part payment of the note, and having caused the balance to be secured by attachment and suit, the sale thereupon became valid and the property vested in Frye.

That the defendant, being a stranger to the transaction between the plaintiff and Frye, should be protected, the plaintiff having received the larger part of the note, and having secured the remainder before the sale by Frye to the defendant.

It was held, that the case discloses no defence. It appears from the note itself, that it was not intended *as payment for the oxen.*

Defendant defaulted,—to be heard in the assessment of damages at Nisi Prius.

Plaintiff, *pro se.*

Hammons & Gibson, for defendant.

JOSIAH PIERCE, *in Equity, versus* JAMES FAUNCE *and another.*

In *equity*, all the parties in interest must be made parties to the suit; and, in a suit seeking to reform a deed, the holder of an equity of redemption, not barred by the lapse of time, under a mortgage not foreclosed, is a party in interest, and must be notified.

Likewise, the grantor in the deed sought to be reformed.

A purchaser of real estate, having notice of a prior unregistered deed, or other claim thereto, may, nevertheless, convey a perfect title to a *bona fide* purchaser having no notice of such claim.

So, also, a purchaser *without* notice of a prior equitable claim, or right, may convey a perfect title to one who *had* notice thereof. After an interest in real estate has passed to an innocent purchaser, and is discharged of its latent equities, it is thenceforth unimportant whether subsequent grantees or assignees had or had not notice of the prior equitable claims.

A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee or assignee of the mortgage, without notice of a prior claim, is entitled to the same protection as a *bona fide* grantee without notice.

BILL IN EQUITY.

The bill sets forth that, in June, 1842, William Prince being the owner of sixty-seven acres of land in Hebron, conveyed to him by one Waterman, and described as being "on

the north side of lot marked G," and William Cousins having recovered judgment against said Prince and others, Cousins obtained execution, and levied it upon a certain described part of the aforesaid land of Prince. In February, 1845, Prince not having redeemed the premises, Cousins conveyed them to the plaintiff for a consideration of $362,11.

The bill further alleges, that previously, in 1834 or 1835, Prince bargained with one Dean to sell him twenty-five acres from one end of the lot he had bought of Waterman; that subsequently, by Dean's request, one Hilborn was employed to draw a deed of the land bargained for, conveying it to Mary Chipman; that Hilborn, being inexperienced, described the premises conveyed as twenty-five acres of land "on the north side of lot G," "being the same land I purchased and was deeded to me by Robert Waterman;" that, in this shape, the deed was executed and delivered; that, in 1838, Mary Chipman conveyed the same land to Orville Byram, who mortgaged it to Amos Chipman to secure notes of Byram for $100; that the notes and mortgage were transferred by Chipman to E. R. Holmes, and by the latter to James Faunce; and that, in 1848, Faunce conveyed the same land by deed to Harriet H. Page.

The bill further alleges, that the several parties to the successive conveyances had knowledge that it was intended by Prince to convey to Mary Chipman twenty-five acres and no more, and that they claimed and occupied no more than twenty-five acres, until 1851 or 1852, when Faunce and Harriet H. Page, the defendants, entered upon the land embraced in Cousins' levy, and in his deed to the plaintiff, and claimed it as embraced in their conveyances.

The bill declares that the plaintiff has been deprived of possession of the premises by reason of the error in the deed from Prince to Mary Chipman, followed by similar errors in subsequent conveyances, and prays that the deed from Prince to Mary Chipman "may be so reformed as to express and carry out the true intent and meaning of the parties thereto," and that the defendants be "forever enjoined and prohibited

from asserting any right, title or claim whatever to the premises described in the said levy," and in the deed from Cousins to the plaintiff.

The defendants, in their answer, deny any knowledge of any error or mistake in the deed from Prince to Mary Chipman, or in the subsequent deeds.

The depositions of Amos Chipman and Mary Chipman were introduced by the plaintiff, tending to prove that Dean bargained for and bought of Prince only twenty-five acres; that he entered upon and occupied no more; and that Prince occupied the remainder of the Waterman lot.

There was testimony tending to show that Byram occupied and claimed only twenty-five acres; also, that Faunce, one of the defendants, had inquired of Chipman how much land was conveyed by Prince, and Chipman told him twenty-five acres and no more, and that Faunce told several witnesses that he should never claim but twenty-five acres.

Howard & Strout, and *L. Pierce*, for the plaintiff.

It is now clearly proved that the deed from Prince to Mary Chipman was intended to convey only twenty-five acres from the northerly or north-easterly part of lot G. Dean bargained with Prince for so much and no more, and it was not intended that the deed should convey any more. The consideration paid was for twenty-five acres.

The successive parties, who have since held under the deed from Prince to Mary Chipman, have claimed and occupied but twenty-five acres, from 1834 or 1835, to about 1852.

But this Court, in the case of *Pierce* v. *Faunce*, 37 Maine, 63, has given a construction to the deed, declaring it to include the whole of lot G, containing sixty-seven acres.

The defendants deny that they had any knowledge or belief that there was any error in the deed from Prince; but the testimony abundantly shows that Faunce knew of the original intention to convey only twenty-five acres.

The claim which the defendants assert to the remaining forty-two acres is inequitable, and a fraud upon the plaintiff.

Cousins and Prince, at the time of the levy, both understood and believed that the deed to Mary Chipman conveyed but twenty-five acres. The plaintiff is an innocent and *bona fide* purchaser of the land taken by the levy, and, as such, invokes the protection of the Court.

The fact that Faunce, up to the time of his conveyance to the other defendant, had occupied but twenty-five acres, and never asserted title to any more, may justly charge her with notice of the plaintiff's claim and of the alleged mistake.

It is competent to prove the alleged mistake by parole testimony. *Peterson* v. *Grover*, 20 Maine, 363; *Farley* v. *Bryant*, 32 Maine, 474; *Lumbert* v. *Hill*, 41 Maine, 475; *Tucker* v. *Madden*, 44 Maine, 206.

Record, *Walton* and *Luce*, for the defendants.

1. The plaintiff is not in a condition to entitle him to interfere for the correction of the alleged error. Nothing was acquired by the levy in favor of Cousins, and, therefore, nothing passed by his deed to the plaintiff. The plaintiff is not assignee of the debt or judgment against Prince and others. The judgment is not satisfied, and Cousins is entitled to have it revived and enforced. No judgment given in the case at bar could be pleaded to prevent a new execution in favor of Cousins.

2. The error alleged is not such a one as a court of equity can properly correct. It does not clearly appear where the twenty-five acres, said to have been conveyed in Prince's deed, should be located. But a small part of it has ever been improved, and no light can be derived from that source. It would be impracticable for the Court to decide what part of the lot should be included in the twenty-five acres, and what part excluded.

3. The error, if any, does not consist in omitting or inserting words, but in a misapprehension of the effect of the language used. This is such an error as a court of equity cannot correct. *Farley* v. *Bryant*, 32 Maine, 474.

4. The title has been purged of any supposed defect, by

passing through the hands of one or more innocent purchasers without notice. 1 Story on Equity, § § 108, 139, 165, 409, 410, 434, 435, 1503 *a*; *Whitman* v. *Weston*, 30 Maine, 285; *Trull* v. *Bigelow*, 16 Mass., 419; *Boynton* v. *Rees*, 8 Pick., 329; *Fletcher* v. *Peck*, 6 Cranch, 87; *Dana* v. *Newhill*, 13 Mass., 498.

5. All persons interested in the land are not made parties. The defendant Faunce is but a mortgagee, and the right of redemption is outstanding and unextinguished. It is a settled principle in equity that all persons, to be affected by the result of the suit, must be made parties. Story on Equity, § 75; *Davis* v. *Rogers*, 33 Maine, 222; *Bailey* v. *Myrick*, 36 Maine, 50; *Morse* v. *Machias Water Power Co.*, 42 Maine, 119. See also, *Dockray* v. *Thurston*, 43 Maine, 216.

The opinion of the Court was drawn up by

APPLETON, J. — The bill in this case alleges that one William Cousins, having recovered judgment against William Prince and others, in the late District Court, held on the third Tuesday of June, 1842, in and for the county of Cumberland, caused the execution, which issued on said judgment, to be extended upon the premises, which form the subject matter of the present litigation, as the property of said Prince; that said Cousins, the time for redeeming said levy having expired, conveyed the same on the 19th of February, 1842, to this complainant; that said Prince, on the 26th of October, 1836, conveyed certain premises to Mary Chipman, which, according to the legal construction of the language of the deed, but contrary to the agreement and intention of the parties thereto, transferred the title of the land, upon which the execution in favor of Cousins against Prince and others was subsequently extended, to the grantee; that the legal title thus vested in Mary Chipman passed through various intermediate conveyances to the defendants; that the different parties to these several transfers, as well as these defendants, had actual knowledge of the mistake in the deed from Prince to Chipman, when they received their titles, and

held the premises subject to the equitable rights of this complainant.

The prayer of the bill is, that the deed from Prince to Chipman may be so reformed as to express and carry out the true intent and meaning of the parties thereto, and that the defendants be forever enjoined and prohibited from asserting any right, title and claim whatever, to the premises described in the levy, &c.

The defendants deny that they, or those through whom the title passed to them, had any knowledge, information or belief of any error or mistake in the description of the premises conveyed in and by the deed sought to be reformed.

According to the construction given by the majority of this Court, in *Pierce* v. *Faunce*, 37 Maine, 63, to the deed from Prince to Chipman of Oct. 26, 1836, in the opinion delivered by Mr. Justice HOWARD, the premises, upon which the execution of Cousins was afterwards extended, by that deed were transferred to the grantee therein. It follows, therefore, that when the levy, under which the complainant derives his title, was made in June, 1842, the judgment debtor, Prince, had no legal interest whatsoever in the land levied upon.

The power of this Court, as an incident to its chancery jurisdiction, upon full and satisfactory proof of a mistake in a deed, to compel its reformation, and to enjoin the party seeking to take advantage thereof from claiming any right under it, is too well settled to be even questioned.

But, assuming the mistake in the deed to be one which a court of equity would, as between the parties thereto, or those claiming under them, with notice, reform, and that its existence is clearly established, there are grounds taken in the defence, which must prevent the complainant's recovery.

(1.) It appears that Mary Chipman, on April 14th, 1838, conveyed the premises in controversy to Orville Byram, who at the same time gave a mortgage back to secure the purchase money. This mortgage, after various mesne assignments, became ultimately vested in the defendant Faunce, and constitutes the only title he has to the land. When the

bill was commenced, the equity of redemption was not barred by lapse of time. Nor is the mortgage shown to have become foreclosed in any mode. The interest of the mortgagee is only to the extent of his mortgage. No principle is better established than that all the parties in interest should be made parties to the bill. The holder of the outstanding equity of redemption is not made a party. If not a party, he would not be bound by any decree which might be made, nor would the rights of the parties be finally determined.

The deed to be reformed is one from Prince to Chipman, yet none of the parties to that conveyance are before us. The bill seeks to reform a deed without notice to or summoning the grantee, whose rights may be materially affected by the proposed reformation of his title.

That the bill cannot be sustained, without the proper parties, and that the Court will take notice if they are not before it, was settled in *Davis* v. *Rogers*, 33 Maine, 222, in *Bailey* v. *Myrick*, 36 Maine, 50, and in *Morse* v. *Machias Water Power*, 42 Maine, 119.

(2.) It has been repeatedly determined that a purchaser, having notice of an equitable claim which would affect his conscience, may convey a perfect title to a *bona fide* purchaser without notice; and, the title thus becoming perfected in such purchaser without notice, he may transfer a perfect title to one having notice. The grantee takes the premises discharged of its latent equities. *Mott* v. *Clark*, 9 Barr., 399. So if a purchaser, with notice of a prior unregistered deed or other claim upon real estate, afterwards convey the same to a subsequent *bona fide* purchaser, who has no such notice, the latter is entitled to protection against the prior equitable claim to the property. A purchaser with notice, from a prior purchaser, who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled to protection against the previous equitable claim which was invalid as against his grantor. *Varick* v. *Briggs*, 6 Paige, 323.

"We cannot see," remarks PARKER, C. J., in *Trull* v. *Bigelow*, 16 Mass., 406, "that the knowledge of an antecedent fact,

which had lost its effect upon the title of the parties, can be material. He knows that the title was defective in one of the persons through whom he claims; and he also knows that the defect was cured, and the stain upon the title effaced. There seems no reason why, as he is a *bona fide purchaser* of him who had an unimpeachable title, he should not have the title unimpeached in his own hands." These principles equally apply, whatever may be the defect in the title as between the parties to the conveyance.

The mortgage of April 14th, 1838, given by Byram to Chipman, was, on December 6th, 1843, assigned by Chipman to E. R. Holmes. It is alleged in the bill, and denied in the answer, that he had notice of the mistake now sought to be corrected. The burthen is on the plaintiff to show he had such notice. The deposition of Holmes is not taken. The deposition of Chipman, who assigned the mortgage to Holmes, neither indirectly intimates, nor directly asserts, that he had such notice. The proof is entirely silent on this point.

Holmes, then, may be regarded as a *bona fide* assignee without notice. If the fee had been conveyed to him under such circumstances, his title could not have been impeached. But a mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee is equally entitled to protection as the *bona fide* grantee. So the assignee of a mortgage without notice is on the same footing with the *bona fide* mortgagee. In all cases, the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title, he receives the protection of the law as against unknown and latent defects.

The mortgage being assigned to Holmes without notice, he could convey the interest thus acquired. His assignment would pass his interest, and it thenceforth became unimportant whether the subsequent assignees had or had not notice.

If the mortgage is not foreclosed, the proper parties are not before us. And if they were, the bill cannot be sustained against the defendant Faunce, he having derived his title from a *bona fide* assignee.

If the mortgage be foreclosed, as the mortgage was held by

Holmes discharged from all liability for the correction of any mistakes in antecedent conveyances, it is equally so held by his assignee, and the title would thus become indefeasibly vested in the defendant.

The result is, that the bill cannot be sustained.

Bill dismissed.— Costs for defendants.

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

INHABITANTS OF PORTER *versus* WILLIAM STANLEY *and others.*

Where the same person was collector of taxes in a town for several successive years, and failed to pay over or account for a portion of the taxes committed to him the first year, moneys collected and paid over by him, arising from the taxes committed in the subsequent years, cannot be appropriated to make up the deficiency of the first year, so as to affect the relative rights and liabilities of the sureties on his several bonds, without their consent.

A settlement made with him by the selectmen, in which such appropriation is attempted to be made, is inequitable and unauthorized, and does not bind the town or the sureties.

Notwithstanding such assumed settlement, an action may be maintained against the sureties of the first year for the balance of that year's commitment remaining unaccounted for.

ON AN AGREED STATEMENT OF FACTS.

This was an action of DEBT on a bond given by William Stanley, as collector of taxes for the town of Porter for the year 1854, with John Stanley, Washington Colcord and Hazen W. Harriman as sureties. The defendants Colcord and Harriman pleaded the general issue, with a brief statement setting forth payment and settlement of the accounts of Stanley for that year.

The plaintiffs introduced William Stanley, the principal defendant, as a witness, who testified that he used for his private business about $300 of the money he collected in

1854, paying a note of his own at a bank, for $250, and other small sums.

The defendants introduced evidence that William Stanley was *treasurer* and collector of the town for the municipal years 1855 and 1856; that in 1854 he did not pay any money to the then treasurer; that after he was chosen treasurer in 1855, the treasurer's book was put into his hands, and remained in his possession until March, 1857.

They then introduced the treasurer's book, on which Stanley was charged, in his own handwriting, with the taxes for 1855 committed to him, $1774,00; cash collected of Meshach Mason on note, Oct. 25, 1855, $14,09; received from the State school fund, $142,00; and on the same page, in the handwriting of David Colcord, "commitment for 1854, $1601,13." These sums were footed up, $3531,22. Then followed this entry:—

"Amount of town orders taken up by William Stanley since March annual town meeting, 1855, to February 27, 1857, the which amount to the sum of three thousand seven hundred fifty-five dollars, sixty-four cents; and we have settled with him as follows:—

"Said amount of T. orders,	$3755,64
"Above footing brought down,	3531,22
	$224,42

"Leaving a balance due said Stanley of two hundred and twenty-four dollars 42–100, to be allowed him on his commitment of taxes in the town of Porter, for the year 1856. Said town orders are registered in this book on pages from one to twelve. "David Colcord, } *Selectmen of*
"Tobias Libby, jr., } *Porter for* 1856."

In another part of the book, on pages numbered from 1 to 12, inclusive, is a list of town orders, with a certificate signed by the same selectmen, that the amount is $3755,64, and that they are the same allowed on settlement with William Stanley, town treasurer, as having been paid by him.

On the next page, Stanley is charged, in his own handwrit-

ing, with the "commitment for 1856, $1798,99," and credited, in the handwriting of David Colcord, with "Balance due Wm. Stanley on T. orders on settlement with selectmen, Feb. 27, 1857, two hundred twenty-four dollars 42–100, $224,42."

William Stanley, recalled by the plaintiffs, testified that he had taken $1200 or $1300 of the orders on the commitment of 1856; that the selectmen, after footing up the amount, said to him they supposed it would be right to settle the commitments of 1854 and 1855, and apply the balance to the commitment of 1856; that he replied that he did not know whether that would be right, that the selectmen knew best, and he wished them to apply it where it legally belonged, as suits were pending against him on his bonds as collector for 1854 and 1856, and the commitment of 1854 had not been collected by $15 or $20.

The testimony of James French, jr., called by the plaintiffs, tended to corroborate that of Stanley.

The defendants introduced David Colcord, Tobias Libby, jr., and Joseph Stanley, 2d, whose testimony tended to contradict that of William Stanley, as regards the conversation alleged to have been held.

It appeared that there were different sureties on William Stanley's several bonds as collector of taxes for 1854, 1855 and 1856.

Hammons and *Gibson*, for the plaintiffs, argued that by the settlement assumed to be made by the selectmen with Stanley, in March, 1857, if they had the right to make it, his sureties as collector for 1854, 5 and 6, would all be discharged, and the deficiency would be thrown on his sureties as treasurer. Or, if they could not do that, the settlement would throw the whole burthen on his sureties as collector for 1856; whereas the proof is, that he had collected but $1300 of the commitment of 1856, and had accounted for all his collections for that year.

The law of appropriations in the case of distinct debts owed by the same debtor, does not apply where there are

sureties to be affected. In applying payments, the principles of equity are recognized at law, as far as the nature of the proceedings will admit. *Thompson* v. *Wheeler*, 2 Foster, (N. H.,) 309; *Upham* v. *Lefavor*, 11 Met., 174, 184; *Livermore* v. *Claridge*, 33 Maine, 428. Equity requires that the sureties of 1854 should be held to account for the $300, collected and used by him in that year; that his sureties as treasurer for 1855 should account for the $156, received by him in cash during that year, and his sureties as collector for 1855, for $620, collected by him in that year and not accounted for at the date of the settlement; and that the $1300, collected by him on the commitment of 1856, should be allowed on that commitment, and not appropriated otherwise.

A debtor cannot appropriate a payment so as to affect the relative rights or liabilities of his different sureties without their consent. *Post Master General* v. *Newhall*, Gilpin, 106; *U. S.* v. *January*, 7 Cranch, 572; *Same case*, 2 Curtis, 673; *U. S.* v. *Eckford's Ex'rs*, 14 Curtis, 592; *Same case*, 1 Howard, 250.

The town cannot be estopped or concluded by any unauthorized acts of their agents or officers.

Ayer and *Wedgwood*, for Colcord and Harriman.

The opinion of the Court was drawn up by

TENNEY, C. J.—William Stanley was the collector of taxes of the town of Porter, for the year 1854, and for the faithful performance of his duty as such, the bond in suit was given. He was also collector and treasurer of the town for the years 1855 and 1856, and gave bonds, with different sureties from those on the bond for the year 1854.

As collector for the year 1854, William Stanley received moneys on the assessment of that year, and a part of the same he omitted to pay into the treasury, or otherwise account for, from the collections so made. But on February 27, 1857, as appears by the books of the treasurer, and other evidence in the case, the selectmen appropriated from moneys

received on the assessments of the two years, 1855 and 1856, sufficient to balance the deficiency of the year 1854. This does not appear to have been done at the request of William Stanley, or by his consent, any further than, if it was right that it should be so done, he would consent thereto. It does not appear that the sureties on either of the bonds were consulted, or had knowledge of the appropriations, or that either of the bonds were cancelled.

The appropriations so made were manifestly inequitable, as it respects the sureties, and, by the authorities cited for the plaintiffs, cannot be upheld. It is said, in the opinion of the Court in the case of *U. States* v. *January & al.*, 7 Cranch, 572, "It will be generally admitted that moneys arising due and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety in the second bond."

It was clearly not the intention, of the selectmen or of William Stanley, that the amount collected by him on the assessment of the year 1854, and not paid, as of the taxes of that year, should be suffered to be a charge against him, without security under any bond. It certainly cannot be covered by the bond of 1855 or by that of 1856. If the sureties on either of the bonds are still liable therefor, it must be those on that for the year 1854. That bond remaining uncancelled, in fact, and the appropriation being made under a misapprehension, this suit is maintainable.

Defendants defaulted.

RICE, APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

OLIVER NEWMAN *versus* ISAAC JENNE.

The owner of goods cannot maintain an action of replevin against a person who is lawfully in possession of them, without a previous demand and refusal, or acts on the part of the possessor amounting to a conversion.

There is no conversion for which replevin will lie, unless there be a repudiation by the possessor of the right of the owner, or the exercise of a dominion inconsistent therewith.

A mortgaged a pair of oxen to B to secure the payment of a note. After the note was due, B requested payment. A did not pay, but took the oxen into the woods for lumbering. B, without demanding the oxen, brought an action of replevin: — *Held*, that the action could not be maintained.

REPLEVIN for a pair of oxen.

It appeared that the defendant bought of the plaintiff, May 9, 1858, a pair of oxen, and gave his note for $120, payable in six months with interest, and also gave the plaintiff a mortgage of the oxen to secure the payment of the note.

The note remaining unpaid, this action of replevin was brought Feb. 5, 1859. The defendant pleaded the general issue, with a brief statement alleging that he had license from the plaintiff to take and possess the oxen, and that the plaintiff never demanded them of him at any time before the commencement of the action.

The plaintiff testified that he never gave the defendant license to take the oxen into the woods for lumbering; that after the note was due, he sent word to the defendant that he wanted the money; and that, after the oxen were taken into the woods, he brought this action, and sent an officer to take them.

The defendant testified that the oxen were not abused by him; that nothing was ever said by the plaintiff as to what work he might do with them; that he never refused to deliver them to the plaintiff; and that the plaintiff never demanded them of him before the service of the writ.

The defendant's counsel requested the presiding Judge, GOODENOW, J., to instruct the jury that, if they found the defendant came lawfully into possession of the oxen by license

of the plaintiff, and that they were not abused or misused by the defendant, the possession and use of them by the defendant would be rightful and lawful until after a demand by the plaintiff.

This, and other instructions requested by the defendant, the Judge declined to give, but instructed the jury that they would consider whether the taking of the oxen into the woods was not a wrongful act, unauthorized by the license given by the plaintiff, and that, if they found it was unauthorized, as the property was admitted to be in the plaintiff, he could maintain his action without proving a demand.

The defendant filed exceptions.

W. W. & S. A. Bolster, in support of the exceptions, to show that a demand is necessary, before bringing an action of replevin, where the defendant has lawful possession of the goods, cited *Pickard* v. *Low*, 15 Maine, 48; *Sawtelle* v. *Rollins*, 23 Maine, 196; 1 Chitty's Plead., 157, 13th Amer. ed.; *Seaver* v. *Dingley*, 4 Maine, 316; *Galvin* v. *Bacon*, 11 Maine, 28.

They further argued, that an abuse of authority or license derived from a party does not constitute the wrongdoer a trespasser *ab initio;* and cited *Hunnewell* v. *Hobart*, 42 Maine, 565; *Bradley* v. *Davis*, 14 Maine, 44; 15 Johns., 35; 8 Coke, 146; 2 Greenl. Ev., § 642; *Fernald v. Chase*, 37 Maine, 289; *John* v. *Weedman*, 4 Scam., 495.

Elisha Winter, contra, argued that the first requested instruction was substantially given. It proposed to leave the question of possession of the oxen by license of the plaintiff, and also that of abuse and misuse of them, to the jury. The question of abuse and misuse, involves the extent of the defendant's authority to use them under the license; for an unauthorized use is a misuse. If, then, the jury found that the defendant had possession by license, and did not exceed his authority under it, his possession would be lawful until after demand; but otherwise if they found either of these points against him. An examination of the instructions given, the

counsel contended, would show that it contained the same ideas in different language.

The other instructions asked for were unimportant, and might well be refused.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of replevin for a yoke of oxen, brought by the mortgagee against the mortgager. The oxen were left in the defendant's possession, by whom they were worked in the woods hauling lumber. The suit was commenced without any demand upon the defendant for the oxen replevied.

The doctrine is well settled that replevin lies in all cases where trespass *de bonis asportatis* will lie. *Wheeler* v. *McFarland*, 10 Wend., 322. It depends on the same principles as the action of trover, and, where trespass or trover can be maintained, replevin will lie. *Sawtelle* v. *Rollins*, 23 Maine, 196. To maintain this action, there must be a tortious taking or wrongful detention.

Unless there be a special agreement to the contrary, the mortgagee may at any time terminate the rights of the mortgager, and take possession of the mortgaged property. If the mortgaged goods be attached as the property of the mortgager, as in *Melody* v. *Chandler*, 12 Maine, 282, or sold by the mortgager, as in *Whitney* v. *Lowell*, 33 Maine, 318, such attachment or sale will be deemed a conversion by the officer so attaching, or by the person so purchasing, and the action of trover or replevin may be maintained by the mortgagee.

"If the defendant came lawfully into possession of the goods," says MELLEN, C. J., in *Seaver* v. *Dingley*, 4 Greenl., 316, "an action cannot be maintained, unless after demand and refusal, which are evidence of conversion. For the same reason, no action of replevin will lie for goods of which the defendant lawfully obtained the possession, until after a demand. From that time the detention is unlawful, and the case comes within the language of the writ of replevin." The defendant was lawfully in possession of the oxen in contro-

versy. He had not sold nor transferred them. He was using them, as well he might, till forbidden by the mortgagee, or until possession of them was demanded. There is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion inconsistent with that right. *Heald* v. *Carey*, 9 Eng. Law and Eq. Rep., 492.

The first requested instruction should have been given.

Exceptions sustained.

TENNEY, C. J., and CUTTING, DAVIS, and KENT, JJ., concurred.

JOSEPH FRYE *versus* ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY.

In an action against the Atlantic and St. Lawrence Railroad Company, to recover the value of a building situate on the route of their road, destroyed by fire communicated by an engine of said corporation running over their road, it is necessary to allege that the engine causing the fire was *in the use* of said company, or of their lessees, the Grand Trunk Railway Company.

Although a declaration defective in this particular will be held insufficient on *demurrer*, the defect may be supplied by an amended count, on payment of costs up to the time when the amendment was offered.

THIS was an action of the CASE to recover the value of a house and some lumber situate on the route of the defendants' road, alleged to have been destroyed by fire, "communicated by a locomotive engine of the said railroad corporation then and there running over said railroad."

At the first term, August, 1859, the counsel for the defendants filed a general demurrer.

At the March term, 1860, the counsel for the plaintiff, having given reasonable notice of his intention so to do, moved for leave to amend his writ by adding a new count. The defendants objected to the amendment as not legally admissible.

It was then agreed that the demurrer should be joined, and the case referred to the full Court. If, in their opinion, the demurrer should be overruled, the action was to stand for trial on the original writ; if the demurrer should be sustained, and the Court should be of opinion that the amendment was admissible, the action should stand for trial on the amended count; or, if the original count would be amendable on motion, upon the payment of costs or otherwise, the action should stand for trial; otherwise the plaintiff to become nonsuit.

The demurrer was joined, and the presiding Judge, KENT, J., ruled, *pro forma*, that it was good and sufficient. The plaintiff excepted.

Hammons and *Gibson*, for the plaintiff, argued that the declaration in the writ followed very nearly the language of the statute, 1842, c. 9, § 5, and contained all the essential requisites to charge the defendants.

If not, the amendment offered was within the discretion of the Court, and was rightfully allowed, being matter of form, and embracing only the same cause of action with the original declaration, as fully appears on inspection of the two counts.

P. Barnes, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.,—There is no allegation in the writ that the locomotive causing the fire was *in the use* of the Atlantic and St. Lawrence Railroad Company, or the Grand Trunk Railway Company, their lessees. The demurrer must be sustained.

The plaintiff, at *Nisi Prius*, may have leave to amend upon payment of costs up to the time when his amendment was offered, and in no event to recover costs accruing before that time.

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW and KENT, JJ., concurred.

EZRA CURTIS *versus* JEREMIAH CURTIS.

Upon a writ of review, the former judgment cannot be reversed, in whole or in part; but, if wrong, the plaintiff in review will have judgment to recover back the money erroneously recovered in the first suit; or, if right, the defendant in review will recover his costs of review, and may execute his former judgment, if not already satisfied.

Where the first judgment has been satisfied by a levy upon real estate, the levy is valid, and conveys a good title, although afterwards, on review, the original defendant recovers a judgment against the original plaintiff for a sum equal to the whole amount of the first judgment.

WRIT OF ENTRY. ON AN AGREED STATEMENT OF FACTS.

The demandant claimed title as follows:—Bailey Curtis, by deed dated May 27, 1850, conveyed the premises to Bailey Curtis, jr., and Bailey Curtis, jr., by deed dated March 15, 1858, conveyed them to the demandant.

The following is the title of the tenant:—Bailey Curtis sued out a writ of attachment against Bailey Curtis, jr., December 13, 1852, by virtue of which the premises were attached, judgment was rendered in the suit, March term, 1853, against Bailey Curtis, jr., for $1012,11, execution issued, and levied on the premises, March 29, 1853, in legal form, and duly returned and recorded, and the premises were not redeemed by the judgment debtor. On March 17, 1855, Bailey Curtis by deed of warranty conveyed the premises to the tenant.

Bailey Curtis, jr., petitioned for a review of the aforesaid action, at the August term, 1854, and, at November term, 1857, obtained judgment against Bailey Curtis for the full amount of the former judgment in favor of the latter, with costs of review.

On these facts the full Court were to enter such judgment as the legal rights of the parties may require.

W. W. Virgin, for the demandant.

The only question is, whether a levy can be sustained after

the judgment on which it was based has been reversed on review.

The action was commenced when the R. S., of 1841, were in force, but the judgment in review was rendered after the revision of 1857 had taken effect. This is deemed immaterial, as change of phraseology is not to be construed as a change of the law, unless the Legislature evidently intended a change. *Hughes* v. *Farrar*, 45 Maine, 72. Chapter 89, of 1857, is, therefore, regarded as equivalent to c. 124, of 1841, as touching this case.

A writ of review brings the original case, in which judgment has been rendered, again before the Court for trial; and the judgment on review is the only final judgment, the former judgment being vacated. Judgment on review is to be rendered "without any regard to the former judgment," and the case "disposed of as if it were an original suit." § 9, of each statute above cited.

The effect of granting a review is analogous to an appeal from the judgment of a justice of the peace. The appeal vacates the judgment. *Atkins* v. *Wyman*, 45 Maine, 399. The analogy continues through subsequent proceedings. The plaintiff opens his case, and produces his proof, "as if it were an original suit," and judgment is rendered, as the "merits of the case, upon law and evidence, require, without any regard to the former judgment." The former judgment being vacated by the subsequent proceedings, the latter judgment takes its place as the final judgment.

There are two descriptions of cases excepted in the statutes. One where the original plaintiff recovers a sum for debt or damages which is reduced by the judgment on review; the other where he recovers an increased sum.

The case at bar does not come within these exceptions. The judgment recovered by the plaintiff cannot be considered "reduced" when he recovers nothing. Nor is the judgment in this case "increased" on review.

If the original judgment was not vacated by the *granting* of the review, it was by the judgment in review, and the for-

mer judgment became a nullity, and the latter "was substituted for it." *Dunlap* v. *Burnham*, 38 Maine, 112.

W. W. & S. A. Bolster, for the defendant.

A review is a statutory mode of trying an action the second time. The original suit and the action of review may be considered as cross actions between the same parties. *Ely* v. *Forward*, 7 Mass., 25.

If, on petition, a review is granted, the case is to be tried as if there had been no former trial, and "disposed of as if it were an original suit." Stat., 1857, c. 89, § 8.

The analogy between a review and an appeal from a justice of the peace does not hold to the final proceedings. In the latter case, the judgment of the justice is vacated, and cannot be enforced, even if an appeal is not entered. But the judgment in a suit is complete and final at its rendition, although afterwards reviewed. Execution can only be stayed by order of court. The original judgment cannot be reversed, either in whole or in part; but a new judgment must be entered. Howe's Practice, 531; *Ely* v. *Forward*, above cited. It is only on writ of error, that the original judgment can be reversed, annulled or vacated.

A judgment is valid as against parties and privies until reversed. *Came* v. *Bridgham*, 39 Maine, 35; *Cole* v. *Butler*, 43 Maine, 401; *Atkins* v. *Wyman*, 45 Maine, 339. The judgment, *Bailey Curtis* v. *Bailey Curtis, jr.*, was entered at the March term, 1853, and execution taken out and levied immediately. There had been then no petition for a review. If the judgment was valid, the levy was valid, and vested the premises in Bailey Curtis, subject to the right of Bailey Curtis, jr., or his representatives, to redeem within one year. There having been no redemption, the title became absolute in Bailey Curtis, and could only pass from him by some form of redelivery, such as a deed or levy. If the legal seizin was in him, this action cannot be maintained. *Langdon* v. *Potter*, 3 Mass., 215; *Munroe* v. *Luke*, 1 Met., 459; *Blood* v. *Wood*, 1 Met., 528.

A construction which would vacate the levy, without any reconveyance, would tend to create great confusion with regard to titles. It would also injuriously affect the rights of innocent third parties.

This case comes within one of the exceptions in R. S., 1857, c. 89, § 10. The first judgment is "reduced" by the judgment on the review, from over $1000 to less than nothing.

The opinion of the Court was drawn up by

DAVIS, J.—This is a writ of entry, by which the demandant seeks to recover possession of a certain tract of land situated in Rumford, in the county of Oxford.

The premises in controversy were formerly owned by Bailey Curtis, who conveyed the same to Bailey Curtis, jr., by his deed dated May 27th, 1850. Afterwards, on the 13th day of December, 1852, Bailey Curtis, the grantor, commenced a suit against Bailey Curtis, jr., the grantee, in which he attached the premises previously conveyed. In that suit he recovered judgment for the sum of $1012,11, and the execution issued thereon was duly levied upon the same premises March 29, 1853. And, on the 17th day of March, 1855, the said Bailey Curtis conveyed the premises, by deed of warranty, to Jeremiah Curtis, the tenant.

In August, 1854, Bailey Curtis, jr., petitioned for a review of the action of Bailey Curtis against himself. A review was granted in 1855, and a new trial was had in November, 1857, resulting in a verdict in favor of the original defendant for a sum equal to the former judgment against him. Supposing that this reversed the former judgment, and rendered the levy void which was made to satisfy it, Bailey Curtis, jr., claimed still to own the premises, and conveyed the same to Ezra Curtis, the demandant, by his deed, dated March 15th, 1858.

A writ of review is not analogous to a writ of error. Upon such a writ, "the former judgment cannot be reversed, in whole, or in part. If the former judgment were wrong, the plaintiff in review will have judgment to recover back the money erroneously recovered in the first suit. If the former

judgment were right, the defendant in review will have judgment for his costs of review, and may execute his former judgment," if it has not been already satisfied. Howe's Practice, 531.

The statutes of this State are not materially different from the former statutes of Massachusetts. The case at bar is within section *ten* of chapter *eighty-nine* of the Revised Statutes of 1857. The judgment of the original plaintiff was reduced the whole amount of it, and judgment rendered for the original defendant for that sum. The statute provides, not that the former judgment shall be reversed, or annulled, but that, "if the former judgment has not been satisfied, one may be set off against the other." In this case the former judgment has been satisfied, in part, by a levy upon the premises sued for. That judgment was not vacated or annulled by the judgment in the action of review. The legality of the levy is not questioned, and, therefore, the tenant obtains a good title from the judgment creditor.

Demandant nonsuit.

Judgment for the tenant.

TENNEY, C. J., and APPLETON, CUTTING, GOODENOW and KENT, JJ., concurred.

HENRY INGALLS *versus* ADDISON G. COLE.

The limitation in § 18, of c. 76, R. S., of 1841, of the liability of a stockholder in a corporation for corporate debts, to "the term of six months after judgment recovered against such corporation in any suit commenced within the year aforesaid," applies only to suits against stockholders whose stock has been transferred, and the transfer recorded, and not to the case of stockholders who have never parted with their stock.

The statute of 1844, c. 109, did not change or extend the limitation in § 18 of c. 76, statutes of 1841, so as to limit the liability of stockholders who have not transferred their stock.

Statutes are to be construed according to their plain import, without regard to mere inferences which may be drawn from the language of an Act passed by a subsequent Legislature.

Where an officer, having an execution against a corporation, has given a stockholder a notice of his intention to levy on his individual property, unless the stockholder shows him corporate property to satisfy the debt, it is not necessary that the creditor, or officer, shall give a further and distinct notice of an intention to commence an action, before a suit can be instituted.

Although the creditor of a corporation who first moves in conformity to law, to fix the liability of a stockholder, acquires a priority of right, which cannot be defeated by the stockholder or other creditor who may first obtain judgment or execution, yet the facts, that a creditor has acquired such priority of right, or that suits have been instituted and are pending on such prior claims, are not sufficient defence to a suit by another creditor, without evidence that the liability of the stockholder has been legally established, without fraud, to an amount which exhausts it.

The fund arising from the individual liability of the stockholder belongs to the first creditors of the corporation who establish their rights to it by proceedings which terminate in fixing the liability.

Whether a stockholder may make payment, in good faith, to creditors who have first fixed his liability by the necessary steps, to an amount sufficient to exhaust the fund, without levy or suit brought, *quære*.

ON REPORT of the case by GOODENOW, J.

THIS in an action of the CASE, by a judgment creditor of the Buckfield Branch Railroad Company, against the defendant as a stockholder, to recover a sum equal to the amount of his stock in said corporation. The writ was dated January 1, 1852. The defendant pleaded the general issue, with a brief

statement, of which the following specifications only are important to the case:—

"3. That this suit was not commenced within six months after the aforesaid judgment against said corporation was recovered.

"4. That no notice was ever given the defendant of the plaintiff's intention to commence this suit against him.

"6. That, at the District Court, held at Portland, within and for the county of Cumberland, on the first Tuesday of March, A. D., 1851, one Enoch L. Cummings, Esq., of said Portland, recovered two judgments against said railroad company; one for the sum of $1896,80, debt or damage, and costs of suit taxed at $5,53, and the other for the sum of $2443,96, debt or damage, and costs of suit taxed at $5,53; and that executions issued thereon, and were put into the hands of Jesse Drew, a Deputy Sheriff of the county of Oxford, for collection; and that, afterwards, on the fourth day of April, 1851, he gave the notices to, and made the demands upon, the defendant in this suit, as required by the nineteenth section of chapter 76 of the Revised Statutes of 1841, the said Drew having first ascertained and certified upon said executions that he could not find corporate property or estate wherewith to satisfy said judgments.

"7. That, at the Supreme Judicial Court, held at Portland, within and for the county of Cumberland, on the second Tuesday of November, 1851, one Charles G. Came, of said Portland, recovered judgment against said railroad company for the sum of $893,76, debt or damage, and costs of suit taxed at $4,70; and that an execution was duly issued thereon, and put into the hands of said Jesse Drew, Deputy as aforesaid, for collection; and the said Drew having first ascertained, and certified upon said execution, that he could not find corporate property or estate wherewith to satisfy the same, made the demand upon, and gave the notice to said Cole, as required by the 19th section, chapter 76, of the Revised Statutes of 1841; and, afterwards, on the 10th day of December, 1851, commenced a suit against said Cole, to recover of him the

amount of said judgment, which suit was pending in this Court in this county, at the time this suit was commenced, and at the time of the alleged demand and notice to the defendant.

"8. That at the Supreme Judicial Court, held at Portland, within and for the county of Cumberland, on the third Tuesday of April, 1851, two judgments were recovered against said railroad company, one in favor of the Canal Bank for the sum of $3470,68, debt or damage, and costs of suit taxed at $4,04; the other in favor of the Casco Bank for the sum of $2099, debt or damage, and costs of suit taxed at $4,04; upon both of which executions were duly issued and put into the hands of said Jesse Drew, Deputy Sheriff as aforesaid, for collection, and that the said Drew, having first ascertained and certified upon said execution that he could not find corporate property or estate wherewith to satisfy the same, and, on the 18th of April, 1851, made the demand upon, and gave the notice to said Cole, required by law to fix and establish the liability of said Cole to pay the judgments aforesaid, to the amount of stock held by him in said railroad company.

"And the said Cole says, that he was unable to show to said officer or to either of the aforenamed creditors, and did not show to either of them, corporate property or estate wherewith to satisfy said executions, or any part thereof; by reason of all which, he became liable, and an action accrued to the aforesaid creditors to demand and recover of him a sum equal to the amount of the stock owned by him in said railroad company, to wit, the sum of twenty hundred dollars, all of which was prior to the aforesaid demand and notice of the plaintiff in this suit.

"And the defendant has since paid the amount of his said liability to said creditors.

"By reason of which the plaintiff's action is barred, and, at the date of his writ, he had no cause of action against the defendant."

The judgment was recovered May 8th, 1851, being the

third day of the term. An alias execution was issued on said judgment, November 20, 1851, and placed in the hands of Jesse Drew, a Deputy Sheriff, for service. The said Drew made several returns on the back of said execution, which are in the words following, to wit:—

"Oxford ss., December 4, 1851.—By virtue of the within execution, having made diligent search for corporate property or estate belonging to the within named Buckfield Branch Railroad Company, wherewith to satisfy the within execution, I have first ascertained, and hereby certify, that I cannot find corporate property or estate belonging to the said corporation. "Jesse Drew, *Deputy Sheriff.*"

"Oxford, ss., December 9, 1851.—By virtue of the within execution, I have this day notified the following stockholders in said corporation, (meaning the within named Buckfield Branch Railroad Company,) to wit, William Bridgham, Addison G. Cole, by giving to each of them in hand a written notice of the amount of the within execution, and that I, on the eighteenth day of the above named month, notified the following person, stockholder in the within named corporation, to wit, James S. Parlin, by giving him in hand a written notice of the amount of the debt, to wit, of the amount of the within execution; and I have also, on the 20th of the above named month, notified the following person, stockholder in the within named corporation, to wit, Henry Decoster, by giving him in hand a written notice of the amount of the debt, to wit, of the amount of the within execution, and of my intention, after forty-eight hours, to levy the within execution upon the several individual property, rights, credits and estates of each and all the above named stockholders, to the amount of stock owned by them severally in said corporation, unless they should, on demand and notice aforesaid, disclose and show to the execution creditor within named, or to me, as an officer, attachable corporate property or estate belonging to said corporation, sufficient to satisfy the within execution and all fees. "Jesse Drew, *Deputy Sheriff.*"

"Oxford, ss., December 31, 1851.—And now, forty-eight hours from and after the time of giving notices as aforesaid, to each of said stockholders above named, has expired, and they have each and all neglected to disclose and show to me, as an officer, or to the within named execution creditor, attachable corporate property or estate belonging to the said corporation, sufficient to satisfy the within execution and all fees. "Jesse Drew, *Deputy Sheriff.*"

There was no other return on the back of said execution.

At the present term the plaintiff moved to amend, and was permitted to file a new count. The defendant objected to the allowance of the amendment, because, as he claimed, it placed the action on R. S., 1841, c. 76, § 30, instead of § § 18 and 20, according to the original count in the writ, alleging that the action as stated in the original count was barred by limitation of time, and that the new count introduced a new cause of action which might not be barred. The presiding Judge allowed the amendment, subject to the opinion of the full Court; and it was agreed that the case should be reported, in order to settle as many questions of law arising in it as practicable, anterior to any trial before the jury.

The defendant contends that the returns on the back of said execution, made by said Drew, do not furnish sufficient evidence that the said Drew ever gave the preliminary notice required by the statute, to warrant the plaintiff in commencing his action, and that the action was barred by lapse of time before the commencement of the suit. If, in the opinion of the full Court, the action is barred by lapse of time, or, if the plaintiff cannot be allowed to show demand and notice by an amendment of the officer's return, or otherwise; or, if he cannot recover without showing demand and notice, or by any authorized amendment, then he is to become nonsuit. Otherwise, the action is to stand for trial upon both counts, if the amendment was rightly allowed. But if the second count was improperly admitted by way of amendment, then that count is to be struck out, and the action to stand for trial on the first count. In order to settle as many questions of law

as possible arising in said case, the parties agreed that the full Court should take into consideration the specifications in defendant's brief statement, numbered 3, 4, 6, 7 and 8, and determine whether, if the facts alleged in those particulars of the brief statement, or in any one of them, are fully proved, it will constitute a good defence to said action, in whole or in part.

Howard & Strout, for the plaintiff.

1. The action is not barred by limitation. It is founded on § § 18, 19 and 20 of c. 76, R. S., of 1841. The only limit as to time of the liability of stockholders is found in § 18, and is confined to cases where they have transferred their stock.

2. The amendment was properly allowed. The amended count claims precisely what was intended to be claimed in the original count. It has no connection with the question of limitation.

3. The plaintiff has taken the necessary preliminary steps to enable him to maintain this suit against the defendant as a stockholder of the delinquent corporation. The returns made by the officer are sufficient to show the certificate required by § 18, and the demand and notice to the stockholder prescribed in § § 19 and 20. No other notice was required before commencing this suit.

4. The plaintiff is not estopped to bring his action by any thing alleged in the defendant's specifications 6, 7 and 8. The creditor first moving according to law may acquire a priority of right, by first fixing the liability of the stockholder, as held in *Cole* v. *Butler,* 43 Maine, 401. But this cannot operate as a bar to subsequent suits by other creditors. The first creditor's suit may fail, or he may recover a less sum than the stockholder is liable for, or may abandon his claim on the stockholder. It is not enough to show that other creditors have prior claims, but the defendant must show that his liability to them has been legally established, and that he has paid the amount for which he is liable. A mere liability to

pay, is no payment and no bar. Payment, even, is not necessarily a bar to the commencement of the suit, though it may be a defence at the trial.

5. The repealing Act of 1857, page 752, saves this case from the effect of the repeal.

J. C. Woodman, for the defendant.

1. The action was barred by limitation before it was commenced. There has been no judicial determination as to the meaning of § 18, c. 76, R. S., of 1841; but the Legislature, in statute of 1844, c. 109, § § 3 and 4, recognize the limitation therein contained as applying to all actions against members of delinquent corporations under the provisions of c. 76. An Act amounting to a legislative declaration of the meaning of a former statute, will govern the construction to be given to it. *United States* v. *Freeman*, 3 Howard, 565; *Hunt* v. *Hunt*, 37 Maine, 333.

The personal liability of members of a corporation, for the corporate debts, depends solely on provisions of positive law, which are to be construed strictly. *Gray* v. *Coffin*, 9 Cush., 192.

2. The amended count, allowed by the presiding Judge, cannot avail the plaintiff. It was so framed as to charge the defendant on § 30 of c. 76; but § 30, when this action was commenced, did not subject a stockholder to any action whatever. The liability of a stockholder, under § 30 was subject to the same conditions and limitations as under § 18.

3. But the amendment was erroneously allowed, especially if, by admitting the amendment, the plaintiff can avoid the statute limitation. The amended count, by placing the action on § 30, states an entirely different case from the one originally stated. It was not offered until more than six years after the commencement of the suit, and hence was barred by the general statute.

4. The preliminary steps necessary to maintain this suit are not shown, nor even alleged to have been taken. The statutes authorize the officer, having execution against a cor-

poration, after forty-eight hours notice to a stockholder, and a demand for him to show corporate property to satisfy the debt, in default thereof, to levy on the individual property of the stockholder. In this case, the officer is to make the demand and give the notice.

But the "creditor, after demand and notice, as mentioned in the preceding section, may have an action on the case against any such stockholder, to recover of him individually." In this case, the creditor must himself sue; so he must make the demand and give the notice. In the former case, the officer is to give notice of his intention to make the levy; in the latter, the creditor must notify the stockholder of his intention to commence an action. At all events, there must be a notice of the intention of the creditor to commence an action, if not to be given by himself. There is no evidence or allegation that any such notice was ever given.

5. The judgments mentioned in the specifications 6, 7 and 8, were recovered earlier than that in favor of Ingalls against the corporation. The creditors thereby "acquired a priority of right to recover against the stockholder to the amount of his stock, with which no other creditor, subsequently moving, can interfere." *Cole* v. *Butler*, 43 Maine, 401. It was not necessary to commence an action in order to acquire a priority of right. By the preliminary steps, the liability of the stockholder became fixed. He had a perfect right to pay these creditors; and, if he did pay them, as he alleges, to the full amount of his stock, the present action is barred.

6. It is contended further, that the action is barred, if he did not pay them. The liability of the stockholder to the other creditors having been fixed, the present plaintiff had no right to demand of him to show corporate property to satisfy his debt. A right to demand, implies an obligation to comply with it. Similar demands had been made on him already for an amount equal to five times the amount of his stock. If he was to be harassed by such demands five or six times, or even twice, on the same amount of stock, he might be harassed and sued a hundred times in the same way. The

inference is, that when one or more creditors, having judgments equal to the whole amount of the defendant's stock, had taken the preliminary steps to establish the defendant's liability, no other creditor could take those steps, until the liability first established should be discharged, paid or removed.

7. This case is barred by the repealing Act of 1857, page 752, on the principles decided in *Coffin* v. *Rich*, 45 Maine, 507.

The opinion of the Court was drawn up by

KENT, J.—This action was not commenced within six months after judgment against the corporation. The first objection made by the defendant rests upon this fact. He contends that the suit was barred by limitation when it was commenced.

We understand, from the case, that, for the purposes of determining this point, it is assumed that the corporation is one within § 18 of c. 76 of R. S. of 1841; that the plaintiff recovered judgment against the corporation in May, 1851; that he placed an execution in an officer's hands, who made a return that he could not find corporate estate, and afterwards returned that he gave the notice to the defendant as required by statute; that this action was commenced in less than a month after the action and return of the officer, but more than six months after the recovery of the judgment, in pursuance of the provisions of § 20. In § 18, is found the provision, which renders the property of a stockholder liable to be taken on an execution against the corporation for the debts of the corporation contracted during his ownership of such stock. This is the general liability. There is in the section a limitation in these words:—"and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof, on the books of the corporation, and for the term of six months after judgment recovered against such corporation *in any suit commenced within the year aforesaid.*"

The defendant contends that this is a limitation of six months applicable to all cases where a levy may be made; and that the same limitation is extended to the provisions in § 20, for an action on the case. The plaintiff insists that the provision applies only to a case where a stockholder has transferred his stock, leaving all other cases to the general law of limitations.

The intention of the Legislature in inserting this parenthetical limitation is obvious, when we look to the history of the Acts in relation to the liability of stockholders.

As early as the year 1808, the Legislature of our parent State passed an Act, authorizing a levy of an execution against a corporation, on the body or property of a member, without limit as to amount or time, in case of deficiency of attachable estate of the company. It was decided that, under that statute, the person must be a member of the corporation at the time of the levy. *Leland* v. *Marsh*, 16 Mass., 389; *Marcy* v. *Clark*, 17 Mass., 330.

The practical difficulty, that was soon made apparent, was, that stockholders of ability, when they found the corporation in danger of bankruptcy, divested themselves of their membership by transfer of their stock, before an execution could be obtained. This led to subsequent statutes by which this liability for debts contracted during the ownership of the stock, was continued for a term beyond the time of the transfer. In fixing a specific time, however, it was seen that the year named might expire after the failure of a corporation before a judgment could be obtained, and, therefore, the liability was continued, in case a suit was commenced within the year after a recorded transfer, until judgment was obtained, and for six months after such judgment, to give the creditor reasonable time to levy his execution.

But this provision has no reference to the case of stockholders who have never parted with their stock. It is impossible to give the construction contended for by defendant, if we give any effect to the words, "in any suit commenced within the year aforesaid." These words refer to the

transfer of the stock, and would be senseless if applied to a case of a stockholder who has never parted with his stock. No judgment answering to the description of a judgment recovered against a corporation, on a suit commenced within a year *from the transfer of his stock*, could be obtained against a man who had *never transferred his stock*.

The argument drawn from the provisions of the law of 1844, in relation to manufacturing corporations, cannot control the plain provisions of the statute. Indeed, we do not understand that the Legislature intended in that Act to change at all the provisions and limitations of § 18. The same limitation applies as to cases of the transfer of stock under the law of 1844, as under the laws of 1841, but it is not changed or extended to embrace stockholders who have not transferred their stock. In this respect, we see no difference in the two statutes. We may also say, that, in our judgment, it would be a very unsafe rule of construction, to take the inferences drawn from the words of a statute of a subsequent Legislature, to determine the intention and meaning of the law of a former year. We must take the law as we find it, and construe it according to its plain import. We cannot go beyond this, and base our decision upon arguments drawn from expediency, or from what we might deem inconveniences or even hardships.

We do not see how the limitation of six months, in § 18, can be applied to § 20. But, even if the same limitation is to be applied to the bringing of an action under § 20, as to the levy of an execution under § 18, the limitation of six months can only be applied in favor of a stockholder who has transferred his stock.

The defendant contends that the preliminary steps, required before a right to commence an action occurs, have not been taken. He contends that no such action can be sustained until a distinct notice has been given of an intention to commence a suit at law.

The right of action, by suit, is given in § 20, "after demand and notice as mentioned in § 19." By the latter sec-

tion, it is provided, that the officer shall give the stockholder notice of his intention to levy the execution on his property, and the amount of the debt or deficiency. This appears to have been done in the present case. The defendant, however, insists that the creditor, or officer, should give a further and distinct notice of an intention *to commence an action*, before he can legally institute a suit at law.

The statute does not, in terms, require this. The Legislature probably thought that a notice of an intent to levy, unless sufficient property was disclosed and shown to the officer, was a distinct intimation to the stockholder that the creditor intended to enforce his judgment on him, if he did not prevent it by showing property of the company.

As a general rule, when a right of action is given by statute, no prior notice of an intention to commence such suit is necessary, unless distinctly required by the Act. When a notice is required by statute, that which is specifically set out is to be given. The Court cannot add to or diminish the nature or extent of the notice. In this case, all that the statute requires has been done, and that is sufficient.

An additional count was filed by permission of the presiding Judge, subject to the opinion of the whole Court.

The objection, made by the defendant, that this new count places the action on the 30th section of chapter 76, instead of sections 18 and 20, does not appear to be well founded in fact. The new count, as well as the old, alleges that the corporation was created after Feb. 16, 1836. We do not see that the new count changes the nature of the action, or affects the question of limitation, or any other question in the case. It was properly allowed.

Certain alleged facts in relation to the proceedings of prior creditors of this corporation, as set forth in the 6th, 7th, and 8th specifications, have been referred to the Court, to determine whether, if those facts are fully proved, they will constitute a good defence to the action, in whole or in part.

This Court has decided, in the case of *Cole* v. *Butler*, 43 Maine, 401, that the creditor who first moves in conformity

to law acquires a priority of right, which cannot be defeated by the stockholder or other creditors who may first obtain judgment and execution.

The intention of the statute is, that a stockholder shall be held to pay the amount of his stock, but shall not be held beyond that amount, or be subject to pay more, after he has paid *bona fide* that sum to a creditor of the corporation, who has acquired a right to it.

We do not think it is enough for a stockholder, when he is sued, to show that other creditors had moved against him before the plaintiff in that suit, and others had laid the foundation for his liability to them. Those claims may never be prosecuted to final judgment. Nor is it enough to show that suits have been instituted and are pending on such prior claims; for those suits may not be sustained or may be abandoned. The liability must be legally established and fixed to an amount which exhausts it, and this must be *bona fide*, and not colorable or fraudulent.

The fund belongs to the first creditors who establish their right to it by proceedings which terminate in fixing the liability. We do not say that a stockholder may not pay to the first or a prior creditor the amount of his stock, if he can show that the proceedings had fixed his liability, and the amount was sufficient to absorb the fund, and the payment was made in good faith, to avoid useless costs.

It may be necessary to continue actions, to await the result of other cases, which may or may not establish prior rights; and it is a duty of the stockholder to see that no unnecessary delay is allowed in bringing such cases to final judgment, if he would avail himself of such proceedings in defence.

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

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

DEPLURA H. BISBEE *and others versus* EBENEZER HAM *and another.*

The settlement or discharge of a demand or claim by the payment of any sum less than the amount due thereon, under statute 1851, c. 113, § 1, (R. S., 1857, c. 82, § 44,) is binding and effectual, unless vitiated by fraud on the part of the debtor.

After such a settlement, before he can maintain a suit on the original cause of action, on the ground of fraud on the part of the debtor, the creditor must rescind the contract of settlement, and tender to the debtor whatever sum he had paid in effecting it.

ASSUMPSIT for balance of account annexed to the writ, with the general money counts. The account annexed was as follows:—

	Ham & Nevens to Bisbee, Allen & Co.,	Dr.
1852, Jan. 1.	To money received of Harris & Coburn on settlement for Bisbee, Allen & Co.,	$335,43
	To interest,	37,66
		373,09
1855, Feb'y.	By cash as per receipt given,	100,00
		$273,09

The plaintiffs were manufacturers of powder. The defendants, in 1848, were railroad contractors. Gould & Co., subcontractors, in August, 1848, gave the defendants an order on the plaintiffs for $305, which was accepted. Gould & Co., becoming embarrassed, assigned their contract to Harris & Coburn. A law suit resulted between the defendants and Harris & Coburn, and the defendants paid Harris & Coburn between $400 and $500 to settle it.

In February, 1855, the plaintiffs and defendants had an interview, and, on the defendants representing their losses, the plaintiffs consented to compromise, and the defendants paid them $100, and took a receipt from the plaintiffs, "in full for powder delivered to Sireno Gould & Co., and in full of all demands against said Ham & Nevens to this date."

In July, 1857, the plaintiffs commenced an action of assumpsit on the foregoing account. At August term, 1858, the defendants filed a special plea of accord and satisfaction. The plaintiffs, in their replication, pleaded that their action "ought not to be barred by reason of any thing in the plea of said defendants alleged, because, they say, that they were deceived and defrauded by the fraudulent representations and suppression of material facts by these defendants," &c.

To this replication, the defendants demurred, because the plaintiffs had not therein alleged or shown that the said contract of accord and satisfaction had ever been abrogated or rescinded, or the $100 paid, restored or offered to be restored, &c.

MAY, J., presiding, adjudged the replication to be bad, and sustained the demurrer; and the plaintiffs filed exceptions.

S. C. Andrews, for the plaintiffs, to the point that a mere receipt given by a creditor for a part of his debt as in full for the debt, is not a good defence by way of accord and satisfaction, cited *Warren* v. *Skinner*, 20 Conn., 559; *Daniels* v. *Hatch*, 1 N. J., 391; *Adams* v. *Topling*, 4 Mod., 88; *Smith* v. *Barthole*, 1 Met., 276; *Worthington* v. *Nigley*, 3 Bing. N. C., 454; *Hinckley* v. *Arey*, 27 Maine, 362; *White* v. *Jordan*, 27 Maine, 370; *Bailey* v. *Day*, 26 Maine, 88.

In actions of *tort*, it is well settled that the parties must be put *in statu quo* before action brought, but not in assumpsit. *Vedder* v. *Vedder*, 1 Denio, 257; *Foster* v. *Trull*, 12 Johns., 456; 2 Parsons on Contracts, 129.

No injury can result to the defendants by the maintenance of this suit. All equities are open to them. They have paid a part of the debt, and, if they ought to pay no more, they may show it by way of defence. *Pennell's case*, 5 Rep., 117; *Cumber* v. *Ware*, Strange, 425; *Thomas* v. *Hathorn*, 2 B. & Car., 477; *Fitch* v. *Sutton*, 5 East, 230; *Blanchard* v. *Noyes*, 3 N. H., 518; *Wheeler* v. *Wheeler*, 11 Verm., 60; *Bailey* v. *Day*, 26 Maine, 88; *Jenness* v. *Lane*, 26 Maine, 475.

Fraud avoids every contract, and annuls every transaction.

2 Parsons on Contracts, 277; *Burton* v. *Stewart*, 3 Wend., 236; *Thayer* v. *Turner*, 8 Met., 550; *Kimball* v. *Cunningham*, 4 Mass., 502; *Perley* v. *Balch*, 23 Pick., 283; *Stearns* v. *Austin*, 1 Met., 557; *Martin* v. *Roberts*, 5 Cush., 126.

The Act of June 3, 1851, does not conflict with the views here taken. It contemplated an honest and manly compromise, free from and untainted by fraud.

The doctrine of rescission of contracts does not apply to a case of this kind. The plaintiff's right to recover rests on the question of fraud. That being established, the compromise becomes void, and the plaintiff's whole debt revives. Why should he be required to refund what was honestly his due, and which, so far as he is concerned, he has honestly received, in order to recover that of which he has been defrauded? Such a rule would be offering a premium on fraud. See *Cushing* v. *Wyman*, 44 Maine, 139.

Record, Walton & Luce, for the defendants, argued that when a claim has once been extinguished by accord and satisfaction, no action can be maintained upon it while the contract of settlement remains unrescinded. Two contracts, one of which is by its very terms to extinguish the other, cannot both be in force at the same time.

To rescind the contract, whatever has been received by virtue of it must be restored, and the parties placed in *statu quo*. When this cannot be done, no rescission can be had; and, if a fraud has been committed, the injured party must seek his remedy by an action of *deceit*.

Contracts tinctured with fraud are not absolutely void, but only voidable at the option of the party defrauded. He may bring an action of *tort* for fraud; or, having first rescinded the contract, he may bring a suit on the original cause of action. The plaintiffs have done neither; but, retaining the $100, paid at the settlement, they bring their suit on the original debt as if there had been no settlement. This the law will not allow them to do; and hence this action cannot be maintained.

The counsel cited the following authorities:—*Junkins* v. *Simpson*, 14 Maine, 364; *Ayers* v. *Hewett*, 19 Maine, 281; *Cushman* v. *Marshall*, 21 Maine, 122; *Tisdale* v. *Buckmore*, 33 Maine, 461; *Cushing* v. *Wyman*, 38 Maine, 589; *Emerson* v. *McNamara*, 41 Maine, 565; *Potter* v. *Titcomb*, 22 Maine, 300; Statute, 1851, c. 213 and R. S. of 1857, c. 82, § 44, as construed in *Weymouth* v. *Babcock*, 42 Maine, 42; *Hogan* v. *Weyer*, 5 Hill, 389; *Herrin* v. *Libbey*, 36 Maine, 350.

The plaintiffs' replication is bad in substance, in alleging that they were deceived by the fraudulent representations and suppressions of material facts by the defendants, but omitting to specify what were the fraudulent representations and the facts alleged to have been suppressed, as required by the rules of pleading.

The opinion of the Court was drawn up by

TENNEY, C. J.—By the statute of 1851, c. 113, § 1, it is provided, that no action shall be maintained, in any Court in this State, on any demand or claim which has been settled, cancelled or discharged by the receipt of any sum of money, less than the amount due thereon. The same is incorporated substantially in the R. S. of 1857, c. 82, § 44. This is a change of the law as it stood previously. *Bailey* v. *Day*, 26 Maine, 88; *White* v. *Jordan*, 27 Maine, 370.

In the case presented, which is assumpsit, the defendants pleaded that they paid the sum of one hundred dollars on Feb. 10, 1855, before the commencement of the present action, in full satisfaction of all and every the promises mentioned in the declaration, &c. To this the plaintiffs reply that they were deceived and defrauded by the fraudulent representations and suppression of material facts by the defendants, and that the plaintiffs were induced, by reason of said fraud, to accept the said sum of one hundred dollars, in full satisfaction and discharge of the promises in their declaration mentioned, &c.

To this replication the defendants filed a demurrer, which was joined by the plaintiffs.

The contract and the receipt of February 10, 1855, as confessed by the plaintiffs, aside from the frauds of the defendants alleged, were binding upon the parties, and were an effectual discharge of the claim now in suit, under the law then existing.

This suit is upon the original cause of action, which was at the time of the transaction, on Feb. 10, 1855, supposed to be fully settled.

The case of *Martin* v. *Roberts*, 5 Cush., 126, which is relied upon by the counsel for the plaintiffs as being decisive of the case before us, was not one in which the plaintiff sought to rescind the contract of sale, or to reclaim the property sold by him to the defendant; but it is an action of assumpsit, on account annexed, to recover a balance of $90, on the price of two watches sold by him to the other party. The sale is treated as effectual, but payment was not, in fact, made in full, because a note, represented as perfectly good, was taken in part payment, when, in fact, it was entirely worthless, and known at the time by the defendant to be so.

This action can be maintained only on the ground that the contract of a discharge is not binding on the plaintiffs, and they seek to rescind it, and treat it as never made. But the replication omits the allegation that the sum paid by the defendants, in discharge of the original contract, has been repaid to the defendants or tendered to them, and it is insisted by the plaintiffs' counsel that this is unnecessary, but that they may treat this sum as payment *pro tanto*, and recover the balance as due on the original claim.

The authorities cited by the plaintiffs are inapplicable to the case, as sustaining their ground. But many of them, and those relied upon in defence, under the statute referred to, establish the doctrine that, in order to rescind a contract entered into, by the fraud of one of the parties thereto, the other party seeking a rescission must return, or tender the whole consideration received. *Exceptions overruled.*

RICE, APPLETON, and KENT, JJ., concurred.

COUNTY OF YORK.

NATHANIEL LEACH, *Adm'r, in Error, versus* MARY MARSH.

A judgment recovered on *default*, against a person admitted to have been *non compos mentis* at the time of the proceedings in the case, will be reversed on a writ of error brought by his administrator after his decease.

Actions brought against persons *non compos* for necessaries, *it seems*, constitute an exception; but, in such case, the defendant in error should plead the fact in bar of the suit.

The case of a judgment on *default*, against a person *admitted* to have been *non compos*, is to be distinguished from such cases as *King* v. *Robinson*, 33 Maine, 114, where the fact of unsoundness of mind was not admitted, and the defendant appeared by attorney, and judgment was rendered upon a trial and verdict.

It would be manifestly unjust to render judgment against a party or his estate, when he had no capacity to take care of his own affairs or to employ another to do it.

WRIT OF ERROR. ON REPORT BY APPLETON, J.

Mary Marsh brought an action against Asa Leach, December 6, 1854; the writ was returned as served by leaving a summons "at the last and usual place of abode" of the defendant, and real estate attached; and, at January term, 1855, the defendant not appearing, a default was entered, and judgment was given for the plaintiff for $344,26, and costs of suit. Execution was issued, and extended by levy on the real estate of Leach.

Asa Leach having deceased, the plaintiff in error, appointed administrator on the estate of the deceased, sued out this writ of error against the said Mary Marsh, September 14, 1857, praying that the former judgment in her favor may be reversed, and assigning the following errors:—

1, 2 and 3. Want of notice and insufficient service on the deceased. 4. "The said Asa Leach, at the time that the officer's return of service of said writ upon said Asa Leach

purports to have been made, and for a long time before that date, and from that time until his decease, after the rendition of said judgment, was *non compos mentis*, and incapable of taking care of himself and of managing his business affairs." 5. "No guardian *ad litem* was appointed by the Court for said Asa Leach, he being at that time *non compos mentis*, and having no guardian." 6. The judgment was obtained by collusion and fraud. 7. Asa Leach did not at the time owe Mary Marsh any thing. 8. By the rendition of said judgment, great injustice was done, &c.

The defendant, in her answer, traversed the first, second, third and sixth assignments of error, but pleaded to the fourth, fifth, seventh and eighth specifications, that there was "no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid," &c.

It was admitted that Asa Leach was *non compos mentis*, as alleged in the writ of error, and that the plaintiff was duly appointed administrator of said Asa Leach, May 5, 1856.

The depositions of Ezra Fairfield and John B. Fairfield, introduced by the plaintiff, tended to prove that the deceased was *non compos mentis* from about 1851 to his death.

It was agreed that the full Court should render such judgment as the law and facts authorize.

E. E. Bourne, jr., for the plaintiff, argued elaborately the several points presented by the assignment of errors; but the case was decided mainly with reference to the fourth specification.

The question whether a judgment rendered against a person insane or *non compos mentis* at the time of the service of the writ upon him is erroneous has never been raised in this State; but many analogous cases are found in the Reports.

In *Mansfield* v. *Mansfield*, 13 Mass., 412, which was a libel for divorce, the respondent was defaulted; but, on suggestion to the Court that he had become insane, the default was taken off, and further proceedings stayed until a guardian was appointed.

A judgment recovered against a person out of the State, without actual notice, will be reversed on error. *Blanchard* v. *Wildes*, 1 Mass., 341; *Smith* v. *Rice*, 11 Mass., 307; *Thatcher* v. *Miller*, 11 Mass., 413; *same* v. *same*, 13 Mass., 270; *Wilton Manuf. Co.* v. *Woodman*, 32 Maine, 185; *Galusha* v. *Cobleigh*, 13 N. H., 79.

A party having a right to appeal, but, without negligence on his part, unable to avail himself of his right, is entitled to a writ of error. *Monk* v. *Guild*, 3 Met., 373; *Skepwith* v. *Hill*, 2 Mass., 35; *Keen* v. *Turner*, 13 Mass., 265; *Gay* v. *Richardson*, 18 Pick., 418.

Other grounds of reversal of judgment on account of incapacity to defend, are the death of one of the parties after suit commenced, the infancy of a party having no guardian, or coverture of a party without the joinder of the husband. 2 Tidd's Practice, 1033; 3 Black. Com., 406, note 4; *Smith* v. *Rhodes*, 29 Maine, 360.

These authorities are based on the ground that the defendant has been barred of the opportunity to make a defence, either from want of notice or incapacity to defend. Do not the same reasons apply with equal force to the case of a person *non compos mentis?* *Mitchell* v. *Kingman*, 5 Pick., 434.

The Court in this State, although the question has not been distinctly decided, has repeatedly intimated that *error* is the proper remedy in the case of a judgment recovered against a person so incapacitated. *Smith* v. *Rhodes*, before cited; *McArthur* v. *Starret*, 43 Maine, 435.

In the case of *King* v. *Robinson*, 33 Maine, 114, relied upon by the defendant in error, although King was *non compos*, and no guardian was or had been appointed for him, yet he appeared by attorney, a hearing was had, and a *verdict* was rendered against him. The Court decided that, as he was represented in Court by his attorney, the judgment ought not to be reversed. King had counsel, and his counsel did not request the appointment of a guardian. The Court, therefore, decided against him. The decision is not a precedent for a case so unlike as the case at bar.

It is true there are incidental remarks, in the opinion delivered by C. J. SHEPLEY, which were not called for by the case, nor sustained by the authorities cited, some of which, however, are English cases decided on extremely arbitrary and anti-republican principles, and others are New York cases based on the old English authorities.

In a case of this kind, a writ of error is the most efficient and direct, as well as the least expensive process to obtain justice. *Arnold* v. *Tourtellot*, 13 Pick., 172; *Hart* v. *Huckins*, 5 Mass., 260; *Blanchard* v. *Wilde*, 1 Mass., 341; *Wilton Manufacturing Co.* v. *Butler*, 34 Maine, 431.

Goodwin and *Fales*, for the defendant in error, after arguing the 1st, 2d, 3d, 6th, 7th and 8th specifications of error, contended, with regard to the 4th and 5th, that the mere fact that a party defendant was *non compos mentis* is no error. It has never been decided that proceedings may not be instituted, and prosecuted to final judgment, against a person who has become *non compos*. *King* v. *Robinson*, 33 Maine, 114.

The 5th specification is void for uncertainty. Even brief statements must contain specifications stated with certainty and precision to a *common intent*. *Washburne* v. *Mosely*, 22 Maine, 160; *Nelson* v. *Swan*, 13 Johns., 483; 1 Chitty's Pleadings, 398; *Eustis* v. *Kidder*, 26 Maine, 97.

The counsel for the plaintiff allege a distinction between this case and that of *King* v. *Robinson*, on the ground that in that case there was an appearance by attorney, and a trial, whereas here there was a default. Yet he has not assigned that fact for error. The defendant was duly notified of the pendency of the suit, and failed to appear. The Court entered a default, pursuant to the statute, c. 82, § 2.

If by such default injustice was done to the defendant, he can on petition have a review; but there can be no *error* in following the provisions of the statute.

The mere fact that a defendant is *non compos mentis*, at the service of the process or when judgment is rendered, is

no defence; for, at law and in equity, a contract or liability assumed by him while of sound mind may be enforced against him when he is of unsound mind. *King* v. *Robinson*, before cited; *Hix* v. *Whitmore*, 4 Met., 545; *White* v. *Palmer*, 4 Mass., 147; *Hathaway* v. *Clark*, 5 Pick., 490.

The opinion of the Court was drawn up by

GOODENOW, J. — This is a writ of error, dated September 14, 1857, to reverse a judgment rendered by this Court on the 25th day of January, 1855, *on default*, against the plaintiff's intestate. The officer returned an attachment of real estate, and that he made service on the defendant "by leaving a summons at his last and usual place of abode," &c.

The *fourth error* assigned is, that—"The said Asa Leach, at the time that the officer's return of service of said writ upon said Asa Leach purports to have been made, and for a long time before that date, and from that time until his decease after the rendition of said judgment, was *non compos mentis*, and incapable of taking care of himself, and of managing his business affairs." To this assignment of error, the defendant pleads "*in nullo est erratum*," which plea is a confession of all errors in facts which are well assigned. The depositions in the case prove the fact, and it is expressly admitted, that the plaintiff's intestate at the times when, &c., was *non compos mentis*, as alleged in the writ. Is this such an error as requires us to reverse the judgment? It is a fundamental principle, in all good governments, that no man shall be condemned, civilly or criminally, without first having had an opportunity to be heard in his defence. Saint Paul was exceedingly happy to have an opportunity to answer for himself, touching the things whereof he was accused by the Jews, and it would have been a great loss to the world if he had been deprived of it.

This is an error not appearing on the face of the record. It is an error of *fact*, if error it is.

"But a reversal may take place for errors of fact, as when the defendant was a maniac, or *non compos mentis*, being legally

incapable of making a defence, or when he was absent from the State, and had no actual notice of the suit, and was defaulted and judgment rendered at the first term, without a continuance as the statute requires." *Smith* v. *Rhodes*, 29 Maine, 361, and cases there cited.

In *Mitchell & al.* v. *Kingman*, 5 Pick., 431, it was held that a person may plead that he was *non compos mentis*, or show it in evidence under the general issue, in avoidance of his contract. In *Seaver* v. *Phelps*, 11 Pick., 304, the doctrine of the above case has been again declared to be sound, and the established law of Massachusetts, notwithstanding some recent decisions in England, which seem to hold a different doctrine. In *Grant* v. *Thompson*, 4 Conn., 204, the defence of insanity was admitted to an action on a promissory note.

In *Seaver* v. *Phelps*, WILDE, J., says,—"It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and, in fact, often is, although the legal consequences and provisions attached to the one and the other respectively are widely different. In the present case, however, this point is settled by the verdict, and no question is made respecting it." The same point is settled in the case at bar. The fairness of the defendant's conduct, if fair it was, cannot supply the want of capacity in the plaintiff's intestate.

While the courts have power to protect the property of a defendant who is temporarily absent from the State, against a suit of which he has not had notice, if they have no power to protect the property of an insane man against a suit when there has been no hearing, and no opportunity for a hearing, and no notice to a responsible party of the existence of the suit, it is to be regretted, to be lamented. It is said this specification is insufficient, that the original defendant was "*non compos mentis*" at the time when, &c. When the insanity is once established, or admitted to have existed, the fact

carries all the other necessary consequences along with it. It follows that there has been no hearing; no legal party.

In *King* v. *Robinson*, 33 Maine, 123, the late C. J. SHEPLEY says,—"The law does not appear to have imposed it as a duty to be performed by the plaintiff to ascertain the mental capacity of the defendant, and to bring it before the Court for its consideration, that such a guardian" (*ad litem*) "may be appointed." But with all due respect, it seems to us that reason and justice and safety do impose such a duty upon the plaintiff in a case like the present. In 1 Mass., 341, SEDGWICK, J., says,—"Although the Court cannot know the fact," (of absence from the State,) "otherwise than by suggestion entered on the record, yet, if the plaintiff will take judgment, he does it at his peril. It was his duty to make the suggestion, and, in practice, it was always made, if made at all, under the former statute, *by the plaintiff;* for who else could make it? Not the defendant surely; for he is supposed to be wholly ignorant of the existence of the suit." Again, "the statute is against the common law, (by which personal notice is always necessary,) and, therefore, ought to be construed strictly. And it is of very great importance that judgments rendered against persons, who have not, in fact, had notice, should not be binding, unless the Court, from the positive provisions of the statute, are bound to say they are." DANA, C. J., says,—"But who is to make the suggestion? The plaintiff, undoubtedly, and if he will take a judgment, he does it at his peril." If a plaintiff will take judgment against a man hopelessly insane, without a suggestion of the insanity to the Court, or notice to guardian or next friend, must he not do it at his peril?

Can he thus carve for himself, without regard to the rights of others?

In commenting upon the case of *White* v. *Palmer*, 4 Mass., 147, Mr. Justice SHEPLEY says, "the error assigned was, that the original defendant was *non compos mentis*, and that White and Hall, long before the *teste* of the writ, had been legally

appointed guardians, and that they had no notice of the suit. The judgment was reversed for that cause, but the case *does not* decide that the judgment would not have been legal, if the *non compos* had not been under guardianship." Upon this hypothesis, it would seem that the judgment was reversed because there had not been due courtesy exercised toward the guardians, not on account of a wrong and injury done to the *non compos*, and to his estate.

In *Seaver* v. *Phelps*, before cited, WILDE, J., says,—"The general doctrine, that the contracts and other acts *in pais*, of idiots and insane persons, are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of consenting to a contract, or of doing any other valid act."

Actions may have been maintained against persons *non compos* for necessaries, as in *Bagster & al.* v. *The Earl of Portsmouth*, 5 Barn. & Cres., 172, and *Thompson* v. *Leach*, 3 Wend., 310. But this is an exception, and not the general rule. "If, then, idiots and insane persons are liable on their contracts for necessaries, they are certainly entitled to as much protection as infants. It matters not, however, how this may be, since the contract in question is not one for necessaries." 11 Pick., 307. If the contract in this case had been for necessaries, and that had been a legal answer, the defendant in error should have pleaded the fact in bar of the writ.

"The Court will generally allow the defendant in error to come in and plead that the said judgment is not erroneous, in any matter of fact, in manner and form, &c., and tender an issue to the country. With this plea, he may be required to file a specification, setting forth, in addition to a denial of the fact assigned for error, any other matter of fact in avoidance, on which he relies, tending to show that the judgment ought not to be reversed." 6 Met., 489.

It was held in *Lamprey* v. *Nudd*, 9 Foster, 303, that the fact, that a person against whom a suit was commenced was, at the time of the service of the process upon him, a person

of insane mind, and that he so continued until the time of the rendition of judgment, even if he appeared in person, or by attorney, *or not at all*, was good cause for reversing the judgment on error.

The case of *King* v. *Robinson*, seems to be relied upon by the defendant in error as decisive of this case. In that case, there was an appearance by attorney. In that case, it was not admitted, as it is in this, that the plaintiff in error was, at the time when, &c., actually *non compos*. While that question was suspended in doubt in the mind of the Judge, it would be a question addressed to his discretion, whether a guardian *ad litem* should or should not be appointed. But when it is once incontestably settled in the affirmative, it would be manifestly against first principles, for the Court to proceed to render judgment against a man or his estate, when he had no capacity to take care of himself or to employ some other person to do so.

In *Hix* v. *Whittemore*, 4 Met., 545, the error assigned was that, at the time of the service of the said original writ, and at the time of the rendition of said judgment, the plaintiff in error was insane; and an issue was made to the jury. There was no intimation from the Court or counsel that the assignment was insufficient, if founded in fact.

The verdict was for the plaintiff in error, and was set aside on exceptions, on account of the supposed misdirection of the Judge as to the burden of proof, or as to the presumption of the continuance of the insanity, when once proved to have existed.

It becomes unnecessary to discuss the questions arising out of the other assignments of error; as we regard the *fourth error* assigned sufficient in law, and proved and admitted in fact. *Judgment reversed.*

APPLETON, CUTTING and DAVIS, JJ., dissented.

THOMAS M. CUTTER *and others versus* EDWARD O. PERKINS, and EDWARD E. BOURNE, *Ex'r, Trustee.*

Under the provisions of R. S., 1841, c. 119, § 63, (R. S., 1857, c. 86, § 55,) enacting that no person shall be adjudged trustee "by reason of any money or other thing due from him to the principal defendant, unless it is, at the time of the service of the writ upon him, due absolutely, and without depending upon any contingency," the liability of the trustee is not necessarily to be determined upon his disclosure made at the first term, if there are matters to be settled afterwards, in order to ascertain the fact and amount of the trustee's indebtedness to the principal defendant.

The "contingency" referred to in the statute is one which may prevent the principal from having any claim upon the trustee, or right to call on him to account; and not one which, although the principal may require the trustee to account, may show, on settlement made, that there is nothing due.

Where a testator provided by his will that all his real and personal property should be sold by his executor, and, after the payment of debts, legacies and expenses, gave the residue to A and B; and the executor was summoned as trustee of B, before he could ascertain whether, on the settlement of the estate, there would remain any balance to be paid to B under the residuary clause, the case may be continued until the estate is so far settled as to ascertain the amount of the residuary fund, and the executor be required to make further disclosure, showing the facts when ascertained; and he will be chargeable as trustee for whatever sum may be found to be in his hands belonging to B.

The fact that the fund, from which the debts and legacies were to be paid, was to be derived in part from the sale of real estate, placed the residuary legatees in no different relations to the executor, than if the testator's estate had all been personal.

The executor is liable to be called on to account for the estate, both real and personal, by A and B, although, on the settlement, there may prove to be nothing due to them.

The residuary fund which proved to be in the executor's hands for A and B, on settlement of his account of administration, was as substantially in his hands when he was served with the process, as though the sales had been made and the avails received before the service was made.

ASSUMPSIT. The alleged trustee appeared and disclosed at the first term, denying that he had, at the time of the service of the plaintiff's writ, any goods, effects or credits of the defendant in his hands or possession, but admitting that he was executor of the will of John Hovey, and, as such, had

returned an inventory of his estate, and had sold the personal property, for which he had received about $1100.

At subsequent terms, the alleged trustee made further disclosure, in answer to questions put to him by the plaintiff's counsel, from which it appeared that, in October, 1857, he settled his account of administration on the estate of his testator, at the Probate Court in the county of Cumberland; that there was then a balance in his hands, to be appropriated according to the provisions of the will of said Hovey, of $6479,75; and that, if his construction of the will was correct, there was of that sum due to the two sons of Eunice Perkins, deceased, $3327,84, if said two sons were both living, at the time of the execution of said will; that one of said sons, John H. Perkins, was and still is living, and the other, only known to the trustee by the name of Octavius, was supposed to have deceased several years since, but, if living, there was due to him $1663,92, on the trustee's construction of the will; and that he, as executor, had sold all the real and personal estate of his testator, and paid all the debts, specific legacies and administration expenses, leaving the balance in his hands above specified.

At the September term, 1858, judgment was rendered against the defendant, Edward O. Perkins, for $6889,60 cents, after a trial and issue joined, and upon the verdict of a jury. At the same term, the plaintiffs filed a declaration, in which, after reciting the facts as to the trial and judgment obtained against the defendant, they alleged that he was one of the two sons of Eunice Perkins, sister of John Hovey, and, as such, was a legatee or devisee under his will, of which the trustee Bourne was executor, &c. These facts were admitted by Bourne.

The will of John Hovey, the alleged trustee's testator, amongst other provisions, contained the following:—

"10th.—After paying all debts, administration expenses and the burying yard appropriations, I give to my sister Eunice Perkins two-fifths of all my estate; and after all other

legacies and devises aforesaid are satisfied and paid, what remains I give to the two sons of my sister Eunice."

The 11th clause directed the executor "to sell and convey all the real and personal estate, for the purpose of paying off all said legacies, and the balance according to said residuary clause."

At *Nisi Prius*, RICE, J., presiding, adjudged Bourne to be the trustee of the defendant; to which adjudication the alleged trustee filed exceptions.

Bourne, in support of the exceptions, argued, at great length, that he could not legally be adjudged trustee of the defendant, because there was no sum of money due from him to said defendant, "at the time of the service of the writ upon him, absolutely, and without depending upon any contingency," R. S., c. 119, § 63; and contended that the recent Massachusetts decisions in similar cases were unsound in principle.

The uniform construction given, in all other cases, to the words "absolute" and "contingency," he contended, confirmed his view. In support of his position, he cited and commented on sundry authorities, as *Roberts* v. *Peake*, 1 Barrows, 325; 2 L'd Raymond, 1361, 1563; 3 Wilson, 207; 2 Bos. & Pul., 443; *Jennie* v. *Hearle*, 1 Stra., 591; *Wentworth* v. *Whittemore*, 1 Mass. 471; *Davis* v. *Ham*, 3 Mass., 36; *Frothingham* v. *Haley*, 3 Mass., 69; *Willard* v. *Sheaf*, 4 Mass., 235; *Barnes* v. *Treat*, 7 Mass., 272; *Hawes* v. *Aiken*, 3 Pick., 1; *Williams* v. *Marston*, 3 Pick., 65; *Thorndike* v. *De Wolfe*, 6 Pick., 120; *Guild* v. *Holbrook*, 11 Pick., 101; *Bissell* v. *Story*, 9 Pick., 562; *Faulkner* v. *Waters*, 11 Pick., 475; *Tucker* v. *Clisby*, 12 Pick., 24; *Rundlet* v. *Jordan*, 3 Maine, 47; *Lupton* v. *Cutler*, 8 Pick., 304.

The liability of the trustee must be determined by the state of facts existing at the time when the process is served, although not so held in New Hampshire. *Ingalls* v. *Dennett*, 6 Maine, 79; *Smith* v. *B. & C. R. R. Co.*, 33 N. H., 337; *Mace* v. *Heald*, 36 Maine, 136. The whole statute implies that the Court is to be confined to the facts existing at the

time of the attachment, as set forth in the disclosure made *at the first term.* § § 9, 12, 16, 22, 24, 26 and 90. The alleged trustee is not to be compelled to attend court after court, to disclose what progress he is making in a matter of business which concerns only himself and those for whom he is acting. His answers, given at the first term, are taken to be true; and if *then*, submitting himself to examination, no evidence of assets is elicited, he is entitled to his discharge.

If subsequent reception of assets is to render him liable, that fact requires, under the statute, the additional allegation of the plaintiff provided for, and evidence to sustain it. But no authority is given to the Court to direct the trustee to come in again and disclose, as he makes progress in the business entrusted to him. Cases of the kind are so common, that if the statute had contemplated giving such authority, it would have been clearly expressed.

The counsel cited and commented on the cases of *Arnold* v. *Elwell*, 13 Maine, 261; *Sayward* v. *Drew*, 6 Maine, 263; *Foster* v. *Libbey*, 24 Maine, 448.

In R. S., 1857, c. 86, § 36, it is provided that any *legacy due* from an executor, or goods in his hands, may be attached on trustee process. A legacy "due," is one due now, one that can be defined, stated and sworn to by the trustee, and which he can be called upon to pay. The word "due" qualifies the liability, or it is surplusage. The manifest intention of the Legislature was to make the executor liable when he had settled his account, and the legacy thereby became due, or when the legacy was a specified sum payable in a designated time. In either of these cases, the legacy would be due, and could be sued for.

In the case at bar, no legacy was given to the defendant. At the time of the attachment, it could hardly be said that any thing was given to him by the will; sundry legacies were given, and after all these, debts, administration expenses, and other appropriations were satisfied, if any thing was left, he was to have half of it. Could it be said that any thing was due to him "absolutely"?

The counsel proceeded to comment upon the recent Massachusetts cases, *Holbrook* v. *Waters*, 19 Pick., 354; *Wheeler* v. *Bowen*, 20 Pick., 563; *Boston Bank* v. *Minot*, 3 Met., 507; and contended that the principles decided were not warranted by law, nor authorized by judicial prerogative, being a departure from the plain intent of the statute of that State, which is similar to that of this State.

These decisions not being sustained by principle or judicial precedents, should not be followed by the Court here. Was any thing due to Perkins from the executor *absolutely* and *without any contingency?* Did not his liability depend upon the question whether there would be any thing to pay to Perkins? If due "absolutely," his legal representatives, in case of his death, would be bound to pay it; and he would remain personally responsible, even after being removed from his trust, or if the property had been consumed by fire. If due "absolutely" and without "contingency," there would be no escape for him. A claim with these elements must have in it something specific, tangible, and that can be estimated. But who, at that time, could determine what the liability was? Suppose the trustee had said he was ready to pay, who could have calculated the amount he was to pay, or say whether it should be one dollar, a thousand dollars, or, indeed, any thing? By good fortune, there is a balance in the executor's hands; but a financial change, about the time of the sale, might have reduced it to a cypher.

The statute says there shall be no "contingency." Will the Court step in and determine that "no contingency" means a certain class of contingencies, and does *not* mean a certain other class?

The embarrassing position in which a process of this kind places an executor is an argument against adopting the principles of the late Massachusetts decisions. The argument *ad inconvenienti* is entitled to weight. Why should a stranger be permitted to interfere and arrest the executor in the discharge of his duties, compel him to become a party to a troublesome and expensive suit, and to defend against the

claim of a foreign, unknown plaintiff, without the power to submit to a default, unless at his own risk?

This Court has repeatedly decided that a trustee is not chargeable where he does not owe the defendant absolutely. *Clark* v. *Viles*, 32 Maine, 32; *Butman* v. *Hobbs*, 35 Maine, 227; *Wilson* v. *Wood*, 34 Maine, 123; *Williams* v. *And. & Ken. Railroad Co.*, 36 Maine, 301; *Plummer* v. *Rundlet*, 42 Maine, 365.

J. Dane, for the plaintiffs.

The trustee was charged upon his disclosure and facts admitted, and thereupon excepted to mere adjudication.

The plaintiffs recovered a verdict against the principal defendant at the same term at which the executor completed his disclosure. In that disclosure, he admits that he held $1663,92, *belonging to the principal defendant*, and was ready to distribute and pay according to the provisions of the will. It is also admitted that the principal defendant is one of the two sons of the testator's sister, spoken of in the will.

The creditors summoned the executor as a trustee, upon the ground that the defendant had *a legacy* in his hands. R. S., 1841, c. 119, § 43. The action, having been duly entered, was continued from term to term, to await the result of a trial against the principal defendant, the settlement of the estate of the deceased, and the executor's final disclosure as to what sum would belong to the defendant, and which the creditors claimed to hold.

The lien created by the service of the writ upon such executor attached not only to money he then held, but to all such funds as *subsequently* came into his hands before final disclosure, belonging to the defendant. *Boston Bank* v. *Minot*, 3 Met., 507; *Holbrook* v. *Waters*, 19 Pick., 354; *Wheeler* v. *Bowen*, 20 Pick., 563; *Kimball* v. *Woodman*, 19 Maine, 203.

The creditors are entitled to reach the sum admitted to belong to the defendant upon the ground that it is a legacy. By the 10th clause of the will, the testator gives "what remains to the two sons of said sister Eunice." Under this

clause, there can be no question that the said sons take *a legacy*. That they do not take the real estate as a *devise*, and the *personal* only as *a legacy*, is shown by the following clause of the will:—"I *direct* my executor to sell and convey *all my real* and personal estate, *for the purpose* of paying off all said legacies and *the balance* according to said *residuary clause*."

The 10th clause contains the only residuary clause. The two sons were to have what remained. In other words, to have the balance *remaining in the hands of the executor*, after selling the real estate and discharging all claims. The sale was not simply discretionary with the executor, but imperative. The executor has exercised the power of sale, and has converted the real estate into money; and there is now no reason why he should not be charged as trustee.

The attention of the Court is called to the words in the new R. S., "the amount for which he is chargeable shall be fixed by the Court;" with the request, that such sum may now be fixed, if proper, and if the Court are of opinion that the trustee should be charged.

The opinion of the Court was drawn up by

TENNEY, C. J.—The trustee has presented a very elaborate argument, to convince the Court that he cannot be holden in his capacity of executor, as the trustee of the principal defendant, and that the opinions of courts, holding different views in their decisions, are not the law of the State.

It is hardly to be expected that we should enter into a minute analysis of the extended argument, notwithstanding it exhibits great research and ingenuity, and some of its criticisms of the reasoning of Judges, in opinions cited, may be just. And we do not regard it as essential to a correct decision of the case before us that we should do this.

"Any debt or legacy due from an executor or administrator, and any goods, effects or credits in his hands as such, may be attached by the process of foreign attachment." "No person shall be adjudged trustee"—"by reason of any money

or other thing due from him to the principal defendant, unless it is, at the time of the service of the writ upon him, due absolutely and without depending upon any contingency." R. S. of 1841, c. 119, § § 43 and 63.

The result of this case must depend upon the correct construction of the provisions just referred to. And the true construction of the latter part of § 63, as quoted, is the matter only which is now in controversy. But the trustee insists that, upon a proper construction of that clause, the Court should have decided upon the question, whether he could or could not be holden as trustee, in his representative capacity, at the term when he made and swore to his disclosure, from which it appears that he had not, at the time of the service of the writ upon him, in his hands, any goods, effects or credits of the principal defendant; and that the continuance of the case, and allowing further disclosures, was unauthorized; and these further disclosures, and other evidence introduced, should not be considered by the Court, in determining the question whether he should be adjudged trustee, or otherwise.

It is quite obvious, that there are cases, where justice and the manifest purposes, intended by the provisions of the statute, in relation to foreign attachment, would fail, if this principle contended for should be rigidly applied. As an example, two suits are instituted under this statute, in favor of different persons, but against the same principal defendant and trustee, and service made on the trustee at different times. At the first term, the trustee makes disclosure in both, upon an examination of the plaintiffs. In the one, when service was first made, he discloses that he had money and credits in his hands, at the time of the service, to a certain amount, which does not exceed the amount of the claim on which the suit is brought, and makes oath to his disclosure. In the other case, he discloses as before, and adds that he had been previously served with the other process, and had made therein a similar disclosure. On these facts, he can be charged in the suit in which service was first made;

but he cannot with propriety be charged in the other, for the reason that the whole fund in his hands may be absorbed in the payment of the judgment which may be obtained in the first action upon the execution which may issue thereon. He cannot properly be discharged in the second suit, because the plaintiff in the first may recover no judgment against the principal; or, if he should, it may be for a sum much less than his claim; or he may never cause demand to be legally made in order to hold him; and the discharge would be unjust to the plaintiff in the last suit, if he should obtain judgment. And, in such cases, it is the practice to continue the suit in which the service is last made, in order that the trustee may disclose further a state of facts, which will probably take place afterwards in relation to the suits, as between the plaintiffs and principal defendant, and in relation to the proceedings in the former, touching the collection of the judgment which may be obtained thereon.

This practice has the sanction of authority upon argument and mature consideration by the Court, when it is apparent that a full disclosure of the trustee, as to his liability and the extent thereof, cannot be determined on his first disclosure; and when the object of the statute cannot be otherwise secured. *N. E. Marine Ins. Co.*, v. *Chandler and trustee*, 16 Mass., 275.

Cases are contemplated by the statute, when such delay may ordinarily be necessary. An example of this is, when the plaintiff or trustee may allege and prove any other facts, not stated or denied by the supposed trustee, which may be material in deciding the question whether the trustee shall be charged or not. R. S., of 1841, c. 119, § 33; *Pease* v. *McKusick and trustee*, 25 Maine, 75. It is provided, also, that, on *scire facias*, if the supposed trustee had been examined in the original suit, the Court may permit or require him to be examined under § 79. And, if this can be done at so late a stage in the proceedings, it would seem that it might be done at an earlier stage.

We do not understand the trustee to deny that the Court

have the power to allow a continuance of the cause, that the trustee may disclose further in certain cases; but in this he insists that, for the purposes designed, it cannot properly be done, because the additional disclosures are of facts which the Court cannot consider, and the delay is unnecessary. But the power to allow the delay is certainly discretionary, and is not subject to exceptions.

We come to the principal question, what is the true construction to be given to the language relied upon, "due absolutely, and without depending on any contingency?" The term "due," we do not understand the trustee contends has the same signification as the word "payable," because the same chapter provides that money, &c., is due absolutely and without any contingency, notwithstanding the time of payment had not arrived, when service was made of the process upon the trustee. Same chapter, § 67.

The words of the statute which we are considering were evidently intended to express the positive and the negative idea, entertained by the authors of the statute. The latter part was designed to give the signification of the words "due absolutely."

The adjective term "due," as used in the statute, has reference to a *debt*, or something in the nature of an obligation to discharge, resting upon some one, in favor of another. And this debt or obligation, to come within the meaning of this provision of the statute, must not depend upon any contingency, but must be free therefrom; that is, "absolute" or unconditional. From this, it follows that "the money or other thing due," in order to be reached by this process, must be something which is not a contingent debt or obligation. And it becomes proper to ascertain, so far as we are able, what is properly denominated, in law, a contingent debt.

The case of *Woodard* v. *Herbert*, 24 Maine, 358, was where a suit was brought against the defendants on a bond, dated Nov. 2, 1841, given by Herbert as principal and French as surety, to procure a release of Herbert from arrest on *mesne process*, in favor of the plaintiff against him, commenced on

May 6, 1843. French had filed his petition in bankruptcy on Feb. 25, 1842, and was duly declared a bankrupt on the fifth day of April following, and obtained his certificate of discharge on January 30, 1844. The plaintiff recovered judgment in the original suit against Herbert, in January, 1843. Herbert failed to give notice of his intention to disclose, according to the provision of the statute, and his bond was forfeited. The defence to the suit upon the bond given by Herbert and French was the discharge of French in bankruptcy.

It was provided by § 5, of the bankrupt Act of 1841, that persons having uncertain or contingent demands, against such bankrupt, shall be permitted to come in and prove such debts under the Act. And the question was, whether the claim in the bond was of this description. In the opinion of the Court, by SHEPLEY, J., the question is asked, "had the plaintiff any actual demand of a contingent character against French at the time when he was declared to be a bankrupt?" The answer given is, "the bond was made according to the provisions of the statute, c. 148, § 17, conditioned that the principal should, within fifteen days, &c., notify the creditor for the purpose of disclosure and examination. The plaintiff had not then recovered judgment against the principal. It was uncertain whether he would be able to recover any judgment. And if he did, it was entirely uncertain whether the principal would not notify him and make a disclosure, and thus perform the condition of the bond. It was, therefore, doubly uncertain whether there ever would be any claim or demand against French upon that bond." "It is necessary to distinguish between a contingent demand, and a contingency whether there ever will be a demand. This distinction may be illustrated by the case of a bond, made to liberate a poor debtor from arrest on execution. In such case the existence and amount of the debt has been ascertained by a judgment. The surety in the bond obliges himself to pay it, if the principal does not, or does not surrender himself to the prison keeper, or does not procure his discharge

by taking the poor debtor's oath. The obligation is to pay the debt or demand, upon these contingencies. The debt is a contingent debt, and can be proved against the bankrupt. Not so, in the case of a bond made to release from arrest on *mesne process.*" The obligors in the bond were held liable.

Another class of debts, which are treated as contingent, is referred to in R. S., 1841, c. 109, § § 13, 14, 15, and 16, in probate proceedings; providing that "any person liable as surety for the deceased, or having any other contingent claim, may exhibit the same," &c. Where a debt exists against a principal and surety, wherein the latter may become the creditor of the former; and, if the principal should die insolvent, as the estate must be settled, the surety can file his claim before commissioners of insolvency, and have it allowed, and a part of the assets is set apart for the payment of a dividend thereon; but, as between the principal and surety, while living, the surety cannot become the creditor of the principal, unless he pay the debt, after its maturity, or cause the principal to be discharged, by assuming the debt absolutely himself, by giving new security. *Ingalls* v. *Dennett,* 6 Greenl., 79.

The case of *Dwinel* v. *Stone,* 30 Maine, 384, was *scire facias,* wherein the defendant disclosed, he having been defaulted in the original suit against him, as the trustee of the principal defendant therein, that he had certain logs in his custody, which he was to sell, and the avails would belong to the principal, after certain claims against the logs should be discharged; that, when he was served with the original process, no sale or settlement had been made between him and the principal defendant; that he afterwards made a settlement by which the principal surrendered all his rights without compensation. It was contended, in defence, that the interest of the principal was contingent at the time of the service of the trustee writ upon the trustee, and, therefore, that he could not be holden. SHEPLEY, J., in delivering the opinion of the Court, says,—"The statute requires that something should be 'due absolutely and without depending upon

any contingency.'" The contingency referred to in the statute, and in the decided cases, is not a contingency, which may often exist before a settlement of an account, or other business transaction, whether any thing may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement; but is a contingency which may prevent the principal from having any claim whatever, or right to call the trustee to account, or settle with him. When the service was made upon the trustee, there had been no settlement made between him and the principal. He afterwards made one by which the principal surrendered all his rights without compensation. Such a settlement can have no effect. The trustee states that the logs had not been sold, and there was then nothing due from him. But he was not authorized to make a valuation of them himself, and to declare that nothing was due. It was his duty to close the whole business, by a sale of the logs, and a settlement of all claims upon them, and to make a division of the surplus. If he omitted to do so, as soon as he might have done, that cannot excuse him from accounting when it was done." And the exceptions taken to the judgment of the Court, charging the trustee, were overruled. The doctrine of this case is, that where property is put into the hands of the trustee by the principal defendant, to be sold, and, after the sale, an adjustment of accounts alone is necessary to determine whether the trustee has goods, effects or credits in his hands belonging to the principal, and the right exists with the latter to call upon the trustee to render an account and make the settlement, and thereupon something is found due from the trustee, that debt is absolute and does not depend upon any contingency, as well before the sale and settlement as afterwards,—and that the trustee is bound to make such sale, settlement and adjustment, after the service made upon him, if not done before; and, if any thing is in his hands as determined by that settlement, he is holden as trustee. The same criterion of a contingent demand is applied in the case of *Wilson and Wood*, 34 Maine, 123, in

which the Court says,—"The contingency named in the statute is one which may prevent the principal from having any claim upon the trustee, or right to call him to account."

The principle of the two cases last cited is not *new* in Massachusetts. It was distinctly enunciated in *N. E. Marine Ins. Co.* v. *Chandler & trustee*, in the 16th vol. of Mass. Reports, before cited, so far, that when a person is made the agent of another, to dispose of certain effects, and, from the avails, to discharge certain specified claims against the latter, if a surplus should remain unappropriated, it may be reached in the process of foreign attachment. And, if the trust, assumed by the agent, has not been fully executed at the time of the service of the trustee process upon him, nor when he makes his first disclosure, the action must be continued, that the same may be completed, by selling the property and paying the debt to be paid by the agent, according to the terms of the trust, and, after that, it may be known for what sum the trustee is to be charged in process of foreign attachment.

With the decisions, and the reasoning of the Court therein, of the cases referred to, from 16 Mass. and the 30th and 34th of Maine, we are satisfied, and, as applied to cases where similar questions may arise upon transactions which have taken place since January 1, 1858, and which may hereafter arise under existing laws, these decisions have been adopted by the Legislature in the R. S. of 1857, by reënacting the statute of 1841, c. 119, § 63, in the revision of 1857, c. 86, § 55. *Starks* v. *New Sharon*, 39 Maine, 368. But this adoption will not embrace this case, as it falls under the provisions of the repealing Act of the former statute, as contained in § 2, of the R. S., of 1857. Yet it shows that the construction of the Court was satisfactory.

The testator, in his will, provided that all his just debts and funeral and administration expenses should be paid. He directed his executor to cause to be erected, around the graves of his father and grandfather and their wives, a granite fence, at an expense of one hundred and fifty dollars, and a marble monument within, in such style, &c., for them and

himself, as he should think appropriate, at an expense of the the same amount. He made certain devises of real estate in fee simple, to individuals named. He gave particular legacies to the amount of $1300. He gave to his sister Eunice Perkins two-fifth parts of all his estate, which might remain, after paying all debts, administration expenses, and the burying yard appropriations. After all other legacies and devises mentioned in the will should be paid and satisfied, what should remain, he gave to the two sons of his sister Eunice Perkins, one of whom is the principal defendant in the original suit. It is provided in the will, if the estate should fail from any cause to satisfy all said legacies, each bequest is to contribute proportionally to the deficiency, and, excepting those lots of real estate which were devised in the will, the testator therein directed his executor to sell and convey all his real and personal estate for the purpose of paying all said legacies, and the balance according to said residuary clause.

The design of the testator, in his will, cannot be mistaken. He made therein no devise of real estate, excepting to George W. Wallingford one acre; to Q. A. Swan, two acres, and to Edward E. Bourne, about four acres of land in fee simple. But all his estate was to be converted into money, and the bounty intended as specified in the will was to be paid therefrom, and is properly denominated legacies.

The personal property and real estate, after excepting the particular devises, was that from which, on sale and conveyance thereof, the funds were provided to pay the debts, funeral and administration expenses, grave yard appropriations and the legacies. For this purpose, all was in the hands of the executor absolutely, and not depending upon any contingency. If he had died, resigned, been removed, or in any manner had ceased to be executor, an administrator with the will annexed would have been appointed to administer the estate so far as the executor had omitted to complete the administration, and he would possess the same power for such purposes, as that which the executor had.

Whether there would be any thing remaining for the residuary legatees, was to be determined by the result of the sales, and the settlement generally of the estate of the testator. The fact that a part of the fund, with which to make payment of debts, &c., was to be acquired from the sale of real estate, placed the residuary legatees in no different relation to the executor, from that which they would have held if all the testator's estate had been personal property. It was in his hands, and he was bound to dispose of it as he would a ship or merchandize, and apply the avails according to the provisions of the will. All this and the personal property was in his possession at the time of the service of the trustee process upon him. And when as specie it was changed into money, it was neither more nor less in his possession. By the process of change, and the settlement of the estate, he was able to determine whether those named as residuary legatees were entitled to any thing from the testator's estate, and, if so, how much. Being named in the will, as they were, they had a right to call upon the trustee to render his account in probate and make the settlement, and this, notwithstanding it might in the end turn out that the estate was all absorbed, without leaving any thing for them. The trustee's obligations to do this, in the discharge of his trust as executor, were just as strong and binding as they would have been, if, in his first disclosure, he had stated the value of the property in his hands, and had admitted that this would exceed the sum necessary to pay all expenses, appropriations and legacies, excepting that contained in the residuary clause. This admission would not be the test, and he could not with propriety be charged on such admission; he had not executed the trust devolved upon him as executor, and, to enable him to do so, the action was continued as a matter of necessity. And, as it turned out, on the sales, that a residue was found in his hands, for the testator's two nephews named in the will, this was substantially in his hands and possession when he was served with the process,

as much as though the sales and conveyances had all taken place, and the avails been received before the service was made. *Exceptions overruled.*

RICE, APPLETON, GOODENOW, DAVIS, and KENT, JJ., concurred.

ELISHA PERKINS *versus* PORTLAND, SACO AND PORTSMOUTH RAILROAD COMPANY.

A railroad company may be bound, by a special contract, (but not otherwise,) to transport persons or property beyond the line of their own road.

Although the power to make such a contract is not expressly granted by the Act of incorporation, it may be conferred by implication, as necessary to the proper and profitable exercise of the powers specially enumerated in the charter.

A company may be thus bound, without any actual arrangement with connecting lines, if, by their agents, they hold themselves out to be common carriers to a place beyond the limits of their own road.

If such agents so represent the company to the public, in such a manner, and for such a length of time, that the corporators may be presumed to know and assent to it, the company would be estopped to deny it.

Although the company may have no special authority, by their charter, to make such contracts, and could, perhaps, by proper proceedings, have been enjoined or restrained from doing it, they cannot plead such want of authority against persons contracting with their agents, empowered so to contract by express act of the company or their directors, or by implication arising from a mutual arrangement amongst all the carriers between the place where the goods are received and the place of delivery.

And, although the agent making such a contract had no authority, express or implied, from the company, yet, if he had for several years, before and after the case in suit, practised making similar contracts to deliver goods at various places beyond the line of the company's road, their assent may be presumed, and they will be estopped from denying his authority.

In such a case, the measure of damages is the value of the goods at the place of delivery, less the cost of transportation, if unpaid.

ON AN AGREED STATEMENT.

This is an action against the defendants, as common carriers, upon the following contract in writing, made on behalf

of the company, by J. S. Works, their agent and station master, at their depot in Biddeford:—

"Office of P. S. and P. R. R., Biddeford, Me., Aug. 27, 1855.

"Received in apparent good order from Mrs. Sarah A. Perkins, 8 Boxes, 4 Chests, 11 Pkg. Furniture, marked E. Perkins, Bloomington, Ills., which we promise to deliver to Elisha Perkins, in Bloomington, in like order.

"J. S. Works, *Station Agent.*"

The defendants are common carriers by railroad between Portland, Maine, and Boston, Massachusetts, but deny their liability beyond the *termini* of their road. The goods were lost by collision on Lake Michigan, while on board of a steamboat, being conveyed to Bloomington, Illinois.

The plaintiff introduced the deposition of Sarah A. Perkins as to what were the articles delivered to the defendants to be forwarded, the circumstances attending the delivery, what were the articles which reached Bloomington, and what articles were never received there, and their value.

The defendants introduced Ichabod Goodwin, president of the company, and John Russell, jr., superintendent, who testified that the station agents had never been authorized to bind the company to deliver goods beyond the termini of the road; that they had no power to authorize the agents to do so; that their road had no connection with the roads beyond Portland and Boston, and had never held itself out as a common carrier beyond those termini, nor undertaken to deliver goods beyond them; that, when goods were received by them to be forwarded beyond Boston, and the freight not paid, the custom was to collect the freight on delivery of the goods to be forwarded; that the company had never assumed any responsibility for goods after delivery to the next company, nor acted in any capacity beyond their line of the road, except as forwarders of goods; that they had never made any special contracts with the Saco Water Power Company, nor was any other person authorized to make such contracts, nor were they aware that any of their employees delivered goods for that company beyond the limits of their road.

The testimony of W. H. Kenney, general freight agent of the Eastern Railroad, at Boston, tended to corroborate the foregoing. He further stated that when he delivered goods to other companies, to be sent west of Boston, he had taken receipts of those companies; and that the freight on these goods, from Biddeford to Boston, was paid to him by the Boston, Worcester and Western Railroad Company, when he delivered the goods to them to be forwarded.

J. S. Works, called by the defendants, testified as follows:

"I reside at Biddeford, am station agent of the P. S. and P. Railroad Company; have been for six years. As station agent, I receive and forward freight, and sell tickets to passengers. I received certain goods from Mrs. Perkins, in August, 1855, to forward to Illinois, marked "E. Perkins, Bloomington." I gave her a receipt for them to be delivered to him at Bloomington. I suppose the receipt reads so. I had no authority any further than Boston. I had never, that I know of, given a receipt beyond Boston, before or since. Previous to that time I had given but few receipts, and that was an error. No officer of the road told me I might do so. I have never before or since known any such receipt given by any other agent of the road."

Cross-examination.—"I am now, and was in 1855, the sole station agent of the P. S. and P. R. R. Co., at Biddeford. For the last three or four years, a large amount of freight has been sent from the depot at Biddeford over the road—more than previously. During all that time, all the freight that was received there to be forwarded was received by me. I was the only one to whom application could be made. I made all contracts for the carriage of freight.

"In the instance of the goods received to be forwarded to Mr. Perkins, the freight was not prepaid. The usual practice for those who send goods beyond Boston, was to pay at either place, Biddeford or Boston. Mrs. Perkins may have asked me what the freight would be, but did not offer to pay it. I think I did not tell her that the whole freight could be paid at Bloomington, because, when any one has offered to

pay me freight, I have usually taken it. I think I told her that the freight could be paid by each company through whose hands the goods passed, to the next previous company, and the last company collected the whole bill of the owner of the goods. I took the form of the receipt from one that Mr. Milliken, the station agent before me, had used for Boston only. I had not at that time a book of forms from which I made up receipts. During the years 1854, 1855 and 1856, I was in the habit of receiving more or less goods from the Saco Water Power Co. I was in the habit of signing receipts to the Saco Water Power Co. The receipts that I gave to them were different from the receipts I gave to others. The difference was that they were printed; no other difference in the form from those I usually gave to persons for whom we carried freight. I think there was no different contract made with the Saco Water Power Co., than with other persons, in regard to delivery or carriage of goods. If the Saco Water Power Co. sent freight to be delivered to some place off the line of the road, we dealt with them the same as with other persons, gave a receipt binding the Company to Boston only.

"I never gave half a dozen receipts to other persons outside of the Saco Water Power Co., until the Laconia Co. commenced taking receipts.

"I did receipt for the Saco Water Power Co., off the line of the road. [Here certain receipts or contracts for the transportation of freight to places off of the line of the defendants' road were shown to the witness by the plaintiff's attorney, and testified to as signed by him and given to the Saco Water Power Co.] I receipted for them different from what I did for others. I now do not write receipts for any one; those who send the goods furnish the receipts; if goods going to Boston, they are written to deliver in Boston, if farther, written to be forwarded.

"I have not had any instructions about the manner of writing my receipts since the commencement of this suit. The contract that I signed and delivered to Mrs. Perkins was all in my handwriting."

Perkins *v.* Portland, Saco and Portsmouth Railroad Co.

Direct examination resumed.—"I have no discretionary power as to the prices of freight, never have had. The receipts given to the Saco Water Power Co., were never written by me. They were brought to me all printed, and filled out; all I had to do was to sign them at that time. Since that, I have interlined them.

"Previous to Perkins' sending their goods, I do not recollect of given a receipt to any body except the Saco Water Power Co. That was the first one that I ever wrote, to my recollection. I receive my directions from the Superintendent. I have always received freight, when it was offered, in advance as far as I way-billed,—I way-billed these goods to Boston. I have received from time to time printed instructions as to my duties as station agent. I received the same kind of instructions previous to August, 1855, as these. [Here the witness referred to a printed book of rules and regulations, 1855, a copy of which was exhibited.] I was acting under these instructions in August, 1855."

Cross-examination continued.—"I did not communicate to Mrs. Perkins my instructions. I do not know who paid, or whether any one paid the freight on these goods."

The plaintiff introduced written agreements signed by J. S. Works, as the defendants' station agent, to the number of ninety-four, given at various times in the years 1854, 1855, and 1856, and one in the year 1857, to the Saco Water Power Company, in which the defendants promise to deliver goods at various places off the line of their road, in Maine, New Hampshire, Massachusetts, Connecticut and Canada.

These agreements are all similar in form to the following, which is a copy of one of them:—

"Marks and numbers.	Office of the Portland, Saco and Portsmouth R. R. Co., Biddeford, September 7, 1855.
J. G. COBURN, Esq., Ag't Hill Mill, Lewiston, Me.	Received in good order from the Saco Water Power Co.'s Machine shop, 1 SHAFT and 1 PAIR COUPLINGS, marked as in the margin, which we promise to deliver in like order, in Lewiston, Me., to J. G. Coburn, Esq., agent Hill Mill, or order. J. S. WORKS, Station Agent."

If the Court, upon the case stated, shall determine that the plaintiff can maintain his action, they are further to determine whether the rule of damages in this case shall be the value of the goods lost, or not delivered, at Biddeford or Bloomington, or what other rule of damages is applicable to the case, and the defendants are to be defaulted, and judgment is to be rendered for the plaintiff for his damages and costs; but, if the Court shall decide that the action is not maintainable, the plaintiff is to become nonsuit.

The plaintiff's damages are to be assessed by a commissioner appointed by the Court for that purpose, who shall determine the value of the goods lost, or not delivered, from the depositions now taken in the case, which either party may produce before him, and such other legal evidence as may be adduced by either party, the value to be found according to the rule determined by the Court as applicable, and, in default of a decision of said commissioner, by death or any other cause, the damages may be assessed by the presiding Judge, in the same manner as above named.

Goodwin & Fales, for the plaintiff.

The execution of the contract, the delivery of the goods to the defendants, their character as common carriers, the agency of Works, and the loss of the goods, being admitted, the plaintiff's case is made out. Works being admitted to be agent, the law will presume him to be a general agent, until the contrary is shown. *Methuen Co.* v. *Hays,* 33 Maine, 169. And the defendants, as common carriers, having received the goods under one entire contract to deliver them at a certain place, their liability as common carriers continued until delivery at that place. *Hyde* v. *Trent & Mersey Nav. Co.,* 5 Term Rep., 389; 2 Greenl. Ev., § 210; Story on Bailments, § 538.

In answer to anticipated objections, the counsel argued the following points:—

1. Railroad companies, in case of the loss or non-delivery of goods intrusted to them as common carriers, under such a

contract as disclosed in this case, may be responsible to the owner, if lost while in transit, though beyond their own lines. Redfield on Railways, 291; Story on Bailments, § 533; *Muschamp* v. *L. & P. Junc. Railway*, 8 M. & W. Exc. Rep., 421; *Watson* v. *A. N. & B. Railway*, 3 Eng. L. & Eq. R., 497; *Crouch* v. *Lancaster & N. W. R. R.*, 25 Eng. L. & Eq. R., 287; *Crouch* v. *London & N. W. R. R.*, 4 C. B., 255 (78 E. C. L. Rep.); *Fowler* v. *Great Western Railway*, 7 Welsby, H. & G. Exch., 698; *Crouch* v. *same*, ib. 705; *Jordan* v. *Fall River R. R. Co.*, 5 Cush., 69; *Nutting* v. *Conn. River R. R. Co.*, 1 Gray, 502; *Fitchburg & Worc. R. R. Co.* v. *Hanna*, 6 Gray, 539; *Farmers' and Mech. Bank* v. *Champlain Transp. Co.*, 18 Verm., 140, and 23 Verm., 209; *Noyes* v. *Rutland & Burl. R. R. Co.*, 27 Verm., 110; *Weed* v. *Sar. & Schen. R. R. Co.*, 19 Wend., 534; *Van Santvoort* v. *St. John*, 6 Hill, 157; *Wright* v. *Boughton*, 22 Barb., 561; *Hart* v. *Renss. & Saratoga R. R.*, 4 Seld., 37; *Bennet* v. *Filyam*, 1 Florida, 403; *Jennerson* v. *Camden & Amboy R. R. Co.*, 4 Am. Law Reg., 234, and note of the editors; *Check* v. *Little Miami R. R. Co.*, decided in Ohio in 1859.

2. As to the authority of Works to bind the company, the liability of the principal depends, not upon his instructions to the agent, but upon the question whether the latter was a general or special agent. *Hatch* v. *Taylor*, 10 N. H., 538; *Anderson* v. *Coonley*, 21 Wend., 279. Works was the defendants' general agent for receiving freight and making contracts for its transportation, the only person to whom application could be made for those purposes at one of their principal stations. As between himself and the company, he might be bound by their instructions; but as between them and the owner of goods having no notice of the instructions, a contract made by him as agent would be valid, though made in disregard of those instructions. Story on Agency, 4th ed., § § 17, 18, 19, 73, 126, 127, 128, 131, 132 and 133. A special agency exists when authority is delegated to do a single act; a general agency, when the authority is to do all acts connected with a particular employment. Story on

Agency, § § 17, 127, note; *Trundy* v. *Farrar*, 23 Maine, 227; Paley on Agency, by Lloyd, 199, note. A third person has a right to assume, without notice to the contrary, that one employed generally by a railroad company, as its station agent, has authority to act for his principal in all matters within the scope of his employment; and, if he is clothed with apparent authority for certain purposes, he may bind his principal within the limits of his apparent authority, otherwise there would be no safety in mercantile transactions. *Pickering* v. *Bush*, 15 East, 38.

The printed instructions do not affect the case. They do not forbid the agent to make the contract in this case; and if they did, they are private, for the guidance of the agent, and his office and authority are distinct, and not derived from the instructions. The instructions are subsequent, collateral and varied from time to time. The plaintiff had no notice of them, and they cannot affect this contract. *Wilson* v. *York, Newcastle & Berwick Railway Co.*, 18 Eng. L. & Eq. R., 557; Redfield on Railways, 291.

The American decisions do not go to the full extent of the English, and have not held companies liable for the delivery of goods beyond the terminus of their line, except upon express contract. In no case, however, have they denied the authority of a general agent, like a station agent, to make such a contract.

3. The defendants are estopped from denying the authority of Works to make the contract. They had, for four years prior to this transaction, through their station agent, been accustomed to contract for the transportation of goods in the same manner as in this case. The evidence shows a large amount of business done in this way. It is reasonable to presume that their manner of doing business, in this respect, was well known at Biddeford, and that the company increased their business and profits thereby. By their acts, the plaintiff was induced to give them credit as carriers for the entire distance. *Weed* v. *S. & S. R. R. Co.*, 19 Wend., 337.

If the president and superintendent did not know that business was done in this manner, it was their duty to inform themselves of their agent's manner of doing business, and the plaintiff is not to suffer by their neglect. Besides, it does not appear that the directors were equally ignorant; but, if they were, it is immaterial. Story on Agency, § 127, note; Parsons' Merc. Law, 217; 27 Verm., 110. The same agent has been retained in their employ to the present time, and *without any new instructions.*

4. It cannot be doubted that the company had power, under their charter, to make this contract. Railroad corporations have such power, if not expressly granted. Redfield on Railways, 287; *Noyes* v. *Rutland & Burl. R. R. Co.*, 27 Verm., 110; *Jennerson* v. *Camden & Amboy R. R. Co.*, 4 Am. L. Reg., 235, and the editor's note; opinion of WAITE, C. J., in *Elmore* v. *Naugatuck R. R.*, 23 Conn., 457; *Steamboat Co.* v. *McCutchin*, 13 Penn., (1 Harris,) 13.

It is true that corporations have only such powers as are specifically granted by their charters. An act of a corporation entirely foreign to the purposes of its institution, is void from want of power. But, on the other hand, when a right is given, all the powers necessary to the exercise and enjoyment of it are also given. 15 Barb., 9. And this includes, not only those without which the right given could not be exercised, but all which are adapted to the convenient, profitable and reasonable use of the powers, or enjoyment of the rights expressly granted.

The question is, whether the right assumed by the defendants to contract to carry goods over their road, and deliver them at a place off of their line, is within their chartered powers, or foreign to the purposes of their incorporation. No matter whether the place of delivery is in Maine, or Illinois, ten miles from their track, or a hundred, or a thousand. Not only is such an act one not foreign to the purposes of their charter, but it is one adapted to those purposes, natural and reasonable, and one without which the privileges of the company could not always be enjoyed. It is a power which may

be abused, but not more liable to be so, than many other undoubted powers.

In a country like this, its various sections so connected by business, and interlaced with railroads, public policy demands that a construction should be given to the powers of corporations, in accordance with the usages of the country, and the interests of the commercial public. In almost every State, the construction has been given which is here contended for. In Connecticut only, the Court being divided, the majority decided against the power of railroad corporations to make such contracts, WAITE, C. J., dissenting.

The Court in this State has already decided this point substantially, and by implication, in *Perkins* v. *E. & B. & M. R. R. Co.*, 29 Maine, 307; *Sager* v. *P. S. & P. & E. R. R. Co.*, 31 Maine, 228.

The defendants are every day contracting to carry goods beyond the terminus of their road at Portsmouth, to Boston, and their power to do so is not denied or doubted.

The rule of damages is the value of the goods at their place of destination, at the time when they ought to have been delivered there. Chitty on Contracts, 393; *Day* v. *Day*, 9 Wend., 129; *Shaw* v. *Nudd*, 8 Pick., 9; *Smith* v. *Berry*, 18 Maine, 122; *Wells* v. *Abernethy*, 5 Conn., 222; *Mitchell* v. *Gile*, 12 N. H., 394; *Nourse* v. *Snow*, 6 Greenl., 208.

Philip Eastman, for the defendants, reviewed the provisions of their Act of incorporation, and argued that the corporation was established only for the purposes of building a railroad from Portland to the New Hampshire line, to connect with a road from Portsmouth to Boston, furnishing the road with necessary equipments, and transporting persons and property in its cars between the two termini. The corporation are to enjoy the privileges conferred by their charter, in return for which the public is to enjoy the accommodations resulting from the building of the road. The powers of the corporation are to be exercised by the president and directors.

A corporation has no other powers than such as are spe-

cifically granted, or are necessary for carrying into effect the powers granted. Its general powers are restricted to the nature and objects of its institution. Angell and Ames on Corp., 66; *Beattie* v. *Knowles' lessee*, 4 Peters, 150; *Bank of Augusta* v. *Earle*, 13 Peters, 519.

Should the president and directors attempt to build a railroad any where else than is authorized by their charter, the corporation would not be bound by their acts or contracts; and the Court, on application, would enjoin them from proceeding. So, if they should undertake to purchase engines or other materials for another railroad.

Their power to receive toll is limited to persons and property transported over the railroad. What, then, is their power to carry, or bind the company to carry, goods beyond the termini of the road? It is contended that their power to carry goods extends just so far as their power to build and equip a railroad, and that their power to bind the corporation by a contract to convey goods is coëxtensive and coterminous with their power to provide the means of conveyance.

It is admitted that, as the charter provides for a connection with the road from Portsmouth to Boston, Boston may, by a liberal construction, be regarded as the terminus of this road, and that the authority to connect may imply authority to unite in transporting goods on the connecting roads. And further, the company may have incidental power to provide carriages and send for goods to be carried by them, and for conveying and delivering the goods to the consignees and owners near the terminus of their route, or at and to the receiving stations of railroads or other conveyances for transportation to more distant places. But the power of the president and directors to contract to carry beyond the termini of the road, except so far as incidental to the nature and objects of the institution, is denied.

The plaintiff's declaration describes the defendants as common carriers, without naming the terminus at either end of the route. He does not charge them as common carriers

from Biddeford to Bloomington, Illinois. He should not only declare, but *prove*, that they are common carriers from the place where they received the goods, to the place of delivery, or at least to the place where the loss took place.

In admitting that the defendants are common carriers between the termini of their road, we admit that, upon this route, and within the sphere of their business, they become insurers of the goods intrusted to them to be carried, against loss or injury, unless by the act of God or of the public enemy. This has been the settled rule of law, since the old and leading case of *Coggs* v. *Bernard*, 2 L'd Raym., 909; Angell on Carriers, c. 4, § 67; *Riley* v. *Howe*, 5 Bing., 217; *Boyce* v. *Anderson*, 2 Peters, 150.

The rigorous responsibility imposed on the common carrier is justified on the ground that he, by implication, undertakes to carry the goods personally, or by servants for whose carefulness and honesty he is willing to be responsible.

In the present case, the case finds that the goods were lost by collision on Lake Michigan, more than a thousand miles beyond the western terminus of the defendants' route.

The position already taken, that the Act of incorporation is the measure and limit, not only of the duties and obligations, but of the powers of the president and directors in the management of the affairs of the company, and that they had no authority to extend their business as carriers beyond the limits to which they were restricted by their charter, for building and equipping their road, is fully sustained by the decision in *Hood* v. *N. Y. & N. Haven Railway Co.*, 22 Conn., 1 and 502; also in *Elmore* v. *Naugatuck R. R. Co.*, 23 Conn., 457, and *Naugatuck R. R. Co.* v. *Waterbury Button Co.*, 24 Conn., 468; and is settled law in that State.

In Vermont, it has been held that a railroad company may be bound by a contract to receive and transport goods outside of the limits of their road. *Noyes* v. *Rutland & Burl. R. R. Co.*, 27 Verm., 110. In that case, the company had undertaken to send their barges to certain places for a quantity of hay to be transported on their road. The Court up-

held the contract, "on the ground of usage and convenience, or common understanding and consent." REDFIELD, C. J., in his treatise on the law of railways, justifies the decision, on the ground that the power as exercised was incidental to the powers conferred on the companies, and necessary to their exercise in a reasonable and practicable mode. It does not follow that the company would be bound by a contract, unless so nearly within a strict construction, as to be necessary to the management of their general and ordinary business. 1 Parsons on Contracts, 120; 3 Eng. L. & Eq., R., 420.

No case can be found where a company has been held bound by a contract to carry goods beyond their own road, except so far as incident to the general objects of their incorporation, or necessary for the convenient exercise of the powers granted, or where two or more roads are connected as parts of the same route, and have formed a kind of partnership to receive payment for freight and give tickets through. Redfield on Railways, § 135; *Far. & Mech. Bank* v. *Champlain Tr. Co.*, 23 Verm., 186; *VanSantvoort* v. *St. John*, 6 Hill, 158; *Fitchburg & Worc. R. R. Co.* v. *Hanna*, 6 Gray, 539; *Nutting* v. *Conn. River R. R. Co.*, 1 Gray, 503.

In this State, there has been no case in which the extent of the power of a railroad company to contract to carry goods has been determined. It remains for this Court to decide what construction shall be given to such Acts of incorporation here. The interests of the community require such a limitation of powers as expressed by the Supreme Court of the United States in 4 Peters, 150, already cited. It should be within the manifest intention of the charter, having reference to the objects for which it was granted. Good faith to stockholders of corporations requires that wholesome restrictions should be observed. If a corporation created to build a road fifty miles, from Portland to Portsmouth, may become common carriers to Bloomington, 1300 miles distant, and in steam propellers that the stockholders never heard of, across Lakes Erie, Huron and Michigan, who can be safe in

calculating results? The Act of incorporation, intended as a shield to protect the stockholders and the public from fraud and imposition, becomes a snare to entrap both. If the power exists to the extent contended for, there is no limit, but the company may assume the responsibility of common carriers to California, the Sandwich Islands, Japan, China and all parts of the world.

Without an express contract, the carrier is only liable to the extent of his own route, and for safe storage and delivery to the next carrier. Redfield on Railways, § 135, and other authorities before cited; *Ackley* v. *Kellogg*, 8 Cowen, 223; *Garside* v. *Trent & Mersey Tr. Co.*, 4 Term R. 581; *Husfield* v. *Adams*, 19 Barb., 577.

To give effect to the receipt given by Works, the plaintiffs must show, not only that the company and its directors, but that Works had power to make such a contract. Corporations, like natural persons, are bound by the acts of their agents only within the scope of their authority. Angell & Ames on Corp., 239, § 9; *Mech. Bank of Alex.* v. *Bank of Columbia*, 5 Wheat., 337; *Salem Bank* v. *Gloucester Bank*, 17 Mass., 1; *Sewall* v. *Allen*, 6 Wend., 335; *Citizens' Bank* v. *Nantucket St. Co.*, 2 Story's C. C. R., 16; Angell on Carriers, c. 4, § 102. It is shown, by the testimony of the president, superintendent, and Works himself, and by the printed regulations, that the station agent had no authority to make such a contract. The usage or course of business of the company is proved by the testimony of Goodwin, Russell and Kenney, to have been against such contracts. When an agent makes a contract out of the line of his employment, and contrary to the common course of business, and published regulations, it will not bind the company. Redfield, § 137; *Elkins* v. *B. & M. R. R. Co.*, 3 Foster, 275.

The plaintiff introduces a large number of receipts given by Works to the Saco Water Power Co., contracting to deliver goods off of the line of the road. He does not show that any of the goods were so delivered. The receipts were all given by one station agent to one party, without the

knowledge of any officer of the company. This evidence fails to show any usage or course of business, or any sanction by the company. The receipts were in printed forms, brought to him already filled, and were signed without his being aware of their meaning.

It is not pretended that the defendants ever carry goods beyond the terminus of their route, but that they contract that they shall be safely carried to their place of destination. This would make them insurers of the goods after they pass from their hands until they are delivered in Bloomington, although they receive freight or pay only to Boston. There is no apparent reason to believe the plaintiff or the defendants, when this receipt was given, imagined that the latter were to guaranty the safe transportation of the goods for the whole 1300 miles, or, indeed, do any thing more than transport them to Boston, and forward them by the next line on the usual route to Bloomington, each carrier on the route being responsible directly to the plaintiff for safe transportation to the end of his own route. *N. J. Steam Navigation Co.* v. *Mer. Bank*, 6 Howard, 344; Greenl. on Ev., § 210.

The opinion of the Court was drawn up by

DAVIS, J. — This is an action against the defendants as common carriers, for the value of a quantity of furniture received by them for transportation. The goods were delivered to the station agent at Biddeford, who gave a receipt for them, of which the following is a copy.

"*Office of P. S. & P. R. R. Biddeford, Me., Aug.* 27, 1855. Received, in apparent good order, from Mrs. Sarah A. Perkins, 8 boxes, 4 chests, 11 packages furniture, marked *E. Perkins, Bloomington, Ills.*, which we promise to deliver to Elisha Perkins in Bloomington, in like good order.

"J. S. Works, *Station Agent.*"

The furniture was carried by the defendants to Portsmouth, and sent thence to Boston, by an arrangement between them and the Eastern Railroad Company, by which the two corporations mutually conduct their business. The defendants do not

appear to have had any care, or to have exercised any control, directly or indirectly, over the property, after it was delivered in Boston. No freight was advanced, nor any rate or sum agreed upon. It was probably understood that the defendants were to receive their usual rates to Boston. From that place the furniture was forwarded from one point to another, by the different railroad or steamboat companies on the line; and, at the time of the loss, by collision, it was on board a steamer on Lake Michigan.

That Works was the general agent of the defendants, to contract for the transportation of freight and passengers from the Biddeford station, admits of no doubt. The only question, therefore, is, whether the company were bound by his contract to deliver the goods in Bloomington, in the State of Illinois. Had any agent of the company any authority to make such a contract?

The defendants were incorporated in 1837, with authority to construct a railroad from Portland to Portsmouth, and to exercise their corporate powers "for the transportation of persons, goods, and property of all descriptions." And it is argued that the corporation being the creature of the law, with no powers but those conferred by law, its agents could not bind it by any contract to transport persons or property, except upon its own line of railroad;—that the company had no authority to become common carriers on other routes, and in other States, and that any agreement to do so, being beyond the scope of the corporate powers, was void.

The question is one of great practical importance, upon which there has been some diversity of opinion.

It is quite clear that a common carrier, if a natural person, may contract to carry persons or property beyond his own line, and thus make the carriers upon the connecting lines his agents. In such case he is responsible for any loss or injury upon any part of the route. Story on Bailments, § 558; 1 Parsons on Contracts, 687; Smith's Mer. Law, 367; Parsons' Mer. Law, 217.

Whether the same rule applies to corporations, chartered

as common carriers upon lines designated in the statutes by which they are created, is not so clearly settled. In England, the law is well established, by a series of decisions, not only that the same rule applies to railway companies as to natural persons, but that, in either case, if a common carrier receives goods marked to be delivered at a place beyond the limits of his own line, he undertakes, *prima facie*, to carry the goods to their destination, and is bound to do so, unless he limits his responsibility by express agreement or notice at the time the goods are received. *Muschamp* v. *L. & P. Railway Co.*, 8 Mees. & Wels., 421; *Watson* v. *A. N. & B. Railway Co.*, 3 Eng. Law & Eq., 497; *Wilson* v. *Y. N. & B. Railway Co.*, 18 Eng. Law & Eq., 557; *Crouch* v. *L. & N. W. Railway Co.*, 25 Eng. Law & Eq., 287.

This doctrine has been denied in this country; and the rule has been held to be, when a railway company receives goods marked for delivery at a place situated beyond the line of their own road, that they are only bound, in the absence of any special contract, to transport and deliver them, according to the established usage of the business, to the carriers of the connecting line, to be forwarded to their ultimate destination. *Nutting* v. *Conn. River R. R. Co.*, 1 Gray, 502; *Van Santvoord* v. *St. John*, 6 Hill, 157; *Bank* v. *C. Trans. Co.*, 18 Verm., 140; 23 Verm., 209; *Jennerson* v. *C. & A. R. R. Co.*, 27 Penn. State R.

In all these cases, it is decided or admitted that a railroad company may, *by special contract*, bind themselves to deliver merchandise at a place beyond the line of their own road; and that, in such case, they are bound as common carriers for the whole route, and can exonerate themselves only by a delivery at the place of destination. But in none of the English cases cited, except the last one, was any question raised in regard to the power of the company under their charter. In that case, though this point was presented, and the contract was to carry goods to a place beyond the realm, the company were held liable as common carriers, on the

ground *that they held themselves out to the public as common carriers to that place.*

Nor was this question directly presented in any of the American cases before cited. But the point was raised in a later case, *Noyes* v. *R. & B. Railroad Co.*, 27 Verm., 110, and it was held that a contract to send barges to a place, not on the line of their road, for a quantity of hay, and to transport it from that point over their road, was within the scope of the powers conferred by the charter, and that the company were bound by it. REDFIELD, C. J., the learned author of the treatise on Railways, in delivering the opinion of the Court, says, "it may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of the charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to."

In the case of *Hood* v. *N. Y. & N. H. R. R. Co.*, 22 Conn., 502, it was held that a contract to carry a passenger from New Haven to Farmington on their railroad, and thence to Collinsville by stage, was not binding on the company, on the ground that the company had no authority, under their charter, to make a contract to carry a person beyond their own line. We are not aware that the doctrine has been carried to this extent in any other State.

Upon a careful survey of all the authorities, we are satisfied that a railroad company may be bound, by a special contract, to transport persons, or property, beyond the line of their own road. In granting the charter, all incidental powers, which are necessary to the proper and profitable exercise of those which are specially enumerated, may be presumed to be conferred by implication. The business of common carriers between different places is intimately interwoven, branching off into innumerable channels. And it is often of great public convenience, if not of absolute necessity, that several companies should combine their operations,

and thus transport passengers and merchandise, by a mutual arrangement, over all their lines, upon one contract, for one price. In such cases each is held liable for the whole distance. *Fairchild* v. *Slocum*, 19 Wend., 329; *F. & W. Railroad Co.* v. *Hanna*, 6 Gray, 539.

And we think a company may be bound, even without any actual arrangement with the connecting lines, if, by their agents, they hold themselves out to the public as common carriers to a place beyond the limits of their own road. If such agents so represent the company to the public, in such a manner, or for such a length of time, that the corporators may be presumed to know it, and therefore, to assent to it, the company would be estopped from denying it. In the language of REDFIELD, C. J., in the case before cited, "if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter, and strangers are thereby induced to contract, upon the faith of the authority of the agents of such company, the company are not at liberty to repudiate the authority of such agents, when their transactions prove disastrous."

The application of these principles to the case at bar, is not free from difficulty. The plaintiff relies upon a special contract to deliver his goods in Bloomington, in the State of Illinois. The place of delivery being far beyond the line of transit under the control of the defendants, it is not sufficient for the plaintiff to prove that the contract was made by one of their subordinate agents. The authority of such agent to make such a contract must be proved.

This might be done by proof of express authority, conferred by the corporation, or by the directors. And, though the company might have had no special authority, by their charter, to make such contracts, and could, perhaps, have been enjoined or restrained from doing it, by proper proceedings, they could not plead such want of authority against persons so contracting with them. To do so would be taking advantage of their own wrong. But the evidence in this case, which is submitted to us upon a report of the testimony, fails to

prove any express authority on the part of the agent to make such a contract with the plaintiff.

If there was no express authority, it might have been implied from a mutual arrangement for the carrying business among all the carriers between the point where the goods were received, and the place of delivery. Where such an arrangement actually exists, there is an implied authority on the part of the agents of each company to make a contract that shall bind them all. But the evidence in this case is conclusive, that no such arrangement existed between the defendants and other companies for the transportation of persons or property to any place beyond Boston.

If the agent who made the contract had no authority, in fact, therefor, either express, or implied, have the company so conducted their business, by holding themselves out to the public as common carriers to places beyond the line of their own road, that they are estopped from denying such authority?

There is considerable evidence upon this point. It appears that this same agent, during a period of several years, both before and after August 27, 1855, made contracts similar to the one in suit, to deliver goods at various places beyond the line of the defendants' road, in this State, in Massachusetts, in Connecticut, and in Canada. Such contracts made *after* the one in suit are, perhaps, inadmissible as evidence on this point. But the nature of these contracts, and the manner of doing business, must have been known by the directors, and by many of the corporators. And their assent may be presumed from the fact that the agent, for so long a time, was permitted to have charge of the business and make such contracts. From these and other circumstances, a majority of the Court are of the opinion that strangers had the right to conclude that he was acting within the scope of the authority conferred upon him by the company, and that the company are therefore estopped from denying it. According to the agreement of the parties judgment must be entered for the plaintiff, for the

value of the goods at the place of delivery, less the cost of transportation, no freight having been paid.

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

JOHN LANE *versus* LEWIS B. GOODWIN *and others.*

The fact that one of the jurors, who rendered a verdict, was disqualified by relationship to the prevailing party, according to R. S., 1857, c. 1, § 4, spec. 22, is sufficient reason for setting aside the verdict, when it appears that the adverse party was ignorant of the relationship, at and before the trial.

THIS was a WRIT OF ENTRY, on which a verdict was rendered in favor of the plaintiff, at January term, 1860.

At the same term, and within ten days, the defendants moved that the verdict be set aside, and a new trial granted, for the reason, amongst others, that one of the jurors, who tried the case and rendered the verdict, was related by affinity within the sixth degree, according to the civil law, or within the degree of second cousins inclusive, to the plaintiff; which fact was not known to the defendants until after the verdict was rendered.

KENT, J., presiding, overruled the motion, *pro forma;* and the defendants excepted, it being agreed that either party may file depositions touching the motion before the next law term, which shall make a part of the case, and also the affidavit of Pelatiah Carll, one of the jurors, who testified that he and the wife of John Lane, the plaintiff, were second cousins; and the affidavits of each of the defendants that they had no knowledge, at or before the trial, that either of the jurors was related by consanguinity or affinity to the plaintiff.

A. F. Chisholm, in support of the exceptions, cited R. S., 1857, c. 1, § 4, spec. 22; *Hardy* v. *Sproule,* 32 Maine, 310; 2 Cow. & Hill's Phil. on Ev., 612, note 458; 4 Gill. & Johns., 407.

As to the admissibility of the affidavit of Carll, the juror, he cited R. S., 1857, c. 82, § 69; c. 77, § 17; 1 Phil. on Ev., 238; *Studley* v. *Hall*, 22 Maine, 201; *Spear* v. *Robinson*, 29 Maine, 531.

Howard & Strout, contra, argued—1. That the fact of the alleged relationship was not sufficiently proved. *Goodwin* v. *Cloudman*, 43 Maine, 577.

2. The affidavit of the juror was not admissible in evidence. *Layton* v. *Cooper*, 1 Penn. R., 65; *Loomis* v. *Stratton*, ib., 245; *Cooper* v. *Gullsaith*, 4 Zabr., N. J., 219; 16 U. S. Dig., 19, § 3, title Affidavit.

3. A motion to set aside a verdict cannot be entertained on the affidavits of jurors. *Chadbourne* v. *Franklin*, 5 Gray, 312; *Cook* v. *Castner*, 9 Cush., 266; *Murdock* v. *Sumner*, 22 Pick., 156; *Folsom* v. *Manchester*, 11 Cush., 334.

4. The fact of relationship can only be taken advantage of by challenge. *McLellan* v. *Crofton*, 6 Greenl., 329: *Jeffries* v. *Randall*, 14 Mass., 105; *Amherst* v. *Hadley*, 1 Pick., 38; *Walker* v. *Green*, 3 Greenl., 215; *Goodwin* v. *Cloudman*, and *Cook* v. *Castner*, before cited.

The opinion of the Court was drawn up by

APPLETON, J.—This case comes before us on a motion for a new trial, because Pelatiah Carll, one of the jurymen by whom the verdict was rendered, was interested, by reason of his relationship to the plaintiff, "within the sixth degree, according to the rules of the civil law, or within the degree of second cousins inclusive." R. S., 1857, c. 1, § 4, spec. 22; *Chase* v. *Jennings*, 38 Maine, 44.

A challenge to favor may be taken after verdict. *Rollins* v. *Ames*, 2 N. H., 349. By R. S., 1857, c. 82, § 73, "If a party knows any objection to a juror *in season* to propose it before trial, and omits so to do, he shall not afterwards be allowed to make it; unless by leave of Court, for special reasons." In the case before us, the evidence introduced leaves no doubt as to the fact of relationship as alleged, and that the defendants and their counsel were alike ignorant

thereof. These facts have been repeatedly held sufficient to authorize the setting aside of a verdict, and ordering a new trial. *Chase* v. *Jennings*, 38 Maine, 44; *Hardy* v. *Sproule*, 32 Maine, 310.

But it is objected that the evidence by which the motion is sustained is inadmissible. No exceptions on this point have been reserved, nor does it in any way appear that they were taken at *Nisi Prius*, at the hearing before the presiding Judge to whose rulings exceptions were taken.

Verdict set aside, and new trial granted.

TENNEY, C. J., and CUTTING, GOODENOW, DAVIS, and KENT, JJ., concurred.

JOHN GOODWIN *versus* ALLEN HUBBARD *and another.*

Where land was conveyed, by deed, *excepting and reserving the pine trees and timber standing and lying on said lot*, the trees remain the property of the grantor.

And such grantor may maintain an action of trespass against the grantee or his assignee, who cuts and carries away any of them, although more than twenty years after the date of the deed. 47 595 b91 234

THIS was an action of TRESPASS, for cutting and carrying away certain pine trees. At the September term, the case was referred to Philip Eastman; and at April term, 1859, after hearing the parties, he awarded that the plaintiff recover $22, damages and costs, unless the Court should decide, on the following facts, that he cannot maintain his action, in which event the defendants were to recover costs: —

"On the 28th of October, 1834, the plaintiff and Ephraim Flint, being owners of the lot upon which the trespass is alleged, which is called the 'home lot,' conveyed it to John Abbott, the defendant's grantor, '*excepting and reserving the pine trees and the pine timber standing and lying on said lot.*'

"During the five following winters, the plaintiff and others interested with him took off most of the pine trees and timber, leaving one Norway pine, which had been marked M, for mast, and a few small white pine trees of the original growth. There was no evidence that the plaintiff, or others interested with him, ever took any thing from the lot after that time. In February, 1846, Ephraim Flint conveyed to the plaintiff his interest in an adjacent lot, owned by them in common, and he then also gave him a bill of sale of his interest in the reserved timber on this lot; and, in March, 1849, Ellis B. Usher, who had been originally interested with the plaintiff and Flint in the *timber* on both lots, gave the plaintiff a bill of sale of his remaining interest therein. It does not appear that Abbott had any knowledge of those bills of sale, and the only evidence tending to show his knowledge that plaintiff claimed the remaining trees was, that in the year 1846, when they were examining the timber on the adjacent lot, which was at that time sold by the plaintiff to Abbott, the plaintiff said to him, that 'if there was time, he should like to go over and see how much timber there was on the *home lot.*'

"The lot was conveyed by Abbott to Allen Hubbard in March, 1854, and the Norway pine, and seven white pine trees of the original growth, were cut by the defendants in the following winter; for which this action is brought."

The presiding Judge, GOODENOW, J., after hearing the parties, ordered judgment to be entered on the award for the plaintiff; and the defendants excepted.

Ira T. Drew, in support of the exceptions.

Where a grantor reserves timber, and specifies a time in which to take it off, he reserves only so much as he may take off within the time fixed; and if, by the terms of the reservation, no time is specified, the law will prescribe a reasonable time. The reservation gives the grantor a chattel interest, and not an estate of inheritance. It carries with it a right in the soil for the support of the trees while they remain, but only for the time specified or prescribed by law as a reason-

able time. This is all that is decided in *Howard* v. *Lincoln*, 13 Maine, 122.

The decision in *Clapp* v. *Draper*, 4 Mass., 266, is inapplicable to this case, the grant there being to H, "his heirs and assigns, of all the trees standing and growing on the land forever, with free liberty to cut and carry away said trees and timber at all times, at their pleasure forever." This was held to convey an estate of inheritance, and that such was the intention of the parties cannot be doubted. Neither is *Lyford's case*, 11 Coke, 46, analogous, that being a case of a lease, reserving a general interest in the trees.

The intention of the parties is to be carried out in all cases, if practicable. What was their intention in this case? The plaintiff took off, immediately, what trees he deemed it profitable to take, and had not been on the lot for sixteen years at the time of the alleged trespass. On these facts, can there be any doubt of the intention of the parties?

In determining what is a reasonable time, the law will consider the location and extent of the lot, which is a small lot connected and used with the farm, and called the "home lot."

To construe the reservation into a perpetual license, would deprive the owner of the land of the privilege of cultivating it and rendering it productive, as, if the owner of the trees should cut them gradually, the natural growth would keep the land constantly covered with trees, so that it could be used for no other purpose. *Pease* v. *Gibson*, 6 Maine, 81.

H. J. Swasey, contra.

The trees cut by the defendants were, in fact, trees which were reserved by the plaintiff, one of them being a tree marked by the plaintiff for a mast. The reservation is absolute, and without limitation or ambiguity. It is immaterial whether it gave him an estate of inheritance or only a chattel interest.

If A sells land to B, reserving a building thereon, B acquires no right to the building, nor can he acquire such right by lapse of time; although, if kept on the land an unreason-

able time, B might, perhaps, cause it to be removed, or maintain an action against A for incumbering the land. *Clapp* v. *Draper*, 4 Mass., 266; *Lyford's case*, 11 Coke, 46; *Sanborn* v. *Hoyt*, 24 Maine, 118; *Allen* v. *Scott*, 21 Pick, 25 and 30; 2 Roll. Abr., 455; *Howard* v. *Lincoln*, 13 Maine, 122; *Hammond* v. *Woodman*, 41 Maine, 177; *Smith* v. *Ladd*, ib., 314; *Winthrop* v. *Fairbanks*, ib., 307.

The rights of the plaintiff do not depend upon a sale upon condition, or on a mere license or permit to cut, and the case differs essentially from *Pease* v. *Gibson*, 6 Maine, 81.

The opinion of the Court was drawn up by

TENNEY, C. J.—The referee made an alternative award. Judgment is to be entered thereon, according to the construction which the Court give to the reservation in the deed from the plaintiff to John Abbott, under whom the defendants claim title in the land, on which the trees in question were standing. The facts are to be treated as conclusively settled, and the law applicable thereto finally determined, excepting so far as it is presented in the referee's report.

The reservation is in these words:—"Excepting and reserving the pine trees and the pine timber standing and lying on said lot."

In *Lyford's case*, 11 Coke, 46, which was, where the party, seized in fee of a farm, leased it to the plaintiff and wife for life, "except timber trees, oak, &c., growing on the land, of more than twenty years' growth," it was held that the trees remained the property of the lessor. This doctrine was applied, in the case of *Howard* v. *Lincoln*, 13 Maine, 122, where the reservation was in these words:—"Reserving all the pine timber on said land, above the size of ten inches in diameter, twenty feet from the stump." The cases referred to, are distinguished in no respect from the one before us, touching the point involved in the latter. *Exceptions overruled;—*

Judgment on the award of the referee.

RICE, APPLETON, GOODENOW, and DAVIS, JJ., concurred.

APPENDIX.

ADDITIONAL RULE IN CHANCERY.

MASTERS IN CHANCERY, not exceeding five in number in each county, may be appointed, with the general powers appertaining to that office; and when the parties in any case in equity do not otherwise agree, one of such Masters in Chancery may be appointed by the Court to act therein.

Such Masters in Chancery may be appointed for any county in the State, at any term of Court held in either district, by a majority of the Justices thereof as a Court of Law; the Clerk shall record such appointments, with the date thereof, upon the docket for the district; he shall certify such appointments, if within the district of which he is Clerk, to the Clerks of the several counties therein; he shall certify such appointments, if within any other district, to the Clerk thereof, who shall record the same upon the docket thereof for the current year, and certify the same to the Clerk for the county in which such appointments are made; and the several county clerks shall record all such appointments therein, with the date thereof, in books to be kept by them for that purpose.

The Clerk of the district, in which any Master in Chancery shall be appointed as aforesaid, shall send a commission therefor, under the seal of this Court, to the person so appointed.

ADDITIONAL RULE OF COURT.

WHEN any party shall die while a suit is pending, on a suggestion thereof being entered on the docket, which may be done by the other party in vacation, it shall be the duty of the Clerk, upon application in writing, to issue process to bring into Court the representative of such deceased party, which process may be made returnable on a day certain, in or out of term time, to be served at least fourteen days before such return day.

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1. The settlement or discharge of a demand or claim by the payment of any sum less than the amount due thereon, under statute 1851, c. 113, § 1, (R. S., 1857, c. 82, § 44,) is binding and effectual, unless vitiated by fraud on the part of the debtor. *Bisbee* v. *Ham*, 543.

2. After such a settlement, before he can maintain a suit on the original cause of action, on the ground of fraud on the part of the debtor, the creditor must rescind the contract of settlement, and tender to the debtor whatever sum he had paid in effecting it. *Ib.*

ACTION.

1. The indorsee and holder of a negotiable note against a fraudulent debtor has *prima facie* evidence of a just claim against the debtor, and unless the indorsement is shown to have been conditional, and the condition to have terminated, he may maintain an action against a third person who has knowingly aided the debtor in transferring his property to prevent its being attached, under the provisions of R. S., 1841, c. 148, § 49. *Abbott* v. *Joy*, 177.

2. On the trial of such an action, proof of fraudulent acts and declarations of the debtor before and after the sale, though in the absence of the defendant, are admissible to contradict evidence previously introduced by the opposing party. *Ib.*

3. In a suit on a bond in the name of joint obligees, a paper under seal, signed by one of the plaintiffs, denying any authority for the use of his name in the suit, and forbidding its further prosecution, but containing no words showing an intention to discharge the cause of action, will not operate as a release. *Southwick* v. *Hopkins*, 362.

4. Where the party signing the paper had, previous to the commencement of the suit, assigned all his interest to the other obligees, they had a right to use his name in the action, and he could not interfere for any other purpose than to require indemnity against the costs. *Ib.*

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INSOLVENT ESTATE.

See EXECUTORS AND ADMINISTRATORS.

INSURANCE.

JUROR.

JUSTICE OF THE PEACE.

LAW AND FACT.

See EVIDENCE, 13. PRACTICE, 6.

LEVY.

See EXECUTION.

LIEN.

See LOGS AND LUMBER, 6, 7, 8, 9.

LIMITATION.

See CORPORATION, 4, 5. INSOLVENT ESTATE.

LIQUOR, SPIRITUOUS AND INTOXICATING.

LOGS AND LUMBER.

MARRIED WOMAN.

MONEY HAD AND RECEIVED.

MORTGAGE.

See EQUITY, 1, 2, 3, 4, 6. MARRIED WOMAN, 1, 2.

MORTGAGE OF CHATTELS.

See EVIDENCE, 12.

NUISANCE.

OFFER TO BE DEFAULTED.

OFFICER.

PARTITION.

PAUPER.

PAYMENT.

PLEADING.

POOR DEBTOR.

See ACTION, 1, 2.

PRACTICE.

REAL ACTION.

REFERENCE.

REFORM SCHOOL.

RELEASE.

See ACTION, 3.

REPLEVIN.

REVIEW.

SALE.

See EVIDENCE, 11.

SET-OFF.

SHIPPING.

STATE LANDS.

See Logs and Lumber.

STATE REFORM SCHOOL.

See Reform School.

STATUTE.

Statutes are to be construed according to their plain import, without regard to mere inferences which may be drawn from the language of an Act passed by a subsequent Legislature. *Ingalls* v. *Cole*, 530.

STATUTE OF FRAUDS.

1. The statute of 1848, c. 52, R. S., c. 111, § 1, providing that "no action shall be brought and maintained upon a special contract or promise to pay a debt from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, or the assignment laws of this State, unless such contract or promise be made or contained in some writing signed by the party chargeable thereby," applies to a suit instituted after the passage of the law, but based on a verbal promise made before its passage. *Kingley* v. *Cousins*, 91.

2. The provisions of the statute relate, not to the validity of the contract, but to the remedy for a breach of it, and are constitutional. *Ib.*

STATUTES CITED.

Constitution of the United States.

Constitution of Maine.

Public Laws of Maine.

SPECIAL LAWS.

ENGLISH STATUTE.

STOCKHOLDER.

See CORPORATION, 4, 9.

TAX.

1. The decision of this Court in a former case, that the assessors of a town have no right to assess one not an inhabitant thereof, applies only to poll taxes. *Hartford* v. *Church*, 169.

2. Improved real estate, and personal property enumerated in the statute, may be assessed to non-residents, and, upon neglect to pay within the time

TENANT AT WILL.

TIMBER.

See Logs and Lumber.

TOWN.

See EXECUTION, 1. REFORM SCHOOL, 2, 3, 4.

TOWN ORDER.

To entitle the holder of a town order that had been issued by mistake, to recover thereon, he must show that he received it from the payee, for value, in the ordinary course of business, and ignorant of any of the circumstances under which it was given by the officers of the town, which would constitute a valid defence to the order, if it had not been negotiated, but remained in the hands of the payee. *Chamberlain* v. *Guilford*, 135.

TRESPASS.

1. Possession of personal property is sufficient to entitle the possessor to maintain an action of *trespass* against a mere wrongdoer, who shows no title. *Craig* v. *Gilbreth*, 416.

2. By R. S., 1857, c. 83, § 1, and c. 82, § 97, in actions of trespass *quare clausum fregit*, and all actions where the title to real estate is at issue, according to the pleadings or brief statement filed by either party, the plaintiff is entitled to full costs, although he recovers less than twenty dollars damages. — GOODENOW, J., *dissenting*. *Burnham* v. *Ross*, 456.

3. The Supreme Judicial Court has original as well as concurrent jurisdiction, with justices of the peace, of actions of trespass *quare clausum*, although the damages demanded are less than twenty dollars. *Ib.*

4. In an action of trespass, if the defendant neglects to tender an issue, and the parties go to trial without any issue joined, and the plaintiff recovers a verdict, as upon the general issue, it will not be disturbed for this cause, on the defendant's motion. *Maxwell* v. *Potter*, 487.

5. In actions of trespass *quare clausum fregit*, the plaintiff prevailing recovers full costs, though the damages are less than twenty dollars. *Ib.*

6. Where land was conveyed, by deed, *excepting and reserving the pine trees and timber standing and lying on said lot*, the trees remain the property of the grantor. *Goodwin* v. *Hubbard*, 595.

7. And such grantor may maintain an action of trespass against the grantee or his assignee, who cuts and carries away any of them, although more than twenty years after the date of the deed. *Ib.*

See RAILROAD, 22.

TROVER.

TRUANT.

TRUST.

TRUSTEE PROCESS.

USE AND OCCUPATION.

See TENANT AT WILL.

WAYS.

WILL.

WITNESS.

See EVIDENCE, 3, 7. WILL.