# REPORTS

OF

# CASES IN LAW AND EQUITY,

DETERMINED

BY THE

# SUPREME JUDICIAL COURT

OF

# MAINE.

By WALES HUBBARD,
REPORTER TO THE STATE.

## MAINE REPORTS,

## VOLUME XLVIII.

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1863.

# JUDGES

OF THE

# SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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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.

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ATTORNEY GENERAL.

HON. JOSIAH H. DRUMMOND.

# CASES

## REPORTED IN THIS VOLUME.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## WESTERN DISTRICT.

## 1859.

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## COUNTY OF YORK.

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AMOS FELCH *versus* ORRIN BUGBEE *& al.* AND FRANCIS O. THOMAS *& al., Trustees.*

A discharge of a debtor, under the insolvent laws of Massachusetts, will not bar an action in the courts of Maine, instituted by a citizen of Maine against such debtor who resides in Massachusetts, although the contract was made and, by its terms, to be performed in Massachusetts.

The indorsement of a negotiable note is a new contract between the parties; and, where such note was made in Massachusetts by a citizen of that State, and payable to another citizen of such State, "at any bank in Boston," and, by him indorsed to a citizen of Maine, before maturity and before proceedings in insolvency, the rights of such indorsee are not affected by a discharge of the maker in Massachusetts under the insolvent laws of that State.

It is citizenship, and not the place of making or of performance, that determines the legal rights of the parties.

An assignment of such debtor's property by the officers of the law of Massachusetts, under the provisions of the insolvency Act, will not operate upon the debts or property in this State, so as to defeat the attachment of a creditor who is a citizen of Maine, made subsequently to such assignment.

ON AGREED STATEMENT OF FACTS.

THIS was an action of ASSUMPSIT, upon two promissory notes signed by Bugbee, Hidden & Co., the principal defendants, payable to their own order and by them indorsed.

One is dated Boston, August 27th, 1856, payable in eight months for $586,67, value received of Ball & Moore. The second is dated Boston, Sept 3d, 1856, for $1386,88, payable in eight months, at any bank in Boston, value received of Day, Frost & Kimball.

The defendants relied upon their discharge from their debts, under the insolvency laws of Massachusetts.

At the time said notes were given, the defendants were, and ever since have been citizens of Boston. They were merchants, under the firm name of Bugbee, Hidden & Co. The notes in suit were made in Boston by the defendants, and by them there given and indorsed to citizens of that place, who, at Boston, negotiated and sold them before maturity to the plaintiff, on the 24th day of April, 1857.

The defendants as partners, and also in their respective separate capacities, on May 12th, 1857, made their petition for the benefit of the provisions of the law of Massachusetts for the relief of insolvent debtors. A due and legal course of proceedings was had upon their petition, and assignees were legally appointed; and, on the first day of December, 1857, the said defendants obtained certificates of discharge.

The writ in this case was served upon the trustees on May 16th, 1857.

The case was elaborately argued by

*L. S. Moore* for the plaintiff, and by

*Swasey & Chisholm* for the defendants.

The opinion of the Court was drawn up by

KENT, J.—The questions between the plaintiff and the principal defendants relate to the effect of a discharge in insolvency, granted to the defendants by the proper tribunal under the laws of Massachusetts. It appears from inspection of the papers, that the discharge was regularly granted, and, by its terms, includes the contract as set forth in each of the notes in suit. The question arises, whether such a discharge is effectual to bar this action.

Both notes were made in Boston, payable to defendants' own order, signed and indorsed by them to citizens of Massachusetts, who, at Boston, negotiated and sold them to the plaintiff, before maturity, and before the commencement of proceedings in insolvency. The first of these notes contains no specification of any place of payment ; the second is payable at any bank in Boston.

The constitutionality, effect and limitations of the insolvent laws of individual States have been discussed very thoroughly by courts in different States and by the Supreme Court of the United States. Nearly all the questions which can arise have been determined, and it would be but a useless effort to recapitulate the arguments and the reasons on which these decisions are based, or to cite a cloud of authorities already familiar to the profession. It may be useful, however, to state the most prominent of the points that may now be considered as settled.

1. That a State has the constitutional power to pass insolvent laws in the nature of bankrupt laws, by which a debtor may be discharged from subsequent contracts, subject to certain limitations. *Ogden* v. *Saunders*, 12 Wheat., 213, and cases cited under the following points.

2. That such discharge may be granted from all contracts made or existing between citizens of the State which enacted the law and whose tribunals granted the discharge. *Stone* v. *Tibbetts*, 26 Maine, 110. And a subsequent change of residence and citizenship, after making the contract, will not affect the validity of a discharge obtained by defendant before removal. *Stevens* v. *Norris*, 10 Foster, (N. H.,) 466; *Brigham* v. *Henderson*, 1 Cush., 430.

3. That such discharge will not bar an action on a contract between a citizen of such State and a citizen of another State, where the contract is not by its express terms made payable or to be performed in the State granting the discharge. *Palmer* v. *Goodwin*, 32 Maine, 535; *Savage* v. *Marsh*, 10 Met., 594; *Fisk* v. *Foster*, 10 Met., 597; *Braynard* v. *Marshall*, 8 Pick., 194. And this rule applies to cases of such contracts

*made in* such last named State with a citizen of another State, where no place of performance is named. *Ilsley* v. *Merriam*, 7 Cush., 242; *Clark* v. *Hatch*, 7 Cush., 455; *Scribner* v. *Fisher*, 2 Gray, 43.

4. That a negotiable contract, payable generally, made between citizens of the State granting the discharge, but indorsed *bona fide* to a citizen of another State, before maturity and before proceedings instituted in insolvency, is a new contract between the parties, and a suit thereon is not barred by such discharge. *Banchor* v. *Fisk*, 33 Maine, 316; *Houghton* v. *Maynard*, 5 Gray, 522; *Savage* v. *Marsh*, 10 Met., 594; *Anderson* v. *Wheeler*, 25 Conn., 603.

5. That no peculiar rights are acquired or lost by the character of the forum in which the suit is determined, but the same principles apply, whether the case is pending in the State Court where the debtor resides and obtained his discharge, or in the State of the creditor's residence, or in the U. S. Courts. *Cook* v. *Moffatt*, 5 Howard, 309.

6. That a contract, which is payable generally, without any specified place, although dated and given at a place within the State, is not barred by the discharge, if the contract is with a citizen of another State. *See cases before cited.*

The first note falls clearly within the class of cases which are not barred by the proceedings in insolvency. The plaintiff is and has been a citizen of Maine; the note was indorsed to him when such citizen, before maturity, or the commencement of the proceedings in insolvency; and is not payable at any particular place, in or out of Massachusetts.

The second note presents another question, which has not been determined with the same unanimity as those before stated. This note is made payable at any bank in Boston; and it is contended that this stipulation takes the case out of the principles of the former decisions, and makes it subject to the discharge offered in evidence; and that a contract, although with a citizen of another State, is barred if it is payable in the State where the debtor resides and has obtained his discharge.

The other questions being disposed of, the only remaining one is, whether the fact that the note is made payable in Massachusetts gives efficacy to the discharge, although the contract is with a citizen of another State.

We will first consider the authorities bearing on this precise point.

In *Scribner* v. *Fisher*, 2 Gray, 43, a majority of the Court in Massachusetts decided that such a note is barred by a discharge in insolvency in that State. This decision has been re-affirmed in several cases decided subsequently in that Court. 5 Gray, 539, and note. No reasons are assigned in the subsequent cases. They rest on the case of *Scribner* v. *Fisher*, in which METCALF, J., gave a dissenting opinion. But this is now established as the doctrine of that Court.

In the case of *Demerit* v. *Exchange Bank*, (Law Reporter, March, 1858,) Judge CURTIS held "that it is not competent for the State of Maine, under the constitution of the United States, to pass any law discharging or suspending the right of action on a contract made with a citizen of another State by a citizen of Maine. This was settled in *Ogden* v. *Saunders*, 12 Wheat., 213, and *Boyle* v. *Zacharie*, 6 Peters, 348." "It is urged," says Judge CURTIS, "that, where the contract *is to be performed in the State*, it is not within *Ogden* v. *Saunders*. It has been so held in *Scribner* v. *Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be, that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Such was Justice STORY'S understanding of the decisions of the Supreme Court of the United States in which he took part. *Springer* v. *Foster*, 2 Story, 387."

Mr. Justice STORY has also expressed the same view of the law in his elementary works. In his "Conflict of Laws," § 341, he says, "that a discharge under any law of the State where made, will not operate to discharge any contracts except such as are made between citizens of the same State." *Very* v. *McHenry*, 29 Maine, 214.

The Court of Appeals in New York, in 1852, in the case of *Donnelly* v. *Corbett*, 3 Selden, 500, had this precise question before them—the contract being payable in South Carolina, where the debtor resided and was discharged—the creditor being of New York. The Court held that an action on the contract was not barred by a discharge. The ground of the decision was, that a discharge, under a State insolvent law, of a debtor from his debts contracted after its passage, is valid as respects contracts between citizens of the State, but invalid as to all contracts where a citizen of another State is a party. The same doctrine is found in *Poe* v. *Duck*, 5 Maryland Rep., 1.

In *Anderson* v. *Wheeler*, 25 Conn., 613, the case presented the same question as the one before us;—the original parties to the note were both of New York—it was indorsed before due to a citizen of Connecticut—it was payable at a bank in New York, where the payee obtained his discharge in insolvency. The Court refers to the case of *Scribner* v. *Fisher*, but dissent from it, and decide that the fact of the place of payment being designated does not take it out of the rule as laid down in Judge JOHNSON'S opinion, concurred in by a majority of the Court, in *Ogden* v. *Saunders*.

We have also the opinion of Mr. Justice BALDWIN of the Supreme Court of the United States, in the case of *Woodhull* v. *Davis*, Baldwin's Rep., 300. His decision is based on the position that bankrupt or insolvent laws can have no extra-territorial effect on persons beyond the limits of the State or nation.

The decisions which are in opposition to the cases in Massachusetts, rest upon the understanding of the doctrine in the original case of *Ogden* v. *Saunders*. All the courts, including that of Massachusetts, state and national, agree, as a starting point, that whatever is clearly and expressly decided in that case is to be taken as settled, although the reasoning may not be entirely satisfactory. That case, indeed, resembles the works of some ancient authors, where the commentaries, and doubts, and explanations, outrun the text and over-

whelm it, leaving the bewildered student "in wandering mazes lost"—oft-times the "interpreter being the harder to be understood of the two."

Mr. Justice WOODBURY, in the case of *Town* v. *Smith*, 1 Wood. & Minot, 137, discusses fully the authorities bearing on the whole question, and, although doubting some of the views, and the soundness of the reasoning on which they are based, yet feels bound by the authority of the cases in the Supreme Court of the United States, which he understands as establishing the test of citizenship of the parties.

The discussions and decisions have, however, resulted in bringing about a general agreement as to all the points first enumerated—leaving this single point of the place of performance yet, in a measure, in controversy.

The Supreme Court of the United States was called upon to revise and interpret the leading case of *Ogden* v. *Saunders*, and the Judges gave their opinions on the various questions raised, in *Cook* v. *Moffatt*, 5 Howard, 309. Whilst there is an almost painful difference of opinion, on the question of the soundness of the grounds assumed or reasons assigned, the Court concurs in fixing certain principles as finally established. The one bearing on the exact point before us is thus stated. "A certificate of discharge under an insolvent law will not bar an action brought by a *citizen* of another State, on a contract with him."

This is the state of the authorities on the subject. The preponderance seems clearly against giving efficiency to the discharge in a case like this.

If we leave the authorities and seek beyond them for the reasons on which any rule on this subject is founded, we find two trains of argument, which, starting from different premises, lead to directly opposite results. The whole controversy on this point seems to turn upon the question whether it is the contract itself, including the place of making and of performance, and the *lex loci contractus*, that is to govern, or whether the *citizenship* of the contracting parties controls,

without reference to the nature or place of making or performance of the contract.

It is urged by those who favor the first view, that, when a foreigner, or a citizen of one State, voluntarily comes into another State, and there makes a contract with a citizen of the latter State, not by its terms to be performed elsewhere, the *lex loci* attaches to the contract, and must not only govern its construction, but its validity, and the grounds or facts by which it may be discharged. The argument is, that every contract made has relation to the existing law of the State—and, (to apply the doctrine directly to the case before us,) that, when such a contract is made within the territorial jurisdiction of Massachusetts, the liability to a discharge under the existing insolvent laws becomes a part and parcel of that contract, incorporated into it, or attached to it, as a condition or limitation, and goes with it everywhere, whoever makes or becomes a party to it, at any time. In this view, citizenship is of no consequence. The ground on which insolvent laws of a State, which allow a full discharge of a contract, are sustained against the objection that they impair the obligation of contracts, and thus violate the provision of the U. S. constitution, is that above stated, viz.: that the liability to such discharge is either expressly or tacitly understood by the parties, as a part of, or a fixed attendant upon all contracts made under the overshadowing canopy of the statute of insolvency; and that any citizen of another State, who comes voluntarily within the territory thus embraced, must be held to contract with reference to the law, and that the enforcement of it would not violate his rights.

If this were a new question, this view of the case would certainly be entitled to great consideration. It will, however, be observed, that the strength of this argument rests upon the doctrine of the *lex loci contractus*, the place of *making* the contract, not the place of *performance* only or chiefly. It is the fact of making a contract, on a territory governed by a certain law, that incorporates the law into it,

if it is thus incorporated. And it would seem, that if it is not citizenship but place, that is to control, those who favor this view should have taken their stand upon the ground that every contract *made* in the State, and not expressly to be performed elsewhere, must be governed by the existing law. But this has been given up by all the Courts. Even the Court in Massachusetts admits that the fact that the contract was *made* in that State cannot bar recovery, after a discharge in insolvency. The place of making is treated as immaterial. *Dinsmore* v. *Bradley*, 5 Gray, 487; *Houghton* v. *Maynard*, 5 Gray, 552; 10 Met., 594, and numerous other cases. The same Court has decided, that a contract *made* in Georgia, and *there to be performed*, between two citizens of Massachusetts, would be barred by a discharge in Massachusetts. *Marsh* v. *Putnam*, 3 Gray.

The question naturally arises, why the place of *performance* of a contract should subject it to the operation of a discharge, when the place of its formation would not? If the place of performance is material, and must control, it must be because the party out of the State voluntarily assented to the condition fixing the place, thereby bringing the contract under the law of the State. The same reasoning would apply to the making of a contract, which might be performed in the State. When the fact of the place of making the contract is not regarded as essential, the citadel, as it seems to us, is surrendered, and it is in vain to attempt to make a stand upon the place of performance alone.

It is conceded by the Court in Massachusetts that the forum makes no difference; that the same rule applies everywhere. And, after a careful consideration of the reasonings and decisions of the Court on this vexed subject, we can only say, that, if the question were an open one in all respects, we might incline to the doctrine that the place of making and the place of performance should control, on the grounds before stated, rather than the fact of naked citizenship. Yet we are forced to the conclusion, that a different rule has been finally established by the Supreme Court of the United States, and

concurred in by most of the State Courts, and we are not disposed to depart from the rule thus established. That rule is the one found in *Cook* v. *Moffatt*, 5 Howard, before cited. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extra-territorial force so as to act upon the rights of citizens of other States; and which holds that, as between citizens of the State, the discharge will bind them, as to all posterior contracts, wherever made or wherever to be executed;—and, as to citizens of other States, will not discharge any existing contract, although made or to be performed in the State granting the discharge. Or, as expressed by the Court, the discharge is not a bar "when the *action* is brought by a *citizen of another State.*" This rule is broad enough to exclude all questions arising from either the place of making, or place of performance. It rests entirely on the citizenship of the parties; and treats all other matters as immaterial.

*The plaintiff must have judgment on both notes.*

The remaining question relates to the trustees, who have disclosed indebtedness to the defendants, and notice to them (the trustees) of an assignment made by the Judge of Insolvency in Massachusetts to the assignees, who now interpose their claim. By agreement of the parties all the questions are submitted to the Court.

It was decided in *Fox* v. *Adams*, 5 Greenl., 245, that a general voluntary assignment *by the debtor*, for the benefit of his creditors, made in another State, will not be allowed to operate upon property in this State, so as to defeat the attachment of a creditor residing in Maine. This has been the established law of our State.

*A fortiori*, an assignment by the officers of the law, under a bankrupt or insolvent law of another State, cannot have that effect. It is now the well settled American doctrine, that an assignment by commissioners, or other officers, of a debtor's

personal property, under a foreign bankrupt law, does not operate as a legal transfer of that portion that is within another jurisdiction, as against the creditor of the bankrupt there residing, who interposes his claim. *Blake* v. *Williams & trustees*, 6 Pick., 306; Story's Conflict of Laws, § 410; Kent's Com., vol. 2, 405; *The Watchman*, 1 Ware, 232; *Town* v. *Smith*, 1 Wood. & Minot, 137.

The claim of the assignees cannot prevail against the attachment of the plaintiff, the plaintiff and all the trustees being citizens of Maine.

Judgment for the plaintiff for amount of both notes and legal interest.

Trustees charged for amount disclosed, viz.: —

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| Francis O. Thomas, | $622,96 |
| Samuel Hanson, | 259,20 |
| Adams & Co., | 195,66 |
| Hamlin & Boynton, | 757,75 |

There is annexed to the papers a copy of the disclosure of Jeremiah M. Mason; but the case, as made up, refers to the determination of the Court the questions arising under the disclosures of the four trustees, first above named, only. It would appear, from the disclosure of Mason, that he should be charged for $700,16, and for $296,89, making the sum of $997,05, if he is to be charged in this case.

The legal costs of all the trustees to be allowed to them respectively.

TENNEY, C. J., and RICE, APPLETON, GOODENOW, and DAVIS, JJ., concurred.*

* CUTTING, J., who was not present at the argument of this case, concurred in the opinion of the Court, in the case of *Snow* v. *Gillion & als.*, argued at the Law Term, 1860.

That was an action upon a negotiable promissory note of the firm of *Gillion, Stackpole & Hobbs*, of Danvers, Massachusetts, given to the plaintiff in the year 1853. The note was dated and payable at Danvers.

Before the commencement of the suit, *Hobbs* had become a citizen of this State. He pleaded, in bar, his discharge under the Insolvency Laws of Massachusetts. The replication to this was, that the plaintiff at the date of the

SAMUEL A. BADGER *versus* GEORGE W. TOWLE.

The Supreme Judicial Court of Maine has general common law jurisdiction in all cases unless its powers are restricted by the constitution or by statute.

Cases enumerated, in which it has jurisdiction, if either or both of the parties reside without the State, and there has been personal service upon the defendant, or his property has been attached.

Want of jurisdiction, for cause not apparent on the face of the record, can be taken advantage of only by plea in abatement. A *motion* to dismiss can only be sustained, where the defect is disclosed upon inspection of the writ.

Where the plaintiff described himself, in his writ, (issued A. D., 1856,) as "late of Kittery in the county of York," the defendant, as of P., in the State of New Hampshire, and an officer of the county of York, certified personal service upon the defendant; a *motion* to dismiss for want of jurisdiction will not be sustained. GOODENOW, J., dissenting.

ON the second day of the term, at which this action was entered, (September term, 1856,) the defendant filed a motion to dismiss the same. At a subsequent term, at *Nisi Prius*, (April term, 1859,) a hearing was had before GOODENOW, J., who sustained the motion and ordered the case to be dismissed. The plaintiff excepted. The material part of the motion is recited in the opinion of the Court.

The questions raised by the exceptions were argued by

*J. N. Goodwin*, for the plaintiff, and by

*Howard* and *Strout*, and *Allen*, for the defendant.

The plaintiff describes himself in his writ, as "late of Kittery in the county of York, trader;" and the defendant, as "of

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note was and ever since has continued to be a citizen of Maine. To this plea the defendant demurred.

GOODENOW, J. adjudged the replication good; to which adjudication the defendant excepted.

The case was argued on the bill of exceptions by

*J. N. Goodwin*, for Hobbs, and by

*I. S. Kimball*, for the plaintiff.

The Court unanimously sustained the ruling of the Judge at *Nisi Prius*, and overruled the exceptions.

Portsmouth in the county of Rockingham and State of New Hampshire."

The service of the writ was by a deputy sheriff of the county of York, by an attachment of "a hat" and giving the defendant "a summons," &c.

The opinion of the Court was drawn up by

RICE, J.—The Supreme Judicial Court of this State has general common law jurisdiction in all cases unless its powers are restricted by the constitution or by statute. R. S., 1841, c. 114, § 7.

In England and America suits in personal actions are maintainable, and maintained between foreigners, when either of them is within the territory of the State in which the suit is brought. Story's Confl. of Laws, § 542.

This Court has jurisdiction in personal actions between parties not resident in the State, if the defendant is found and duly summoned when temporarily within the State. *Barrell* v. *Benjamin*, 15 Mass., 354; *Nelson* v. *Omaley*, 6 Maine, 218; *Lovejoy* v. *Albee*, 33 Maine, 414.

Where there has been an attachment of the property of a non-resident of the State, but no personal service upon the defendant, a judgment will bind the property but not the person. *McVicker* v. *Beedy*, 31 Maine, 314.

In the case at bar, the officer returns an attachment of the defendant's property and a service upon his person, within his precinct.

Sect. 2 of c. 114, R. S., 1841, refers to cases where both parties reside within the State. Sect. 27, of same chapter, is directory, and has reference to cases where goods and estate are attached and where the defendant is resident out of the State and not personally summoned when in the State. *Nelson* v. *Omaley*, 6 Maine, 218.

The writ in this case, on its face, discloses no want of jurisdiction. It does not appear, therefore, that the plaintiff was not an inhabitant of, and resident within the State at the time the action was commenced.

The motion sets out the following facts:—"And the defendant says, that at the time of the issuing and service of said writ, he was an inhabitant and resident of Portsmouth, in the State of New Hampshire, and had no property in this State, and that the said plaintiff is now, and, at the time of the issuing and service of said writ was, and for the last three years has been a resident of Detroit, in the State of Michigan."

Most of the facts therein set forth are issuable, and could be made available to the defendant, if at all, by plea and proof only, and not on motion, which is only available when the defect is apparent upon the record. *Chamberlain* v. *Lane*, 36 Maine, 388. *Exceptions sustained.*

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

GOODENOW, J., dissenting. — The writ should state all the facts which are necessary to show that the Court has jurisdiction.

The common law forms of writs which have come down to us, never fail to state the place of residence of the parties. The statute of 1841, c. 114, § 1, requires that the forms of writs in civil actions shall remain as established in the year 1821. By the statute of 1821, the forms of all writs required the place of the residence of the parties to be stated. Every defect which appears on the face of the writ may be taken advantage of by the defendant, on motion; or the Court may, *ex officio*, abate the writ. 6 Pick., 364. The writ in this case, alleges the residence of the defendant to have been at Portsmouth in the State of New Hampshire, and does not allege any place of residence of the plaintiff, only that he had once resided in Kittery in said county of York; that is, "late of Kittery." *Expressio unius est exclusio alterius.* It is equivalent to an averment that he did not reside in Kittery at the date of the writ. It does not allege that the defendant was "commorant" of Kittery, at the date of the writ. It has been deemed essential, in order to give jurisdiction, to allege

the residence of the parties. No judgment has been yet rendered, and no presumption is to be made. It would certainly be highly inconvenient to defendants, when traveling on business or pleasure, in any States of the Union, remote from their residence, and in which they had no attachable property, to be obliged to answer upon a simple summons, to any plaintiffs residing in any part of the country, who might choose to institute suits against them, on demands just or unjust. *Argumentum ab inconvenienti* is forcible in law. They could not have the benefit of a trial by their peers, or by a jury of the vicinage. It will not be contended, that this is a case, where both parties resided within the State.

"In all actions commenced in any Court, proper to try the same, jurisdiction shall be sustained, if goods, estate, effects or credits of any defendant named in said action are found within the State, and attached on the original writ." c. 114, § 5. The return of the officer does not show such an attachment in this case. An attachment of property, in order to give the Courts of our State jurisdiction of a cause, the defendant in which resides in another, must not be merely formal or nominal, but actual and effectual. 1 Cush., 23.

There would be good reason for holding the defendant to answer to the plaintiff in the Courts of this State, if he actually had property here, which could not otherwise be reached by the plaintiff. But if he does not reside here and has no property here, it is not easy to perceive any good reason why he should be harrassed in this way, or why we should be burthened with the litigation, which properly belongs to other States. If the plaintiff could obtain judgment here, he has no means of obtaining satisfaction. He has no hold either upon the person or property of the defendant. The cause of action, upon such a state of facts as must appear by the record, could not be regarded in another State as *res judicata.*

This Court had no authority to order the defendant, who resided in New Hampshire, summoned to appear and answer to the plaintiff, unless it was alleged in the writ that he was

"commorant" in some town within its jurisdiction. The jurisdiction of State Courts is limited by State lines. Mere knowledge of the pendency of a suit in this State, without a legal service of process, is not sufficient to compromise the rights of the defendant living in another State. 1 Cush., 28. In *Barrell* v. *Benjamin*, 15 Mass., 354, the writ was served by *arresting the body*. So also in *Melan* v. *Duke de Fitzjames*, 1 B. & P., 138.

In this case, as in *Rea* v. *Hayden*, 3 Mass., 25, it does not appear that either party was within this State when the action was brought; and the Court say, it cannot be inferred from this decision, that, if the defendant had been found within the jurisdiction of the Court, *and arrested*, the suit would have been dismissed.

In *Barrell* v. *Benjamin*, the defendant had, for more than twenty years, his domicile in Demerara, and had taken an oath of allegiance to the British government. The plaintiff was a native citizen of the United States, born in Massachusetts, and had his residence in Connecticut at the time the action was commenced. As a citizen of one State, he was "entitled to all the privileges and immunities of citizens of the several States."

The defendant was found in Boston, on his way to Demerara. He was, no doubt, sued as of Boston, and arrested there. The Court say, "a debtor coming here merely for the purpose of embarking, may be detained several months before he procures a passage; he may have all his effects with him; and he may never return to the place where he transacted his business. If the creditor cannot *take him* here, he may lose his chance of securing his debt." No such evils can result in this case. By the plaintiff's own showing, the defendant was a citizen of New Hampshire, and not of this State, at the time of commencing this action. He could have been sued there and arrested, or his property attached, if any he had. He could have had his case tried by his peers, without unnecessary and unreasonable inconvenience and expense. As a citizen of one State of the Union, the defendant was

entitled to "privileges and *immunities*," as well as the plaintiff. He should not be harrassed and burthened without any reason or necessity. No such necessity existed, if he had no attachable property in this State. One of the great arguments in favor of our system of a confederation of States over a consolidated government, is that justice may be had at each man's door.

It is not material, that the motion of the defendant states facts which do not appear upon the record. They may be rejected as surplusage, if enough appear without them.

If the residence of the plaintiff is not set forth in the writ as the law requires, it is a defect on the face of the papers, and not *dehors the record*, and the fact need not be pleaded in abatement.

For aught that appears, the summons might have been delivered by the officer to the defendant in New Hampshire. He could not have arrested him, unless found within this State. The summons would have been notice of the pendency of the action, but not such a service of process as the defendant was bound at his peril to regard.

If the defendant can be rightly held to answer in this Court, upon the facts which appear, he might be held to answer in the most distant State in the Union, upon similar facts, if he happened to be traveling there, and obliged to defend against the most unjust claims, at an expense so great as to be equivalent to a denial of justice.

On the whole, in my opinion, the law does not give a plaintiff, whether residing in the State or out of it, a right to call the defendant residing in another State into this State to answer to an action here, unless he has found and attached property of the defendant within this State; or arrested his body within the State; and that, therefore, the exceptions should be overruled, and the action dismissed. See the opinion and reasoning of SHEPLEY, C. J., in *Lovejoy* v. *Albee*, 33 Maine, 416.

JAMES ANDREWS *versus* NATHANIEL G. MARSHALL.

When a contract made in violation of law has been executed, Courts will not lend their aid to compel one party to restore the other to the condition which he held before the contract, unless the statute has made some provision therefor.

The provision in R. S. of 1841, c. 161, § 2, (R. S. of 1857, c. 126, § 2,) making a transfer of property with intent to delay or defraud creditors, or defraud prior or subsquent purchasers or other persons, criminal in both parties, does not so far repeal or modify former statutes, as to make such transfer void as between the parties when actually perfected.

In the case of a fraudulent mortgage of chattels executed and completed, the record of the mortgage is equivalent to a delivery of the goods, and passes the title to the mortgagee, so far as to enable him to maintain an action against an officer for the value of goods attached, and sold at private sale, without any account having been kept, though sold with the assent of the mortgager in whose possession the goods were found when attached. DAVIS, and GOODENOW, JJ., *dissenting*.

A made a fraudulent mortgage of goods to B, which was duly recorded. A's creditors attached the goods, and they were sold by the officer, by consent of A and the attaching creditors; but a part of them were sold at private sale, and no account of sales kept.— *Held*, that B may maintain an action against the officer for the value of that part of the goods thus irregularly sold. DAVIS, and GOODENOW, JJ., *dissenting*.

ON EXCEPTIONS to the ruling of GOODENOW, J.

THIS was an action of TRESPASS to recover the value of a stock of goods, attached by Rufus M. Lord, a deputy of the defendant, as Sheriff of this county, by virtue of a writ against Jacob L. Chase, who had them in possession.

The plaintiff claimed the goods under a mortgage bill of sale given him by Chase, duly recorded prior to the attachment.

The defendant contended that the mortgage was fraudulent and void as against Chase's creditors.

It appeared in evidence, that, after the return and entry in Court of the writs upon which the goods had been attached, and also of the writ in this action, but before judgment, due notice having been given to Andrews to replevy the goods, upon request by the first attaching creditor, and consent of

the other attaching creditors and the debtor in writing, the deputy, Lord, advertised the stock of goods to be sold at public auction, and, pursuant to the advertisement, and by adjournment from day to day, proceeded to sell a part of the goods from day to day for several days:—that during the intervals of the adjournments, with the consent and assistance of Chase, the debtor, he sold a part of the goods at private sale, and kept no account of the sales at private sale.

The defendant's counsel requested the presiding Judge to instruct the jury, that Andrews had no right by law to take advantage of any irregularities in the sales made by Lord, occurring not till after the commencement of this suit, to hold him liable as a trespasser *ab initio*.

This instruction the Judge declined to give, but charged the jury that, if they should find that the mortgage to Andrews was made to defraud the creditors of Chase, yet he was not thereby barred from recovering against the officer for the value of the goods sold at private sale after the commencement of this suit, and of which no account was kept; and instructed the jury to find a verdict for the value of the goods so sold, even if they should find that the mortgage was made to defraud creditors. The verdict was for the plaintiff.

To which rulings, instructions, and refusal to instruct, the defendant excepted.

*H. W. Paine* and *Eastman*, in support of the exceptions.

1. Sec. 2, c. 161, R. S., 1840, imposes the penalty of fine and imprisonment on both the parties to a transfer of property, made to defraud creditors.

2. This section is a clear prohibition of *such* transfers; and seller and buyer are in *pari delictu*.

"A penalty implies a prohibition although there are no prohibitory words in the statute." Per HOLT, C. J., in *Bartlett* v. *Vinor*, Carth., 252; *Lane* v. *Hodsdon*, 11 East, 300; *Parker* v. *Dick*, 11 East, 502; *Wheeler* v. *Russell*, 17 Mass., 253.

3. The mortgage having been made to defraud creditors of the mortgager, was prohibited, and neither the mortgager nor

mortgagee can have the aid of a court of law to enforce it. *Sheffren* v. *Gordon & al.*, 12 East, 304; *Drury* v. *DeFontain*, 1 Taunt., 139.

When one party attempts to enforce a forbidden contract, or to reap the fruits of it, the other may show the character of the transaction and defeat the suit. This is the law in England. *Langton* v. *Hughes*, 1 M. & S., 593. This is the law in this country. *Patten* v. *Greely*, 13 Mass., 284; *Robinson* v. *Howard*, 7 Cush. 611.

Had Chase sued the notes he took from Andrews, the latter might have defeated the action by showing the purpose of the mortgage. So, if Andrews had brought replevin for the goods, Chase might have defeated the action by the same proof.

4. These goods were in the possession of Chase and they could not lawfully be taken from him by Andrews, the mortgagee. Chase had all the title, after the mortgage, which he had before.

As to Chase, the officer was a wrongdoer, if to any body. Chase, and Chase alone, had a right to treat the officer as a trespasser *ab initio*.

It is by force of the statute of 13 Elizabeth alone, that the transaction is valid between the parties. That statute is not in force in Maine. It is superseded by another.

*T. M. Hayes* and *R. P. Tapley, contra.*

The opinion of the Court was drawn up by

TENNEY, C. J. — This case has previously been before the law Court, on exceptions taken to the instructions, given to the jury, under evidence substantially the same, as that which was presented at the last trial, *Andrews* v. *Marshall*, 43 Maine, 272. At the former hearing, the presiding Judge instructed the jury, that although the officer might by his irregularities in the sale have become a trespasser *ab initio*, as regards Chase, yet the plaintiff in this action, can derive no advantage from such irregularities. If they found that the

mortgage was made to defraud or delay creditors, the defendant may justify under his attachment, and contest the validity, as to Chase's creditors, of the mortgage to the plaintiff, in the same manner as if the proceedings had been regular and legal. That if the mortgage was fraudulent, the defendant would be answerable to Chase, and not to the plaintiff, for any such irregularities.

These views the whole Court regarded as erroneous in law, and the exceptions were sustained, on the authority of the statute of the 13th of Elizabeth, touching conveyances made to hinder, delay and defraud creditors, and constructions given to that statute in England and in this country. The Court held the true rule, as decided from the Act of 13 Elizabeth, and the authorities applicable thereto, to be, "The fraudulent vendor or grantor parts with his interest in the property conveyed to his vendee or grantee; the law affords him no aid, and equity no relief in reclaiming it."

At the second trial, instructions were given to the jury, in conformity with the decision of the whole Court, upon the same point, which was raised in the previous trial; and exceptions were taken, not because the instructions were erroneous, under the settled construction of the statute of the 13th of Elizabeth, but that the statute was effectually repealed by the statute of this State, in the revision of 1841, c. 161, § 2, which makes it criminal, in both parties, to a transfer of property made with "intent to defraud prior or subsequent purchasers, or to hinder, delay or defraud creditors or other persons," &c. It does not appear from the report of this case, in the 43d Maine, 272, that this point was taken in argument.

It is, undoubtedly, well settled, as a general principle, that an action will not lie upon a contract made in violation of a statute, or of a principle of the common law. The authorities were cited, and examined upon this point in *Wheeler* v. *Russell*, 17 Mass., 258, and the doctrine fully recognized.

But it is also well settled, that where a contract made in violation of law has been executed, Courts will not lend their aid

to compel one party to restore the other to the condition which he held before the contract, unless the statute has made some provision for such a purpose.

The principal question argued in this case is not new in this State. The statute now relied upon was invoked in the case of *Ellis* v. *Higgins*, 32 Maine, 34, which was a real action, to recover possession of a parcel of land conveyed by the tenant to the demandant, the former continuing in the occupation thereof. The tenant proposed to prove his own fraud, for the purpose of defeating his own deed. SHEPLEY, C. J., in delivering the opinion of the Court, says "The counsel does not notice the distinction between *executed* and *executory* contracts."—"Between the parties to the fraud, the law renders no aid to either. The title, though by a fraudulent deed, passed from the tenant to the demandant. The statute does not declare it to be void. If it had been a contract to convey, it could not have been enforced. It was an actual conveyance. It passed the title without any aid from the Courts."

On examination of the statute, it will be found, that crime consists, not in the intention and an abortive effort to transfer the property, but in the conveyance or assignment of any estate or interest in lands, goods, &c., with intent to defraud; thereby treating the transaction as effectual between the parties, when the contract has been carried into full effect.

It is insisted that, the goods being in the possession of Chase, they cannot lawfully be taken from him by the plaintiff.

The case finds, that the goods were conveyed to the plaintiff in mortgage. It is not necessary to cite authorities to show that this constituted a full transfer of the property, subject only to the right of redemption, by a fulfilment of the condition on the part of the mortgager. It is not pretended that the latter obtained possession after the transfer, against the consent of the former. The possession was probably by some agreement between the parties to the mortgage, not inconsistent with its legal effect, and was in submission to the plaintiff's title to the goods. The recording of the mortgage

was tantamount to a delivery of the property; and the statute itself, providing for the recording of the mortgage of personal property, has made the record equivalent to the delivery of possession of personal property mortgaged to the mortgagee, and the retention by him afterwards.

In the case of *Ellis* v. *Higgins*, before cited, the possession of the grantor, even if the deed was fraudulent, was not regarded as an obstacle to the demandant's recovery. And, in the case at bar, the title to the goods had passed by a contract which was complete, and was in the plaintiff, as has been already decided in this case.

*Exceptions overruled:—Judgment on the verdict.*

RICE, APPLETON, and KENT, JJ., concurred.

GOODENOW, and DAVIS, JJ., non-concurred.

DAVIS, J., dissenting. — When this case was under consideration before, I made some suggestions in a note, which the reporter published as a dissenting opinion. I still entertain the same views which I then somewhat imperfectly expressed.

The suit is by a mortgagee, against an officer, for taking the goods embraced in the mortgage, upon sundry writs against the mortgager. Upon the first trial, the mortgage was found by the jury to be fraudulent and void as against the creditors for whom the property was attached. But the officer, "with the consent and assistance of the debtor," who had possession of the goods at the time of the attachment, sold some of them at private sale. This would have rendered him liable as a trespasser *ab initio*, if the debtor had not given such consent. Did it, having been done with his consent, render the officer liable to the *fraudulent mortgagee?*

The statute of Eliz., 13, c. 5, making fraudulent sales void, as against the creditors of the vendor, had its origin in the most obvious principles of justice and equity, and, from the first, has been construed liberally in favor of the object to be attained by it. *Gooch's case*, 5 Coke, 60. As Lord MANSFIELD says in *Cadogan* v. *Kennett*, Cowp., 434, "it cannot

receive too liberal a construction, or be too much extended, in suppressing fraud."

Fourteen years later, another Act was passed, making fraudulent conveyances void as to subsequent purchasers. The statute of 27 Eliz., c. 4, applied to sales of real estate only. The first statute applied to all fraudulent sales, whether of personal or real estate. All such sales, though valid and binding between the parties thereto, were declared to be utterly void as to creditors, and subsequent purchasers. And in those cases where *creditors* subsequently became *purchasers*, their rights have been sustained as well under the first Act as under the second.

The fact of fraud being admitted or established, it would seem that the law would afford the fraudulent vendee no aid, under any circumstances, against the creditors of the vendor. Such was the rule laid down in the case of *Daggett* v. *Adams*, 1 Maine, 198.

In one of the earliest cases under the statute, decided in the 43d year of Elizabeth, where the fraudulent vendor remained in possession until his death, after which the vendee took possession, he was held to be liable in trespass, to the administrator. *Bethel* v. *Stanhope*, Cro. Eliz., 810. This doctrine was denied in the case of *Osborne* v. *Moss*, 7 Johns., 161, where it was held that a creditor who took the goods, *without suit*, from a fraudulent vendee, was liable to him in trespass, notwithstanding the fraud. The case of *Hawes* v. *Leader*, Cro. Jac., 270, was cited by the Court; but it does not sustain the decision. In the latter case, a similar action was sustained, by a fraudulent vendee, against the administrator of the vendor; but it was expressly upon the ground that the administrator did not plead that the estate was in debt, and, therefore represented, not the *creditors*, but the *intestate*. In a later case, the Supreme Court of New York questioned the soundness of the decision in *Osborne* v. *Moss*, and commended the rule laid down in *Bethel* v. *Stanhope*. *Babcock* v. *Booth*, 2 Hill, 181.

But, if we concede, when the fraudulent vendee is in *actual possession*, that the creditor can obtain the goods only by legal process, and a strict compliance with the provisions of the statute, it by no means follows that this is his only remedy when the goods remain in possession of the vendor. In such case, the creditor may take the goods by *purchase* from the vendor, or by any means to which he consents, without subjecting himself to any liability to the fraudulent vendee. There are no cases in which this is denied; while there are many in which it is assumed, or implied. *Wadsworth* v. *Havens*, 3 Wend., 411; *Burrel's case*, 6 Coke, 72; *Boyd* v. *Brown*, 17 Pick., 453; *Van Deusen* v. *Frink*, 15 Pick., 449; *Clapp* v. *Leatherbee*, 18 Pick., 131. Some of these cases relate to conveyances of real estate. But they all, and many more that might be cited, assume the doctrine to be unquestioned, that, under the statute of 13 Elizabeth, the creditor of a fraudulent vendor or grantor may take the property from him by legal process, or, if he is in possession, by *purchase*. A seizure and sale on execution is a statute sale for the vendor. A voluntary sale by him, to his creditors, or by them, with his consent, and in payment of their demands, is a legal equivalent to a sale by process of law.

There is no difficulty in applying these principles to the case at bar. The defendant, as an officer, represented attaching creditors. Whatever he did, in the sale of the goods, that was irregular, and not in conformity to the provisions of the statute, he did *with the consent* of the debtor, who was in possession of the goods at the time of the attachment. This possession was explained; but the mortgage to the plaintiff was proved by other evidence to be fraudulent, so that it was like any other case of fraudulent sale without delivery, leaving the property liable to be taken by creditors, or subsequent purchasers. *Ludwig* v. *Fuller*, 17 Maine, 162. As to them, the mortgage was utterly void.

It is not unusual for debtors, when their property is attached, to waive the requirements of the statute in regard to the

sale of it by the officer. In such cases, the sale is equally as valid as when the statute provisions are strictly complied with. In this case, it is expressly found that the debtor *consented* to the proceedings of the officer. It was competent for him to give such consent. As to the creditors, he was the owner. They were not bound to consult any one else. And the sale being valid as to him, because made with his consent, to hold that it rendered the agent of the creditors liable in trespass to a fraudulent vendee, who, as against them, had no legal title, is a conclusion to which I cannot assent.

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SAMUEL THOMPSON *versus* WILLIAM A. MCINTIRE.
same *versus* EDWARD HAYMAN.
same *versus* JOHN FROST.
same *versus* WILLIAM A. YOUNG.
same *versus* THOMAS GOODWIN.

The case of *Coffin* v. *Rich*, 45 Maine, 507, examined and approved.

Where a case is submitted to the full Court on report of the case, a suggestion in argument, of an amendment of the writ, will not be considered; no motion to amend having been made at *Nisi Prius*.

The opinion of the Court was drawn up by

KENT, J.—These cases all depend upon the same question. The case of *Coffin* v. *Rich*, 45 Maine, it is admitted by plaintiff's counsel, is decisive of these cases, as they are before us on the report, if that case is to stand as sound law. We have examined the elaborate and minute argument of the learned counsel for the plaintiff, and we see no reason for overruling the case referred to, which was carefully considered. We do not deem it necessary to restate the points decided, or to consider in detail the objections which are now urged.

No motion to amend is before us, as none was made in the county Court. We cannot regard a suggestion in argument as equivalent to such a motion.

In all the above entitled actions

*Plaintiff is to be nonsuit.*

*J. C. Woodman*, for plaintiff.

*Howard* and *Strout*, for defendants.

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IRA T. DREW, *Executor, versus* EDMUND ROBERTS *& ux.*

The design of c. 102, of the laws of 1859, was only to remove the objection, which was based on grounds of policy, to the admissibility, as witnesses, of husband and wife, and not to render them competent, where, by law, their testimony was excluded on different grounds.

In a suit against a husband and wife, brought by one, in his capacity of executor, their testimony was rightfully excluded, there being no evidence that the executor was only a nominal plaintiff; and, in the absence of such evidence, the provision of c. 79, of the laws of 1859, does not apply; for, an executor, as such, cannot be regarded as a nominal party, in contemplation of that statute.

THIS was an action brought upon a promissory note, purporting to have been signed by the female defendant, before her marriage, and payable to the plaintiff's testator.

At *Nisi Prius*, the counsel for the defendants offered them as witnesses, to prove that the signature to the note was not genuine. GOODENOW, J., ruled that neither of the defendants was a competent witness, and both were excluded.

The defendants excepted to the ruling of the Court, after verdict against them.

*J. S. Kimball*, in support of the exceptions.

*Drew, per se., contra.*

The opinion of the Court was drawn up by

KENT, J.—In this case, both Edmund Roberts and his wife, the two defendants, offered themselves as witnesses. The Judge excluded them; and to this exclusion the defendants except.

The case is one within § 83, c. 82 of R. S. It is brought by plaintiff as executor of William Thing, and the provisions of the preceding five sections, by which parties are admitted as witnesses, do not apply to the case. The old common law rule of exclusion remains.

The defendant contends that the amendment of § 83, by the Act of 1859 and the Act of April 2d, 1859, have made provisions which authorize the admission of the husband and wife. The amendment provides that, "if such representative party is *nominal only*, the interest being in another or others, in whose name or names the action might have been brought, the said five sections shall apply, and the nominal party and the adverse party shall be examined as witnesses."

An executor, who sues as such, on a debt claimed to be due to the estate, cannot be a *nominal* party unless it appears that his testator or he, as executor, had or have no interest in the claim, but the interest is in another, or others, in whose name the action might have been brought or might be defended.

There is no evidence in the case that any other party had such interest, or that the action might have been brought in the name of any other person. The object of this amendment was to reach those cases where parties, who might have brought the action in their own names, have transferred the claim, without the actual interest, and thus prevented the defendant from being a witness.

This is not such a case.

The other Act of 1859, (c. 102, p. 96,) in relation to the admissibility, as witnesses, of husband and wife, does not embrace cases in which they are both parties. It only removes the objection arising from the conjugal relation, which was based on grounds of policy to prevent domestic broils and family quarrels. *Walker* v. *Sanborn*, 46 Maine, 470.

The objection arising from the interest as a party was removed by the first statute. *Ibid.*

It is very clear that when, *as parties*, a husband or wife would be excluded under the former statute, because the action was brought by an executor, they cannot be admitted because the recent statute has removed an objection to their competency as witnesses generally.

*Exceptions overruled.*

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JOSHUA T. RANDALL *versus* ROBERT G. BOWDEN *& al.*

Where a debtor, to be released from arrest on execution, had given a bond which did not conform to the requirements of the statute, but was valid as a common law bond, a forfeiture of it will be saved, if he takes the oath named therein, notwithstanding, before the expiration of six months, and before the taking of the oath, a new statute is in force by which the poor debtor's oath to be taken is materially changed.

It is an essential non-compliance with the requirements of the statute, where a poor debtor gives a bond to be released from arrest on execution, if the approval of the surety, in the manner the statute provides, is wanting.

ON STATEMENT OF FACTS.

This was an action of DEBT on a poor debtor's bond, given by Robert G. Bowden, on Dec. 9th, 1857, to be released from his arrest on execution. One of the alternative conditions of the bond is that he will take the oath prescribed in § 28th, c. 148 of the R. S.

From the statement of the case, it appears that, on the 13th day of May, 1858, a citation was duly served upon said Randall, issued by a magistrate, upon the application of said Robert G. Bowden.

On the 4th day of June, 1858, in pursuance of said application and citation, two disinterested justices of the peace and quorum of said county were selected, one by the debtor, the other by the creditor, and the said justices disagreed as

to the sufficiency of said application and citation. A third disinterested justice of the peace and quorum of said county was then legally selected, and the said three justices acted in said case till its final decision. Two of the three said justices adjudged the application and citation sufficient, and, upon hearing the disclosure of the debtor, all of them adjudged said debtor entitled to take the oath prescribed in the 28th section of the 148th chapter of the Revised Statutes, passed in the year 1840, and they thereupon administered to him said oath. The surety on the bond was not approved *in writing*, either by the creditor or by two justices of the peace and quorum, but the bond was accepted by the creditor.

In his application, the debtor claims to be allowed "the oath prescribed in the 28th section of chapter 148, of the old Revised Statutes, and also in the 28th section of the 113th chapter of the present Revised Statutes of this State."

The R. S. of 1857 took effect after the bond was given and before the citation was issued. The defects, which are relied upon as rendering the obligation invalid as a statute bond, appear from the arguments of counsel and the opinion of the Court.

*Goodwin & Fales*, for the plaintiff, argued —

1. That the justices had no authority to act, for it does not appear, either from the debtor's application or the citation issued by the magistrate, that the debtor was arrested *in the county*, wherein the magistrate was authorized to act. R. S., c. 113, § 23. His authority and the jurisdiction of the justices cannot be sustained by *presumption*. They must appear from the papers in the case.

2. The oath to be taken is that prescribed by the law in force at the time the oath is to be administered; which was that provided by c. 113, of R. S. of 1857. *Morse* v. *Rice*, 21 Maine, 53; *Burbank* v. *Berry*, 22 Maine, 483; *Barnard* v. *Bryant*, 21 Maine, 206; *Little* v. *Hasey*, 12 Mass., 319.

The taking of a different oath is not a performance of the bond.

*Chisholm & Mason*, for the defendants.

The bond does not conform to the requirements of the statute, and therefore a *literal performance* of its condition is sufficient.

1. The penal sum is $90,80, which is not "double the sum" for which the debtor was arrested. The amount of debt and costs is $43,90; costs on execution, $1,50; interest from the rendition of judgment, 45 cents, total 45,85. Double the sum for which he was arrested is $91,70, and the case discloses nothing that shows this departure was "by reason of accident, mistake or misapprehension," and so is not within § 43, c. 148 of R. S. of 1840. *Clark* v. *Metcalf*, 38 Maine, 122; *Flowers* v. *Flowers*, 45 Maine, 459.

2. For another reason, the statute is not complied with. It was not "approved in writing" by the creditor, or by two justices of the peace and quorum. He was not bound to take it. If he took it voluntarily, it is his own contract, and not one made for him by the statute.

*Goodwin & Fales*, replied.

The difference between the penal sum named in the bond, and that which the defendants' counsel contend should have been the penalty, is 90 cents. The interest to the time of the arrest amounts to 45 cents; double that sum, is just the amount of the difference.

It is apparent, therefore, from the case, that the interest was omitted by accident or mistake, and not by the design of the officer, who was acting under oath, and would render himself liable in discharging the debtor upon an insufficient bond.

It may well be presumed that the officer intended to take the bond the statute provided, and if he failed to take such bond it was accidental. The debtor himself supposed he was giving such a bond. He speaks of it, in his application as "the bond required by law and referred to in the 20th § of c. 148, of the R. S."

The cases cited by the defendants' counsel were examined

and commented upon; and it was contended that the case at bar was distinguishable from them.

No authority is cited to sustain the defendant's position, that the bond is valid only as a common law bond, because it was not "approved in writing." The approval, the law provides for, relates to the sufficiency of the sureties.

The case finds that "the creditor accepted the bond;" and he has brought a suit upon it; either of these facts is equivalent to the approval named in the statute. *Bartlett* v. *Willis*, 3 Mass., 86; *Kimble* v. *Preble*, 5 Maine, 553; *Coffin* v. *Herrick*, 10 Maine, 121.

The approval is no part of the bond. No time is specified, within which it shall be approved.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action upon a poor debtor's bond, dated Dec 9, 1857, signed by Robert G. Bowden, as principal, and Absalem Bowden as surety. There is no approval of the surety "in writing by the creditor, or by two justices of the peace and of the quorum of the county." It is, therefore, not a statute bond. The acceptance of it by the plaintiff, and bringing a suit upon it does not make it a statute bond. He was under no obligation to take it. One of the conditions of the bond is, that the said Robert G. Bowden should, in six months from the time of executing said bond, cite Joshua T. Randall the creditor, before two justices of the peace *and of the quorum*, and submit himself for examination, agreeably to the 148th chapter of the Revised Statutes, and take the oath prescribed in the *twenty-eighth* section of said chapter.

The question is, has he done this?

Application was made by said Robert G. Bowden to Luther T. Mason, Esq., a justice of the peace within and for the county of York, on the 12th day of May, 1858, in writing, claiming to have the privilege and benefit of the oath authorized by the 28th section of chapter 148, and requesting said justice to cite said creditor to appear before two justices of

the peace and of the quorum, at the office of Luther T. Mason, in Biddeford, in said county of York, on the 4th day of June, A. D. 1858, at ten of the clock in the forenoon, &c.

On the same day, said justice issued his citation under his hand and seal to the said Randall, to appear before two justices of the peace and quorum, at the time and place, and for the purpose mentioned in said application. On the 13th of May, 1858, C. P. Hunton, a deputy sheriff, returned on said citation and application that "by virtue of the within I have this day notified the within named Joshua T. Randall, to appear at the time and place and for the purpose within named, by reading to him aloud in his presence and hearing the within application and citation." On the 7th of June, 1858, the following certificate appears to have been made by the magistrates:—"York, ss., June 7th, 1858. Having examined the above return, and duly cautioned the said Robert G. Bowden, we have administered to him the oath or affirmation allowed in the statute of October 22, 1840, § 28, c. 148, above referred to; and made out a certificate thereof in the form therein prescribed. "Jacob K. Cole, } *Justices of Peace*
"Samuel W. Luques, } *and quorum.*
"Alex'r F. Chisholm, selected by A. Haley, Deputy Sheriff of said county, because said Cole and Luques were disagreed on points for adjudication, and on selection of a third justice."

It does not appear from the papers that the justices, who administered the oath and granted the certificate, had any jurisdiction; or that the justice, who issued the citation, was not a justice of the peace in the county where the debtor was arrested. I think it may well be presumed that he was. Where nothing appears to the contrary, it is to be presumed that men do their duty, rather than that they violate the laws; and especially officers under oath; and to save forfeiture or avoid a penalty.

The main point relied upon by the plaintiff is, "that the debtor did not take the oath." The case shows that he did take the oath "nominated in the bond." As to the other

oath prescribed by the statute of 1857, he may well say, "*non in haec foedera veni*," when sued upon this bond.

Upon the whole, without going into a minute comment upon all the positions taken and authorities cited, I am of opinion that a nonsuit must be entered and judgment entered for costs for defendants. *Plaintiff nonsuit.*

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

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HULDAH DALTON *versus* ASA DALTON & T. M. HAYES *& al., Trustees.*

Where, from the disclosure of a trustee, it appears that he has been notified by the principal defendant, that the funds in his hands belong to a deceased person, of whose will he is executor, and the defendant, as executor, makes application to the Court to be admitted to contest the question with the plaintiff, the issue to be determined, is, not whether the trustee is chargeable, but whether the funds belong to the defendant in his individual character, or to the estate of his testator.

ON EXCEPTIONS, by the principal defendant, Asa Dalton, to the ruling and adjudication of KENT, J., charging the trustees. From the disclosure of one of the trustees, it appears that the principal defendant left with them, for collection, a note against Hobson *& al.*, payable to him, upon which a suit was brought in his name, and the note collected; that the amount paid was in their hands at the time of the service of the writ upon them in this action. *That*, subsequently, they were notified by said Asa Dalton, that the note, though payable to him, was the property of Benjamin Dalton, deceased, and that he claimed it *as executor* of the last will of said deceased.

There was testimony introduced by the defendant Dalton, at the hearing before the Judge at *Nisi Prius*, tending to show that the note collected was given in payment of another note due to Benjamin Dalton. The testimony so taken was certified as part of the bill of exceptions. The order of Court,

charging the trustees, refers to the disclosure, the written testimony, and the "application of Asa Dalton, executor;" but no such application is found among the papers in the case.

*I. T. Drew* argued in support of the exceptions, and

*A. F. Chisholm*, for the plaintiff.

The opinion of the Court was drawn up by

DAVIS, J.—The defendant, as executor of Benjamin Dalton, claims to hold the funds in the hands of the trustees, as part of the estate of said testator. He excepts to the order charging the trustees for the benefit of the plaintiff.

The exceptions seem to indicate that said defendant, *as executor*, had made an "application" to the Court to be admitted to contest this question with the plaintiff. If so, he should have been admitted, and, upon the *issue made up*, the jury, or the Court, as the parties preferred, should have found, not whether the trustees were *chargeable*, but whether *the funds belonged to the estate of Benjamin Dalton*.

If the defendant, as executor, did make such an application to be admitted to contest this question, it has not been copied. It is not before us. But, in such case the proceedings were irregular. An issue of *fact* must be framed, which the parties may submit to the jury, or to the Court if both parties consent. As defendant, he was no party to the disclosure of the trustees; and the question of his rights, as executor, to the funds, had no connection with the question of his own indebtment to the plaintiff.

The question in this case is not whether the trustees have funds in their hands, but *to whom do the funds belong?* This question was not properly tried; and it was not *decided* at all by the Court, except by implication. The proceedings having been irregular, the exceptions must be sustained, and the case remanded to the Court sitting at *Nisi Prius* for further proceedings.

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

STEPHEN J. ABBOTT *versus* NATHANIEL MARSHALL.

A. having in his possession a horse belonging to a third party, sold him to P. by exchange for another horse, without disclosing his want either of title in, or authority to sell him. As between the parties, such concealment would render the sale fraudulent.

If A. had previously mortgaged the horse, and induced P. in ignorance of that fact, to purchase him by exchange for another, the trade, as between the parties, might be rescinded by P., who would be bound to restore the horse received by him, unless prevented by the rightful owner's taking the horse from him; or, unless there were other circumstances in the case, that would excuse him from doing so.

And, if after such exchange, and before P. has discovered the fraud, A. mortgages the horse he received from P. to a third person, to secure only pre-existing debts and liabilities, (which are affected in no way but by being thus secured,) the mortgagee is not in the character of an innocent purchaser, for a valuable consideration, so as to set up title against the original owner of the horse.

Yet, if as an inducement and consideration for giving the mortgage, the mortgagee had agreed with A. to give him further time for payment of the debt due to him, and also agreed to pay certain notes where he was surety for A. and wait on him for re-payment, although there was no time of waiting specified, these facts will place the mortgagee in a new relation, so that he may be regarded as an innocent purchaser, not to be affected by the fraud of A. in the exchange of horses with P.

It being a well settled rule of law, that a vendee is not estopped to prove that there were other considerations, than those expressed in the written instrument, upon the same principle a mortgagee may be permitted to prove by parol evidence, an additional agreement, not disclosed by the mortgage and not inconsistent with it.

Whether by c. 126 of R. S., a person obtaining property by false pretences, is guilty of a *felony*, so that he cannot impart to an innocent purchaser a title against the former owner, is not an open question, where a case is presented upon a bill of exceptions, from which it does not appear that any request for instruction on that point was made at *Nisi Prius*, and the report of the testimony disclosed no false pretences on his part, other than his having possession of the property, claiming and selling it as his own.

EXCEPTIONS from the rulings of KENT, J.

THIS is an action of TRESPASS, brought against the defendant, for the official act of one of his deputies, whilst he was sheriff of the county of York, in the taking of a horse, alleged

to be the property of the plaintiff. The writ is of the date of March 11, 1858.

At January term, 1860, the general issue was pleaded, with a brief statement, that at the time of the alleged trespass, the horse was not the property of the plaintiff, but was the property of one Lewis Pierce, from whom the horse was wrongfully detained; that the officer, under the direction of said Pierce, and by virtue of a writ of replevin, dated Feb'y 19, 1857, in favor of said Pierce against one James E. Abbott, took said horse and delivered him to said Pierce; that the writ was duly returned, and the action entered in this Court, and is still pending. And that the officer acted under the direction and by the command of said Pierce and as his servant.

From the bill of exceptions, it appears that, at the trial, it was proved that said Lewis Pierce was the owner of the horse mentioned in the plaintiff's declaration, from November, 1856, until the last of January or first of February, 1857; and that, during this time, he boarded the horse at the livery stable of James E. Abbott, a brother of the plaintiff; that the horse was known as the "Pierce mare;" that, in the latter part of January or first part of February, 1857, Pierce exchanged said horse with J. E. Abbott, receiving from him another horse, known as the "Warren horse," and paying to Abbott between thirty and forty dollars, as the difference in the value of the horses; that this exchange was made at the *Saco House*, neither of the horses being present and no writing of any kind being made. Delivery of both horses was proved. Both had been kept at Abbott's stable before the exchange, and remained there afterwards, until after the 5th day of February, 1857; that, on the second day of said Feb'y, said J. E. Abbott executed a mortgage bill of sale to the plaintiff of several horses, carriages, &c., including the horse in controversy, to secure the payment of several notes he held and to indemnify him against loss, as a surety of J. E. Abbott. There was no evidence of any consideration, other than the claims specifically described in the mortgage and in

the statements of the plaintiff, who testified that, before the execution of such mortgage bill of sale, he promised said J. E. Abbott, that, if he would give him such mortgage, he, the plaintiff, would pay the notes described in the mortgage on which he was surety, and wait for re-payment by J E. Abbott, until he would pay; and also, wait for payment of the notes described in the mortgage as payable to plaintiff until J. E. Abbott could pay them; that thereupon J. E. Abbott executed the mortgage to him, and he had paid the notes where he was surety, and had waited until the present time.

No new consideration was paid for the mortgage, and no responsibility or liability incurred other than such as is thus testified to by the plaintiff.

There was evidence tending to show, that the "Warren horse" was never the property of J. E. Abbott, but was the property of one Isaiah Warren of Fryeburg, who delivered him to J. E. Abbott on the 12th day of December, 1856, with the agreement, that when said J. E. Abbott should pay to said Warren the sum of two hundred dollars, the horse should become Abbott's property; but should remain the property of said Warren until such payment; that no such payment, nor any part of it, was ever made to Warren by said J. E. Abbott or any one else. There was counter testimony as to this sale.

It was also in evidence, that after J. E: Abbott received the horse of Warren he used him as his own; that, on the thirty-first day of December, 1856, he executed a mortgage bill of sale of certain property, including the "Warren horse," to one George W. Wiggin, which mortgage has never been paid or discharged; and the evidence tended to prove that, upon the exchange of horses with Pierce, J. E. Abbott made no disclosure of Warren's title to the horse or of the mortgage to George W. Wiggin, or of any want or defect of title in himself.

Upon the fifth day of February, 1857, J. E. Abbott left Saco, and soon after, the State, and has not since returned.

There was evidence tending to prove that, between the fifth

day of February, 1857, and the 19th day of the same month, Wiggin took possession of the "Warren horse," upon his mortgage bill of sale, and Warren, within a short time afterwards and before the said nineteenth day of February, took the horse upon a replevin writ, and has continued to hold him since.

The Judge instructed the jury that if they were satisfied that J. E. Abbott had no title in the "Warren horse" and no right, as against Warren, by license or otherwise, to sell him; if he did sell him by exchange to Pierce, without disclosing his want of title, that these facts would be sufficient evidence to justify the jury in finding that sale fraudulent as between the parties to it; and that, if there was a prior mortgage on the "Warren horse" by Abbott to Wiggin, and Abbott did not disclose the fact to Pierce, but induced him to purchase in ignorance of that fact, it might be sufficient ground for Pierce to rescind the trade as between the parties. But, in the latter case of the mortgage, he would be bound to restore the horse received, unless prevented from so doing by the fact that one having a superior title to both Pierce and J. E. Abbott, had taken the horse rightfully out of his, Pierce's, possession before rescission.

In reference to plaintiff's claim to hold the horse under his mortgage, if the sale or exchange was void or voidable between the original parties, the Judge instructed the jury that when a mortgage is given solely to secure pre-existing debts or liabilities, such debts or liabilities not being otherwise affected than by being thus secured, the mortgagee is not in the character of an innocent purchaser for a valuable consideration, and does not thereby acquire a right to set up a title, as such, against the original owner, if the title of his mortgager was void or voidable as against him by reason of his fraud in obtaining the property from the original owner.

But, if as an inducement and consideration for giving this mortgage, and before it was made, the plaintiff agreed with J. E. Abbott to give further time for the payment of the notes due to him, and also agreed to pay the notes where he was surety for him, and wait on him for re-payment of what

he should thus advance and pay, as stated by plaintiff, that these facts would place him in a new relation, and he might be regarded as an innocent purchaser, with all such purchaser's rights, and he would not be affected by the fraud, if any there was, in the sale or exchange between J. E. Abbott and Pierce; although no other particular time of such waiting was specified or agreed upon.

The verdict was for the plaintiff, and the defendant excepted to the instruction by the Court.

*T. M. Hayes*, in support of the exceptions.

The plaintiff's claim to the property in controversy is under a mortgage bill of sale, given to secure *antecedent* debts and liabilities. There is no evidence that the mortgage was ever recorded. Pierce was the unquestioned owner of the horse from November, 1856, to the last of January or first of Feb., 1857, and at one of the last named dates, he and J. E. Abbott went through the form of an exchange of horses, he nominally receiving from Abbott the "Warren horse" for the one in controversy.

At no time were there any *indicia* of title furnished by Pierce to J. E. Abbott. Abbott did not disclose his want or defect of title in the "Warren horse."

I. The instruction that related to the right of Pierce to rescind the trade, and his duty to restore to Abbott the "Warren horse," was fitted to mislead the jury; and, upon the facts reported, was erroneous.

The general rule, as to return or tender of property received, may have other qualifications besides that stated in the instruction; and there may be other circumstances which will excuse a party from a return or tender of return. *Thayer* v. *Turner*, 8 Met., 558.

There could be no more complete restoration of the property to Abbott, than is shown by this case; for it still continued in his possession after the exchange. The instruction, therefore, must have led the jury to suppose that Pierce was bound to do something more by way of restoring the

horse than he did, or than it was possible for him to have done.

II. The other, and principal instruction is erroneous.

(1.) It virtually informed the jury that an innocent purchaser for a valuable consideration, of personal property, from one who had procured it from the true owner, by any species or degree of fraud, could hold it against such true owner.

It is conceded that this proposition finds an apparent support in numerous American cases, but it is believed to be contrary to sound reason, justice, and the established principles of a healthy jurisprudence.

For the general principle applicable to the law, *vide* Kent's Com., vol. 2, pp. 224–5 and note, (4th ed.); *Bradeen* v. *Brooks*, 22 Maine, 474.

The exceptions to the principle, Kent's Com., vol. 2, p. 225, note *b;* Broom's Legal Maxims, p. 354, (2d. ed.)

It has always been held that, if goods be stolen, no title passes from the felon to the *bona fide* purchaser. So, if goods are bailed for a particular purpose, but with power of sale, a transfer of them by the bailee confers no rights of property to a *bona fide* purchaser. Because the title of the true owner cannot be lost without his own free act and consent. And yet, by a somewhat refined species of logic, many American decisions apparently authorize the conclusion, that, if the thief or the fraudulent bailee procures one's goods in exchange for the goods stolen or bailed, the owner cannot reclaim them from the person who has purchased them *bona fide* from such thief or bailee.

It is difficult to perceive any good ground for distinction between these cases. The thief who steals a horse can confer no right of ownership upon a *bona fide* purchaser, because he has himself no such right. If, in exchange for the stolen horse, the *bona fide* purchaser delivers to the thief another horse, the thief acquires no more ownership in him than he had in the one stolen. The whole transaction is void. And so in the case of goods bailed for a particular purpose.

Such cases differ from those where some false representations or warranties have been made which authorized the party defrauded to rescind a transaction which, if not rescinded, will constitute a valid contract. This distinction, which is real, may not have been sufficiently noticed.

A distinction has been made between chattels *fraudulently* procured and those *feloniously* procured from the true owner. In *Dame* v. *Baldwin*, 8 Mass., 521, it was held that a sale by a person who had procured the goods *feloniously* "could not transfer the property. This distinction was recognized in *Ditson* v. *Randall*, 33 Maine, 202.

In the case at bar, the testimony tended to show that J. E. Abbott procured the horse from Pierce *feloniously*. He procured it in exchange for one that he had no title to, and upon which a prior mortgage existed, without disclosing either of these facts. This was an offence against § 1, c. 126 of our Revised Statutes, settled by *State* v. *Dorr*, 33 Maine, 448, and *Rex* v. *Henry Freeth*, 1 Crown Cases, (Russell & Ryan,) 127. Such an offence is *felonious* because punishable by imprisonment in the State prison. R. S., c. 131, § 9.

J. E. Abbott thus procured Pierce's horse *feloniously*, and the instruction of the Judge, that an innocent purchaser would not be affected by these circumstances, was erroneous. 14 Wend., 31.

(2.) This instruction is erroneous for another reason. It has been repeatedly decided that a fraudulent purchase of goods gives no title as against the vendor, and that such a purchaser's transfer of the goods to pay or secure a *bona fide* creditor for a pre-existing debt, will vest no title in the creditor. *Gilbert* v. *Hudson*, 4 Maine, 345; *Hawes* v. *Dingley*, 17 Maine, 341; *Buffington & al.* v. *Gerrish & al.*, 15 Mass., 156; *George* v. *Kimball*, 24 Pick., 241.

In the case at bar, the plaintiff claimed an interest in the horse in controversy, by virtue of the mortgage from J. E. Abbott. He has never paid anything, done anything, given up anything for the horse. He only claims to hold it as collateral security for debts due to himself before the execution

of the mortgage, and against his liability as surety for J. E. Abbott's debts due to others. Upon the payment of these debts, pre-existing debts, the mortgage would be canceled, and all the plaintiff's interest in the horse gone. There is not a mill of new consideration which would entitle the plaintiff to any claim upon the horse upon the discharge of these antecedent debts.

In *Gilbert* v. *Hudson*, 4 Maine, 345, it was held that, if a creditor attach goods fraudulently procured, for a subsequent and also for a prior debt, joined in the same writ, his lien on the goods, as against the party defrauded, extends only to so much of them as will satisfy the subsequent debt and costs.

Applying this principle to the case at bar, and what is there upon which the plaintiff can claim any lien upon the horse? The mortgage is to secure prior debts, nothing besides. The plaintiff assumed no new liabilities—he gave no *specific* time to J. E. Abbott during which he could not enforce his claims against him; and, if he did assume any new liabilities, the mortgage does not cover these. It is simply a mortgage to secure pre-existing debts, according to their original terms.

If any such talk was had between J. E. Abbott and the plaintiff as he states, it was *outside* of the mortgage and was no part of its consideration.

The instruction, if sustained, would extend a doctrine which has already stealthily advanced beyond the limits of good sense, and which some Courts are endeavoring to bring back to narrower limits. *George* v. *Kimball*, 24 Pick., 240–1; *Ash* v. *Putnam*, 1 Hill's N. Y. Rep., 306 – 7.

*S. W. Luques*, for plaintiff, replied.

The opinion of the Court was drawn up by

TENNEY, C. J.—This action is for a trespass, alleged to have been committed by the defendant's deputy, the defendant being at the time the sheriff of the county of York, in taking a certain mare, called the "Pierce mare," on a writ of replevin, in favor of Lewis Pierce against James E. Abbott.

The question raised by the pleadings, is whether the property, at the time of the taking, was so far that of the plaintiff that he can maintain this action, the defendant representing therein Lewis Pierce, who was once the undisputed owner thereof, and continued to be so, till the exchange made by him with James E. Abbott of the mare for a horse called the "Warren horse," in which exchange Pierce paid to Abbott the sum of thirty or forty dollars, the estimated value of the "Warren horse" over that of the Pierce mare.

A question of fact was presented at the trial, whether James E. Abbott, at the time of exchange, had purchased the "Warren horse" of Warren, the supposed owner, or whether he had only the right to use him and to purchase him, by paying within a time fixed a certain price. This question did not appear material, because, on Dec. 31, 1856, James E. Abbott gave a mortgage of the "Warren horse" to one Wiggin, who, according to the evidence, took possession thereof under said mortgage, between the fifth and nineteenth days of February, 1857; and that Warren a short time afterwards, and before the nineteenth day of February, 1857, took the horse upon a replevin writ, and has continued to hold him since.

In the exchange of horses made by Pierce and James E. Abbott, the latter disclosed no defect of title in him of the "Warren horse."

The plaintiff's right to the Pierce mare is under a mortgage thereof, with other personal property, dated Feb'y 2, 1857, from James E. Abbott, made after the exchange before mentioned, to be void on the payment of certain notes given by the mortgager, on which the plaintiff's name was as surety, and of notes holden by plaintiff against him. It was in evidence, without objection, that, before the execution of the mortgage, the plaintiff promised the mortgager that if he would give such a mortgage, he would pay the notes on which he was surety and wait for reimbursement of the money so to be paid, and also wait for the notes so holden against him, and, thereupon, the mortgage was executed and the plaintiff

had paid the notes on which he was surety and had waited until the time of the trial.

The case is presented to this Court solely on the instructions given to the jury. The first portion relate to the withholding, by James E. Abbott, of defects in his title to the "Warren horse" at the time of his exchange with Pierce. No error is perceived in these instructions, and they cannot be regarded as unfavorable to the plaintiff.

The jury were further instructed, that, when a mortgage is given solely to secure pre-existing debts or liabilities, such debts or liabilities, not being otherwise affected, than by being thus secured, the mortgagee is not in the character of an innocent purchaser for a valuable consideration, and does not thereby acquire a right to set up a title as such against the original owner, if the title of the mortgager was void or voidable as against him by reason of his fraud in obtaining the property from the original owner. This instruction was no ground of exceptions by the defendant. Upon the facts exhibited by the mortgage alone, it was as favorable to the defendant as the law will authorize.

The jury were further instructed, that if, as an inducement and consideration for giving the mortgage, and before it was made, the plaintiff agreed with James E. Abbott, to give further time for the payment of the notes due to him, and also agreed to pay the notes where he was surety for him, and wait on him for re-payment of what he should thus advance and pay, as stated by the plaintiff, that these facts would place him in a new relation, and he might be regarded as an innocent purchaser with all such purchaser's rights, and not affected by the fraud, if any, in the sale or exchange between James E. Abbott and Pierce, although no particular time of such waiting was specified or agreed upon.

It is insisted for the defendant, that no effect should be given to the parol evidence, as to the consideration of the mortgage, but that the rights of the parties should be confined to the facts as disclosed by the mortgage itself. This agreement is not inconsistent with anything in the mortgage;

and it is well settled by our law, that a vendee is not estopped to prove that there were other considerations than those expressed in the instrument. *Packard* v. *Richardson*, 17 Mass., 122; *Tyler* v. *Carlton*, 7 Greenl., 175; *Emmons* v. *Littlefield*, 13 Maine, 233.

A part, at least, of the consideration of the mortgage, if the evidence was believed by the jury, was the agreement touching the notes held by the plaintiff, and those on which he was surety. If, at the time of this transaction, the plaintiff had actually paid the notes, on which he was surety, and had taken notes of James E. Abbott for the amount paid, and also new notes for the direct indebtedness to him, to be paid at a time later than that fixed in the original notes, it cannot be doubted that this would be a valid consideration for the mortgage. And, if the holder of the notes on which the plaintiff was surety, had made a valid agreement with the principal to extend the time of payment without the knowledge and consent of the surety, the latter would be discharged, on the ground that he would, by such agreement, if still holden, be subject to a greater liability than he had assumed. It follows that, when he by a contract increased his liability, it was a consideration for the security given. The authorities cited sustain this position. Before the common law was changed by the statute, the payment of the part of a debt by the debtor, upon an agreement to discharge the balance, was held to be without consideration, but if time was given, it was otherwise.

It is incidentally mentioned in the defendant's argument, that it does not appear that the mortgage to the plaintiff was recorded. No question upon that matter is presented in the exceptions, and it does not appear that the mortgage was not recorded.

Again, the defendant invokes the principle as applicable to the facts of this case, that when property is obtained feloniously from another, the one so obtaining it cannot impart to an innocent purchaser a title against the former owner. And it is insisted that James E. Abbott obtained the Pierce

mare by false pretences, and that, having done so, he may be punished by imprisonment in the state prison. R. S., c. 126, § 1. And it is hence insisted that, by c. 131, § 9, he is guilty of a felony. Whether James E. Abbott would have been guilty of a felony, if convicted of having obtained goods by false pretences, we here give no opinion. But, upon the assumption of the defendant's counsel, in that matter, we think the point is not open to the defendant. The case finds, that James E. Abbott did not disclose any want of title in the "Warren horse" at the time of the exchange, but there is nothing, in the evidence reported, tending to show that he made any false pretences, but simply treated the horse in his possession as his own. The view now taken was not presented to the Court at the trial in any request for instructions, and we cannot assume that he did obtain the property in question by such unlawful means. *Exceptions overruled.*

*Judgment on the verdict.*

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

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THOMAS HOBBS *versus* GEORGE HATCH.

In an action of trespass, brought by a tenant in common of the *locus in quo*, under the provisions of R. S., 1857, c. 95, §§ 14 and 15, it is optional with the plaintiff, whether to name his co-tenants or not.

If the other co-tenants are not named, the defendant can take advantage of the omission only by a plea in abatement; nor will the objection avail to defeat the action, unless the plaintiff had knowledge of the names of his co-tenants.

THIS was an action of TRESPASS, for cutting and carrying away trees from certain described premises in Wells.

The defendant pleaded the general issue, with a brief statement, denying the ownership of the plaintiff, and claiming to have committed the acts complained of by license of the owners.

By a deed, dated June 14, 1794, Joseph Hobbs conveyed to Thomas Hobbs, the father of the plaintiff, the premises where the alleged trespass was committed. Thomas Hobbs died in 1808, leaving eight children, one of whom was the present plaintiff. Of the other seven, some are living, and others deceased, leaving issue.

The plaintiff was sworn, and testified as is stated in the opinion of the Court.

The defendant admitted that he committed the acts alleged in the writ.

GOODENOW, J., presiding, ordered a nonsuit.

The plaintiff filed exceptions.

*R. P. Tapley*, for the plaintiff, argued that the plaintiff presented sufficient evidence of title to maintain trespass against one showing no title or possession.

The defendant can take advantage, of the other owners not having been joined in the suit, only by plea in abatement. 1 Chitty's Pleading, 65; *Thompson* v. *Hoskins*, 11 Mass., 419; *Lothrop* v. *Arnold*, 25 Maine, 136; *Holmes* v. *Sprowle*, 31 Maine, 73; *Jones* v. *Lowell*, 35 Maine, 538; *Wheeler* v. *Depeyster*, 1 Johns., 471; *Brotherson* v. *Hodges*, 6 Johns., 108; *Bradish* v. *Schenk*, 8 Johns., 151; *Hall* v. *Adams*, 1 Aiken, 166; *Bell* v. *Layman*, 1 Mons., 40; *Rich* v. *Penfield*, 1 Wend., 380.

There is more reason for the rule in cases of trespass upon land than on personal property, for the tenant in common is often ignorant of the number and residence of his co-tenants. *Thompson* v. *Hoskins*, before cited.

Under R. S., 1857, c. 95, § 14, the omission cannot avail the defendant even by plea in abatement. That statute does not repeal the common law, but gives a cumulative remedy. *Gooch* v. *Stephenson*, 13 Maine, 371; *Pratt* v. *A. & St. L. R. R. Co.*, 42 Maine, 579. Statutes in derogation of the common law are not to be extended by implication. *Howe* v. *Wilder*, 34 Maine, 573.

Neither can the fact of the other co-tenants not being

named in the plaintiff's writ be taken advantage of except by plea in abatement.

*T. M. Hayes*, for the defendant, contended that the statute, c. 95, §§ 14 and 15, repealed entirely the common law practice. It proceeds upon the idea that the plaintiff knows his co-tenants better than any one else. It is intended to prevent multiplicity of actions, and harassing litigation. It allows any number of co-tenants to sue on certain conditions, and, by inference, prohibits such suits except upon compliance with the conditions. The plaintiff, having entirely disregarded the statute provisions, is a very proper subject for a nonsuit.

The opinion of the Court was drawn up by

TENNEY, C. J.—The defendant is charged in the plaintiff's writ with having broken and entered his close, therein described, with force and arms, and having done certain acts therein to his injury. The defendant pleads the general issue, which is joined, and files a brief statement, alleging that neither the title nor possession of the premises was in the plaintiff, but in others named, from whom he had license to do the acts complained of.

The plaintiff introduced a deed from Joseph Hobbs to his father, Thomas Hobbs, dated June 14, 1794, embracing the *locus in quo;* and testified that his father, the grantee in the deed, possessed the land therein described, at the time of his death in the year 1808; that he died intestate, leaving seven children besides himself, three of whom have since died, leaving children; that the land is wild, and he has never parted with his interest therein; that, within twenty years, he has done nothing on it but haul wood therefrom for himself and the minister, but has hauled none for himself since 1846; that he supposes he has paid taxes assessed upon it; that, for the last forty years, he has had the care of the lot himself, and does not know that any body else had the care of it; that he was present at the sale of wood on the land by Samuel Mil-

dram, auctioneer, and the defendant bid it off; that he told the defendant the land was his, and it was for cutting that wood that this suit is brought. The defendant admitted that he committed the acts alleged in the plaintiff's writ.

Upon the introduction of the foregoing evidence of the plaintiff, the Court directed a nonsuit, upon the motion of the defendant. The ground of this direction is not stated in the exceptions; but, it is insisted in the argument for the defendant, that the action cannot be maintained in the name of the plaintiff alone, but that the co-tenants should be named in the writ.

At common law, the authorities cited for the plaintiff are decisive, that this is a valid objection, but that it can avail the defendant only under a plea in abatement.

The counsel for the defendant invokes R. S. of 1857, c. 95, §§ 14 and 15, which are the same as in R. S. of 1841, c. 120, §§ 17, 18, 19 and 20. In these it is provided, that all or any tenants in common, &c., may join or sever in personal actions for injuries done to their lands, setting forth in the declaration the names of all the co-tenants, if known; and the Court may order notice to be given in such actions, to all other co-tenants, known, and all or any of them, at any time before final judgment, may become plaintiffs in the action and prosecute the suit for the benefit of all concerned. The Court shall enter judgment for the whole amount of the injury proved; but award execution only for the proportion thereof sustained by the plaintiffs; and the remaining co-tenants may afterwards, jointly or severally sue out a *scire facias* on such judgment, and execution shall be thereupon awarded for their proportion of the damages adjudged in the original suit.

The evident intention of the authors of this provision was, that one co-tenant in real estate should not be deprived, by a plea in abatement, of redress for an injury to his interest therein, by reason of refusal of his co-tenants to join in a suit, or to allow him to use their names in the same, if they were known to him. The design was to relieve a co-tenant,

wishing to prosecute, of the previous embarrassment and not to increase it. Where the co-tenants are known, he has the right to name them in his writ as such, for his and their benefit, without exposure to defeat. The statute was manifestly intended not to be imperative but optional. Such is its language. The condition is important. The party wishing to prosecute had the right to name other co-tenants, *if they were known*. If they were not known, they could not be named. If he claimed the entire title and possession in the land, he would not name others as co-tenants. Such would be an absurdity.

The Court may order notice to be given in such action, to all other co-tenants *known*, implying that, before this action of the Court, the case must be entered upon the docket. And co-tenants may become plaintiffs at any time before final judgment, and the Court may, without doing the least violence to the language of the statute, give this notice to any one not originally named in the writ, when it shall become known that he is a co-tenant. How is such knowledge to be brought to the attention of the Court? The statute contains no provision for a change in the rule of pleading in such actions. If the co-tenants of the plaintiff are not named in the writ, in its origin, and this omission is relied upon by the defendant, no reason is perceived for taking this objection in a different mode from that required before the statute was enacted. In the latter case, the defendant pleaded in abatement, if he supposed there were not all the parties in interest in the land made plaintiffs. And, under the present statute, why should he not make his objection in the same manner, the same parties being omitted to be named in the writ? By analogy, the plea in abatement is as indispensable in one case as in the other. The defendant must give a better writ; thereupon an amendment may be allowed, or, if the plaintiff claims the entire right in the land, or the possession thereof, an issue to the country may be made. If an amendment should be granted, on its being made known that a co-tenant is omitted, and notice be ordered to him, and the action proceed, there is no

reason for a denial of this course, when all co-tenants are omitted in the original writ.

In the case of *Thompson* v. *Hoskins,* 11 Mass., 419, cited for the plaintiff, PARKER, C. J., in delivering the opinion of the Court, says, in speaking of the propriety of such objection being taken by plea in abatement, in injuries to real estate as well as to personal property, "and, indeed, there is more reason for the rule in such cases, than in those which relate to personal property, because it often happens, that one tenant in common may be totally ignorant of the number of his fellows, and of the place of their residence." This case, in which more than fifty years have elapsed since the estate in question, being wild land, descended from the father to the plaintiff and seven others, his children, a part of whom are dead, leaving issue, is a striking example of the probable uncertainty touching the names and the residence of the co-tenants.

If this action could be defeated for want of the names of all other co-tenants in the writ, it must appear that the plaintiff had knowledge thereof. This may be denied by the plaintiff, and, before that question could be legally settled, there must be an issue in fact, in some mode. It is not seen how such a question can be presented under the pleadings in this case.

The objection, made to the writ in this case, cannot be taken, as is attempted, and the direction of the nonsuit was erroneous. *Exceptions sustained;—*

*Nonsuit discharged;—*

*Action to stand for trial.*

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

STEPHEN ROBERTS, *Administrator, in Equity, versus* NATHANIEL G. LITTLEFIELD.

Where a mortgagee enters into possession after condition broken, without taking the course provided by the statute to foreclose the mortgage, it is open for redemption for twenty years.

But where the mortgager, and those claiming under him, permit the mortgagee to hold the possession for twenty years without accounting, and without admitting that he holds only as mortgagee, his title becomes absolute.

BILL IN EQUITY.

The case is stated in the opinion.

*Moses Emery,* for complainant.

*E. E. Bourne, jr.,* for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J. — This is a bill in equity, in which the plaintiff seeks a decree that he, as the administrator of the goods and estate of Joel Littlefield, deceased, may be allowed to redeem a mortgage, given by his intestate on June 21, 1820, to the defendant, his son, of a certain farm in the town of Lyman, for the security of a promissory note for the sum of $524,50, with interest thereon, payable in one year.

The plaintiff complains and says, that soon after the giving of the mortgage, the defendant entered into the premises, and into the receipt of the income and profits thereof, and has ever since continued in the possession and receipts. And the bill further shows, that Joel Littlefield died on March 14, 1838, and the plaintiff was duly appointed administrator of his estate on March 2, 1858, and became authorized to redeem the premises, and to recover and receive from the defendant the balance of the income and profits of the estate, over and above the sum justly due on the mortgage. And the plaintiff further shows, that, on the thirteenth day of March, 1858, he applied to the defendant, and demanded of him a true account of the sum due on said mortgage and of the rents and profits

of said real estate during his use and possession thereof, and money expended and repairs and improvements, if any; at the same time informing him, that he was ready and intended to redeem the same, in his capacity of administrator.

The defendant, in his answer, admits the giving of the mortgage, as stated in the bill, for the security of the note described; that, after the maturity of the note, the mortgager failed to make payment thereof, and in August, in the year 1821, the defendant entered into the possession of the mortgaged premises, for the breach of the condition, and for the purpose of foreclosing the mortgage, and has remained in the open and peaceable and adverse possession of the same ever since, by means of which the title has become absolute in him; and he has, for more than thirty-seven years, claimed said estate as his own in fee, the said Joel, from the time of the taking of possession by the defendant, never having claimed any interest in the same.

The defendant further admits that, at the time stated in the bill, the plaintiff did demand of him an account of the rents and profits, &c., as alleged in the bill, and informed him that he intended to redeem the same, with all which demands the defendant was not bound to comply, the said estate and all rents and profits belonging to the defendant in fee.

It is not alleged in the answer, and it is not shown by the evidence, that the entry and possession taken by the defendant, met the requirement of the statute of 1821, c. 39, § 1, the entry not having been by process of law, or by consent in writing of the mortgager, or by the mortgagee's taking peaceable and open possession of the premises mortgaged in presence of two witnesses, so that the mortgage became foreclosed in three years from the time possession was taken. The entry must be considered as made by virtue of the mortgage alone, and can have no effect upon either party under the provision of the statute for *foreclosing* mortgages, for breach of conditions therein.

It is said, in 2 Story's Eq. Juris. § 1028, (a,) that "in re-

spect to the time, within which a mortgage is redeemable, it may be remarked, that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession, after the breach of this condition, under his title by analogy to ordinary limitations of rights of entry and actions of ejectment. If, therefore, the mortgagee enters into possession in the character of a mortgagee, and, by virtue of his mortgage alone, he is for twenty years liable to account, and if payment be tendered to him, he is liable to become a trustee of the mortgager and be treated as such. But if the mortgager permits the mortgagee to hold the possession for twenty years, without accounting, and without admitting that he possesses a mortgage title only, the mortgager loses his right of redemption, and the title of the mortgagee becomes absolute in equity, as it previously was in law." *Chick* v. *Rollins*, 44 Maine, 104.

The allegation of the defendant, that he has remained in open, peaceable and adverse possession of the premises since the entry made by him in 1821, is responsive to the bill, and can be overcome only by the amount of evidence required by equity rules in such cases. The evidence contained in the depositions is conflicting, and much of it inadmissible, and attempts have been made to impeach a part of it. It is in evidence that, since his entry in 1821, the defendant has said repeatedly, that he would relinquish his right by the payment of a sum specified, but it is not satisfactorily shown that he intended to admit that the mortgage was then open. On the other hand, the evidence tends to show that, after the entry of the defendant, the mortgager often asserted that he had no remaining interest in the farm, though he lived in the house situated thereon with the defendant till his death. The defendant continued in possession till the filing of the bills on Aug. 17, 1858, and, for aught which appears to the contrary, to the present time.

From a careful examination of all the evidence in the case, in connection with the bill and answer, we are satisfied, that the premises have been claimed to be, and have been in fact,

in the possession of the defendant for more than twenty years before the demand to account, as stated in the bill, without any admission on his part by word or act, that the mortgage was open to redemption. This view is strongly corroborated by the fact, that not the least attempt has been made by the mortgager, his heirs or representatives to redeem the premises, or cause them to be redeemed for more than thirty-five years, since the possession was taken by the defendant.

*Bill dismissed with costs.*

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

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WALTER LITTLEFIELD *versus* ISAAC CURTIS.

Where the parties to a promissory note, at the time it is given, agree that a third person shall determine whether there was any consideration for the note, a letter from such person, written before the making of the note, though received afterwards, is not admissible in an action upon the note as his determination of the question submitted to him.

ON EXCEPTIONS to the ruling of GOODENOW, J.

ASSUMPSIT upon a promissory note given by defendant to plaintiff.

It appeared in evidence that, at the time the note was given, there was a dispute between the parties as to the proportion of the earnings of a vessel the defendant was entitled to receive. The defendant claimed *three-fifths* while the plaintiff said he was entitled only to *two-fifths*. Thereupon they agreed to submit the question to one Perkins, and the validity of the note was to depend on his decision. It did not appear that Perkins subsequently made any determination of the question submitted to him. At the trial, the plaintiff offered a letter from Perkins to himself, written *before* the agreement to submit, but received *afterwards*, as the award of Perkins. The defendant objected, but the presiding Judge

admitted it. The verdict being against the defendant, he excepted to this ruling.

*Dane*, for plaintiff.

*Bourne, Jr.*, for defendant.

The opinion of the Court was drawn up by

MAY, J.—Whether there was any consideration for the note in suit was, by the agreement of the parties, to be determined by one Perkins, who was a witness at the trial. That agreement was made March 28, 1856, when the note was made; and the validity of the note was to depend upon his award or declaration, subsequently to be made, concerning a single fact then in controversy between the parties. Perkins, the referee, who was called by the plaintiff, would not testify that he had ever made any such award or declaration. The plaintiff, to show that he had done so, offered in evidence a letter from Perkins to Littlefield, dated March 26, 1856, in which he says, "I have always supposed that the agreement between you was, that Capt. Curtis should have two-fifths and you three-fifths; at least, I so understood it." This referred to the earnings of the bark while the defendant was master. The letter was objected to, but admitted. The only ground upon which it could have been legally admissible was, that it was in effect an award or declaration made in pursuance of their agreement to refer. That it was not so made is apparent from the fact that it was written two days before the agreement to refer existed. It could not, therefore, have been the determination which the parties contemplated. The fact that it was not received by the plaintiff until after the agreement to refer, does not make it any more effectual. If the letter, under any circumstances, could be regarded in substance as the act of Perkins, which was to give validity to the note, it is very clear that, under the circumstances appearing in this case, it cannot be so regarded. It had no tendency to show that the subsequent condition on which the note was to take effect had occurred. It was there-

fore, without reference to any other reasons, inadmissible. Whether the accounts between Perkins and the plaintiff, which were put into the case, were admissible, need not now be determined. *Exceptions sustained.*

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

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LOVEY J. THOMPSON, *Adm'x, versus* RUFUS WADLEIGH.

By the provisions of c. 102 of the statutes of 1859, the wife is made a competent witness for her husband, in a suit against him, by an administrator, she not being a party to the record.

ASSUMPSIT, for labor done by the plaintiff's intestate. At the trial, May term, 1861, the wife of the defendant was called as a witness by his counsel, to prove a special contract between the plaintiff's intestate and the defendant, under which the labor was performed. The plaintiff objected to the admission of the witness, and GOODENOW, J., ruled that she was not a competent witness and excluded her testimony.

The verdict was for the plaintiff and the defendant excepted to the ruling of the Court, in excluding the testimony offered.

*J. H. Goodenow*, argued in support of the exceptions.

*I. S. Kimball, contra.*

The opinion of the Court was drawn up by

MAY, J.—The exclusion of husband and wife, at common law, when called to testify for or against each other, was upon the ground of mutual rights and interests, or, as being against public policy. When only one of them was sued, the other does not appear to have been excluded by reason of being regarded as a party to the record. Although they twain are said to be one flesh, and are, in some sense, to be regard-

ed as one person, still they are not one in such a sense that one is legally liable to answer to any process against the other, nor is one liable to be arrested upon an execution against the other. When the husband is summoned as a witness, the wife is not bound to appear, and so, *vice versa.* For these purposes, and many others, the law regards them as different persons. In this suit against the husband, the wife is, therefore, not a party, either upon the record or otherwise. She can, in no proper sense, be regarded as defending the suit.

The objection to the admissibility of the defendant's wife, as a witness, must rest solely upon that of her interest in the event of the suit, or upon the relation which subsists between her and her husband. In regard to the first ground, this Court has settled that the objection cannot be sustained. In the case of *Walker, Ex'r,* v. *Sanborn,* 46 Maine, 470, which was a case where the widow of the plaintiff's testator was admitted as a witness, the Court held, that the R. S., c. 82, §§ 78 to 84, applied only to instances in which the plaintiff or defendant offers himself as a witness; and that the interest of a witness in a suit, where one of the parties was an executor or administrator, did not exclude the witness.

The other ground of objection is founded upon principles of public policy, and is not removed by the provisions of the statute just cited. It was left in full force, and is still in force, unless it has been removed by the statute of 1859, c. 102, § 1. *Dwelly* v. *Dwelly,* 46 Maine, 377. This statute provides that, "in the trial of civil actions, the husband and wife of either party shall be deemed competent witnesses when the wife is called to testify, by or with the consent of her husband, and the husband, by and with the consent of the wife." These provisions must have been intended to apply solely to objections, growing out of the marital relations, which public policy has suggested, and the law has sanctioned for the preservation of peace and quietness in families. It could not have been intended to apply to any other, because all other grounds of objection had been removed by the preceding statutes.

The remark of KENT, J., in the case of *Drew, Ex'r,* v. *Roberts & als.*, (ante p. 35,) that the Act of 1859 does not enlarge the number of cases in which husband and wife may testify, must be understood as referring only to cases in which they could have testified before, if they had not been prevented by the very objection which this statute was designed to remove. This is evident from the next sentence in the opinion, in which he says that, "the statute only removes the objection arising from the conjugal relation, which was based on grounds of policy to prevent domestic broils and family quarrels." The case before us is one where the wife could have testified before, but for this objection, and that objection having been removed, by the statute last cited, and the husband's consent, her testimony should have been admitted.

*Exceptions sustained.*

TENNEY, C. J., and APPLETON, CUTTING, (in the result,) GOODENOW, and DAVIS, JJ., concurred.

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WILLIAM HODGE *versus* SAMUEL BOOTHBY.

The term *beach*, when used in reference to places near the sea, means the land between the lines of high water and low water, over which the tide ebbs and flows.

In a deed from A to B "reserving to C a right to cross said lot to the beach, and to take and haul away stones, gravel, sand and seaweed, as he has hitherto done by shutting gates and bars," the phrase "*as he has hitherto done*" does not limit the manner of crossing the lot, but defines the right of taking and hauling away.

Though this reservation may not pass such right to C, yet B, by accepting the deed, is precluded from interfering with C's exercise of such right, because the title of B is only that of a stranger, as against him.

ON EXCEPTIONS to the ruling of GOODENOW, J.

TRESPASS, for breaking and entering the plaintiff's close and hauling away gravel and stones.

The general issue was pleaded, with a brief statement justifying the acts done, "under grant and reservation."

The plaintiff introduced a deed to himself from Thomas Boothby, of the *locus in quo*, containing the following clause: "Reserving to Samuel Boothby a right to cross and re-cross said lot to his field, as he has heretofore done, by shutting gates and bars; and also reserving to said Samuel Boothby a right to cross said lot to the beach, and take and haul away stones, gravel, sand and seaweed, as he has hitherto done, by shutting gates and bars; meaning and intending hereby to reserve to said Samuel the same right I reserved to myself in my deed to him, dated March 24th, 1841."

The evidence offered by plaintiff was, that there was, upon the lot described in the deed, a sea-wall thirteen feet high above high water mark at one place, and four feet at the lowest part, which was at the east end; that the defendant hauled away gravel and stones from the sea wall where it was thirteen feet high, as alleged in the writ; that, between the sea-wall and low water mark, the tide ebbed and flowed; but the tide never flowed over the sea-wall. The plaintiff admitted that, before said deed to him, the defendant had at his pleasure taken and hauled stones from the east end of the sea-wall, but never from the place where he took them at the times alleged in the writ.

The presiding Judge thereupon ruled, that the plaintiff could not maintain the action and ordered a *nonsuit;* and the plaintiff excepted.

*E. R. Wiggin,* for plaintiff.

The plaintiff at the trial made out a *prima facie* case, and had a right to go to the jury. *Foster* v. *Dixfield,* 18 Maine, 380; *Fickett* v. *Smith,* 41 Maine, 65.

By the reservation in the deed, the defendant is limited to the *beach.* He can haul stones, &c., *only from the beach.*

The sea-wall is no part of the beach. The beach is the space between high water mark and low water mark. *Cutts* v. *Hussey,* 15 Maine, 241; *Littlefield* v. *Littlefield,* 28 Maine, 184.

If he is not limited to the beach, he may haul stones, &c., from any part of the farm, which could not have been the intention of the parties.

Nor does the phrase in the reservation "as he has hitherto done," extend his rights. This describes the *manner* in which he may use the way, and not the *place* on which he has a right to take stones, &c.

*T. M. Hayes*, for defendant.

The opinion of the Court was drawn up by

MAY, J. — If the acts of the defendant, as shown by the evidence, were no infringement of the rights of the plaintiff, the nonsuit was rightly directed. Whether they were so or not, depends upon the construction of the deed from Thomas Boothby to the plaintiff, dated September 15th, 1857. By that deed the plaintiff became seized of the premises described in his writ, subject to the easement, whatever it may be, which was carved out of the estate by the following words contained in the deed immediately after the description of the lot, namely — "Reserving to Samuel Boothby a right to cross and re-cross said lot to his field as he has heretofore done, by shutting gates and bars; and also reserving to said Samuel Boothby a right to cross said lot to the beach, and to take and haul away stones, gravel, sand and seaweed *as he has hitherto done*, by shutting gates and bars; meaning and intending hereby to reserve to said Samuel, the same right I reserved to myself in my deed to him, dated March 24th, 1841." Whatever rights were thus reserved for Samuel Boothby were not conveyed to the plaintiff; and although the reservation may not, *ex proprio vigore*, pass such rights to the defendant, still the plaintiff by his acceptance of the deed as it is, is precluded from interfering with the defendant's exercise of such rights, because, while the defendant does not go beyond the limits of the reservation, the title of the plaintiff is only that of a stranger as against him. *Knight & ux.* v. *Mains*, 12 Maine, 41.

It appears from the testimony, that there is upon the plaintiff's lot a sea-wall, lying between the upland and the beach adjoining the sea, from the east end of which, the defendant, before the plaintiff took his deed, had been accustomed to take and haul stones at his pleasure; but not from the place where the alleged acts of trespass were committed. Do then the alleged acts, the same being fully proved, show a violation of the rights of the plaintiff?

It is contended by the plaintiff, that all the rights of the defendant, except of crossing and re-crossing his lot, are confined by a proper construction of his deed to the beach alone, by which we understand, that part of his land lying between the lines of high water and low water over which the tide ebbs and flows. This is the fixed and definite meaning of the word "beach" when used in reference to places anywhere in the vicinity of the sea, or the arms of the sea. *Doane* v. *Willcutt*, 5 Gray, 328. By this construction the sea-wall would be excluded from the places from which the defendant might rightfully "take and haul stones, gravel and seaweed" if there to be found. We do not think, however, that the reservation can properly be limited in its application, so far as it relates to the things to be taken and hauled away, to the beach alone. The beach, as well as the field of the defendant, mentioned in another part of the reservation, appears to have been referred to, as a terminus of one of the ways over which the defendant might pass, or as a particular place to which he might go. The fact that the things to be taken, other than the sand and seaweed, were to be found in the sea-wall, and had been accustomed to be taken from there by the defendant, before the plaintiff took his deed, repels the construction for which the plaintiff contends.

The true construction of the reservation to the defendant is to be found in the words, "as he has hitherto done." The idea that these words refer only to the manner of transportation, or to the teams and carriages that might be used, is too narrow to be reasonable. The right reserved was *to take*, as well as haul away. Both these rights were to continue in

the defendant as they had been exercised before. Not that the defendant should be confined to the precise spot or place where he had been accustomed to take and haul away, for this would not always be practicable. He was, however, bound to exercise his rights in a reasonable manner. If the sea-wall was a common mine or quarry, from which gravel and stone had been accustomed to be taken, as the testimony seems to show, the fact that it had been opened only in one place, and that the defendant had before operated only in that place, does not satisfactorily show that the words "*as he has hitherto done*," were intended to limit him, in his future operations, to the opening already made. When a new opening had been made in the same general mine or quarry, we think the defendant might rightfully operate in such new place, when he could do so without any unreasonable interference with the operations of the plaintiff. The right to take the gravel and stone would attach to the whole mine or quarry, or, in other words, to the sea-wall, when it could reasonably be exercised without any improper interference with the plaintiff's exercise of the same right. The evidence in the case fails to show any particular interference, and, we think, would not authorize a jury to find that the rights of the plaintiff had been invaded, or unreasonably violated. The nonsuit was therefore proper.

*Nonsuit to stand, and*
*Judgment for the defendant.*

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

CITY BANK *versus* JONATHAN NORTON *& als.*

The provisions of chapter 185, of the Acts of 1860, in relation to the disclosure of poor debtors, apply as well to one who has been released from arrest upon giving bond, as to one under actual arrest or in imprisonment.

ON FACTS AGREED.

DEBT on a poor debtor's bond. The principal was arrested on an execution in favor of the plaintiffs, and, upon giving the bond in suit, was released from arrest.

The debtor, thereupon, duly cited the creditors before two justices of the peace and of the quorum, at two several times, and submitted himself to examination, and, each time, the justices refused to administer the oath to him.

Thereupon, upon his petition to one of the Justices of the Supreme Judicial Court, a commissioner was duly appointed to take his examination and disclosure. The commissioner, after proceedings in accordance with chapter 185 of the Acts of 1860, administered to him the poor debtor's oath and gave him a certificate thereof. All these examinations and disclosures were within the six months limited in the bond.

*S. W. Luques*, for plaintiffs.

No condition of the bond has been performed. The justices refused to administer the oath.

The statute of 1860, under which the commissioner was appointed, does not apply to this case.

It applies only to a debtor who "shall twice have been refused a discharge from *arrest* or *imprisonment.*"

It can only be invoked by a debtor to obtain a discharge from "arrest" or "imprisonment" in *fact.*

This is the language of the statute, and the construction contended for is confirmed by the use of these terms in chapter 113, of the Revised Statutes.

*Chisholm*, for defendants.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of debt on a poor debtor's bond.

By c. 185, § 1, of the Acts of 1860, which is additional to c. 113 of the R. S., it was enacted that "any debtor who, under the provisions of said chapter (113) shall have twice been refused his discharge from an arrest or imprisonment, shall not be entitled to his discharge from such arrest or imprisonment on any further examination, excepting upon application to a Judge of the Supreme Judicial Court, who, either in vacation or term time, may, after notice to the creditor or his attorney and a hearing of the parties, if he thinks proper, appoint a commissioner to take the examination and disclosure of such debtor," &c. Under the provisions of this Act, a commissioner was appointed, an examination had and a certificate given. The debtor, who having been arrested on the execution, was released upon giving the usual bond, has taken the oath required by law, and, having obtained his certificate, claims that he is entitled to a discharge.

The question is, whether the terms arrest and imprisonment, embrace, as well those under arrest and imprisonment, as those who, having been arrested, were released from such arrest on giving bond; or, whether the statute is to be limited only to cases of actual arrest, the arrest continuing, and of imprisonment.

This Act, in its terms, is additional to R. S., 1857, c. 113. The poor debtor, enlarged on giving bond, may surrender himself. Though enlarged, on giving bond, he may yet be imprisoned under and in virtue of his original arrest.

The word "arrested," in c. 113, § 29, has been held to apply, as well to those arrested and enlarged on giving bond, as to those under actual arrest. So, in § 43, in case of failure on an application "for a discharge from arrest and imprisonment," costs are allowed. But, from an examination of that section, we think it was intended to embrace equally those who, having been arrested, have given bond, and those under

arrest. No reason is perceived for making any distinction between those under arrest and those arrested and enlarged. From the use of the same words in other parts of c. 113, we think the design of the Legislature was, that this Act should be as general as the Act to which it is additional.

*Judgment for defendants.*

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

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YORK COUNTY MUTUAL FIRE INSURANCE COMPANY *versus* GEORGE W. KNIGHT.

Where the by-laws of a mutual insurance company require that "notice of assessments, or classes of property to be assessed, shall be given by the treasurer and published in one or more newspapers printed in the county of York, three weeks successively, the last publication of which shall be not less than six days prior to the time fixed for the payment," &c., the following notice — "The members of the third class of the York County Mutual Fire Insurance Company are hereby notified, that the directors of said company have ordered an assessment on the members of said class, payable on or before the 15th of February, 1857, with interest thereafter," dated and signed by the treasurer, is sufficient.

The provisions of the charter of an insurance company, incorporated in 1852, are not affected by chapters seventy-six and seventy-nine of the Revised Statutes of 1841, so far as they are inconsistent therewith.

Although c. 79 of R. S. of 1841, requires a *demand* before a mutual insurance company can maintain an action for an assessment, yet, if the charter subsequently enacted, provides that such action may be brought after *notice* in a paper, the provisions of the charter control the statute.

ON REPORT.

ASSUMPSIT on a promissory note given to the plaintiffs.

The facts are stated in the opinion.

*John M. Goodwin*, for plaintiffs.

*Appleton & Goodenow*, for defendant.

1. The plaintiffs have not given the *notice* required in the ninth section of their charter. The fair construction is, that

there shall be *actual notice* before the suit can be brought. The notice proved was given *in a country paper*, and does not state the amount claimed, nor the per centage, nor anything from which the sum due could be computed.

2. No *demand* was made prior to the commencement of the suit.

A demand, thirty days before suit brought, is a condition precedent to the maintenance of the action. R. S. of 1840, c. 79, § 29; R. S. of 1857, c. 49, § 30.

The plaintiffs' charter (sec. 17) makes the company subject to the laws of the State in relation to corporations.

Section nine of their charter, in connection with article four of their by-laws, provides for *notice* of their assessments. But the general law requires a *demand* also. Both must be proved. They are not incompatible. If they are, the charter being expressly made subject to the general law, the former must yield to the latter.

The opinion of the Court was drawn up by

APPLETON, J. — This is an action of assumpsit upon a deposit note of which the following is a copy: —

"For value received in Policy No. 1722, dated the twentieth day of March, 1854, issued by the York County Mutual Fire Insurance Company, I promise to pay said company or their Treasurer for the time being, the sum of one hundred and eight dollars, in such portions and at such time or times as the directors of said company may, agreeably to their Act of incorporation and by-laws, require.

"$108,00." "Geo. W. Knight."

By Art. 4 of the by-laws, "Notice of assessments or classes of property to be assessed, shall be given by the treasurer, and published in one or more newspapers printed in the county of York, three weeks successively, the last publication of which shall not be less than six days prior to the time fixed for the payment, and may be published in such other newspaper or newspapers as the directors may deem necessary or expedient."

By the plaintiffs' charter of incorporation, § 9, it is provided that "all assessments shall be determined by the directors, and the sum to be paid by each member shall always be in proportion to the original amount of his deposit note, of the class in which his property is embraced, and shall be paid to the treasurer within thirty days next after notice of said assessment shall have been published; and, if any member of said company, or his legal representatives, shall, for the space of thirty days *after notice*, neglect to pay the sum assessed upon his note, in conformity to this Act, the *directors may sue for and recover the whole amount of said deposit note, with costs of suit.*"

It is objected, that the plaintiffs are not entitled to recover, because the notice given of the assessments was insufficient, and because there was no demand for assessments before the suit was instituted.

(1.) The notice, as published in the paper designated by the directors, was as follows:—

"The members of the third class of the York County Mutual Fire Insurance Company are hereby notified, that the directors of said company have ordered an assessment on the members of said class, payable on or before the 15th of February, 1857, with interest thereafter.

"Abner Oakes, *Treasurer.*

"South Berwick, Jan'y 16, 1857."

The charter and by-laws of the plaintiff corporation, so far as applicable to the questions now under consideration, are almost verbally identical with those referred to in *Atlantic Fire Insurance Company* v. *Saunders*, 36 N. H., 253. In that case, referring to the notice, which was similar to the one before us, BELL, J., says, "the notice shown in the case seems an exact and literal compliance with the by-law before recited. It is a notice of the assessment, and it designates the class, and, whatever may be our opinion as to the expediency, in such associations, of giving men full and definite notice of such assessments, the by-law requires no more than was done." "From the nature of the case, it seems that notice of the sum

to be paid on each premium note could not be intended, since the number of policies issued by some of these companies amounts to thousands, and no newspaper, in some such cases, could contain the notice."

(2.) It is apparent, if the notice is sufficient, that the plaintiffs would be entitled to recover by virtue of section nine of their charter, unless the general provisions of R. S., 1841, c. 79, § 29, reënacted in the revision of 1857, c. 49, § 30, by which authority is given to maintain a suit for an assessment remaining unpaid, "for thirty days *after demand* made by any agent of the company on any person liable to pay the note," are applicable and must control the charter.

This result is claimed from the language of the plaintiffs' charter, § 17, which provides, that "this Act shall be subject to all the provisions and restrictions of the laws of this State *in relation to corporations.*"

The plaintiffs were incorporated by an Act, approved March 30, 1852. The Act referred to was R. S., 1841, c. 76, "Of Corporations," which contains no requirement of a demand before the commencement of a suit for assessments. There is no inconsistency between the plaintiffs' charter and the chapter "Of Corporations," referred to in its seventeenth section. The section cited does not refer to R. S., 1841, c. 79, as the argument of the counsel for the defendant seems to suppose, but to c. 76, which relates to "corporations."

Further, by R. S., 1841, c. 79, § 1, it was provided, that "all insurance companies now or hereafter incorporated in this State, may exercise the powers, and shall be subject to the duties and liabilities contained in this chapter, and in chapter seventy-six, respecting corporations, *as far as consistent with the provisions of their respective charters.*" The laws of the State may be repealed or modified as the Legislature may deem expedient. It was unnecessary to reserve this right. But it seems to have been expressly done. The Legislature might grant charters with powers more or less limited. They have authorized the plaintiffs to maintain an action in certain cases, for assessments, without requiring a *demand* on the de-

fendant. By becoming a member, he has assented to the terms of the charter and of the by-laws, as then legally established, by which the notice, as published, is made a sufficient demand.

By the agreement of parties, *the case is to stand for trial.*

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

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ELIZABETH HOOPER, *Adm'x, versus* JORDAN J. GOODWIN *& als.*

An officer *de facto* is one, who executes the duties of an office under some color of right, some pretence of title, either by election or appointment.

The acts of an officer *de facto* are valid when they concern the public or the rights of third persons, and cannot be indirectly called in question, in a suit to which such officer is not a party. It is only in a suit against him that his right can be questioned.

*Thus,* in a suit upon a poor debtor's bond, where the defence was, that the debtor had performed one of its alternative conditions, by taking the oath required, evidence that the justice, who issued the notification to the creditor, was, at the time he was commissioned, a minor and not eligible to the office, was rightfully excluded.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action of DEBT, upon a bond given by a debtor, arrested on execution, for his release. The bond is dated May 30, 1859. On the 27th day of June following, *Austin Edgerly*, who then held a commission as a justice of the peace in and for the county of York, issued a citation to the creditor, upon the application made to him by the debtor. The citation was duly served, and the debtor took the oath as provided by law, and the certificate was duly issued by the justices of the peace and of the quorum before whom the oath was taken. The creditor did not appear at the time of the examination and the taking of the oath.

The action was submitted to APPLETON, J., presiding at *Nisi Prius*, by the parties, with the right to except.

The plaintiff introduced an attested copy of the commission of said Edgerly, as justice, from which it appeared that he was appointed and commissioned on the 9th day of March, 1859, and was qualified on the 18th day of the same month. He also offered in evidence a copy of the town records of Buxton, of the births of that town, showing that said Edgerly was born March 25th, 1838, as evidence to prove that the said Edgerly, who issued the citation, as a magistrate, was a minor when he was commissioned and qualified, and was then acting under that commission.

The presiding Judge ruled that the evidence was inadmissible for the purpose for which it was offered, and directed a *nonsuit.* The plaintiff excepted.

*S. P. McKenney,* for the plaintiff.

*J. M. Goodwin,* for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—An officer *de facto* is one, who executes the duties of an office under some color of right, some pretence of title, either by election or appointment. The acts of an officer *de facto* are valid when they concern the public or the rights of third persons, and cannot be indirectly called in question in a suit to which such officer is *not* a party. His right can only be questioned in a suit against him. A mere usurper is one who acts without color of title, and whose acts are utterly void. *Tucker* v. *Aiken,* 7 N. H., 113.

Whether a person, exercising the office *de facto,* is an officer *de jure,* cannot be settled in proceedings between third parties. *Morse* v. *Colley,* 5 N. H., 222; *Bean* v. *Thompson,* 19 N. H., 290; *People* v. *Collins,* 5 Johns., 549; *Norwich* v. *Yarrington,* 20 Vermont, 473.

In *People* v. *Dean,* 3 Wend., 438, it was held that, by the statutes of the State, a minor was incapable of holding a civil office; but that it was not for the officer appointed to administer the oath to determine whether the person presenting himself, was or was not, on account of age, capable of holding

the office to which he was appointed. If the appointment was improvidently made, there is a legal mode by which it is to be declared void.

In the present case, Edgerly was commissioned and qualified to act as a justice of the peace. Whether the appointment was legal or not, cannot be called in question in a suit between these parties. He is an officer *de facto*, acting under color of an appointment in due form of law, and if, on account of his alleged minority, it was illegal, the invalidity of the appointment, or the personal incapacity of the appointee, can only be determined in a suit in which he can contest these questions. *Brown* v. *Lunt*, 37 Maine, 423. His official acts are valid as to third persons, till his commission has been judicially determined to be null and void. Such, too, was the rule of the Roman law, even when the appointment was of a slave. "*Acta apud prætorem gesta rata sunt, quamvis per errorem creatus sit, is qui inhabilis esset, puta servus.*"

*Exceptions overruled.*

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

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BENJAMIN F. HANSON *& al., scire facias, versus* HAVEN A. BUTLER, *Guardian.*

In this State, attachments of property in the hands of the trustees of the principal debtor are wholly regulated by statute; and the statutes contain no provision by which a guardian, as such, can be summoned and holden as trustee.

Where a guardian was summoned as trustee, and was charged, *as guardian*, upon his disclosure, without taking exceptions, on *scire facias*, he was allowed, (under the provision of the statute,) to make a further disclosure; and, although it was *held*, that he could not be legally chargeable, as trustee, costs of the last suit were allowed the plaintiff, the defendant being guilty of neglect in not excepting to the adjudication in the original suit.

EXCEPTIONS from the ruling of GOODENOW, J.

The defendant, Butler, in his capacity of guardian of Emily M. Williams, was summoned as the trustee of Henry R. Williams, in an action brought by the plaintiff against said Williams. At the first term the supposed trustee made a disclosure, and, thereupon, was charged, as trustee, in his said capacity of guardian.

Upon *scire facias* brought by the plaintiff against him, the said Butler, by leave of Court, made a further disclosure upon which, as guardian, he was adjudged trustee. To this adjudication the said Butler excepted.

*Jordan & Rollins*, for the plaintiff.

*Ira T. Drew*, for the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J. — Attachments of property in the hands of trustees of the principal debtor are wholly regulated by statute in this State; and the statutes contain no provision that a guardian can be summoned and holden as a trustee, on account of goods, effects or credits belonging to the principal defendant, in a suit against the latter. The guardian cannot be sued for the debt of the ward, though assets may be in his hands. *Raymond* v. *Sawyer*, 37 Maine, 406.

In the case now before the Court, the ward was supposed to be indebted to the principal defendant at the time the original action was brought, and, at the term of the Court, at which that action was entered, he disclosed assets in his hands, and he was adjudged trustee. He failed to make payment or deliver any goods of the principal debtor, when called upon for the purpose, by the officer, who had the execution in force against the principal debtor, and the goods, effects and credits of him, in the hands of the defendant, the supposed trustee, and this process is instituted on account of this omission.

By the authority of R. S., c. 86, § 71, the defendant was allowed by the Court to disclose further, in this action against him. He has made his disclosure and was again adjudged trustee, to which adjudication he takes exceptions.

From the view, which we have expressed in the foregoing, touching the liability of a guardian to the trustee process, we are of the opinion, that the defendant was not liable; and, although a judgment against him, as trustee, was entered in the original suit, he now has relief by the provision of § 72, of the same chapter, that if he had been examined in the original suit, the Court may permit or require him to be examined anew, in the suit of *scire facias;* and he may then prove any matter proper for his defence; and the Court may enter such judgment as law and justice require, upon the whole matter appearing, on such examination and trial. He has been guilty of neglect, in not taking exceptions to the adjudication on the first disclosure.

It is adjudged, that the supposed trustee is not chargeable; but that the plaintiff recover costs of *scire facias* against him.

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

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GRANVILLE L. HILL *versus* DANIEL W. LORD.

Ancient deeds of lands, of which the grantee entered into possession, are to be upheld, although defective in form or execution; and the same rule may be applied to wills and levies of executions, to some extent.

The principle of law, that a deed of land adjoining a stream or body of water carries with it adjoining flats, applies to islands as well as to the mainland, and to conveyances made after as well as before the colonial ordinance of 1641.

A reservation in a deed, saving to the public any right they may have to take seaweed from the premises, confers no rights upon any one having no other title.

Permission by the land owner to certain persons to cross his land and take seaweed therefrom, without proof of a deed, cannot avail other persons, long after his decease, against subsequent purchasers of the land.

The right to take seaweed may be conveyed by the owner of an estate, without conveying the soil, even of the flats, or it may be acquired by prescription.

But, if a corporation claim a prescriptive right, it must be shown by corporate acts, regulating the right or exercising control over it. Acts of the corpora-

tion, declaring the premises forever common for the use of the inhabitants, or surveying a lot to one who did not subsequently go into possession of it, or laying out a road to the premises, are not such acts as would prove a prescriptive right.

The *inhabitants* of a town cannot acquire, by prescription, a right to take seaweed, for there could arise no presumption of a grant, as an inhabitant cannot purchase for himself and his successors.

The inhabitants of a town may acquire by *custom* an *easement*, but not an interest in the land, or right to take a profit from it.

The right to take seaweed from the land or beach of another, is not an easement, but a right to take a profit in the soil, and cannot be acquired by *custom*.

ON REPORT of the evidence by RICE, J.

*Trespass quare clausum*, to recover damages for breaking and entering the plaintiff's close in Kennebunkport, called Vaughan's Island, and carrying away seaweed, &c. Plea the general issue, with a brief statement setting forth various grounds of defence, which will be found enumerated in the opinion of the Court.

The plaintiff introduced a grant from Charles I, King of England, to Ferdinando Gorges, dated in 1640; a deed from F. Gorges to Thomas Gorges, dated July 18, 1643; and various subsequent deeds, wills and other documents, tending to show title to the *locus in quo* in himself.

The plaintiff testified that, in 1854 or 1855, he forbade the defendant taking seaweed from the island; and he introduced witnesses who testified that, in 1855 and 1856, the defendant employed persons to haul seaweed therefrom.

The defendant introduced testimony, tending to prove that seaweed is brought upon the island by the tide, and is frequently carried away by the next tide; that it does not form soil, or become a part of the beach or sea-wall, but, if left to dry, is carried away by the wind; and that, in 1800, Capt. Ebenezer Perkins, who then owned the neighboring farm, gave timber to build a bridge to the island, and many others aided in building it, for the purpose of hauling seaweed from the island for manure.

After this testimony was introduced, the parties agreed that the case should be reported, including such portions of the

evidence in the case of *Hill* v. *Cluff*, tried in this Court at the April term, 1857, as might be relevant; and the parties admitted, for the purposes of this trial, that, for more than seventy years, all persons "living in Kennebunkport and elsewhere," had hauled seaweed at pleasure from the *locus in quo*, until forbidden in 1854 or 1855 by the present plaintiff. And the plaintiff waived his right to recover damages of the defendant for injury to the soil, if the law and evidence will sustain a custom for the inhabitants to take and carry away seaweed.

From the evidence in the case of *Hill* v. *Cluff*, the following were selected and introduced by the defendant:—Copy from the town records of Kennebunkport of a grant of fifty acres of land, by said town, to Bezaleel Getchell, March 23, 1721, and of a location in pursuance thereof, by Brown and Huff, in 1723, of twenty acres, on Palmer's Island, on account of James Mussey. Copy of vote of said town, February 17, 1723–4, that all islands in Arundel shall remain common to perpetuity. Copy of records of proceedings of said town in 1803, as to a way from James Huff's house to the town road near Capt. Ebenezer Perkins' house. Copy of proceedings of said town, in 1841, in the location and acceptance of a way to Turbet's creek, from the road leading to Theodore Cleaves', near whortleberry swamp. Also a large number of depositions tending to prove the common custom of the inhabitants to haul seaweed from the island called Vaughan's (or Palmer's) and that the practice was allowed by the occupants of the farm to which it is claimed that the island belonged.

*T. M. Hayes*, for the plaintiff.

1. The plaintiff has title to the island. Under this head, the counsel reviewed and commented upon the several deeds, grants and other instruments put in by the plaintiff. His title extends to low water mark. Colony Law, c. 63, § 3. Seaweed belongs to the owner of the soil. Angell on Tidewaters, 262, *ut seq.*; *Moore* v. *Griffin*, 9 Shep., 350; *Phillips* v. *Rhodes*, 7 Met., 322; *Emans* v. *Turnbull*, 2 Johns., 313; Colony Law, c. 63, § 23.

2. The defendant has trespassed as alleged by the plaintiff.

The defendant's first position in defence is, that the *locus in quo* is the property of the town of Kennebunkport.

This is negatived by the plaintiff's proof of title. The title to the island and to the farm on the mainland have always gone together, and been included in the same deed until 1847. The town never exercised any ownership. There is no evidence of any corporate acts claiming ownership. The vote declaring the islands common, was not passed until the year after Mussey's location. Constant trespasses by the inhabitants could give the town no title. *Green* v. *Chelsea*, 24 Pick., 71. No title was gained by the location to Mussey, as he never claimed under it.

As to the second claim of the defendant, a prescriptive right in the town of entering on the *locus in quo*, and hauling away seaweed. There is no evidence of any corporate acts by which such a right could be acquired.

The position that the "public" have acquired a right of this kind by *custom*, is too general, vague, uncertain and unreasonable to be supported.

The claim that there was an ancient deed, now *lost*, is likewise too vague and uncertain, giving no names of parties, nor date of commencement. 3 Chitty's Pleadings, 1122. A lost deed may be presumed, where a great number of circumstances concur to raise a presumption. *Valentine* v. *Piper*, 22 Pick., 93. But, although a jury *may* presume a deed in such case, it is optional and not imperative. *Livett* v. *Wilson*, 3 Bing., 115. In this case, there are many circumstances inconsistent with such a deed.

The fifth claim of the defendant is to a right in himself by virtue of a *que* estate. He claims a right to take a profit in the *locus in quo*, by taking and carrying away seaweed therefrom. There is testimony to show that seaweed, instead of drifting to Vaughan's island from distant places, grows on its soil and in its immediate vicinity. It is thus as much a crop of the plaintiff as the herbage on his uplands.

A right to take a profit in another's soil cannot be acquired

by prescription in this State. In this connection, the counsel discussed the law as to incorporeal hereditaments, citing 2 Blackstone's Com., 21; *Wolf* v. *Frost*, 4 Sanf. Ch. R., 72; *Littlefield* v. *Maxwell*, 31 Maine, 134; 3 Blackstone, 32, 403; Greenleaf's Cruise, tit. 23, § 1 and note; *Clayton* v. *Corby*, 5 A. & E., 415; *Wilson* v. *Willis*, 7 East, 121; *Blewett* v. *Tregonning*, 3 A. & E., 550; 1 Greenl. Cruise, 71; 1 Smith's Leading Cases, 331, note *f*. Commenting on these authorities, the counsel argued that the right of *common*, known to English law, has no existence in this country.

The sixth position of the defendant is, that there is a custom for every inhabitant of Kennebunkport to take seaweed on the island, and carry it away at pleasure. If such a custom is good in law, the defence must prevail. Acts sufficient can be proved and admitted, to establish such a custom, if it is a legal defence.

1. A custom to take a profit in another's land, has been uniformly held to be bad. *Waters* v. *Lilly*, 4 Pick., 145; *Perley* v. *Langley*, 7 N. H., 233; *Littlefield* v. *Maxwell*, 31 Maine, 134.

2. Such a custom is unreasonable and uncertain. *Race* v. *Ward*, 4 Ellis & Blackburn, 702.

The seventh position of the defendant is, that he was justified by a license by Ebenezer Perkins, claiming to own the island, given by deed to the inhabitants of the town, to take and carry away seaweed, &c.

1. A license from a person *claiming title* is of no value.

2. Evidence shows that Perkins had not the whole title, he only owning one half, which gave him no power to incumber the whole.

3. No deed is shown, nor is its non-production accounted for.

If it was a parol license, it was revoked by the death of the alleged grantor. *Cook* v. *Stearns*, 11 Mass. 533; 2 Am. Leading Cases, 677; *Stevens* v. *Stevens*, 11 Met., 251. And by conveyance from Mrs. Eunice Perkins, the owner of the other half, to Horace Porter.

The vote of the town relied upon, laying out a town way, on condition that the inhabitants may pass through Perkins' land to the sea to haul seaweed, and that Perkins work out his highway tax on said road for ten years, in effect limits the right of passage to ten years. Besides, the town way could have been discontinued, and the license must be revocable; the town could not legally locate a road upon such conditions; and this was not a license to take seaweed, but a license to cross Perkins' land.

*Bourne*, and *Howard & Strout*, for the defendant, argued that the plaintiff failed to show title to the island. The deeds introduced by him do not contain any description by which this particular island can be identified. The counsel then reviewed and commented on the various conveyances introduced by the plaintiff. If Vaughan, under whom the plaintiff claims, ever had a valid title, he abandoned it in the time of the Indian wars, and the town resumed the ownership. The records of the town for 1723, contain a vote that all the islands shall lie "common forever." This vote was placed on the records, and must have been known to all the inhabitants, and the evidence shows that, from that time, all the acts of the inhabitants indicated an uninterrupted claim of right. The same year the island was "laid out" by the town to James Mussey, and the location returned and recorded in the usual mode. At this late day, it is to be presumed that the location was accepted and ratified by the town. The location embraced but about 50 acres, and not the whole island, and does not militate against the remainder of the island remaining common. The location made was covered with woods in part, and in part meadow, leaving ample room for the inhabitants to take seaweed. It is admitted that the practice has been for 70 years for the inhabitants to take seaweed. The proceedings with regard to the Perkins road tend to show a contract between him and the town, that he was to keep the road in repair ten years, and the inhabitants were to cross his farm to obtain seaweed. Perkins did not

claim the island; but it is evident that the town did. What other motive had they for laying out a road?

In 1841, the town laid out another town way across the same farm towards this island, evidently for the purpose of aiding the inhabitants in obtaining seaweed from the island.

The evidence shows that Eunice Perkins admitted the right of the inhabitants to obtain seaweed from the island.

The counsel proceeded to point out various defective links in the plaintiff's chain of title, which he contended were fatal.

2. If the plaintiff has established any title to the island, it does not follow that he owns the flats. The colonial ordinance of 1641 does not aid him, as it applies, by fair interpretation, only to titles then existing. *Rust* v. *Boston Mill Dam Corp.*, 6 Pick., 158. The plaintiff does not show any evidence of title so early as 1641.

The counsel further argued that the ordinance was not intended to, and did not, include islands.

The counsel then proceeded to discuss the law as to the rights of the defendant by prescription or custom.

The question whether seaweed thrown on the land or beach is a part of the soil, is a question of fact for the jury, and not of law for the Court. The evidence in this case shows, that seaweed adds no strength to the sea-wall, nor does it make the beach on which it is cast more compact or enduring. The doctrine in *Emans* v. *Turnbull*, 2 Johns., 313, that seaweed belongs to the owner of the land, is not objectionable; but, when it is said by the Court, that it affords an increase or accumulation to the soil, and a protection to the bank, that is a question of fact, and not a matter of law. Every thing on the land belongs to the owner, until some one shows a better title; but every thing on the land is not a *part* of the land. Apples, hay, wood and vegetation of every kind, were never so regarded, after being separated from the parent stock. Manure made on a farm goes with the farm; that made at a livery stable does not go with it.

Every thing which may pass by deed, may be the subject of prescription. Prescriptions which involve a common good,

are favored more than others,—as, a right to dig for coal, for masters of vessels to dig for and carry away ballast, to dig for gravel on adjoining land to repair a highway, or to pull down houses to prevent a great fire spreading. It seems scarcely necessary to argue that the right to take seaweed may be acquired in the same manner. No one can doubt that it can be the subject of grant. *Phillips* v. *Rhodes*, 7 Met. 322.

If seaweed cast on Vaughan's island, for the ages past, had produced the imagined increase, the island might have been large enough for a kingdom. But such increase is no part of its mission. It is a fertilizer, and, as such, is important to the agriculturist, especially on the seaboard, where, owing to the varied pursuits carried on, the portion of land allotted to each person is small, and manures cannot be produced or procured as in the interior. We say, then, that a prescription or custom to obtain seaweed, is in the highest degree reasonable and necessary to the interests of the community. The long continued habit of taking seaweed is good evidence of a prescriptive right to do so. *Sales* v. *Pratt*, 19 Pick., 41; 1 Dane's Abr., 535; *Knowles* v. *Dow*, 2 Foster, 388.

The counsel then discussed the question, who can have the enjoyment of the right by custom or prescription, and argued that the town, in its corporate capacity, could do so, for the benefit of all its inhabitants. The case of *Littlefield* v. *Maxwell*, 31 Maine, 134, was decided on the ground that *inhabitants* of a town could not acquire a right in another's soil, because they have no certain continuance. So of the cases cited in *Littlefield* v. *Maxwell*. But the permanency of a corporation endows it with the same capabilities as the owner of a *que* estate. In the case of *Sales* v. *Pratt*, 19 Pick., 41, there was a failure for want of proof of any corporate action. The relation of town resembles very much that of the owner of a *que* estate. It has a qualified interest in all the lands in its borders, and it is for its advantage to have it made as profitable as it can be.

The counsel then proceeded to argue, from the evidence in

the case, that a custom had been shown for the inhabitants of Kennebunkport to take seaweed from Vaughan's island, and that it had all the elements of a custom good in law, being immemorial, uninterrupted, undisputed, reasonable and certain.

Every land owner has a right to turn his lands common, and does so whenever their produce will not pay the expense of inclosure. In such a case, any one may let his cattle run on them, and consume anything there growing, and no action of trespass will lie. This law comes to the aid of the defendant. The land on the island, seaward from the road, has always been common, and is so barren and exposed that it must be common forever.

The right to take seaweed, as claimed by the defendant, is of immeasurable importance in this and other States. It has always been considered and treated as a common right. It will be perceived that the defendant justifies under an original right common to all, as well as under grant, custom and prescription.

The opinion of the Court was drawn up by

DAVIS, J.—This is an action of trespass *quare clausam*, to recover the value of a quantity of seaweed taken by the defendant from the shore of Vaughan's Island, in the town of Kennebunkport. The defendant admits the taking, and justifies under several pleas, which will be separately considered.

1. The first plea alleges that, at the time of the taking, the title to Vaughan's Island was in the town of Kennebunkport, and not in the plaintiff; and that the defendant, as one of the inhabitants, entered thereon and took the seaweed by the permission of the town.

Without going into a minute analysis of the testimony, it is sufficient for us to say that the evidence fails to prove such title in the town. No deed is produced; nor copy of any deed; nor is there any proof that one ever existed. Nor is there any evidence of possession, or any claim of title by the town, in its corporate capacity.

Is the title to the island in the plaintiff? That it was in his *possession*, is not denied. And such possession is sufficient proof of title against a stranger. But various questions are presented, in other pleas, which render it necessary that we should determine the plaintiff's claim of title, in fact, to the premises in controversy. He has put into the case a series of instruments as muniments of his title, extending back to the ancient colony charters from the crown.

The whole of New England is embraced within the patent granted to the Plymouth Colony by King James, in 1620, which extended from the fortieth to the forty-eighth degree of north latitude, "in length by all the breadth aforesaid, throughout the mainland, from sea to sea." This patent was afterwards confirmed by King Charles, in 1628. The Plymouth Colony subsequently granted to Sir Ferdinando Gorges a portion of their territory, extending from the entrance of Piscataqua harbor, northeastward, one hundred and twenty miles, including "all the islands and flats lying along the coast, within five leagues of the main." This grant was confirmed to Gorges by King Charles, in 1637, in the "charter of the Province of Mayne," recorded in the Registry of Deeds for the county of York, in 1640. That Vaughan's Island is within this grant admits of no doubt.

In 1643, Ferdinando Gorges, by Thomas Gorges, then "Deputy Governor of the Province of Mayne," conveyed certain premises claimed to embrace Vaughan's Island to one John Smyth. They are described as "one hundred acres of land, and one island, situate, lying, and being at Cape Porpoise, in length from northeast to southwest, and so up into the mainland on a northwest line, by all the breadth aforesaid, until one hundred acres are completed." The identity is denied by the defendant; but the fact that Vaughan's Island is one of the group near Cape Porpoise, is near the mainland, and has always been occupied with the farm adjacent on the mainland, is relied upon by the plaintiff to sustain this point. There are recitals, in some of the subsequent deeds, which strengthen the presumption for the plaintiff.

The deed of Gorges to Smyth appears to have subsequently come into the hands of one William Phillips, who claimed title under it, though without any written transfer to himself. He made a written assignment of it, under seal, to Bryan Pendleton, in 1666. The deed and the assignment were recorded in the registry of deeds, July 14th, 1680.

The records also show that Pendleton, in 1655, received a conveyance of the island from one Richard Ball, who appears to have been in possession of it, with the farm on the main land. In this deed it is called "Smyth's Island," and is said to contain "about fifty acres." There appears at that time to have been "edifices, or buildings" on the island, erected for the purpose of "fishing or making of fish thereon." The grantor in this deed claims to have derived his title, through mesne conveyances, from George Cleaves. That it related to the same premises conveyed to Smyth, cannot be doubted. Whether Cleaves claimed adversely to Smyth does not appear; nor is it material.

It appears also, that Cleaves conveyed three other islands at Cape Porpoise, in 1651, to one Gregory Jeffery, of whom Pendleton purchased them in 1658. These three islands are designated by name, and are said, in the deed of 1658, to be "the very next islands unto that which the said Bryan Pendleton formerly bought."

This deed is of no importance in this case, except in identifying the premises purchased by Pendleton of Ball and of Phillips. There is a clause in all of these deeds reserving a nominal rent to the original proprietors. But this cannot affect the title; as they all contain covenants of warranty, and are absolute grants, with no words of defeasance.

We are satisfied, from all the evidence, that Pendleton owned what is now called Vaughan's Island, in 1680, together with the farm adjacent, on the mainland. By his last will and testament the premises were devised to James Pendleton, who conveyed them, in 1681, to William Vaughan. They appear to have been, at that time, in the occupation of one Richard Palmer; and, in the subsequent conveyances, the island

has sometimes been called "Palmer's Island," but generally "Vaughan's Island."

The chain of title from 1681 is not distinct at every point. Various defects are suggested in some of the earlier conveyances, which would be serious if they were of recent date. But much is to be presumed in favor of ancient deeds, if accompanied by possession; and the same rule may be applied to wills, and to levies of executions, to some extent. The plaintiff invokes the maxim, *ex diuturnitate temporis omnia praesumuntur*, &c. This is not only a rule of evidence at common law; it has the force of legislative enactment in this case. It was not always possible to employ officers, or scriveners who understood all the requirements of the law; and "sundry persons, having just and equitable titles to estates, were in danger of being evicted out of their just rights and possessions, because the deeds, or instruments, or other writings conveying such estates, were defective, or imperfectly made and executed." An Act was therefore passed for "quieting possessions," which made such possessions, if continued until 1720, conclusive evidence of title. Province Laws, c. 49 and 115.

The plaintiff, in this case, claims under a warranty deed, duly acknowledged and recorded; and the claim of title by warrantors extends back from the plaintiff for a period of nearly sixty years. There is nothing to break the force of these conveyances, except the fact that the inhabitants of the town, and others, have always been in the habit of going upon the island, at their pleasure, and taking seaweed from it. But, upon the question of title to the soil, both in the flats and the upland, this custom by no means outweighs the record evidence, corroborated by the fact that the plaintiff, and those through whom he claims, have had possession, cultivating such parts of the land as have been suitable for that purpose.

It is argued for the defendant, with apparent seriousness, that if the plaintiff owns the upland, he has no title to the flats, but that the latter belong to the public. The reasons suggested for this position are, that the ordinance of 1641

does not apply to *islands*, nor to any other lands not conveyed by the original proprietors before that time. But such a distinction has no foundation in reason; the ordinance itself indicates no such intention; and the cases cited by the counsel do not sanction any such doctrines.

It is contended, however, that the defendant may justify under the following reservation contained in the deed to him, and in several of the deeds next earlier than his:—"reserving to the public any right that they may have to cross said island, and to take seaweed therefrom."

Such a clause is frequently, as a matter of caution, inserted in deeds of lands in which the public have no rights. Highways are usually reserved by similar language. But no one could justify under such a reservation, without showing a previous location, prescription, or grant. Such a reservation in a deed confers no rights, *proprio vigore*, upon any one. It merely saves the grantor, upon his covenant against incumbrances, from any liability if such rights have previously been granted or acquired. If not, it has no force whatever.

2. By the plaintiff's exhibit of title, it appears that, in 1797, the premises were owned by Ebenezer Perkins and his wife; and that he devised his interest to his wife, who conveyed the whole estate, by warranty deed, to other parties, under whom the plaintiff claims. And the defendant pleads, that said Perkins granted to the inhabitants of Kennebunkport, "by a good and sufficient deed, free license to go on said close and take seaweed," &c. There is no evidence of any grant or license such as is here pleaded. And if, under this plea, a parol license could be relied upon, there is no evidence of such a license that can avail the defendant. The case shows that Perkins, in his lifetime, permitted persons to take seaweed from the island, and that he supposed they had the right to do so. But, if he had been the sole owner, such a license could not be available for other persons, fifty years afterwards, against subsequent purchasers of the estate.

3. The defendant, in several other pleas, justifies as one of the public, and also as one of the inhabitants of Kennebunk-

port; and, in each capacity, by *custom*, and by *prescription*. And, in support of all or either of these grounds of justification, it is admitted, "that for more than seventy years, all persons who chose, living in Kennebunkport and elsewhere, have hauled seaweed *ad libitum* from the *locus in quo*, until forbidden by the present plaintiff in 1854 or 1855." If by this the public, or the inhabitants of the town, either by prescription, or by custom, have acquired any right that can be legally upheld, the plaintiff does not claim to recover. Or if such custom, with any other evidence in the case, establishes any prescriptive right in the town, in its corporate capacity, for the use of the inhabitants, the plaintiff cannot recover.

It appears by the evidence that large quantities of seaweed, a part of it growing on the beach, and a part of it floated by the tides from other localities, accumulate upon the flats of the island in controversy. These flats belong to the owner of the upland, as appurtenant to it. They may be conveyed without the upland, and thus the dominant and servient estates be severed. *Valentine* v. *Piper*, 22 Pick., 85. But the title to the seaweed is in the owner of the flats; and both together, unless there has been a severance, belong to the riparian proprietor. *Emans* v. *Turnbull*, 2 Johns., 313.

Title by prescription arises by a presumption, from long continued use of an incorporeal hereditament, of a previous grant, which has been lost. 3 Cruise, 467. Therefore nothing can be prescribed for that cannot be the subject of a grant. *Luttrel's case*, 4 Coke's R., 86. For the same reason, whatever can be acquired by grant, may be acquired by prescription. The owner of the whole estate to which flats are appurtenant, may convey the right to take seaweed, without conveying the soil, even of the flats. *Phillips* v. *Rhodes*, 7 Met., 322. Such a right is an incorporeal hereditament, and may be acquired by prescription. 3 Kent, 401.

Such a right may be *personal*. A man may claim it by long

continued enjoyment, by himself and his ancestors, or grantors. The defendant does not claim upon this ground.

Or one may claim it as appurtenant to some particular estate, described in the plea, of which he is the owner. This is pleading it with a *que estate*. 2 Greenl. Ev., 540. No such right is sufficiently pleaded by the defendant; and, if it had been, there is no proof to sustain it.

If a prescriptive right is not *personal*, it must be a *corporate* right, under which any member of the corporation may justify. Coke Litt., 113, *b*. Such a right, in the town of Kennebunkport, the defendant claims by his pleadings. If sustained by the evidence, the justification would be good. But a lost grant to the corporation can be presumed only from corporate acts. The use by individuals is no sufficient basis for the presumption. *Green* v. *Chelsea*, 24 Pick., 71.

There is no evidence that the town of Kennebunkport, in its corporate capacity, ever claimed the right to take seaweed from Vaughan's Island. There is no record of any corporate act regulating any such right, or exercising any control over it. The vote of 1724, that "the islands should lay common forever, for the use of the inhabitants," if it was intended to embrace this island, can avail nothing against those who now establish a good title to the soil. The survey of a lot to John Mussey, in 1723, was not followed by occupation, or possession, or claim of title, by him, or by the town. The location of the town way to the island was no assertion of any corporate interest, in this, any more than in other cases of location of public ways.

The fact that the inhabitants have always been accustomed to take seaweed from the premises, is set forth by the defendant in nearly all his pleas, and is relied upon by his counsel in support of all his positions. It was held, in the case of *Sale* v. *Pratt*, 19 Pick., 191, that such a custom by the inhabitants created no presumption of a lost grant to the corporation. If we should hold otherwise, there is another difficulty in this case. This custom has not been confined to the

inhabitants of Kennebunkport. It is suggested that the greater includes the less; but this is no answer. For, as title to lands by disseizin can be acquired only by an *exclusive* occupation, so a title to an incorporeal hereditament, unless an easement merely, can be acquired only by an *exclusive* enjoyment. The free participation of the public in it, rebuts any presumption of private or corporate right. Coke Litt., 110, *b; Muston* v. *Yateman*, 10 Mod., 301; *Commonwealth* v. *Low*, 3 Pick., 408.

It is claimed, however, that if there was no prescriptive right in the town, in its corporate capacity, the *inhabitants* had acquired such a right *for themselves*. But, if such a right is an interest in, or right to a profit in the soil, and not a mere easement, this ground of justification fails. For, though a person, or a corporation, may prescribe for such an interest, it was held, as long ago as the case of *Foxall* v. *Venables*, Cro. Eliz., 180, that the *inhabitants* cannot prescribe for a profit in the soil. This doctrine was affirmed four years later, and the satisfactory reason given, that there could be no presumption of a grant, "for an inhabitant cannot purchase to himself and his successors." *Fowler* v. *Dale*, Cro. Eliz., 363. The old books abound in cases to the same point. *Fowler* v. *Landers*, Cro. Jac., 446; *Whittier* v. *Stockman*, 2 Bulstrode, 86; *Weekly* v. *Wildman*, Lord Raym., 405.

The inhabitants of a town, or of a State, could acquire such a right by *custom*, if it were an *easement* only, and not an interest in the land. *Baker* v. *Brereman*, Cro. Car., 419; *Coolidge* v. *Learned*, 8 Pick., 504. The case of *Smith* v. *Gatewood*, Cro. Jac., 152, more fully reported as *Gateward's case*, 6 Coke, 60, is usually cited as the leading case on this point. The distinction was there made, and has since been recognized as an established principle of law, that, though *custom* may support a claim for an *easement*, nothing less than *prescription* can sustain a claim for a profit *a prendre in alieno solo*. The owner of the fee can be divested of it only by a grant from himself, or by such enjoyment in another as raises the pre-

sumption of a previous grant. *Cocksedge* v. *Farnshaw*, Doug., 126; *Grinstead* v. *Marlow*, 4 T. R., 717; *Littlefield* v. *Maxwell*, 31 Maine, 134.

The case at bar, therefore, turns upon the question, whether the right to enter upon the flats of another, and take seaweed therefrom, is an interest in, or a right to take a profit in, the soil.

That seaweed belongs to the owner of the soil upon which it grows, or is deposited, unless some other person has *acquired* the right to take it, the defendant admits. But he contends that it is not a part of the soil, nor a product of it where deposited; and that the right to take it is, therefore, no interest in the soil. It is said, and perhaps correctly, that if not taken away it does not become incorporated with the soil, but that much of it is washed away by the same tides that bring it to the shore.

The distinction between an interest in the soil, or a right to a profit in it, and an easement, is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles by which to determine it.

All rights of way are easements. So is the right to enter the close of another and erect booths upon public days; or to dance, *Abbott* v. *Weekly*, 1 Lev., 176; or to play at any lawful games and sports, *Fitch* v. *Rawling*, 2 Hen. Bl., 393.

Aquatic rights, of whatever kind, when held by those not owning the soil, are considered easements. 3 Kent, 427. The numerous water privileges, and industrial enterprises of New England, have originated questions of this kind, in great variety. The same principle is found in the English cases. Thus, the right to enter upon the close of another, and take water for domestic purposes, from any *natural* fountain, as a pond, *Manning* v. *Wasdale*, 5 A. & E., 758, or a running spring, *Race* v. *Ward*, 82, E. C. L. 700, has been held to be an easement only, sustainable by proof of custom by the inhabitants. The grounds upon which these decisions rest, are, that running water is not a product of the soil, whether above

or below the surface; and that it does not remain for any appreciable period of time in any one place. The Courts, in these cases, expressly affirm that the right to water in wells, or cisterns, would be an interest in the land, or a right to a profit *a prendre.*

The right to enter upon the lands of another for any of the following purposes has been held to be a right to take a profit in the soil;—to cut grass, Viner, Tit. Prescription; for pasturage, Cro. Eliz. 180, 363; for the purpose of hunting, *Pickering* v. *Noyes*, 4 B. & C., 639; *Wickham* v. *Hawker*, 7 M. & W., 63; or for fishing in an unnavigable stream, *Waters* v. *Lilley*, 4 Pick., 145. So also to take away drifting sand from the beach, *Blewett* v. *Tregonning*, 3 A. & E., 554; or to pile wood and lumber thereon, for the purpose of sale and shipment, *Littlefield* v. *Maxwell*, 31 Maine, 134.

So far as any general rule can be deduced from these cases, they tend to the conclusion that the right to take seaweed is a right to take a profit in the soil. It does not come within the principles applied to aquatic rights. The subject of it is, in part, a product of the soil where it is found. And, in regard to that portion which is washed ashore by the tides, though not permanently remaining, the right which the owner of the flats has to it is much more analagous to the *jus alluvionis* of riparian proprietors, than to the right of appropriating waifs or derelict goods, to which it is compared by the counsel for the defendant. "It may be considered," says KENT, C. J., in *Emans* v. *Turnbull*, before cited, "as one of those marine increases arising by slow degrees; and by the rule of the common law, it belongs to the owner of the soil. The *jus alluvionis* ought in this respect to receive a liberal encouragement in favor of private right."

Upon a careful consideration, we are satisfied that a right to take seaweed is not an easement, but is a right to take a profit in the soil; that neither the inhabitants of a town, nor the public, can acquire any right to it by custom; and that the evidence in this case does not establish any prescriptive right to it in the defendant himself, nor in the town of Ken-

nebunkport in its corporate capacity. According to the agreement of the parties, a default must be entered, with judgment for the plaintiff for the sum of twenty-five dollars, with costs.

TENNEY, C. J., and APPLETON, RICE and KENT, JJ., concurred. GOODENOW, J., dissented.

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CHESTER C. W. SMITH *versus* HIRAM H. BRAGDON *& als.*

When it is stated in the application for a citation by a poor debtor desirous of taking the oath, and also in the citation, that the creditor is out of the State, and that A. B. is his attorney of record, service on the attorney is legal and sufficient, there being no evidence that the facts are not as stated.

DEBT on a poor debtor's bond.

Bragdon, the principal defendant, having been arrested on execution, gave a poor debtor's bond, and subsequently applied to a justice of the peace for a citation to Smith, his creditor, the present plaintiff, to attend and hear a disclosure of his business concerns. In the application, it was stated that Smith was out of the State, and that S. W. Luques of Biddeford was his attorney of record. The same facts were recited in the citation, which was addressed to Samuel W. Luques, attorney of Smith, the creditor. The officer returned that he had served the citation on Luques as attorney of the creditor, by reading it in his presence and hearing, and that, the creditor being out of the State, he could make no further service.

The debtor made disclosure at the time appointed before Isaac L. Mitchell and James M. Small, two justices of the peace and quorum for the county of York, who certified that the creditor was duly notified, and who administered to the debtor the oath prescribed for poor debtors, and gave him a certificate thereof, the plaintiff not being present.

APPLETON, J., presiding, ruled, *pro forma*, that the plaintiff

was not entitled to recover; and the case was continued for the full Court to determine as to the correctness of the ruling; if correct, a nonsuit to be entered.

*S. W. Luques*, for the plaintiff, argued that the debtor's recital in his application for a citation, that Smith was absent from the State, and that Luques was his attorney, was only matter of description, and not evidence of the facts; that the citation being addressed to Luques, made him a party to the disclosure, instead of the creditor; and that, under these circumstances, the service on Luques was illegal, and ineffectual to notify the creditor. The justices do not certify that the citation and return of service had been examined by them, and "found correct," as the statute requires.

*W. M. McArthur*, for the defendant, cited R. S., c. 113, §§ 23, 24, 26, 48; *Baker* v. *Holmes*, 27 Maine, 153; *Ayer* v. *Fowler*, 30 Maine, 347; *Baldwin* v. *Merrill*, 44 Maine, 55.

The opinion of the Court was drawn up by

TENNEY, C. J. — The certificate signed and sealed by two justices of the peace and quorum of the county of York, required by R. S., c. 113, § 31, is presented in defence of this suit. It is insisted, in behalf of the plaintiff, that the service of the citation is fatally defective, on the ground that the citation is such that the service contemplated by the statute was not and could not have been made.

In the application of the debtor to the magistrate for a citation to the creditor to appear, &c., it is stated, among other things material, and which are deemed by the Court sufficient, that he has been arrested, in the county of York, on an execution issued on a judgment obtained against him, in favor of Chester C. W. Smith of Portland, in the county of Cumberland, whose attorney of record in said suit is Samuel Luques, Esquire, of Biddeford, in the county of York; and the justice of the peace to whom the application is directed, is requested to cite said Luques, as the said creditor is out of the State. A citation was issued upon this application to said Luques,

declared in the citation to be attorney of record of said creditor, the said creditor being alleged also in the citation to be out of the State. The sheriff of the county of York made, upon said citation, return that he had made service of the application and citation, by reading the same in the presence and hearing of said Luques, the attorney of the within named creditor, in the original suit, the creditor within named living out of the State of Maine, he could make no further service.

No particular form of the citation to the creditor, or the application therefor, is required; but service of the former shall be made upon the creditor, if alive and within the State, otherwise upon the attorney in the suit, &c. R. S., c. 113, §§ 23 and 24.

The creditor and the attorney are both named in the citation and in the application therefor; and if the officer, while he had them in his hands, had found the creditor in his precinct, and had made seasonable service on him, by reading the same in his presence and hearing, we cannot doubt that the service would have been sufficient. The evidence in the case, that the creditor was out of the State at the time the citation was made, and also at the time when it was served, being uncontradicted, is sufficient proof of that fact, and the service afforded all the notice to the creditor which the statute required, and the defence is sustained.

*Plaintiff nonsuit.*

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

GEORGE JORDAN *versus* SIMEON P. MCKENNEY.

A and B deposit $100 each with C, to be paid to whichever shall win in a horse-race. A wins the race, but B forbids C to pay the stake. A directs C to abide the result of a suit by B for his deposit, and use his (A's) deposit to pay the expenses, if necessary. B brings a suit, and recovers, C paying expenses exceeding the amount of A's deposit. — *Held*, that A is precluded by the directions he gave to C from afterwards claiming his deposit of him, and an action to recover the amount cannot be maintained.

A party requesting another to bring or to defend a suit, in which the former has an interest, and promising to indemnify him against the expense, *it seems*, is bound by his promise.

A person, having in his hands money belonging to another, and paying it out according to the owner's directions, is to be protected from a suit by the owner.

ASSUMPSIT. Facts reported by APPLETON, J.

A. P. Hamilton and A. P. House, June 19, 1855, deposited with the defendant $100 each, to be paid to the winner of a horse-race; and on the same day, Hamilton drew an order in favor of the plaintiff for the $100 he deposited, and it is proved that it was the plaintiff's money.

After the race had been run, the plaintiff claimed that he had won; House denied it, and forbade the defendant paying the money to the plaintiff. The defendant offered to pay each party his $100; but the plaintiff claimed the whole, and forbade the defendant paying any part of it to House; agreed that his $100 should be held by the defendant to indemnify him against the cost of a suit, if House should bring one, and promised to pay any further expense that might arise out of such a suit.

House commenced a suit, and the plaintiff directed the defendant to defend it, and himself employed counsel for that purpose. The defence was unsuccessful, and the judgment recovered by House, with the costs and expenses, exceeded the amount in the defendant's hands.

The Court, to which the case was referred, ruled that, on these facts, the plaintiff in this action could not recover; and

the facts were reported for the judgment of the full Court, whether the ruling was correct.

*E. R. Wiggin*, for the plaintiff, argued that the agreement between the plaintiff and the defendant, that the latter should make a defence against House's action, was an illegal one, and could not be enforced. It has been well settled that there could be no legal defence to such an action. *Lewis* v. *Littlefield*, 15 Maine, 233; *Stacy* v. *Foss*, 19 Maine, 337; 2 Parsons on. Contracts, 139. A promise based on such an agreement was void. *Avery* v. *Halsey*, 14 Pick., 124. A court of justice will not aid any person to obtain the fruits of an unlawful bargain. *Russell* v. *De Grand*, 15 Mass., 39; *Holman* v. *Johnson*, Cowp., 343; *Laughton* v. *Haynes*, 1 M. & S., 593; *Hunt* v. *Knickerbocker*, 5 Johns., 327; *Jones* v. *Knowles*, 30 Maine, 402. The defendant cannot set up the performance of an illegal contract as a defence in this action. He ought to be held to show that the performance of the contract might, by some possibility, be of advantage to the plaintiff. But this he cannot do, for, being a lawyer himself, he well knew that no defence would avail against House's action.

The counsel further argued, that the plaintiff never authorized the defendant to pay $40 of the money in his hands as stakeholder, to Goodwin, whom the plaintiff himself had employed to aid in the defence, and whom he expected to pay himself; that this payment, being wholly unauthorized by the plaintiff, should not be allowed to the defendant in defence to this action.

*Howard & Strout*, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J. — It seems that A. P. House and A. P. Hamilton placed in the hands of the defendant, each one hundred dollars, to bide the result of a horse-race, and that the defendant was to pay the whole amount thus deposited to the party who should win the bet. The money deposited by Ham-

ilton was furnished by the plaintiff, who was the party interested in the wager.

The race was run, and the plaintiff was the winner. House, the losing party, who seems to have been willing to adhere to his bet only in case of its success, forbade the payment of the money to the winner, and demanded his deposit. The defendant was desirous of paying House the money by him deposited, and thus exonerate himself; but the plaintiff, claiming that he had won, forbade the payment and agreed to indemnify him against the expenses of any suit that might be commenced;—that he might apply the money in his hands to the payment of any such expenses, and that, if this should not be sufficient, he would pay any balance remaining. The loser commenced a suit. "When the event has transpired, and the money is lost, it is not for the criminality of the act that the loser repents," says HEBARD, J., in *Danforth* v. *Evans*, 16 Vermont, 538, "but it is that he has lost his money." But the repentance of House availed him, and he saved his money, as was determined in *House* v. *McKenney*, 46 Maine, 94.

The plaintiff brings this action to recover his money deposited by Hamilton for his benefit. The costs of the defence in the suit, *House* v. *McKenney*, have been paid by the defendant, and much exceed the money in his hands.

It is well settled law, that if a party having an interest, request another to bring an action or to defend one already brought, and promises that he will indemnify the party so bringing or defending against the costs of such prosecution or defence, if he will permit him to assume the management of such suit, he will be liable upon such promise. *Goodspeed* v. *Fuller*, 46 Maine, 141; *Knight* v. *Sawin*, 6 Greenl., 361; *Fenden* v. *Parker*, 11 Mees. & Wels., 675; *Adams* v. *Pansey*, 6 Bing., 506. The plaintiff directed the defence to be made, and employed counsel. The money deposited has been applied to the purposes of the defence, according to the directions of this plaintiff. That the defence then made was unsuccessful, was no fault of the defendant. In all litiga-

tion, there must be a losing and a winning party. The want of success in that suit in no way enlarges the plaintiff's right to recover. The defendant has in all respects followed the directions of the plaintiff, and he is not to be mulcted in the costs of a litigation in which he had no interest, and where the benefit, if successful, would have accrued to the plaintiff.

"The stakeholder," remarks SHAW, C. J., in *Ball* v. *Gilbert*, 12 Met., 397, "is a mere depositary of both parties for the money deposited by them respectively, with a naked authority to deliver over on the proposed contingency. If the authority is actually revoked before the money is paid over, it remains a naked deposit to the use of the depositor." If the money be paid to the winner by the consent, express or implied, of the loser, and before he countermands such payment, he cannot recover it back. *West* v. *Holmes*, 26 Vermont, 533. "The consent to its being paid," remarks REDFIELD, C. J., in the case last cited, "gives him, (the winner,) the right to retain it, as the Court will not interfere after the illegal wager is consummated." If the stakeholder pay the winner before the authority given is countermanded by notice not to pay, such payment will be a defence to the action. *Danforth* v. *Evans*, 16 Vermont, 538; *McAllister* v. *Gallagher*, 3 Penn., 468; *Stacy* v. *Foss*, 19 Maine, 335; *Tarleton* v. *Baker*, 18 Vermont, 9; *Ball* v. *Gilbert*, 12 Met., 403.

But whether the payment be made to the winner or any one else, if made by the authority of the party depositing, can make no difference. The stakeholder, when he obeys the directions of the owner as to the disposition of his funds, is to be protected.

The action of assumpsit is equitable in its character. The defendant has none of the plaintiff's funds. He has paid them as the plaintiff directed.

The plaintiff would impose upon an innocent party the expense of a litigation in which he had no interest. He has no claim morally, legally nor equitably.

"It is certainly to be regretted," remarks CARTER, C. J., in *Kenney* v. *Stubbs*, 4 Allen, (N. B.,) 127, which related to a

horse-race, "that in the great press of business, * * the time of the country should be taken up with matters of this sort." But, whether the horse-racing be in New Brunswick or here, that suits without foundation are instituted, must always be matter of regret. *Exceptions overruled.*

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

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SARAH A. COLE *versus* JOHN S. EDGERLY.

Where the amount of a mortgage debt, under a mortgage by a husband and wife, was paid to the assignee of the mortgage by the husband, the wife not being present, or shown to have knowledge of the transaction, and the assignee, by direction of the husband, conveyed the estate to a third party by deed without formally assigning the debt, this is not a payment of the mortgage, it being manifestly the design of the parties that it shall be kept up as a subsisting estate. Such a conveyance is good against all except those who stand in the place of the mortgager, and even against them, until redemption.

The remedy of the wife's assignees, after the husband's decease, is by bill in equity; and if, on investigation, it is determined that the mortgage is not foreclosed as against her, she may be entitled to redeem.

WRIT OF ENTRY. On an agreed statement of facts.

The demandant claims title as follows:—The premises were owned and occupied by Seth Storer for a series of years prior to and at the time of his death; they were set off to Olive, wife of John Spring, and daughter of said Storer, in the partition of his estate amongst his heirs; and Olive Spring conveyed the premises by quitclaim to the demandant, Dec. 14, 1854, acknowledged and recorded Aug. 19, 1857. John Spring died Aug. 17, 1858.

The tenant's title was derived from a mortgage made by John Spring and Olive, his wife, January 4, 1833, to the President, Directors and Company of the Saco Bank; deed of said bank, by their President, to Jonathan King and others, trustees, dated September 20, 1833; deed of Jonathan King

and others, trustees, to David Webster, July 13, 1836; deed of Webster to Daniel Burnham, April 18, 1838; copy of a writ, judgment and execution, James Rangely against Webster and Burnham, execution levied July 6, 1839, with other papers necessary to complete the title; deed of James Rangely to Noah Burnham, dated Aug. 18, 1842; copy of will of Noah Burnham, proved in Merrimack county, N. H., September 22, 1857, naming Lyman T. Flint and Daniel Burnham as executors and trustees of his estate. The tenants are holding under their authority.

There was evidence to show that an entry was made to foreclose the mortgage, sometime in 1833 or 1834, by Ether Shepley, in presence of two witnesses; that Spring was present; but there was no positive proof that Mrs. Spring had any notice.

It further appeared, that, just previous to the termination of the time of foreclosure, Spring offered to redeem the mortgage, if King would take an acceptance on a Portland Bank, due in sixty days, for $5000. This King, at last, consented to do, and agreed that if the acceptance was paid at maturity, it should be the same as if paid in time. The check was duly paid, and also the balance of the money due; and, by Spring's request, a deed was made by the trustees to Webster, who furnished the acceptance, and the mortgage, mortgage note and deed to Webster, were delivered to Spring.

The papers are very voluminous, embracing the papers in the case of *Rangeley* v. *Spring*, twice heretofore tried in this Court.

The original mortgage and certificate of foreclosure were neither of them produced.

*T. M. Hayes*, for the demandant, contended that the foreclosure, in the manner in which it was made, was ineffectual for want of personal notice to Mrs. Spring, which only could supply the place of continued possession. *Thayer* v. *Smith*, 17 Mass., 431. If the mortgage is by a man and his wife, notice of entry to the husband will not be effectual against

the wife. *Hadley & ux.* v. *Houghton,* 7 Pick., 29; *Swan* v. *Wiswall & ux.,* 15 Pick., 126. Where one claims title to real estate by statutory provisions, he must show a strict compliance therewith. *Storer* v. *Little,* 41 Maine, 69.

2. The mortgage debt was paid before any foreclosure, and Mrs. Spring's interest in the premises thereby discharged. The check and money were offered on the day before the time of redemption expired, and an arrangement made that the payment should be regarded as in season. Payment was afterwards made, and all parties evidently regarded the mortgage as satisfied. No doubt the trustees would have reconveyed the premises if they had been requested so to do, instead of conveying them to Webster. But the conveyance to Webster was made without Mrs. Spring's assent, and cannot affect her rights. And the debt, having been paid before foreclosure, extinguished the mortgage, and no reconveyance was necessary to restore Mrs. Spring's title. 4 Kent's Com., 193–4 and note, (4th ed.) At the termination of her husband's life estate by his death, Mrs. Spring's remainder vested in the demandant, free from any incumbrance, and she is entitled to maintain this action against those who are only strangers and disseizors. *Patch* v. *King,* 29 Maine, 448; *Chadbourn* v. *Rackliff,* 30 Maine, 354; *Williams* v. *Thurlow,* 31 Maine, 392; *Crosby* v. *Chase,* 17 Maine, 369.

*Shepley & Dana,* for the tenant, argued that it was unnecessary for the wife to have notice of the entry to foreclose. She had neither possession nor the right to it, and could not have prevented the entry had she been present. The statute requirements were entirely complied with in making the entry. and this Court cannot add to them. *Storer* v. *Little,* 41 Maine, 69.

2. The payment to King was not made until after the foreclosure was perfected, and was not intended by the parties as a discharge of the mortgage, but as a consideration for the conveyance by the trustees to Webster. In fact, the payment was not made by the mortgagers, but by Webster.

The opinion of the Court was drawn up by

APPLETON, J. — This is a writ of entry to recover a parcel of land in Saco.

The title was originally in Olive Spring, who, on Dec. 14, 1854, conveyed any then existing interest she might have to the demandant.

The tenant's title is as follows: — On Jan. 4, 1833, John Spring and Olive Spring, his wife, mortgaged the premises in dispute, which belonged to her, to the President, Directors & Co., of the Saco Bank.

On Sept. 30, 1833, the President, &c., of the Saco Bank assigned their mortgage to Jonathan King and others, as trustees of the Saco Bank.

On the 9th or 10th of May, 1833, an entry was made to foreclose the mortgage, and notice thereof given to John Spring; but it is insisted that Mrs. Spring was not notified of this entry, and that, as to her, it was ineffectual.

On July 13, 1836, Jonathan King and others, trustees, transferred their interest in the premises to David Webster.

On April 18, 1838, David Webster gave a deed of the premises to Daniel Burnham, and, on July 6, 1839, James Rangely, having previously recovered judgment, levied his execution upon the premises as the property of Webster & Burnham. On Aug. 18, 1842, James Rangely conveyed his interest by levy to Noah Burnham, who deceased in August, 1857, and, by his last will and testament, appointed Daniel Burnham and Lyman T. Flint, trustees and executors.

John Spring, the husband of Olive Spring, died Aug. 17, 1858.

The tenant is in possession under Daniel Burnham and Lyman T. Flint, acting for themselves as well as for the heirs of Noah Burnham.

The plaintiff claims that the mortgage has been paid, and that, so far as regards her grantee, Olive Spring, there has been no foreclosure, and that, having thus either the fee or the equity of redemption, she can maintain this suit.

Upon the facts, as disclosed in the report, it has been de-

termined, and correctly, that the mortgage was not paid and discharged; that, as to John Spring, it is to be deemed foreclosed, and that the interest of the trustees of the Saco Bank was duly conveyed to David Webster. *Rangely* v. *Spring*, 21 Maine, 130; *Rangely* v. *Spring*, 28 Maine, 130; *Shepley* v. *Rangely*, 1 W. & M., 213.

It is unnecessary to determine whether the alleged foreclosure of the mortgage from Spring and wife to the Saco Bank was binding or not on Mrs. Spring, because, assuming it to be ineffectual, for want of notice to her, or for want of continued possession in the mortgagees or their assigns, we think the action is not maintainable.

If the mortgage was foreclosed, so as to bind Mrs. Spring, the plaintiff has no claim.

If not so foreclosed, then Rangely by his levy acquired nothing but the life estate of John Spring, and, upon his decease, all rights under the levy would cease.

But, if the mortgage was not foreclosed, neither was it paid. It was manifestly the design of all parties, that it should be kept up as a subsisting estate. The deed from King and others to Webster, and from Webster to Burnham, operated as assignments of the mortgage. *Hill* v. *More*, 40 Maine, 515. An assignment of a mortgage by a quitclaim deed is effectual, if such be the intent of the parties. *Crooker* v. *Jewell*, 31 Maine, 519. A mortgagee in possession may, by a deed in common form, and without assigning the debt, convey a seizin that shall be good against all but those who stand in the place of the mortgager, and, even as against them, until redemption. *Hutchins* v. *Carleton*, 19 N. H., 487; *Smith* v. *Smith*, 15 N. H., 55.

By the deed from Webster to Burnham of April 18, 1838, the fee passed to the grantee, if the mortgage was foreclosed as against all parties. If the foreclosure was insufficient to bind Mrs. Spring, then it operated as an assignment of the bank mortgage to him, and he has never been divested of this title, and must be regarded as in possession under a mortgage not foreclosed. The tenant is in under Daniel Burn-

ham. There is no evidence that there are two persons of that name, and we cannot presume such to be the fact, without proof. Upon the facts, as admitted in the case, the tenant is entitled to call in aid the title of Burnham, whatever it may be.

The remedy of the plaintiff is by bill in equity; and if it should be determined that the mortgage is not foreclosed as against Mrs. Spring, she may be entitled to redeem.

*Plaintiff nonsuit.*

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

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HANNAH A. BUZZELL *versus* LACONIA MANUFACTURING CO.

It is the duty of every employer to use all reasonable precautions for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and, by the same reasoning, bridges, passageways or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer.

The master is responsible to the servant for an injury caused by the negligence and want of ordinary care of the former, the defect occasioning the injury being known to the master, and not to the servant.

But, if the defect was known to the servant, or to both servant and master, and the servant continued in the service, he assumed the risk himself.

Neither can the servant recover, if his own neglect contributed to the injury. In order to maintain his suit, he must show ordinary care on his part.

In a suit for damages to an employee, arising from the neglect of the employer, in the use of defective machinery or tools, the declaration is bad, if it does not allege, that the defect was unknown to the plaintiff, as well as known to the defendant, and that it arose from the want of proper care and diligence on the part of the defendant.

ON DEMURRER.

This was an action of the case. The declaration alleged, in substance, that the defendants were the owners of a cotton mill in Biddeford, to which they had built and maintained a

bridge and walk for persons working in the mill to pass and repass over when going to and returning from said mill; that, on the twenty-fourth day of September, 1859, the plaintiff was, and for a long time had been, in the defendants' employment, and, in such employment, was required to pass over said bridge and walk; that the defendants then, and for a long time before, had represented that said bridge and walk were safe and sufficient; that the said bridge and walk were not safe and sufficient, but, on the contrary, unsafe, &c.; and that, on said day, by reason of the negligence and carelessness of the defendants, and not by any fault of her own, the plaintiff was thrown down and permanently lamed and injured, &c., to the damage of the plaintiff in the sum of $10,000. A second count alleged that, by reason of the injury received by the plaintiff, she had suffered great pain and inconvenience, had expended large sums of money for surgical aid, nursing, &c.

The defendants filed a general demurrer, which having been joined, the presiding Judge, APPLETON, J., adjudged the declaration bad. The plaintiff excepted.

*R. P. Tapley*, for the plaintiff, argued that a corporation should be held responsible for its own carelessness, whereby one of its servants suffered damage. The reported cases do not hold corporations liable for negligence of their servants, whereby fellow servants suffer, but none go so far as to excuse the corporation for their own negligent acts. *Carle* v. *Bangor & P. R. R. Co.*, 43 Maine, 269; *Beaulieu* v. *Portland Co.*, (*post.*); *Tarrant* v. *Webb*, 86 C. L. R., 804; *Brown* v. *S. Ken. Ag. Soc.*, 47 Maine, 275.

The latter case determines the liability of a corporation to one not an employee. Why should it be less in the case of one in their service?

It is alleged in the declaration, and by the demurrer admitted to be true, that the defendants made representations to the plaintiff that the walk was safe, convenient, &c., and that the plaintiff, trusting in those representations, passed over it and was injured, not *without the fault*, but utterly through the

fault of the defendants. Having induced the plaintiff to pass over the walk to her injury, by their representations and the requirements of their rules, shall they be exonerated from liability, when the injury was occasioned by the careless and insufficient construction of the walk by the corporation, and their negligence to keep it in repair whilst making the representations? Such a construction would bring reproach on the law.

*T. M. Hayes*, for the defendants, cited *Priestly* v. *Fowler*, 3 Mees. & Wels., 1; *Hutchinson* v. *York N. & B. R. Co.*, 5 Exch., 343; *Wigmore* v. *Jay*, 5 Exch., 354; *Southcote* v. *Stanley*, 1 Hurls. & Nor., 247; *Shipp* v. *Eastern Co. R. Co.*, 9 Exch., 223; *Wiggett* v. *Fox*, 11 Exch., 832; *Seymour* v. *Maddox*, 71 Eng. C. L., 326, (Phil. ed.); *Ormond* v. *Holland*, 96 Eng. C. L., 102; *Tarrant* v. *Webb*, 86 Eng. C. L., 797.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiff and the defendants sustain to each other the relation of master and servant. The plaintiff, in her writ, alleges that the defendants are owners of a mill and bridge erected by them and connected therewith, over which she was obliged daily to pass and re-pass in going to and returning from her labor in their service; that through their negligence it had become out of repair, unsafe and dangerous; that the defendants represented it to be safe and free from danger; that, relying on their representations, she passed over the bridge, and, in so passing, was dangerously injured and suffered great bodily pain, without fault on her part, and in consequence of the defective and dangerous condition of the bridge, arising from the defendants' neglect and want of ordinary care.

The defendants, by their demurrer, admit the facts set forth in the plaintiff's writ.

The defendants would, unquestionably, be liable to a stranger for an injury caused by the defect or want of repair of a bridge which they were bound to keep in repair, and over

which he was obliged to pass and was passing to the defendants' counting room, for the purpose of transacting business with them, if the injury occurred without default on his part, and in consequence of the ruinous condition of the bridge, arising from their negligence and want of ordinary care.

It is difficult to perceive why a similar rule should not apply in case of a servant injured in passing over a bridge unsafe from the negligence of his employer, when he is passing over the same in the course of his employment, and the neglect of the employer, without fault on his part, is the cause of the injury.

It is the duty of every employer to use all reasonable precautions for the safety of those in his service. He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect. The capital of the master furnishes the means of his employment. His will determines the place. His sagacity directs, controls and supervises not merely the labor, but the machinery and other instruments and appliances by which the labor is performed. The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril. The servant has no general control. He is the actor. The master is the director. The one commands, the other obeys. The servant is in subordination. He relies on the judgment of the master that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe, and he may be wanting in the intelligence required for the proper determination of the question. His service is compulsory, from the pressure of want. His attention is exclusively due to the peculiar duties incident to his branch of

employment. He assumes the risks, more or less hazardous, of the service in which he is engaged, but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation and preventable by ordinary care and precaution on the part of his employer.

The servant is responsible for his own neglects. The general supervisory responsibility and control over all the work to be done, the place where, the instruments with which and the persons by whom it is to be done, rest with the master.

The same reasoning, which shows that the machinery and other instruments of labor should be safe, would demand that the bridges used in passing from one part of the premises to another, or the ladders used in ascending to or descending from labor, and that the passage ways in the premises of the employer and within the precincts of the place where the labor is to be done, should be safe and convenient; and, that at least, the same care and precaution be used for the safety of the servant, as for that of the stranger whose accidental presence, business may require within the same limits.

The claim, as stated, in the plaintiff's declaration, arises from the relation of master and servant, and from the neglect of the master in that relation. It is so argued by the counsel for the plaintiff. It is so resisted by the counsel of the defendants. It will be so examined and determined by the Court.

The rule is well settled, that a master is not liable to a servant for an injury caused by the neglect of a fellow servant in the same employ. Each servant assumes the risk of neglect on the part of fellow laborers.

The question here presented is, whether the master is liable to a servant for an injury caused by his own negligence and want of ordinary care.

By recurrence to the decisions of courts it will be perceived that the weight of judicial authority is in favor of the maintenance of an action like the present. In *Williams* v.

*Clough*, 3 Hurls. & Nor., 259, it was alleged in the declaration that the defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into his granary; that the defendant, believing the ladder to be fit for use and not knowing the contrary, did carry corn up the ladder to the granary, and, by reason of the ladder being unsafe, the plaintiff fell from it and was injured. It was held, on demurrer, that the declaration was sufficient. In *Roberts* v. *Smith & al.*, 2 Hurls. & Nor., 213, the injury arose from a rotten and defective scaffold, over which the plaintiff, a bricklayer, was compelled to pass in the course of his employment, and, in consequence of its rottenness, it broke, and the plaintiff fell to the ground. The case assumes the liability of the defendant, if the injury arose from his negligence, he knowing the condition of the scaffold and the servant being ignorant thereof. In *Vose* v. *Lancashire & Yorkshire R. Co.*, 2 Hurls. & Nor., 728, the cause of action arose from the defective rules of the defendant corporation, and their observance, and the defendants were held liable. In *Patterson* v. *Wallace*, 1 McQueen, 748, "I believe, by the law of England," says Lord CRANWORTH, "just as by the law of Scotland, in the actual state of the case with which we have to deal here, a master employing servants upon any work, particularly a dangerous work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle and being guilty of negligence, his negligence occasioning loss to them." The same view of the law was taken by Lord BROUGHAM in that case. The case of *Marshall* v. *Stewart*, 33 Eng. L. & Eq., 1, was an appeal heard in the House of Lords, from a judgment of the Court of Session in Scotland, in an action by the representatives of a miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant,

his employer. The law of Scotland was, throughout the case, treated as the same with the law of England. The servant, in that case, was killed while leaving his master's employment, without proper cause. "A master," says Lord CRANWORTH, "by the law of England and by the law of Scotland, is liable for accidents, occasioned by his neglect, to those whom he employs. I quite adopt the argument of the Solicitor General, that he is duly responsible while the servant is engaged in his employment, but then we must take a great latitude in the construction of what is being engaged in his employment;" and he further adds, that the liability of the master continues "whatever he does in the course of his employment, according to the fair interpretation of the words, *eundo, morando, redeundo,* for all that the master is responsible, and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord BROUGHAM, in the same case, "who let them down, is bound to bring them up, even if they come up on their own business and not on his; he is answerable for the state of his tackle by which this lamentable accident was occasioned." In *Bryden* v. *Stewart,* 2 McQueen's Rep. Scotch Cases in House of Lords, 30, the Lord Chancellor, *inter alia,* said, "the law of both countries (England and Scotland) make a master liable for accidents occasioned by his neglect towards his servants."

In *Dixon* v. *Rankin,* 14 Court of Session Cases, 420, the Lord Justice CLERK, held, "the master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus and keeping the same in good condition, and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater obligation to make up for its defects by the attention necessary to prevent such an injury."

The English cases, cited by the counsel for the defendant, are not adverse to these views. In *Tarrant* v. *Webb,* 86 E. C. L,. 796, JARVIS, C. J., says, "The rule is now well estab-

lished, that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. That, however, does not negative liability in every case. The master may be responsible when he is personally guilty of negligence," &c. In *Ormond* v. *Holland*, 96 E. C. L., 102, the liability of the master to the servant for personal neglect, is fully affirmed. "The rule is," remarks CROMPTON, J., "that the master is not liable, unless there be personal negligence on his part, which negligence may be either personally interfering in the work or in selecting servants, who do interfere."

The same question has been repeatedly discussed in the Courts of this country, and with the same result as in England. In *Indianapolis Railroad Co.* v. *Love*, 10 Indiana, 554, the Court held the corporation liable if they allow an employee to pass over a *defective bridge*, known to the corporation, and not to the servant. If the employee knows, or both company and employee know, the company is not liable, unless it give special directions. But, in the present case, it is not necessary to consider the effect of special directions, and as to that, we give no opinion. In *Keegan* v. *Western Railroad Co.*, 4 Seld., 175, a railroad company which continued a defective and dangerous locomotive, was held liable to its servant engaged in running such machine, for an injury sustained by him, (without negligence on his part,) in consequence of such defects. In *Noyes* v. *Smith*, 28 Vermont, 59, it was decided, that a master was bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servants; and if he fail to do so, he will be liable to the servant for any injuries he may sustain therefrom. In *Mad River & Erie Railroad Co.* v. *Barker*, 5 Ohio, N. S., 541, the Court say, "if the defects which caused the injury were actually unknown to the company or the conductor, and were not discoverable by due and ordinary care and inspection, and yet, were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring or continuing to use cars and machinery beyond the time when they could be safely used,

the company will be liable." In *McGatrick* v. *Wason*, 4 Ohio, N. S. 566, the general rule is declared to be that an employer, who provides overseers and controls the operation of machinery, must see that it is suitable, and if a defect, unknown to a workman, injures him, which ordinary care could have prevented, the employer is liable for the injury. In *Byron* v. *N. Y. Telegraph Co.*, 26 Barb., 39, the plaintiff was employed to climb the poles and regulate the wires. The complaint alleged negligence in providing and using unsound poles and in not having guards, &c. The company was held liable. Negligence was proved by showing the corporation knew the defect in the pole. The defect, in that case, was not known to the plaintiff and was not discoverable by inspection. In *Hayden* v. *Smithville Man. Co.*, 29 Conn., 548, it was held, that a servant might maintain an action against his master for an injury caused by defective machinery, when the employer knew, or ought to have known of the defect, and the servant did not know it and had not equal means of knowledge. In *Fifield* v. *Northern Railroad*, 42 N. H., 225, the plaintiff, a brakeman in the employ of the defendant corporation, being injured without fault on his part, by their negligence in permitting the road to be blocked up with snow and ice, and their car to be out of repair, was held entitled to maintain an action to recover compensation for the damages by him so sustained.

If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk and cannot recover. He might leave if he chose, but, choosing to remain, he cannot remain at the risk of the master. Every employer has a right to judge for himself how he will carry on his business, and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service, or, having entered, whether they will remain. *Hayden* v. *Smithville Man. Co.*, 29 Conn. 548. "A servant," remarks POLLOCK, C. B., in *Dynen* v. *Leach*, 26 Law Jur., 221, "cannot continue to use a machine he knows to be dangerous, at the risk of his employer." In *McNeil* v. *Wallace*, 15 Court of Sessions

Cases, 818, a collier sued his employer for an injury received by the fall of the roof of his excavation. It was the custom of the mine for the workmen, each to prop his own excavation, the wood for that purpose being furnished by the coal master at the mouth of the mine. No wood was furnished, but the workman went on to work, although it was, as the witness agreed, "a seen danger" and the workmen were warned of it. The Court held, as he went on to work, he assumed the risk himself and could not recover of his employer.

Neither can the servant recover if his own neglect contributed to the injury. "In England, in Scotland, in every civilized country," remarks Lord CRANWORTH, in *Paterson* v. *Wallace*, 28 Eng. L. & Eq., 48, "a party, who rushes into danger himself, cannot say, that is owing to your negligence." The master is not liable for the folly, the carelessness or the rashness of his servant. The plaintiff, to recover, must show ordinary care on his part.

The declaration should allege that the insufficiency of the bridge in question, was unknown to the plaintiff, and that it was known to the defendant, or that, but for want of all proper care and diligence, it would have been known. *Noyes* v. *Smith*, 28 Verm., 59; *Williams* v. *Clough*, 3 Hurls. & Nor. 258; but, as was remarked by BRAMWELL, B., in the case last cited, "that is a mere question of special pleading."

As the declaration is amendable on terms, we have determined the question presented as if it were free from all defects.

But the declaration, upon principle, must be deemed defective. Whether to be amended or not, and on what terms, will be determined at *Nisi Prius*, by the Justice presiding.

*Demurrer sustained;—*
*Declaration bad—and*
*Exceptions overruled.*

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

WILLIAM B. NASON *versus* LORENZO D. STAPLES.

Where a person accused of a crime is ordered by a Court of preliminary jurisdiction to recognize for his appearance at the proper tribunal for trial, and neglects to do so, the mittimus is sufficient if it states that he was "convicted" and ordered to recognize, instead of stating that it appeared that an offence had been committed, and that there was probable cause to believe the accused to be guilty.

Since the revision of the statutes in 1841, the writ *de homine replegiando* does not apply to cases of persons held under legal process, that is to say, a writ or warrant issuing from any Court, under color of law, however defective.

Persons restrained of their liberty, under color of process of law, have a speedy remedy by writ of *habeas corpus*, and one much less onerous, because requiring neither recognizance nor bond.

THIS was an action of PERSONAL REPLEVIN.

It appeared that the plaintiff, having been tried on a complaint for adultery, before the Municipal Court for the city of Biddeford, that Court ordered him to recognize in the sum of $500 for his appearance before the proper tribunal for trial, which he refusing to do, a mittimus was issued for him to be committed to await his trial. The defendant, being Marshal of the city, the mittimus was delivered to him, and, in pursuance of its precept, he committed the plaintiff to jail.

On trial of this action, the defendant justified by virtue of his said office, and the mittimus before named. The case was tried before the Judge, APPLETON, J., reserving the right to except. The Judge ruled that the justification was insufficient, and gave judgment for the plaintiff. The defendant excepted.

*R. P. Tapley,* in support of the exceptions.

1. Every thing that it is necessary should appear in the mittimus appears there.

The Municipal Court of Biddeford is made, by the Act creating it, "a Court of record with a seal," and all the presumptions of law favorable to the proceedings of Courts of record apply to it. It had jurisdiction of the offence charged, and of the person of Nason, to examine and to hold to bail, and this is what the Court did.

It is objected that it does not appear, by the mittimus, that the Court found that an offence had been committed, and that there was probable cause to charge Nason with it. But the mittimus declares that he was "convicted" on the complaint, &c., which is equivalent to stating, that all was proved that was necessary to be proved. The form was the same as used in cases of conviction of offences within the jurisdiction of the Court, but may be upheld as containing all that is necessary in this case.

The mittimus is not the judgment or record of the determination of the case by the Court, and need not contain all the particulars of the action of the Court, any more than an execution is required to contain all the particulars of the judgment or record in a civil case.

When a party is arrested on a warrant, and the examination, before being completed, is adjourned to another time, the prisoner is usually remanded into the custody of the officer by verbal order, and without any mittimus. This case is analogous.

It is enough for an officer, if the Court has jurisdiction of the offence and of the person, and if his precept is in proper form. It is not for him to inquire into the propriety or regularity of the previous action of the Court.

2. These objections are not open to the plaintiff in this process. By R. S., c. 101, a party is entitled to this process, unless, amongst other things, he is restrained by "force of a lawful writ, warrant or other process, civil or criminal, issued by a Court of competent authority." It was never intended that the validity of the original process should be tested on the writ of replevin. If it were so, every person accused of crime, both before and after conviction, and even convicts in the State prison, might resort to this process to procure a respite from restraint, whilst the legality of the restraint was litigated. A person in custody, and in danger of conviction, might resort to it to be set at liberty long enough to take leg bail.

The amount of bond is to be determined by the officer who

serves the writ. If insufficient, where is the remedy? If on the officer's official bond, is that sufficient? It cannot be that the criminal law can be evaded in such a manner.

The only safe construction is, that all precepts which a Court is authorized to issue, are excepted under the statute; that, whatever bears the form of a writ, warrant or other process, with the test or seal of the Court, is not subject to revision by such proceedings.

The writ of *habeas corpus* is the proper remedy in cases of improper restraint under color of judicial process. Under that process, the party is held in custody pending the inquiry. If, on inspection, the process, by which he is held, is erroneous on its face, he may be discharged. If the process does not disclose the error, but there is one preceding that process, a writ of *error* lies. In these modes, all his rights are preserved.

Under the general statutes, the amount of bail, and the sufficiency of it when presented, are to be determined by the Court that tries the offence. But, if a party ordered to furnish sureties, can cause himself to be replevied, he transfers the question, both of amount and sufficiency, to the officer serving the writ of replevin; in fact, withdraws all security from the State, and transfers it to the officer having the mittimus. The State is entitled to the custody of the person, or to a recognizance for his appearance; but, by this process, may be deprived of both.

By the constitution, certain offences are not bailable. But, if the offender may replevy himself, he may evade the constitutional provision, and go at large on such bail as an officer may require of him.

*J. M. Goodwin, contra.*

The defendant relies wholly upon the warrant of commitment, by virtue of which he claimed to have authority to arrest and detain the plaintiff, to maintain his defence.

We say the warrant in this case gave no authority, was null and void; and, therefore, the defence fails.

"A magistrate's warrant of commitment must show his jurisdiction to issue it." *Gurney* v. *Tufts*, 37 Maine, 130.

"As the jurisdiction of justices of the peace is given and limited by particular statutes only, and nothing can be presumed in favor of such jurisdiction," the warrant should show that due and legal proceedings had been had to authorize the magistrate to order the commitment. *State* v. *Hartwell*, 35 Maine, 129.

"To authorize a magistrate" to order the commitment "of an accused person, to answer before a Court of superior jurisdiction for an alleged offence, the punishment of which is beyond the jurisdiction of such magistrate, it is necessary that it should appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty." R. S., c. 133, § 11; *State* v. *Hartwell*, 35 Maine, 131.

"Until these facts are made to appear, on an examination before a magistrate, on process issued in due form of law, there is no authority on the part of the magistrate to require bail." *State* v. *Hartwell*, 35 Maine, 131.

Where there is no authority to require bail in case of a bailable offence, there can be no authority to commit for want of bail; and it is only when no sufficient bail is offered that the magistrate is authorized to commit to await a trial. R. S., c. 133, § 11.

Now, in this case, the magistrate did not find that the crime of adultery had been committed, either within his jurisdiction or elsewhere. Nor did he find that there was probable cause to believe the prisoner guilty. Therefore it does not appear that the magistrate had authority to require bail, and, *a fortiori*, is his authority not shown to commit for want of bail.

In other words, it may be said that the warrant of commitment, in this case, does not show the jurisdiction of the magistrate to issue it, and it is therefore void.

The opinion of the Court was drawn up by

DAVIS, J.—This case is not analogous to that of *State* v. *Hartwell*, 35 Maine, 129. There the mittimus merely set out

that the magistrate had reason to suspect the accused to be guilty. Here it is alleged that the accused, upon his hearing, had been "convicted" of the offence. Though the magistrate had no authority to sentence, he had authority to try the case. He required the accused to plead to the charge; and, upon that plea, after the hearing, he *convicted* him. "Conviction" is an adjudication that the accused is guilty. It imports all that the statute requires before holding one to bail, *and more.* It involves not only the *corpus delicti*, and the *probable* guilt of the accused, but his *actual* guilt. I think the mittimus sufficient.

But if not, I am satisfied that the plaintiff's remedy is not by the writ *de homine replegiando*, but that he should have applied for a writ of *habeas corpus.*

I am aware that a writ of personal replevin was sustained by this Court in the case of *Gurney* v. *Tufts*, 37 Maine, 130; and the opinion in that case, in regard to what is requisite in a warrant, in order to justify the officer in executing it, is clearly correct. No other question was raised in the argument. The attention of the Court was not called to the fact that the statute was entirely changed by the revision of 1841; and it is not strange that it should have been overlooked.

The writ of personal replevin was provided for by statute in 1787. 1 Laws of Mass., 361. That was reënacted in this State, at the time of our separation. Laws of 1821, c. 66. By that statute, persons held upon criminal process, (with various exceptions, including all offences not then bailable,) when such persons were not under sentence, were entitled to the writ. So all persons held upon civil process, unless held in execution upon judgment, or by distress for taxes, were entitled to the writ; and all persons held in duress without any process. If the person applying for the writ was held to answer upon any *criminal* process, before he could be delivered, he was required to recognize, with sufficient sureties, for his appearance, "to answer, abide, and perform the order and sentence of the Court." If held upon *civil* process,

(which was restricted to *mesne* process,) or, if held without process, he was required to give bond to the defendant.

These provisions, except for persons held *without any process*, were found to be needless. Persons restrained of their liberty without cause had a speedy remedy, much less onerous in that it required no recognizance or bond, by a writ of *habeas corpus*. So that there is not a single case reported, in this State or in Massachusetts, where a person held upon legal process, either civil or criminal, ever applied for the writ. For these reasons, doubtless, when the statutes were revised in 1841, all the provisions for this writ, except in behalf of persons held without any process, were carefully omitted. That it was then intended to abolish or discontinue the writ in all cases where the person was held upon any process, either civil or criminal, is evident for the following reasons.

The exception embraces all such processes. No person is entitled to this remedy who is held upon "a lawful writ, warrant, or other process, civil or criminal." The term "lawful" does not mean legally sufficient, but is the same as *legal process*, or *process of law*. A writ, or warrant, issuing from any Court, under color of law, is a legal process, however defective.

The original statute excepted persons held upon *final* process, either civil or criminal; and also persons held to answer for offences not bailable. There is no such exception in the statute of 1841. If *any* one held upon legal process is entitled to the writ, *every* one is, whether the process is *mesne* or *final;* whether he is held *to answer* to a criminal charge, or is *under sentence;* whether the offence is bailable, or not. Such could not have been the intention of the Legislature.

This view is confirmed by the fact that, in the revision of 1841, all provisions for a *recognizance* were stricken out. It cannot, therefore, apply to a *criminal* case. Nothing is required but a *bond*, as in replevin for chattels.

And the cases of custody enumerated in section *seven*, R. S., 1857, c. 101, show that it was not intended for persons held

upon civil process. The words "or otherwise" imply cases of a similar nature to that of "child, apprentice, or one under bail." The statute would apply to a seaman, or to a soldier. *Hutchins* v. *Van Bokkelen*, 34 Maine, 126. But, to apply it to one in custody upon legal process, under the provisions of the present statute, would endanger important public and private rights and interests, without any possibility of redress. *Exceptions sustained.*

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

## COUNTY OF CUMBERLAND.

* MOSES GOULD *versus* SYLVANUS R. LYMAN.

The divisional line between the *Custom-house wharf* and *Portland pier* in the city of Portland established.

REPORTED from *Nisi Prius* by GOODENOW, J.

The case is stated in the opinion of the Court.

*Rand*, for plaintiff.

*Shepley & Dana*, for defendant.

The opinion of the Court was drawn up by

RICE, J.—This case comes before us on report. There are many deeds in the case, but the evidence, tending to show their location upon the face of the earth, is by no means satisfactory. The plan,† also, which accompanies the case, which,

* The case was argued for plaintiff in 1857, and continued to be argued in writing. The opinion was announced in 1861.

† The plan did not come into the hands of the Reporter.

though executed with skill, does not designate many of the lots and monuments relied on by the parties. In this condition of the evidence we are obliged to determine many questions inferentially, which, possibly, might have been established by direct evidence. In addition to this, the defendant's counsel have presented no argument in the case. We, however, proceed to dispose of the case, as best we may, upon the evidence which has been furnished.

Both parties claim by deed from Thomas Warren. The plaintiff holds under two deeds from said Warren, the first of which bears date August 15, 1851, and conveys a lot of flats in Portland, lying between Wharf street and Commercial street, and is bounded—commencing in the line of division between the proprietors of Custom-house wharf (formerly Titcomb's wharf) and Thomas Warren's flats, at its intersection with Commercial street; thence running south-westerly thirteen and three-quarters feet, on the line of Commercial street, to a stake; thence running north-westerly, from those two bounds, to Wharf street, keeping the width of thirteen and three-quarters feet. The second deed to plaintiff, bearing date February 18, 1852, conveys a parcel of flats twenty-five feet wide and lying south-westerly of, and adjoining, the piece conveyed by the first deed.

The defendant claims under a deed from the same grantor, to Lyman & Richardson, dated January 29, 1853. The land conveyed by this deed is described as follows:—"Beginning at the intersection of Wharf street with the north-easterly side of the passage-way leading to Portland pier, and twenty-six feet from the southerly corner of John Wilson's brick store; thence, by said Wharf street, north-easterly fifty-nine feet, to a stake; thence, south-easterly fifty-six feet, to Commercial street; thence, by Commercial street, south-westerly sixty-two and one-quarter feet, to the intersection of said street with the passage-way leading to Portland pier; thence, north-westerly, by said passage-way, forty-eight and one-half feet, to the first mentioned bounds."

These three deeds, from Warren, purport to convey on

Wharf street 97¾ feet, and were intended to be located on the flats situated between Wharf street and Commercial street, and between the passage-way, on the south-west, and the line of division between Custom-house wharf and Portland pier, on the north-east.

It is contended by the plaintiff, that there is not land sufficient, between these two exterior lines, to fill all the calls in the several deeds, but, that the last deed from Warren, under which defendant holds, overlaps the land covered by the plaintiff's second deed, several feet. This is denied by the defendant. Whether it does so or not depends upon the location of the divisional line above referred to.

It is admitted by the parties, that the Woodman and the Pierson lines, both of which extend from low water mark across and beyond Commercial street and Wharf street, are correctly delineated upon the plan.

The proprietors of Falmouth, September 30, 1736, granted to Edmund Mountfort a "small tract or parcel of rocks, beach, and flats, lying in Falmouth, and on the north-west side of the Fore river, so called, the same being bounded as follows, viz.:—Beginning at a stake standing at the most northerly corner of a parcel of flats laid out to Samuel Proctor, before his house, below the road," &c. This lot run 52 feet, as the shore runs, and extends below the road, at that width, far enough to make one-half acre.

On the 7th of April, 1784, the proprietors of Falmouth granted to Joseph Noyes the flats, beach, and rocks, in Falmouth, lying below Fore street and between flats then in possession of Benjamin Titcomb, the line of which is understood to be Pierson's line, and flats before granted to Samuel Proctor and Edmund Mountfort. These grants to Mountfort and Noyes having passed through sundry mesne conveyances, or so much thereof as is necessary to illustrate the point now in controversy, are now owned by the proprietors of Custom-house wharf.

August 15th, 1788, the heirs of Samuel Proctor, by deed of partition, divided certain real estate then held in common

by them. This estate, which consisted of two parcels, was divided into five parts. The first parcel divided is thus described in the deed of partition: — "beginning at high water mark at the north-east corner of Benjamin Woodman's wharf; thence by said high water mark north-easterly ninety feet, and from these two bounds adjoining said Woodman's wharf and flats, to the channel." This tract was divided into four lots of twenty-two and one-half feet each, and constituted four-fifths of the whole estate divided by the above deed among the heirs of Samuel Proctor. The north-east side of Benjamin Woodman's wharf and flats, is understood to be the "Woodman line." The other portion of the Proctor estate divided was situated west of the Woodman wharf.

Thus it will appear that the ninety feet of flats belonging to heirs of Samuel Proctor, the half acre granted Mountfort, and the tract granted to Noyes, covered all the flats between the Woodman and Pierson lines. It also appears that the Mountfort and Noyes grants are now represented by the proprietors of Custom-house wharf, and that the Mountfort grant adjoins the Proctor lot.

Having thus ascertained the location of these several parcels with reference to each other, and also that the Mountfort and Noyes fronts are wholly in the Custom-house wharf lot, and also the size of the Proctor lot, it becomes important to ascertain whether any, and if so, how much, of the Proctor tract is now represented by the proprietors of Custom-house wharf.

The Proctor tract, being 90 feet in length, was divided into four lots of 22½ feet each. Of these divisional lots, No. 4, or the lot adjoining the Mountfort grant, was assigned in the deed of partition to Enoch Ilsley. On the 3d of January, 1798, Ilsley conveyed to Rogers & Hatch certain real estate, situate on Fore street, in Portland, "together with one-fifth part of flats, in common and undivided, belonging to the heirs of old Mr. Samuel Proctor, late of Falmouth, deceased, one-fifth of said flats is supposed to be twenty-seven feet wide, and to extend south-easterly to the channel, or low water

mark, and fronts the above land," that is, the land first referred to in said deed.

There is no evidence in the case tending to show that Ilsley had any interest in any flats in that vicinity which belonged to the heirs of old Mr. Samuel Proctor, except those referred to in the deed of partition, and in those his interest was not then in common and undivided, but had been specifically assigned to him, consisting of lot No. 4, and, instead of being 27 feet wide, as *supposed* in this deed, was in fact 22½ feet, as shown by the deed of partition. This deed, however, was sufficient to pass the lot which had been assigned to him; and from him, the title thereto, passed, through mesne conveyances, to the Custom-house wharf proprietors. There is no evidence in the case showing that any other portion of the "Proctor flats" have been transferred to that company.

Lot No. 3, of the Proctor flats, was assigned in the deed of partition, above referred to, to Nathaniel Proctor, and by him conveyed to Samuel Butts, by deed dated August 21, 1788. This deed contains the following descriptive language:—"Beginning at the northerly corner of a lot of flats, belonging to the heirs of Sarah Cox, deceased, which corner is 45 feet from Benjamin Woodman's wharf, by high water mark; thence north-easterly, 22½ feet, by high water mark, and, from these two bounds, to run south-easterly, parallel to said Woodman's wharf and flats, and adjoining the flats of the said Sarah Cox's heirs, to the channel."

Butts, the grantee in this deed, by deed dated February 25, 1797, conveyed this lot, and enough from No. 2, of the Proctor lots, (which appears to have been assigned to him in part, in the division referred to above,) to make 36½ feet in width, to Asa Clapp; and is represented as adjoining easterly on the Ilsley flats. Clapp conveyed to Fickett, January 15, 1801, a lot 36½ feet adjoining easterly on flats lately belonging to Ilsley, and, February 13, 1802, Fickett conveyed the same to Graffam, and Graffam to Preble, Dec. 25, 1805, and, on the 20th of April, 1813, Preble conveyed 30 feet of the above, adjoining flats owned by Henry Titcomb, to John Ho-

bart, and it is admitted that the title of Hobart passed to Warren, the grantor of both parties. It should also be remarked, that the title to lot No. 4, of the Proctor flats, passed through Benjamin Titcomb and Henry Titcomb to the proprietors of Custom-house wharf.

Thus it appears that the Mountfort and the Noyes grants, also lot No. 4, in the Proctor flats, as divided by the heirs, is represented by the Custom-house wharf, while lots 1, 2 and 3, in the Proctor flats, were represented by the Portland pier, or Thomas Warren. These three lots adjoin each other—they are each 22½ feet wide, and No. 1 adjoins the Woodman line. The result is, that the divisional line between the Custom-house wharf and Portland pier, is sixty-seven and one-half feet from the Woodman line. This we understand to be in conformity with the claim of the plaintiff, who is, therefore, entitled to judgment.

An assessor is to be appointed to determine the amount of rents and profits according to the agreement of the parties.

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

## * EZRA T. WILLIAMS *versus* FRANCIS O. J. SMITH.

The protest of a promissory note, under the hand and seal of a notary public, is made by our statutes sufficient evidence of the facts stated in such protest, in any court of law.

A notice to an indorser, of the dishonor of a note, is sufficient, if it describe the note with reasonable certainty, though the description may not be strictly accurate.

If one of several joint indorsers of a note is sued alone, he can take advantage of the non-joinder only by plea in abatement.

Where a promissory note is indorsed by the payee and others, in the usual manner, parol evidence is not admissible to show that the indorsement by the others was a *joint* indorsement.

An agreement to pay more than the usual rate of interest for delay, does not discharge an indorser.

In order to discharge an indorser by granting delay, there must be such a valid agreement as would bar the holder of the note from maintaining an action upon it during the time covered by the agreement.

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

ASSUMPSIT upon three promissory notes signed by D. C. Emery, as treasurer of the York and Cumberland Railroad Company, payable to David Hayes or his order, and indorsed by said Hayes and the defendant and seven other persons.

The plaintiff introduced the notes and the notarial protests. The protests were under the hand and seal of the notary. The following is a copy of the material portions of one, so far as this defendant is concerned:—

"On this tenth day of December, in the year of our Lord one thousand eight hundred and fifty-one, I, H. Ilsley, jr., Notary Public, in and for the county aforesaid, by legal authority, appointed and commissioned under the seal of the State aforesaid, duly admitted and sworn and dwelling in the city of Portland, aforesaid, at the request of E. T. Williams of Westbrook, and holder of the original promissory note, whereof a true copy is on the other side written, and indorse-

* This case was argued and decided in 1858, but accidentally the decision was not announced till 1862.

ments of the same: and presented said note at the office of the York and Cumberland Railroad Company, in this city, and demanded payment of the same of the treasurer thereof, the time and grace expiring this day, the payment of said note was then neglected and refused, and the note dishonored. Afterwards on the same day, and by the next mail, I sent written notice to each of the indorsers, viz., David Hayes, Saccarappa, Me., and Francis O. J. Smith, Westbrook, Me.; I also, at the same time, left another notice at the office of said Smith in this city, notifying each of them that the said note had this day been presented and payment thereof demanded of the treasurer, at the office of said Company in this city, and that the said Company had neglected and refused to pay the same, and that the holder would look to each of them for payment thereof."

The others were similar.

The defendant introduced evidence showing that the principal paid to the plaintiff from time to time, after the maturity of the notes, interest for six months, at the rate of twelve per cent.; that the plaintiff called on the treasurer many times for payment of the notes, but the latter told him he could not pay them, but would pay at the rate of twelve per cent. per annum, until the notes should be paid, if he would wait; that payments were made accordingly, but that the plaintiff uniformly said he would not agree to wait.

The defendant offered to prove that the indorsements on the back of the note were *joint* and not *several* or *successive*, but the evidence was rejected.

The defendant offered the original notices to him, with proof that they were the only ones received by him. The following is a copy of one and the others were like it.

"State of Maine.—Cumberland, ss.—Portland, Dec. 10th, 1851.—To Francis O. J. Smith, Dan'l C. Emery, Treas'r of Y. & C. Railroad Company.—A promissory note for one thousand dollars, dated Portland, June 7, 1851, payable six months from date, at the office of said company, in Portland, in favor of Daniel Hayes, and indorsed by you, is due this day, (the

last day of grace,) and, payment having been duly demanded, at said office, is protested for non-payment. The holder requires of you payment thereof with interest.

"Done at the request of E. T. Williams, Falmouth.

"H. Ilsley, Jr., *Notary Public.*"

The case was withdrawn from the jury and submitted to the full Court, upon the stipulation that, upon so much of the evidence as was legally admissible, judgment should be rendered according to the legal rights of the parties; or, if the evidence rejected was admissible, the case should stand for trial.

*Howard & Strout,* for plaintiff.

*Smith, pro se.*

1. The delay of payment, allowed to the maker of the notes, in consideration of extra interest, paid in advance, releases the indorsers. *Leavitt* v. *Savage,* 16 Maine, 73; *Chute* v. *Pattee & al.,* 34 Maine, 102.

2. The notices were insufficient. They were addressed to Emery, the Treasurer, as well as the defendant, and described notes indorsed by both, and not the notes in suit.

3. The testimony that the indorsements were joint should have been admitted.

Many cases were cited to show that parol evidence is admissible to show the nature of the contract.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action against the defendant as an indorser of three several promissory notes, signed by D. C. Emery, Treasurer of the York and Cumberland Railroad Company and payable to David Hayes or order, and indorsed by said Hayes, and by the defendant, and also by seven other persons, on six months from date, with interest; one note for $500, and one for $1000, both dated June 7, 1851, and one other for $500, dated June 14, 1851. The notes were protested for non-payment by a notary public; copies of which and of the original protests make a part of the case.

The defendant contends that the notices served on him by the notary were insufficient.

By R. S., c. 44, § 12, the protest of any foreign or inland bill of exchange or promissory note or order, duly certified by any notary public, under his hand and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law. The protests describe the notes in suit with sufficient accuracy. The original notices offered in evidence by the defendant, but rejected by the Court, if admitted, would not conflict with facts stated in the protest. They may exhibit a want of clerical accuracy, in omitting an "s," with an apostrophe, after the name of the signer of the note. It may be, that the notary was in doubt, whether it was Daniel C. Emery's note or the company's note. We think the defendant could not fail to understand that the notice was to him alone as indorser, and was the same in effect as if the printed blank had been filled without any alteration, to wit, "a promissory note, signed by Daniel C. Emery, Treasurer of the Y. & C. Railroad Company, for one thousand dollars," &c. *Bradley* v. *Davis*, 26 Maine, 50; *Cummings* v. *Herrick*, 43 Maine, 203.

The indorsement of the defendant was intended to give value and currency to the note in the market. There is nothing ambiguous on the face of the paper, or outside of it, which parol evidence can be admitted to explain. If it was a joint promise by the defendant and others, the fact could be only pleaded in abatement. But we do not so regard it.

In order to discharge an indorser, there must be a valid agreement for delay, founded upon a sufficient consideration.

An agreement to pay more than the legal rate of interest for delay, does not discharge the indorser. *Whitney* v. *South Paris Manufacturing Company*, 39 Maine, 316.

In *Freeman's Bank* v. *Rollins*, 13 Maine, 202, WESTON, C. J., says, "The bank may have been willing, as a matter of favor and indulgence, to afford additional accommodation, presuming that it was desirable and acceptable to all parties, who

had signed the note; but they could not have intended to preclude a surety from the exercise of the right he had by the terms of the note, to pay it after it became due." In *Oxford Bank* v. *Lewis*, 8 Pick., 458, it was held that the bank, notwithstanding the receipt of interest in advance, retained the power of suing and might, if they apprehended a failure, have made an attachment; and that therefore the surety remained liable. See also 10 Pick., 129. The same principle was again recognized and acted upon by the Court in this State, in *Mariners' Bank* v. *Abbott*, 28 Maine, 280. Mr. Justice WELLS says, in delivering the opinion of the Court, "But there must be a *contract* or *agreement* between the creditor and principal." The case of *Crosby* v. *Wyatt*, 10 N. H., 318, which holds that the reception of interest in advance is *prima facie evidence* of a binding contract, to delay the time of payment, was not overlooked, but it was said in relation to it, that "It is unnecessary to inquire which rule is the most reasonable, for the law has been so long settled, on this subject, in our State, that it would be unwise to change it."

The evidence in this case falls far short of proving an *agreement* on the part of the plaintiff to *wait.*

Daniel C. Emery, a witness called by the defendant, on cross-examination, says, that the "plaintiff always told him he would not wait for payment of the notes, and the plaintiff never agreed with witness to wait one moment,—constantly refused to wait—and never agreed to extend the time of payment. By direction of the directors I tried to make same arrangement with him, as with others, about waiting."

According to the agreement of the parties, as reported by the presiding Justice, we are of opinion that a default must be entered. *Defendant defaulted.**

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

* A similar decision was made at the same term, in the case of *Ezra T. Williams* v. *David Hayes*, which was assumpsit against the defendant, as indorser of the same notes. The case was tried before APPLETON, J., and a verdict ren-

* JOSEPH NOBLE *versus* SEWARD MERRILL *& als.*
* SEWARD MERRILL *& als. versus* JOSEPH NOBLE.

An action upon a judgment cannot be defeated by any defence which might have been made in the suit in which the judgment was recovered.

An assignment of a portion of a judgment by one of the creditors, to a third person, for a valuable consideration, is not a satisfaction of any part of the judgment.

A judgment, after the lapse of twenty years from its recovery, is presumed to be paid; but this presumption may be rebutted by proof.

Under the statutes of 1821, one summoned as the trustee of another was protected against any claim upon him by the principal defendant during the pendency of the trustee suit; and the judgment in that suit was a bar to an action upon such claim by the principal defendant, except for the excess thereof over the amount of the judgment.

But the judgment against the trustee was no discharge of the judgment against the debtor, though, by means of the trustee suit, payment by the trustee to the debtor was prevented, and, by the subsequent insolvency of the trustee, the debt was lost.

Nor was the judgment discharged by the neglect of the creditor to sue out a writ of *scire facias* against the trustee, for twenty years, the trustee continuing insolvent.

Nor could the debtor, after the lapse of twenty years, maintain assumpsit against the creditor for such neglect, it not appearing that the suing out of *scire facias* would have been of any service to the debtor.

ON REPORT by APPLETON, J.

In the first case, (which was DEBT upon a judgment,) after the evidence was out the defendant submitted to a default, upon the agreement, that if the evidence offered, entitled the plaintiff to recover, the default should stand; otherwise, the case should stand for trial.

In the second case, (an action of ASSUMPSIT,) the Court

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dered for the plaintiff. The defendant excepted to rulings and instructions in accordance with the decision in the other case. The *exceptions were overruled.*

*Howard & Strout,* for plaintiff.

*F. O. J. Smith,* for defendant.

* These cases were continued from the year 1858, for argument. The opinion was announced in 1861.

were to render a legal judgment upon the pleadings and evidence.

The facts, which are the same in both cases, are stated in the opinion of the Court.

*F. O. J. Smith*, for Merrill and others.

I. The plaintiff's right to control the effects in the hands of the trustee by force of the judgment became *fixed* and *absolute*, and his remedy by *scire facias* was positive. Laws of Maine, c. 61, § 9, (1821,) then in force; *Patterson* v. *Patten, Ex.*, 15 Mass., 474.

II. Upon such *scire facias*, the property of the trustee corporation was attachable to secure payment of the judgment. Laws of Maine, March 11, 1830, c. 46.

III. By these proceedings, and rights absolutely fixed in the plaintiff, defendants were barred thenceforth of all right of action against the trustee for the debt, and the debt became perfectly pledged to the plaintiff as if put in that situation by contract. *Perkins* v. *Parker*, 1 Mass., 117; *Stevens, Adm'r*, v. *Gaylord*, 11 Mass., 265; *Mathews* v. *Houghton*, 11 Maine, 381; *Norris* v. *Hall*, 18 Maine, 335; *Franklin Bank* v. *Bachelder*, 18 Maine, 64; *McAllister* v. *Brooks*, 22 Maine, 80.

IV. This judgment against the trustee was as much a protection against defendant's right of action *before* as *after* such judgment had been paid, and down to the present hour, and until reversed. The cases last cited establish this principle.

V. At the time of the demand of payment on the execution against the trustee, the trustee corporation was solvent, and, by recourse to *scire facias* and an attachment of property, the debt of defendant to plaintiff would have been satisfied. But plaintiff wholly neglected to institute *scire facias* against the trustee.

VI. The corporation subsequently became bankrupt, and the debt due to defendant in the hands of plaintiff has been totally lost to him.

VII. This brings the responsibility of plaintiff within the universally recognized principle that, where a debt is lost by

the inattention of the party having control over and care of it for another, to collect it *when in his power*, he becomes liable for it, *and must sustain the loss himself.*

VIII. The laches of plaintiff for a period of six years after the right of action accrued to defendant against the trustee, lost that right to him, by operation of the statute of limitations. The settlement between defendant and the canal corporation took place August 1, 1829, and six years thereafter barred defendant's right of action upon the indebtedness then admitted. The only remedy against the debtor corporation left, was held by Noble and partners, in their unsatisfied judgment against the corporation.

IX. More than twenty years having elapsed since the right of action accrued to plaintiffs, by *scire facias* upon their judgment against the trustee, their right of action upon such judgment was also barred before the commencement of their present suit against defendant.

X. At time of plaintiff's judgment against the trustee, the goods attached in trustee's hands, were holden *without limitation as to demand.*

XI. That the limitation provided in statutes relating to ordinary processes, are not applicable in the construction of the statute giving the trustee process, is illustrated in the case of *Flower* v. *Perkins & als.*, 3 Mason, 253.

XII. The statute of limitations does not bar the right of the Merrills to recover their suit against Noble, because, until twenty years had expired, after the judgment of Noble against Merrill's trustee, so as to bar revivor of that judgment, the laches of Noble was not so complete, but that he could have tendered the Merrills an assignment of that judgment, and Merrill's right of action, then, did not absolutely accrue until after the expiration of that twenty years, and, at any time within six years after that period, they had a right to bring it, and did not bring it against Noble.

It was a continuous neglect of Noble for the whole twenty years, and, although that neglect may have been sufficient to entitle the Merrills to hold Noble responsible for the canal

debt at an earlier day, yet it was not positively fixed until the termination of the twenty years.

XIII. To recognize any other construction than this claimed for the Merrills, upon the state of facts which the case finds, will operate upon them a loss of the whole indebtedness of the canal corporation, through the laches of Noble, and a payment in addition, to Noble, of his whole debt, from Merrill.

XIV. The debt from the Canal Company to Merrill, being greater than the debt due from Merrill to Noble, the excess lost to Merrill, through Noble's laches, is the sum which the Merrills are entitled to recover, in set-off, by the rendition of cross-judgments.

*Rand,* for Noble.

The opinion of the Court was drawn up by

TENNEY, C. J. — On August 1, 1829, the plaintiff in the suit first above named, with Eleazar Wyer and Joseph M. Gerrish, (the two last named having since deceased,) as partners in trade, under the firm of Wyer, Noble & Co., brought their suit against the present defendants, returnable to the late Court of Common Pleas for the county of Cumberland, begun and holden on the first Tuesday of October, A. D., 1829, and in the same suit, the Cumberland and Oxford Canal Corporation was alleged to be the trustee of the principal defendants, and service of the writ in that suit, having been duly made on all the parties defendant therein, the same was entered in Court, and the principal defendants were defaulted at said term. The trustee disclosed, and was adjudged to be trustee; whereupon an appeal was taken from that adjudication to the Supreme Judicial Court, begun and holden in the county of Cumberland, on the first Tuesday of Nov. 1829, and the appeal was entered in the Court last mentioned, and continued therein from term to term, until the term begun and holden on the first Tuesday of May, A. D., 1831, at which term, the said corporation was adjudged trustee; and judgment was rendered against the principal defendants

for the sum of $486,80, damages, and costs of suit taxed at $19,23, and execution awarded thereupon against the principal defendants, their goods and estate within their own hands, and likewise against their goods, effects and credits in the hands and possession of said trustee. Execution was issued accordingly, on July 20, 1831, and put into the hands of an officer, who, under date of Oct. 21, 1831, returned, that he had that day demanded of the said corporation, by a call upon C. E. Barrett, clerk thereof, to expose and deliver to him the goods, effects and credits in the possession of said corporation, belonging to the debtors, in said execution, or said amount in money, which they neglected and refused to do, and, not being able to find property of the debtors, within his precinct before the return day of said execution, he returned the same unsatisfied.

The clerk of said corporation, C. E. Barrett, testified, that on the day of the service of the trustee writ, which was Aug. 1, 1829, the corporation was able to pay the claim of the plaintiffs in that action, and a part of the sum due from the trustee was paid to the principal defendants, and a balance reserved sufficient to satisfy the judgment which might be recovered in said trustee suit, and the amount so reserved, has never been paid to any one; that on the day of service, the corporation was in funds and for three or four months afterwards; and, that the trustee writ alone prevented the payment to the principal defendants of the amount due from the corporation.

The judgment so obtained, remaining unsatisfied, an action of debt was brought thereon, in the year 1837, against the debtors in the judgment, and the same year judgment was rendered in that suit for the amount of the former judgment, including interest and costs. And, upon the judgment last named, being in no part satisfied, this suit was instituted. The defence is upon the ground, that the original plaintiffs having omitted to sue out a process of *scire facias*, against the corporation for the space of twenty years from the time the first judgment was rendered, and the corporation having

failed to discharge the same by payment, the principal defendants in that suit have lost the amount due from the corporation by means of the institution of the trustee suit.

The implication from the fact, that the corporation was in funds at the time of the service of the trustee process upon it, and so continued for three or four months afterwards, is, that it ceased to be so, subsequently. No evidence is offered and no suggestion made, that a process of *scire facias* against the corporation, instituted at the earliest time that it could be brought, would have been of the least avail. If the judgment, that the corporation was trustee on the disclosure made, was suffered to remain without any effort by *scire facias* to obtain payment, that could not operate as a discharge of that judgment. And the defence is inconsistent with a proposition, that the judgment is presumed to be paid.

The trustee suit was properly commenced; and while it was pending, the corporation ceased to have funds, and for this the plaintiffs in the trustee process were in no wise accountable, notwithstanding it prevented the payment by the corporation to the defendants in that suit. But, if it were otherwise, this defence was waived by them, in suffering judgment to be rendered in the action of debt, commenced in the year 1837, when all the facts now relied upon, were then in existence.

It is insisted by the defendants, that one third part of the judgment against them has been paid to Gerrish, one of the original plaintiffs. It is true, that Gerrish assigned his portion of the judgment to Daniel Green, who paid him therefor. This was not between Gerrish and either of the debtors, and the judgment against the latter was in no part satisfied.

*Default to stand.*

The other suit is a cross-action, so that a judgment, if obtained thereon, can be set off against the judgment sought to be recovered in the action first named, if the defence thereto should fail. The suit in favor of Merrill & al., is as-

sumpsit. The defendant pleads the general issue, and also relies upon the statute of limitations.

As the statute touching foreign attachment was, while the trustee action was pending, the trustee by that judgment was protected against the claim of the principal defendants, provided such claim did not exceed the amount of the judgment. *Matthews* v. *Houghton*, 11 Maine, 377; *Norris* v. *Hall*, 18 Maine, 332. Hence, the defendants were precluded from enforcing their demand against the corporation, so long as that judgment was in force. But, it is insisted by the plaintiffs in the present suit, that, after the lapse of twenty years from the rendition of that judgment, it ceases to be a bar to a suit against the trustee, in favor of the plaintiffs, and the claim, which is the foundation of this action, is not barred by the statute of limitations, and cannot be so barred till six years shall have elapsed from the time such cause of action accrued.

The above view is not sustained by law. The judgment is a bar to the plaintiffs' claim, so long as it stands in force. The lapse of twenty years raises the presumption that it has been discharged. This presumption, however, may be rebutted by proof. But, if the presumption is not dislodged by proof, it affects equally the principal defendant and the trustee in the trustee suit. But the ground taken by the plaintiffs, to sustain this action, is, that this judgment has not been paid or discharged, and so the presumption is overcome. If this is true, and we cannot doubt that it is, the trustee might invoke the judgment in bar, if a suit should be instituted by the plaintiffs in this action.

It is in proof, that the trustee suit was so long pending in Court, that the means of payment by the corporation had ceased before the judgment. This could not be attributed to the fault of either party. The process of foreign attachment was legally open to this defendant and his partners. The plaintiffs cannot, therefore, complain, that it defeated any attempt on their part to obtain payment. The attachment failed, as direct attachments sometimes fail, pending the suit.

This, in the case before us, was the result of the insolvency of the trustee, if such was the condition of the corporation. Nothing presented in evidence furnishes any satisfaction, that the process of *scire facias* could have been serviceable to the plaintiffs, and that the defendant was bound to incur the expense. We think this suit cannot be sustained.

*Plaintiffs nonsuit.*

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

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* HIRAM JACKSON *versus* THE Y. & C. RAILROAD CO.

Without some statutory provision, no action can be maintained in the name of an assignee, upon interest coupons, which contain no negotiable words, nor language from which it can be inferred, that it was the design of the corporation issuing them, to treat them as negotiable paper, — or, as creating an obligation distinct from, and independent of, the bonds to which they were severally attached when the bonds were issued.

The negotiability of such coupons is a question of law, to be determined, from the papers themselves, by fixed and well settled rules; and proof of custom, as to the negotiability of them, is inadmissible.

The bonds being specialties, the remedy for breaches thereof, is, by an action, not of assumpsit, but of debt or of covenant broken; not being *legally* assignable, no action is maintainable in the name of the holder, though he be assignee. GOODENOW, J., dissenting.

It is indispensable to its maintenance that the cause of action exist at the time the action was commenced. The statute of 1856, c. 248, does not remedy this defect.

REPORTED from *Nisi Prius*, October term, 1855, by HOWARD, J.

This was an action of ASSUMPSIT, brought on eleven memoranda in writing, called "coupons," issued by the defendant corporation, promising to pay various sums of money on each

* This case was first argued in 1856, re-argued very elaborately in writing, in 1858, and decided by a majority of the Court, as then constituted, although the opinion was not announced until a more recent period.

of said coupons, on the first day of May, 1854. The general issue was pleaded and joined. The plaintiff, after reading the writ and coupons, called Daniel C. Emery, who testified that he signed the coupons declared upon in the writ, as treasurer of the defendant corporation; that these coupons were issued by the said corporation in connection with and attached to certain bonds, upon the same sheets of paper with the bonds, and that they were each and all so issued by the defendant corporation for a valuable consideration, as appeared by the bond book of the defendants, then in Court.

The plaintiff then introduced one of the bonds declared upon in this writ, No. 60, for $300, and the parties agreed that this bond should be a sample of, and substituted for, all the other bonds referred to, by numbers upon the several coupons, declared upon, differing from them only in the number appearing on their face, and in the amount of money therein promised to be paid. Said Emery further testified that all the coupons, declared upon in the plaintiff's writ, were, when issued by the said defendants, attached to bonds as aforesaid.

*On cross-examination,* he testified that the several bonds, to which the coupons declared upon were attached, when first issued by defendants, were issued to different persons, some to E. L. Cummings, and some to others, but none to the plaintiff.

The defendants' counsel then called E. L. Cummings, who, at request of counsel, produced two writs, pending in this Court, each against the said defendant corporation, one in favor of William C. Lord and the other in favor of the witness, on coupons No. 6 of the bonds from which coupons No. 5, declared on in this suit, were taken, and upon other coupons from different bonds.

Defendants' counsel then asked the witness if he owned all the bonds referred to upon the coupons, in the suit at bar, at the date of the writ. The question was objected to by plaintiff, but admitted, and the witness answered that he did then own them.

The plaintiff offered to prove the custom as to the negotiability of these coupons. This testimony was ruled out by the Court. The defendants offered to prove that the bonds, referred to in the coupons in suit, were, when originally issued by the defendant corporation to Cummings and others, as above appears, issued for a less sum than their nominal value. This testimony was excluded by the Court. The case was thereupon taken from the jury, the defendant defaulted, and the case reported by the presiding Judge for the decision of the full Court.

The case was argued by

*E. L. Cummings*, for the plaintiff, and by

*J. C. Woodman*, for the defendants.

The opinion concurred in by a majority of the Judges was drawn up by

TENNEY, C. J.—The plaintiff claims, in this action of assumpsit, the amount due on certain memoranda in writing, called coupons, signed by the treasurer of the defendants. They were originally upon the same sheet, with bonds to which each corresponded respectively, and which were issued by the company and signed by the proper officers, with the seal of the corporation affixed.

None of the bonds, to which the coupons in suit were severally annexed, were made to the plaintiff, and it appeared that he did not own the bonds at the commencement of the suit; and it did not appear that he had any interest in them, at any time.

A copy of the bond, numbered 60, from which one of the coupons in suit was taken, is made a part of the case, and the portion thereof, material to the question before us, is in these words:—"Know all men by these presents, that the York and Cumberland Railroad Company acknowledge themselves indebted to Toppan Robie, or bearer, in the sum of three hundred dollars, which sum they promise to pay Toppan Robie, or bearer, in the city of Portland, on the first day

of November, A. D., 1871, with interest thereon, payable semi-annually, at said city of Portland, on the first day of May and November, in each year, upon the surrender of the corresponding coupon hereto annexed, at the office of the company in Portland." The coupon taken from the bond, of which the foregoing is copied, is in the following terms:— "York and Cumberland Railroad Company. Coupon No. 1. Bond No. 60. On the first day of May, 1852, the York and Cumberland Railroad Company will pay nine dollars, on this coupon, in Portland. $9." signed by the treasurer of the company.

The other bonds, from which the coupons in suit were respectively taken, are in the same form, varying in the amount and numbers, and the other coupons, which are declared upon in this action, are similar in form to the one copied, varying, also, in the sum named and in numbers.

The coupons on their face are not made payable to any person named, nor to the bearer thereof. Each refers, by the number, to the bond with which it was connected, and made part of the same; this is apparent, when separated therefrom. The language of the bond clearly imports, that the expectation of the company, and of the holder of the bond, was, that the coupon would continue to be part and parcel thereof, till the interest, as it should become due and payable upon the bond, at the respective times specified therein, should be paid, and then, the coupon corresponding in time and amount with such interest would be separated from the bond, and surrendered to the company. The possession of the coupon, by the company, and the want of the same upon the bond, or in the hands of the holder, would be evidence of payment, and would supersede the necessity of indorsement of interest, as it should be paid from time to time.

The coupons in this case, containing no negotiable words, nor any language implying, or from which it can be inferred, that it was the design of the company to treat them as negotiable paper, or as creating any obligation, distinct from, and independent of the bonds to which they were severally at-

tached, no action can be maintained thereon, in the name of an assignee without some statutory provision.

The proof offered by the plaintiff, of the custom, as to the negotiability of these coupons, was properly excluded. Whether paper is negotiable or not is a question of law, to be determined from the paper itself, by fixed and well settled rules.

But, it it is said that coupons are negotiable by the custom of merchants. "General mercantile customs, which have frequently become the subject of legal investigation in the course of evidence, when ascertained by long experience, to be of public use and utility, are at last recognized and adopted by the law without further proof." 2 Stark. Ev., 450. In the case of *Edie* v. *East India Company*, 2 Burr., 1216, Justice FOSTER said, "much has been said about the custom of merchants, but the custom of merchants or the laws of merchants, is the law of the kingdom and is part of the common law. People do not sufficiently distinguish between customs of different sorts; the true distinction is between general customs, which are a part of the common law, and local custom which are not so. This custom of merchants is the general law of the kingdom; part of the common law; and therefore, should not have been left to the jury, after it had been settled by judicial determinations." In the case of *Pillans* v. *Micross*, 3 Burr., 1669, Lord MANSFIELD said, "a witness cannot be admitted to prove the law of merchants."

It is said by Mr. PARSONS, in his work on Contracts, vol. 1, p. 240. — "It may, however, be said here, that we regard the English authorities as making all instruments negotiable, which are payable to bearer, and are also customably transferrable by delivery, within which definition, we suppose, that the common bonds of railroad companies would fall. Of the coupons attached, which have no seal, this would seem to be probable." These remarks are inapplicable to the coupons, which are the basis of the present suit, they not being payable to the order of any person, or to bearer.

The bonds, with which these coupons were connected, are

specialties, and actions of assumpsit thereon for breaches are not maintainable, but the remedy is by action of debt or covenant broken. And such instruments are not legally assignable, so that a suit can be sustained in the name of an assignee or holder.

In the bonds to which the coupons were originally attached, now in suit, interest was secured equally with the principal. It is not easy to perceive that, so far as the interest is secured by the bonds, a different form of action could be treated as the remedy for the breach of this part of the covenant, from that required, if the company should fail to pay the principal. The coupons attached to the bonds certainly do not cancel or nullify the covenant in the bond to pay the interest, and if suits in assumpsit can be maintained for the former, the company is liable to the payment of double interest.

This action was commenced and the same was tried prior to the statute of 1856, c. 248. It is a general principle that the cause of action must exist at the time it is instituted, as indispensable to its maintenance; otherwise the obligation of the contract would be impaired. No cause for this action in the name of the plaintiff is shown at the time it was commenced, or when the trial took place. And the statute does not profess to remedy this defect. *Plaintiff nonsuit.*

GOODENOW, J., dissenting. — This is an action of *assumpsit*, founded on certain coupons, which were attached to bonds issued by the defendants, payable to Toppan Robie or bearer. It is admitted that the plaintiff is not, and never was, the owner of the bonds from which the coupons offered in evidence have been cut off. It is contended on the part of the defence, that these coupons are not negotiable, and that no action can be maintained upon them, in the name of any other person than the owner of the bonds; and secondly, that if any action can be maintained by the plaintiff, it should be an action of covenant or debt, and not assumpsit.

In *Miller* v. *Race*, 1 Burr., 452, it was settled that property in a bank note passes like that in cash, by delivery;

and a party taking it *bona fide*, and for value, is entitled to retain it as against the former owner from whom it has been stolen; and that property in negotiable instruments will pass like that in coin, along with the possession, when they have been put in that state, in which, according to the usage and custom of trade, they are transferred by one man to another by delivery. 1 Smith's Leading Cases, *Miller* v. *Race*, [258,] note. Whenever an instrument is such that the *legal* right to the property, secured thereby, passes from one man to another, by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it *bona fide*, and for value, whatever may be the defects in the title of the person transferring it to him. Ibid.

It appears to be settled, in American cases, that the holder of a negotiable note is, *prima facie*, entitled to recover, upon merely producing the note; but, if the defendant proves that the note was fraudulent in its inception, or fraudulently put in circulation, or stolen, or lost, or obtained by duress, there is thrown upon the plaintiff the burden of proving that he is a holder *bona fide*, and for a valuable consideration. Ibid., 263, *b*, note.

Professor Parsons, in his work on the Law of Contracts, says, (vol. 1, p. 203,) "We may find the reasons of the law of negotiable bills and notes in their origin and purpose. By interchange of property, men supply each other's wants and their own, at the same time. In the beginning of society, this could be done only by actual barter, as it is now among the rudest savages. But very early money was invented as the representative of all property, and as measuring its convertible value. The utility of this means enlarged, as the wants of commerce, which grew with civilization, were developed. But at length more was needed; it became expedient to take a further step; and negotiable paper, first bills of exchange, and then promissory notes were introduced into mercantile use, *as the representative of the representative of property;* that is, as the representative of money. * * But, still, coin was itself a substantial article, not easily moved

to great distances in large quantities; and while it adequately represented all property, it failed to represent *credit.* And this new invention was made, and negotiable paper introduced to extend this representation another degree. It does not represent property directly, but money. And, as in one form, it represents the money into which it is convertible at the pleasure of the holder, so, in another form, it represents a future payment of money, and then it represents credit."

If a note be originally made payable to "bearer," it is negotiated or transferred by delivery only, and needs no indorsement, any person bearing or presenting the note becoming, in that case, the party to whom the maker of the note promises to pay it, and the holder of negotiable paper indorsed in blank, or made payable to bearer, is presumed to be the owner for consideration. Ib. 206. It was the intention of the defendants, in issuing these railroad bonds and coupons, to create a new species of negotiable paper. As such, it would more readily pass into circulation and command a higher price in the market, without increasing their burthens. They could as conveniently pay the interest, as it became due, to the holders of the coupons, whoever they might be, as to the obligees, or bearers of these bonds. There is no promisee named in the coupons. The law will imply that the promise is to the holder, *bona fide.* From the peculiar terms of the contract, it is reasonable to conclude, that the parties understood and agreed that the coupons should, from time to time, as the interest became due, be separated from the bonds, and pass into circulation as the representative of money.

If the action were founded on the bonds for the recovery of the *principal sum* and *interest* on the coupons *annexed to them*, it might, perhaps, be successfully contended, that it should be debt or covenant, and not an action of assumpsit.

But it seems, that it is, and was intended to be, a contract in the *alternative*, depending upon future contingencies or acts of the obligees; a contract under seal to pay the obligee or

bearer, if he retains the coupons with the bond, and brings his action to recover principal and interest at the same time; or a promise to pay the holder of the coupons, if the obligee or bearer of the bond shall choose to cut them off, and dispose of them, retaining the bond. It is the same in all negotiable pomissory notes.

"If A in his note promises to pay B, *or his order*, then the original promise is in the *alternative*, and it is this which makes the note negotiable. The promise is to pay either B or some one else, to whom B shall direct the payment to be made. And when B orders the payment to be made to C, then C may demand it under the original promise. He may say the promise was made to B, but it was a promise to pay C as soon as he should come within the condition; that is, as soon as he should become the payee by order of B. And then the law merchant extends this somewhat, by saying that the original promise was in fact to pay either to B or to C, if B shall order payment made to him, or to any person to whom C shall order payment made, after B has ordered payment made to C." 1 Parsons on Contracts, 202, 203.

Cutting the coupons from the bonds, by the obligee, and delivering them to a third person, may be regarded as equivalent to the indorsement of paper payable to order, or the delivery of paper payable to bearer. It would extinguish the claim of the holder of the bonds *pro tanto*, upon the defendants, and create a new obligation, in lieu of it, to pay the same amount to the holder of the coupons.

This would furnish an adequate consideration for the promise of the defendants to pay the bearer or holder of the coupons. To this the defendants may be considered as consenting, when they executed and issued the bonds.

The obligation to pay, "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." "But upon the broader and more satisfactory basis, that the law, operating on the act of the parties, under the duty, establishes

the privity, and implies the promise and obligation, on which the action is founded." *Brewer* v. *Dyer*, 7 Cush., 337.

Professor Parsons says, (vol. 1, p. 240,) "We regard the English authorities as making all instruments negotiable which are payable to bearer, and are also transferable by delivery, within which definition we suppose that common bonds of railroad companies would fall. Of the coupons attached, which have no seal, this would seem to be probable. But usage must have great influence in determining this question." Note *o* and cases cited.

The case finds, that the plaintiff offered to prove the "custom" as to the negotiability of these coupons, and that this testimony was ruled out by the Court. The ruling of the presiding Justice was not, in this respect, erroneous. It was a question of law. Public policy, as well as the interest of the parties, requires that the question should be settled distinctly, one way or the other, as matter of law, and should not depend upon the verdict of a jury, in each particular case.

"Although an instrument may contain nothing on the face of it, inconsistent with the character of negotiability, still, if it be not accustomably transferable in the same manner as cash, it will not be looked upon as a negotiable instrument. Thus, in *Lang* v. *Smith*, (7 Bing., 284,) a question arising, whether certain instruments called *bordereaux* and *coupons*, which purported to entitle the bearer to portions of the public debt of the kingdom of Naples, were negotiable instruments, the jury having found that they did not usually pass from hand to hand like money; that finding was held conclusive to show that they were not negotiable instruments. Whether an instrument, which has never been solemnly recognized by the law as negotiable, be accustomably transferable by delivery, or not, is a question which must, in each case, be left to the determination of a jury. It was submitted to the jury in *Lang* v. *Smith*, and held to have been rightly so." 1 Smith's Leading Cases, 261, note.

Without any proof of usage or custom, on the part of the

plaintiff, the Court are authorized to decide, from the face of the contract, its origin and purpose, that these coupons are negotiable instruments.

In *Lang* v. *Smith*,—"These," said TISDALE, C. J., "are not English instruments, recognized by the law of England, but Neapolitan securities, brought to the notice of the Court for the first time, and, as Judges, we are not allowed to form an opinion on them *unless supplied with evidence as to the law of the country whence they came.* Judges have only taken upon themselves to decide the nature of instruments recognized by the laws of this country, as bills of exchange, which pass current by the law merchant, divided warrants, or exchequer bills, the transfer of which is founded on statutes, which a Judge in an English Court is bound to know."

In *Clark* v. *Farmers' Manufacturing Co.*, 15 Wend., 256, it was held that a note for the payment of money *under seal*, though in all other respects, like a promissory note, is not *negotiable.* The plaintiff declared in *debt*, as the *indorsee* of the instrument. He proved the death of the *payee*, and the indorsement of the note to him by his *executor.*

It does not appear that the indorsement by the executor was *under seal.*

Without intending to question the correctness of the conclusion of the Court in that case, the case under consideration is regarded as one essentially differing from it. We have before adverted to its peculiarities.

In *Hinkley* v. *Fowler*, 15 Maine, 285, SHEPLEY, J., after stating certain well established rules, says, "Without a violation of these rules, a statute or record, or sealed instrument, may not only be used as evidence, but may form the very foundation out of which arises an action of *assumpsit.*"

In *Fenner* v. *Mears*, 2 Bl. R. 1269, the defendant made a bond to one Cox, and indorsed upon it an agreement to pay to any assignee of Cox; the plaintiff being assignee maintained assumpsit.

"*Innes* v. *Wallace*, 8 T. R., 595, was assumpsit by the assignee against the obligor of a stock bond, and the Court

say this is not an action on the bond; that, the assignment is a consideration for the assumpsit, and liken it to an assumpsit on a foreign judgment."

From the best examination and consideration I have been enabled to give this case, I arrive at the conclusion that the coupons declared upon must be regarded as negotiable instruments; and that when transferred, by being cut off and delivered, the holder of them, in good faith and for value, may maintain an action of *assumpsit* in his own name against the defendants.

NOTE. — Since the above was written, Redfield on Railways has been published, to which I refer, page 595, § 239, and cases there cited.

RUFUS KNIGHT *versus* STEPHEN P. MAYBERRY *& al.*

Where the debtor in an execution holds the legal record title to the real estate, neither he, nor his tenant, nor any person holding under him, can maintain trespass against an officer, or the creditor in such execution, for entering upon such real estate, and levying the execution thereon.

*It seems* that the remedy of the *equitable* owner of real estate, who claims that the levy of an execution upon the same, as the property of the one having only the *legal* title thereto, is fraudulent as against him, is in *equity*, and not at *law*.

ON REPORT by DAVIS, J.

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

*F. O. J. Smith*, for plaintiff, contended in an elaborate argument, that, upon the evidence offered, the levy was void; that this might be shown in an action at law, and, therefore, that the action may be maintained.

*J. C. Woodman*, for defendant, presented a full argument controverting the positions of the counsel for plaintiff.

As the decision of the Court does not involve the point chiefly argued, the arguments are omitted.

The opinion of the Court was drawn up by

KENT, J.—This is an action of trespass *quare clausum*. It is instituted against a deputy sheriff and creditor, and the act proved, is an entry upon the land for the purpose of levying an execution against one Morse. The facts, as they appear, are substantially these. Morse had the legal title to the land. In 1847 he gave a bond to the plaintiff to convey the land to him upon payment of certain notes, the last payable in seven years.

In 1852 the defendant Mayberry attached the land as the property of Morse. The bond was acknowledged and recorded in 1854. In November, 1857, defendant recovered judgment in his said suit, and, on the seventeenth of the same month, the officer, who is sued, entered upon the land with the appraisers and the creditor, who pointed out the land, to make a levy to satisfy the execution. This levy was completed on the twenty-third of said month. Morse, by deed, conveyed the premises to the plaintiff on the following day, the twenty-fourth of November. The whole amount due on the bond and notes was not paid until the last named day.

The plaintiff offered to prove that the creditor, the defendant Mayberry, knew of the purchase and occupancy of the land by the plaintiff; that his levy of his execution was fraudulent as against the plaintiff, and that he had, by his attachment and proceedings, fraudulently prevented the plaintiff from paying his notes to Morse, and from obtaining a perfect title in law.

The first question that naturally arises is, whether this action of trespass can be maintained against the officer and his assistants, the only act being proceedings necessary to levy the execution. The legal record title clearly remained all the time in Morse, as whose property the land was levied upon. The plaintiff was in possession; but he had not any deed of the land. He might have equitable rights under his bond; but, in law, he was only tenant at will to Morse.

We are not prepared to say that, in such a case, an action of trespass can be maintained against an officer and creditor,

who enter only to make a levy to transfer the legal title. It would be a dangerous precedent to establish against officers, to hold that they may, for such an act, be liable to a suit in which the parties may contest, at immense cost, their titles, and settle their controversies at their expense. It is true, that the defendants cannot strictly justify as acting under the legal title, afterwards acquired and perfected by the levy, because the title does not pass to the creditor until the acts are completed. But the law authorizes the levy, and directs the officer to make it. When made, against a debtor in possession, and who is the undisputed owner of the legal title, such debtor clearly could not maintain trespass for the entry for the purpose of making a levy. And yet, the perfect legal title and full possession is in him, when the officer enters and during all the preliminary proceedings. The officer's protection is, that he has a right and is bound to levy upon the estate, and do all acts necessary to perfect such transfer of title. And if the land is in possession of another, as the tenant of the legal owner, or holding under him, the officer cannot be held as a trespasser; and if the officer cannot be, the creditor, who goes on to point out the land, and the appraisers, cannot be thus held. *Cook* v. *Crommet*, 13 Maine, 250; *Hunnewell* v. *Hobart*, 42 Maine, 565.

The protection which commissioners, appointed by the Court to estimate damages, or to assign dower, or to do any act under such authority, derived from the law, rests upon the principle, that what the law authorizes to be done on the premises will be regarded as lawfully done. The entry, and acts following necessary to the performance, cannot be regarded as a trespass, or such a violation of the legal rights of the party in possession, as will sustain an action.

We do not intend to intimate any opinion in relation to the legal or equitable rights of the parties, beyond the point above considered.

We may properly say, that the questions presented in the able arguments of the counsel, seem to belong appropriately to the equity jurisdiction of the Court, and could in that form

of action be best considered and determined. The parties, however, must determine for themselves, as they may be advised, as to any further proceeding in relation to the matters between them. *Nonsuit confirmed.*

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

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BENJAMIN MORSE *versus* WILLIAM MAYBERRY.

Under the statute, (R. S., c. 82, § 101,) a plaintiff, who has had costs awarded against him in a former action, cannot maintain a suit upon the same cause of action until such costs are paid, although a new and additional cause of action is embraced in the second writ.

ON EXCEPTIONS to the ruling of DAVIS, J.

ASSUMPSIT on an account annexed to the writ, and the usual money counts.

At the return term of the writ, the defendant appeared and moved that the plaintiff be ordered to pay the costs of a former suit, in a judgment rendered against him and in favor of the defendant, upon a nonsuit. The writ, in the former suit, embraced the same causes of action as the one in this; but the writ in this suit contained claims additional to those in the other writ.

The presiding Judge granted the motion and ordered the costs to be paid by the first day of the next term, and, in default, the action to be dismissed. On the first day of the next term, the costs not having been paid, the Judge ordered the case dismissed.

These orders were duly entered upon the docket. To the last order the plaintiff excepted.

*F. O. J. Smith,* for plaintiff.

The constitutional right of the Legislature to impose terms of disqualification of a party to bring suits is not entirely clear.

The statute, if sustained, will be construed strictly, and will not be held to affect a cause of action never before sued.

*Vinton*, for the defendant, cited R. S., c. 82, § 101.

The opinion of the Court was drawn up by

KENT, J. — When, in a former action, the plaintiff has had costs awarded against him, he cannot sustain a suit "upon the same cause of action, until such costs are paid." R. S. of 1857, c. 82, § 101.

In this case, the only question is, whether, if the second suit contains items additional to those in the first suit, the statute provision, as to payment of costs, applies. We think it does. The object of the statute is to prevent a party from being harrassed by successive suits, by an irresponsible plaintiff, or by one who will not, if he is able, pay the costs awarded against him. This object would be in a great measure defeated, if the plaintiff could avoid the effect of non-payment, by bringing a second, or third, or fourth suit, and, in each, adding some new item of claim, which might be a just or an unjust claim. When the second suit contains the "same cause of action" as the first, it cannot be prosecuted until the costs of the first suit are paid, although the second may contain additional claims. This decision is clearly within both the letter and spirit of the statute. *Exceptions overruled.*

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

NATHAN NUTTER *versus* NORTON STOVER, 2d.

If a person entrusts his promissory note to another and the latter agrees to indorse it, get it discounted, and apply the proceeds to pay another note, but fails to do so, he has no such property in the note entrusted to him, as will enable him to maintain an action upon it against the maker.

The holder of a promissory note, taken in the ordinary course of business, for a valuable consideration, before it is due, and without notice of any defect in the title, or right of the person transferring it, may collect it of the maker, although the original holder had obtained it wrongfully, or held it in trust for a specific purpose for the benefit of the maker, or for any other cause had no legal right, as against the maker, to transfer it.

But, in order to let in the defence, express notice of a defect in title or right is not indispensable; it is sufficient, if the circumstances are of such a character as necessarily to cast a shade upon the transaction and put the holder on inquiry.

One, who receives a note merely as collateral security for a pre-existing debt, cannot be regarded as a holder for a valuable consideration.

A note, not valid against the maker, is not a sufficient consideration for a new note given in *renewal* of the other.

Nor is a note, not valid against the maker, *although indorsed by the person on whose account it is held as collateral security*, a sufficient consideration for a new note given in renewal of the other.

Declarations of the maker of a note given for an old one, at the time of making the note, are not admissible to affect his legal liability on the note; but are admissible to show whether the new note is entirely a new contract, or an extension of the old one.

ON REPORT. Case referred to the Court.

ASSUMPSIT upon a promissory note, signed by the defendant and indorsed by one Stevens. The facts found by the Court, as proved by the evidence, and questions arising thereon, are stated in the opinion.

*J. C. Woodman*, for plaintiff.

I. The note in suit being given in renewal of the old note, if there was a consideration for the latter, there was for the former.

The agreement of Stevens to take up the $405 note was a sufficient consideration for the old note.

A promise is a good consideration for a promise; and it is

so previous to performance and without performance. 1 Parsons' Con., 372; 1 Com. Con., 14; *Gower* v. *Capper*, Cro. Eliz., 543; *Cartwright* v. *Cooke*, 3 Barn. & Ald., 703; *Wentworth* v. *Bullen*, 9 B. & C. 840; *Miller* v. *Drake*, 1 Caines, 45.

II. But the note given up was indorsed by Stevens, and, therefore, the second note was on good consideration, even if the first note was not. The waiver of the plaintiff of his right against Stevens was a sufficient consideration. 1 Parsons' Con., 369.

III. Nutter was a *bona fide* holder of this note for a valuable consideration, without notice of any want of right in Stevens to dispose of it for his own benefit.

*Shepley & Dana*, for the defendants.

The opinion of the Court was drawn up by

KENT, J.—The first question in this case is, whether the original note for $130, for which the one in suit was afterwards substituted, was on a legal and sufficient consideration, so that an action might have been brought at once, by Stevens, to whom it was given. The plaintiff contends that there was sufficient consideration, in a promise for a promise.

The facts on this point are substantially these. Stover, the defendant, had given his note for $405 to Stevens, which note Stevens had transferred to the Canal Bank. Before it became due, Stover had, from time to time, loaned sums to Stevens, and being about to go on a journey to Baltimore, he gave Stevens a note for $130, and enough more money, added to what he had before lent him, to make up the $405, coming due on the note. The arrangement seems to have been, that Stevens was to get the note for $130 discounted, and, with that money, and what had before been loaned or left with him, to take up the note for $405 when it should become due. This he did not do.

Assuming that Stevens did promise or agree to take up the note at the bank, was that such a consideration, for the note

of $130, as would enable Stevens to maintain an action on it against Stover, at once, or before he had performed his agreement? We think not. The whole transaction was in the nature of a bailment, of the kind denominated *mandatum*.

If one has property entrusted to him, in order that he may do something in, or about, or with the property, if he accepts the property and trust, this is a contract on a consideration, and he may be held for any failure in the discharge of his obligation. But such a contract does not transfer the property in the thing bailed to the bailee, or enable him to sue in his own name a note thus entrusted to him. If it did, then any express-man, who had taken an indorsed note, agreeing to carry it to a bank in another town and get it discounted, and, with the money, pay a debt of the person employing him, to a third party in that town, could at once sue the note as his own, and set up his promise to carry the note, and get it discounted, and apply the money as directed, as a good consideration to sustain his action.

If, in consideration of the note and money, Stevens had agreed, at all events, to take up the note for $405, and to discharge Stover from all liability thereon to him, and to receive this note for $130 in payment, and such an absolute and final arrangement had been executed, then a sufficient consideration would appear. *Cushing* v. *Wyman*, 44 Maine, 121. But the facts in this case do not establish any thing beyond, at most, a promise to do a certain thing with the note if he could, and to apply the proceeds towards the payment of a note in the Canal Bank. It was simply a delivery of certain things to Stevens, as his agent or bailee, to do with them as directed. There was no release, and no agreement to take up the note, except as he might be supplied by funds derived from a discount of this note delivered to him. A promise is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has a right at once to hold the other to a positive agreement. *Biddel* v. *Dowse*, 6 B. & C., 255, and *Hopkins* v. *Logan*, 5 M. & W., 241.

In the case at bar, all that Stevens agreed to do was to get the note discounted, and apply the proceeds. If he could not get a discount, or obtain money on the note, he was under no legal obligation to defendant to take up the large note at the bank. If he did take it up as indorser, without such aid from this note, he would have had a right to recover of Stover on the note, at least the deficiency beyond the cash he had received.

We conclude, then, that Stevens could not have maintained an action on the first note against the defendant. He had not any claim on Stover, for he did not perform, as bailee of this note, the undertaking he had voluntarily assumed.

The plaintiff further contends that he is entitled to recover, on the ground that he was a *bona fide* holder of the first note, for a valuable consideration, without notice. If he was, he undoubtedly acquired a legal right in the note as indorsee, although Stevens might not have any right. Did he take it, giving value—and did he take it without such notice as would debar him from claiming as a *bona fide* holder?

The law is well settled, that if a person takes a negotiable note in the ordinary course of trade, giving value for it, before it is due, and without notice of any defect in the title or right of the person transferring it, he may recover the amount, although in fact the original holder had obtained it wrongfully, or held it in trust for a specific purpose, for the benefit of the maker, or from any cause had no legal right as against the maker to transfer it. *Wheeler* v. *Guild*, 20 Pick., 549, and numerous other authorities.

The question on this part of the case is, had the plaintiff sufficient notice of the defect of title, or want of authority in Stevens? This fact, perhaps, might have been more satisfactorily determined by a jury, who had seen as well as heard all the witnesses, and who could therefore, with that advantage, pass upon whatever of contradiction appears in the testimony. There seems to be no doubt that defendant and Stevens had at times accommodated each other by loans and signatures to notes. It also appears, that the plaintiff was

somewhat familiar with both, and was aware that there were such transactions. The plaintiff says that he was so told by Stevens. The plaintiff "made Stevens' counting-room his stopping place; and was in the habit of getting money for Stevens, on his, (Stevens',) checks indorsed by plaintiff." There was, evidently, a close intimacy and considerable knowledge of each other's affairs. The defendant testified, that the first knowledge he had of Stevens' failure was from the plaintiff, who informed him of the fact, and, also, that "Stevens had not paid his note for $405." How he knew that there was such a note, and that Stevens had promised to take it up, does not appear. The argument is, that, if he knew the fact, he probably also knew why and how he was to raise the money.

Stevens swears positively that the plaintiff knew he had this note, and asked him for it; that he told him that "the (Stover) note did not belong to him, and he, (plaintiff,) must not use it; that if he did use it, he must take it up when it became due." The defendant testifies, that plaintiff told him that "when Stevens gave him the note he told me I ought not to use it." The plaintiff does not, in direct terms, deny that such conversation took place. He admits that Stevens objected to letting him have the note; that he said he did not wish to let him have it. He says, that afterwards he "saw Mr. Stevens, and he authorized me to negotiate the $130 note, and I did." He also states, that he knew nothing about the transactions between Stover and Stevens, until he saw Stover in the cars after his return from Baltimore, when Stover told him. All this may be true, and yet Stevens might have told him, what he swears he did, about not owning the note; and plaintiff might have told the defendant that Stevens did tell him that he ought not to use the note. We have, then, the testimony of two witnesses, not directly, or by necessary inference, contradicted by plaintiff.

Taking this testimony and the surrounding circumstances into consideration, we think the clear preponderance of the

evidence is, that the notice, testified to by Stevens and defendant, was in substance given.

Was this sufficient? "Express notice is not indispensable, but the notice will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry." *Cone* v. *Baldwin*, 12 Pick., 545; *Hall* v. *Hale*, 8 Conn., 336; *Evans* v. *Kymer*, 1 B. & Ald., 528; *Carr* v. *Hilton*, 1 Curtis, 390.

We cannot doubt that the plaintiff had sufficient notice to put him on his guard and on inquiry, and that he did not take the note in the common course of business, without notice. He cannot claim the right of an innocent indorsee of the first note, for value, without notice.

The evidence in the case leaves the actual transaction between Stevens and the plaintiff, in relation to the first note, somewhat in doubt. Stevens represents, in substance, that the plaintiff had aided him in obtaining money, and that he was on his check as indorser, and perhaps otherwise his creditor, and that he let him have this note as collateral security, and to raise money upon to meet his liabilities. The plaintiff seems to convey the idea that he in fact bought this note and paid for it; that he let Stevens have $100, in cash on Saturday, and took this note afterwards for the $100, and paid the balance of $30, to Stevens. But, this view is not consistent with his own statement, that "he *afterwards* saw Mr. Stevens, and he authorized me *to negotiate* the $130 note, and I did." If he had before bought the note and paid for it, and taken it absolutely by purchase, why should he seek for the consent of Stevens to negotiate it? The fact probably was, that there was some looseness in the transaction, and that the note was, in fact, handed to plaintiff to secure him, and to aid him in raising money. At least, in the conflict of the testimony, the somewhat indefinite statements of the plaintiff cannot sustain the assumption of an absolute sale of the note to him, against the positive testimony of Stevens, and the probabilities of the case.

In the case of *Bramhall* v. *Beckett*, 31 Maine, 205, this Court, after full consideration and examination of numerous authorities, decided that, where a person receives a bill or note, as collateral security merely, without parting with any right, extending any forbearance, or giving any other consideration, the transaction will not constitute a commercial negotiation in the usual course of business, and he cannot be regarded as holder for a valuable consideration. See, also, *Evans* v. *Kymer*, before cited; a case which resembles this in many particulars.

But the plaintiff claims that the note in suit is not the original note for $130, given by defendant to Stevens, but another note, for the same sum, given by defendant directly to the plaintiff, and that there was a new and independent consideration for the note in suit.

The consideration for the new note was the old note given up. The declaration of defendant, when he gave it, that he never would pay it, could not affect his legal liability, created by the written contract and his signature. It could only bear upon the question whether it was an entirely new contract, or a mere extension of the old, the defendant reserving all his right to resist the payment of the new note as well as the old. On the other hand, any verbal and additional promise to pay the note when it became due, could add nothing to his legal liability. The defendant's written contract binds him, unless he has a defence to the contract.

He admitted to Mr. Brown, that he gave the note, but said "that it was not for him to pay." His defence is, that there was no legal consideration for this second note. This depends upon his legal liability on the first. A mere renewal of a note, which is not valid against the party, cannot be a sufficient consideration to support the new note, which simply takes the place of the other. Even if a man, by mistake of facts, supposes himself indebted when he is not, and gives a note for the sum claimed, he may undoubtedly show a failure of consideration. We have before determined that the plain-

tiff could not maintain an action against the defendant on the first note.

But the plaintiff further insists, that there was a new consideration, viz., the giving up of the old note, which had the indorsement of Stevens on it. This might be a good consideration, if the plaintiff, by such surrender, did in fact give up any valuable claim on Stevens as indorser. If he had been the absolute owner of the note, and Stevens, by his indorsement, was held beyond his former liability to the amount of this note, and if due notice had been given, then the plaintiff would have had a direct and presumptively valuable interest in Stevens' indorsement.

But, if it was in his hands merely as collateral security, then any payment would have been for Stevens' benefit. Stevens' indebtedness to plaintiff was not affected by the transfer. His indebtedness and liability remained the same. If he paid, as indorser of this note, $130 to plaintiff, that would reduce his debt to plaintiff, by that amount. If he did not pay it, his original liability continued. It does not appear in the case that the note was protested, or a demand on Stevens made. But we do not decide the case upon that point.

According to agreement of the parties, it appearing that the action cannot be sustained, the judgment must be—

*Plaintiff nonsuit.*

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

STILLMAN ROBERTS *& al., scire facias, versus* AMOS KNIGHT.

A writ of *scire facias* cannot be lawfully issued against one who has been adjudged a trustee, before the return day of the execution against the principal defendant.

ON EXCEPTIONS to the ruling of HATHAWAY, J.

THIS was an action of *scire facias* against the defendant as trustee of one McDonald.

The defendant demurred to the writ, and the demurrer was joined. The presiding Justice overruled the demurrer, and adjudged the declaration to be good, and the defendant excepted. The declaration alleged, *inter alia*, that execution was issued against McDonald as principal and the defendant as trustee, Nov. 14, 1857; that an officer made demand upon the defendant, Dec. 10, 1857; and, on the same day, the officer made his return on said execution, that the defendant refused to deliver or expose to him any goods or credits of said McDonald.

The writ of *scire facias* was sued out Dec. 29, 1857, as appeared by its date.

*S. L. Carleton*, for plaintiffs.

Plaintiff may sue out *scire facias* against a trustee after *demand* by the officer holding the execution, and it is returned unsatisfied. R. S., 1840, c. 119, § 74; R. S., 1858, c. 86, § 67.

And after return of execution, even before its return day. *Grose* v. *Hill*, 36 Maine, 22; *Whitney* v. *Hammond*, 44 Maine, 305.

*Fessenden & Butler*, for defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The only question presented by the pleadings is this—can a writ of *scire facias* be lawfully issued against one who has been adjudged a trustee, before the return day of the execution against the principal defendant?

In this case, a demand was duly made upon the defendant, and the execution returned before the writ of *scire facias* was sued out. But, the return day of the execution did not occur until February 14th, 1858; and the writ was issued December 29th, 1857.

Before such a writ can be sued out, the statute requires, that the "execution be returned unsatisfied." R. S., c. 86, § 67. Until that is done, it is uncertain whether it may not be satisfied by the principal defendant. Nor can this uncertainty be removed until the return day of the execution. If, in fact, returned before, it may be re-issued; as it is only when the officer has used the power conferred by the process during the whole time given to him that he can return it unsatisfied, within the meaning of the statute. *Adams* v. *Cummiskey*, 4 Cush., 420.

*Demurrer sustained; — Declaration adjudged bad; — Judgment for the defendant.*

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

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UNION BANK *versus* JOHN C. HUMPHREYS.
Same *versus* ALFRED J. STONE.

A notarial protest which states that the notary "made notices to all the indorsers," which he "caused to be left at their dwellinghouses," is not sufficient evidence of notice to charge the indorsers of a promissory note.

ON REPORT. Both cases presented the same questions, and the facts are sufficiently stated in the opinion of the Court.

*Gilbert & Rogers*, for plaintiffs.

*Barrows*, for defendants.

The opinion of the Court was drawn up by

APPLETON, J. — The defendant is sued as indorser. He claims to be discharged because he was never notified of the dishonor of the note. The only evidence on this subject is the notarial protest, which states that the notary "made notices to all the indorsers," which he "caused to be left at their dwellinghouses." It is for the plaintiffs affirmatively to establish the facts necessary to charge the defendant as indorser. What the notices contained, and whether sufficient or not to charge an indorser, is left entirely to conjecture. The plaintiffs neither asked for leave for the notary to amend his protest, nor offered to prove that the notices sent contained the proof of the dishonor of the note. Upon the evidence offered the defendant is not liable.

In *Lewiston Bank* v. *Leonard*, 43 Maine, 144, the Court were satisfied, from the facts proved, but which are not fully referred to or set forth in the opinion, that the defendant had been seasonably notified of the dishonor of the note. In the present case, the evidence entirely fails to establish that fact.

According to the agreement of the parties,

*The case is to stand for trial.*

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

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NOTE by KENT, J. — This case is distinguished from the case of *Lewiston Falls Bank* v. *Leonard*, 43 Maine, 144, in several particulars. In that case the notary certified that he made a demand on the promisors, and that payment was refused, and "that said notes remaining unpaid, he *duly* notified the indorsers by written notices sent them by mail," &c. The words "duly notified," might reasonably be construed to mean something more than the naked words used in this case. An indorser could not be said to be *duly* notified, unless he had notice of demand and non-payment.

In that case, it also appeared in the testimony of the cashier, that the notarial notices to the indorsers were sent to him, and that they were "notices of non-payment and requiring payment," and that he sent them by mail to the indorsers. In that case, it also appeared that the notice sent to the defendant was in the possession of his daughter, who acted as his agent to take letters from the post-office.

Under these circumstances, the Court, having the power to draw inferences, were satisfied that the plaintiffs had, *prima facie*, proved *due* notice.

In this case, if the certificate of the notary that he caused notices to be left at the house, is sufficient evidence of the fact stated, which may perhaps be doubtful, in the absence of the testimony of the person who left it, yet it does not show with certainty that the notice ever came into the actual possession of the defendant, or that it is now in existence, and could be produced on notice.

No inference as to the contents, based on non-production, could therefore be raised in this case.

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NATHANIEL BLANCHARD *versus* GEORGE H. BLANCHARD.

The conveyance of two thirds of a parcel of real estate in common and undivided, by one who owns the whole in fee subject to the right of dower of a widow, has no effect upon the right of dower.

In such case, partition between the parties to the deed would not save the grantee from the liability of having the widow's dower assigned in his portion of the estate; nor can the grantee, by petition for partition, have his portion set out in severalty, before the dower has been assigned.

The covenants of warranty, in a deed given under such circumstances, are broken on its delivery.

The breach, having once taken place, is not cured, though only one third of the whole is assigned as dower, and the grantee is left in possession of the residue.

The damages will depend upon whether more than one third in value was assigned as dower; and the grantee is not concluded, upon this question, by the assignment.

ON REPORT.

ACTION OF COVENANT for the breach of the covenants in a deed of warranty.

The defendant being seized in fee of a parcel of real estate, subject to the right of dower of his mother therein, conveyed by deed of warranty two undivided third parts thereof to the plaintiff.

Subsequently, one-third of the whole was assigned to his mother as dower by metes and bounds, and the plaintiff was left in possession of the remainder without interruption, or eviction therefrom.

*Shepley & Dana*, for plaintiff.

*Henry Willis*, for defendant.

1st. In construing covenants, the whole instrument must be taken together, and one part be explained by another. Technical rules are not to be so much consulted as the real meaning of the parties, where it can be gathered from the instrument itself. U. S. Digest, vol. 7, p. 147, §§ 1 and 2; *Killian* v. *Harshaw*, 7 Iredell, 497.

2d. The whole tenor of the deed shows, that it was the intention of the parties to reserve one third of the entire estate for the purpose of satisfying the widow's right of dower; and that the covenant of freedom from incumbrances was not intended to extend over that right of dower.

3d. The defendant in good faith conveyed by his deed to the plaintiff, two thirds in common and undivided of the estate, leaving one third to satisfy the widow's dower, she being then in possession as dowress. After the dower was assigned in due form of law, there still remained the two third parts of the entire estate, conveyed by defendant's deed, which the case shows plaintiff has ever since occupied without eviction or interruption.

4th. The case, therefore, showing that there has been no eviction of the plaintiff from the premises conveyed by the defendant's deed, this action cannot be maintained, *Emerson* v. *Prop'rs of land in Minot*, 1 Mass., 464; *Bearce* v. *Jackson*, *Adm'r*, 4 Mass., 408; *Gilman* v. *Haven*, 11 Cush., 330.

5th. But, if the Court should be of opinion that the action will lie, the plaintiff having suffered no actual injury, he can recover no more then nominal damages. 4 Kent's Com., *476; *Copeland* v. *Copeland & al.*, 30 Maine, 446; *Stowell* v. *Bennett*, 34 Maine, 422, and cases cited; *Willson* v. *Willson*, 5 Foster, (N. H.,) 229.

The opinion of the Court was drawn up by

TENNEY, C. J.—The deed containing the covenant, for the breach of which this action was brought, dated Oct. 4, 1851, is of two undivided third parts of certain real estate, therein described, which was owned and possessed by David Blanch-

ard, at the time of his decease, in the year 1838, and which descended to the defendant, subject to the right of dower therein, of Almira Blanchard, the widow of David.

In 1856, the widow, under proper proceedings in probate, had her dower assigned in said real estate, and has had exclusive possession of the part so set off to her, since the assignment, leaving the remainder in the possession and the occupation of the plaintiff, without interruption, and eviction therefrom.

The conveyance of two third parts of the whole to the plaintiff, in common and undivided, had no effect upon the widow's right of dower; she was still entitled to have the assignment from any portion of the whole, according to the judgment of the commissioners appointed by the Probate Court and the approval of the Probate Judge. The incumbrance, therefore, was co-extensive with the boundaries of the whole.

If the portion conveyed to the plaintiff in common and undivided, was free from this incumbrance, the plaintiff could forthwith have instituted proceedings, in order to have partition, so that he could enjoy his two third parts in severalty, without exposure to any change by the widow in securing and making effectual her right. But partition in a process between the parties to the deed, would not in the least secure the plaintiff from the liability to have a part of the land set off to him in the partition, covered by the assignment of the widow's dower. Hence, he could make improvements only at the risk of loss, arising from an eviction which he could not resist to some extent, if it should be attempted.

Persons seized of, or having a right of entry into real estate in fee simple or for life, as tenants in common, joint tenants or co-partners, may be compelled to divide the same by a writ of partition at common law. R. S., c. 88, § 1. Or, by petition for partition, under the same statute, § 2, *et seq.* But, a person having such seizin or right of entry of real estate, as mentioned in the section referred to, cannot invoke this process in order to cause a partition, when the other party is a widow entitled to dower, which has not been assigned.

The proceedings in partition, whether by writ or petition, are in the Supreme Judicial Court, and the parties have a right to a trial by jury of any issue of fact, which may be presented, as in cases at common law. But the assignment of dower is in probate, and the parties have not an absolute right to a trial by jury, and the proceedings are essentially unlike those in questions of partition, as well as before a different tribunal of dissimilar jurisdiction. Hence, it follows, that in a deed of land, which is subject to the right of dower, and two third parts only thereof are attempted to be conveyed in common and undivided, in fee simple, with covenants of warranty, the incumbrance is not thereby removed from the two third parts; and the grantee is not bound by the line which separates the part set off as dower from the residue. The covenant of warranty was broken on the delivery of the deed. *Porter* v. *Noyes*, 2 Greenl., 26; *Shearman* v. *Ranger*, 22 Pick., 447. The breach having taken place, is not cured, though one third only of the whole land subject to the dower, is assigned.

According to the agreement of the parties, *the defendant must be defaulted.*

It cannot be predicated, that the damages are merely nominal, though in fact it *may* be so. As we have seen, the plaintiff is not concluded by the assignment, on the question of damages. The question is open, whether he has the possession and enjoyment of two third parts of the land. He has been evicted, in fact, of the part set off to the widow. If this part shall be shown to exceed in value one third part of the whole, he will be entitled to damages accordingly, so long as the life estate in the portion assigned shall continue.

Damages to be assessed by any member of the Court, according to the agreement in the report.

RICE, APPLETON, GOODENOW, DAVIS and KENT, JJ., concurred.

JAMES DOCKRAY, *in Equity, versus* HARRIET L. MASON *& al.*

By virtue of section 1, chapter 61, of the Revised Statutes, (the provisions of which are in affirmance of well established doctrines in equity,) real estate, paid for by a debtor, and conveyed to another with intent to defraud creditors, is liable to be taken for the payment of debts contracted before said conveyance.

After a creditor, in such case, has exhausted all legal remedies, a court of equity will aid him in perfecting his title to the estate, and prevent his being injured by an outstanding fraudulent title.

The levy of an execution is not of itself sufficient to transfer real estate to which the debtor never had the legal title, but which is held in trust for him, but a court of equity will thereupon decree a conveyance of the legal title.

After such a levy, a fraudulent conveyance of the estate to one assisting in the fraud, will not affect the rights of the creditor.

The administrator of a deceased debtor need not be made a party to a bill seeking a decree, that real estate purchased by him in his lifetime, but conveyed to another with intent to defraud his creditors, and levied upon by one of them, shall be released by the person fraudulently holding the legal title.

BILL IN EQUITY.

The bill alleges, that Charles Mason, now deceased, September 19, 1854, gave to one Mitchell his promissory note for $435,24, payable in twelve months, for merchandize purchased of said Mitchell; that, before said note became due, Mitchell, for a valuable consideration, indorsed and transferred it to the plaintiff; that the plaintiff recovered judgment against Mason upon the note, and, Nov. 22, 1855, levied his execution upon certain real estate described in the bill; that said Mason, on the nineteenth day of April, 1855, had purchased the same real estate of Abigail M. Tolman, and paid for it with his own money, but, with the intention of defrauding his creditors, caused it to be conveyed to the defendant, Harriet T. Mason, then his wife, in whose name the title stood at the time of the levy; and, that the said Charles and Harriet T. Mason, by deed dated Nov. 23, 1855, but executed Dec. 7, 1855, without consideration, and with intent to de-

fraud the plaintiff, conveyed the real estate to Mary M. Tolman, the other defendant, who was cognizant of and assisted in the fraud.

The plaintiff prayed for general relief, and that the defendants be required to release and convey to him the estate levied on.

The defendants demurred to the bill.

*Henry Willis*, for plaintiff.

1. This Court sitting as a Court of Equity, has jurisdiction of this case under the statutes of Maine, both as the bill alleges fraud on the part of defendants and as the property described may be considered as being held in trust for Charles Mason by his wife, the said Harriet. R. S. of Maine, c. 77, §§ 8, 4, and the bill is not demurrable. *Hartshorn* v. *Eames*, 31 Maine, 93; U. S. Digest, vol. 13, p. 361, §§ 57, 58; Story on Equity, §§ 64, 65, 66, 73, 184 and note, 252, 333, 349, 351, 352, 353, 355, 369, 440, 1200 to 1205, and 1265.

2. The property having been purchased with the money of the husband, Charles Mason, is subject to be taken in satisfaction of the claims of his creditor, the complainant. R. S. of Maine, c. 61, § 1; *Davis* v. *Herrick*, 37 Maine, 399; *Dewey* v. *Long*, 25 Vt., p. 564, also in (U. S. Digest, vol. 14, p. 325, § 68.) The levy in this case was the proper mode of acquiring an equitable title. Greenleaf's Cruise's Digest, vol. 2, p. 520, note 3; U. S. Digest, vol. 13, p. 362, § 67.

3. The complainant having exhausted the remedies provided at common law, must now look to a court of equity to perfect his title to the demanded premises.

*Shepley & Dana*, for defendants.

1. As the debtor had not the legal title to the estate at the time of the levy, the complainant took no title by it. *Blood* v. *Wood*, 1 Met., 528; *Howe* v. *Bishop*, 3 Met., 27; *Haskell* v. *Hilton*, 30 Maine, 419, cited in *Houston* v. *Jordan*, 35 Maine, 535.

The levy being void, a court of equity cannot make it valid and enforce it.

2. The bill is defective because the administrator of Chas. Mason is not made a party to it. If alive, he would be an indispensable party. His estate is equally interested, and his administrator should be a party.

The opinion of the Court was drawn up by

TENNEY, C. J.—The case is presented on a demurrer to the bill; and, according to the statements therein, a gross fraud, upon the rights of creditors existing at the time of the transactions alleged, was attempted. Whether the relief sought by the complainant can be granted or not, as the parties and the bill are now presented, is the question.

As between Charles Mason and his wife, Harriet T. Mason, the latter held the estate, conveyed by Abigail M. Tolman, to her, in trust, resulting from the payment of the consideration alleged to have been made entirely by the husband, (2 Story's Equity, § 1201,) and was to be taken as his property, in payment of his debts, contracted before the purchase. R. S., c. 61, § 1.

The provisions of this statute are an affirmance of well established doctrines in equity, in cases of fraudulent conveyances, so far as these provisions have relation to creditors, who were so at the time of the fraudulent acts complained of. 2 Story's Eq., § 1265.

The statute referred to has prescribed no form of remedy, for cases falling within its provisions, in this respect, and we are to seek the process for obtaining the object, intended to be secured, that is ordinarily adopted in analogous cases. When a creditor cannot effectually reach the real estate which is equitably that of the debtor, by reason of a fraud committed by the debtor, and others, who may hold the legal title, courts of equity will aid the creditor, to enable him to obtain payment, when the legal remedies have proved inadequate. And, on the exhibition of such facts as show these remedies to have been exhausted, equity jurisdiction attaches. When real estate has been conveyed, and, under the laws of this State, the conveyance operates as a fraud upon the rights of

a creditor, established principles allow him to make a levy upon it, if he would have the assistance of a court of equity to enable him to obtain satisfaction from the estate itself, which has been thus fraudulently conveyed. Having done all in his power, in order to obtain a title, in the mode provided, a court of equity will prevent his being injured by an outstanding fraudulent title. *Webster* v. *Clark*, 25 Maine, 313.

The authorities cited for the defendants, are conclusive upon the point, that the extent of an execution upon real estate, to which the debtor therein had no legal title, but the legal title in the same is held as a resulting trust for his benefit, is not of itself sufficient to vest the legal estate in the creditor, against the trustee. But these authorities go no further. And the institution of this suit is to obtain a decree for a conveyance of the legal title to the complainant, which is held in fraud against the creditor in the execution, because, without such decree or relief in equity, he has no remedy.

The allegations in the bill, are, that the land upon which the levy was made, and other land adjoining, was purchased by Charles Mason, the plaintiff debtor, with his own means, of Abigail M. Tolman, which, by his procurement was conveyed to his wife by Abigail M. Tolman. This land, therefore, is in the condition stated in the statute referred to, and may be taken for the husband's debts, contracted before the conveyance.

It is further alleged in the bill, that the same real estate was fraudulently conveyed by Harriet T. Mason and her husband, Charles Mason, on Dec. 7, 1855, to Mary M. Tolman, the mother of Harriet T. Mason, without consideration, and with the fraudulent intent of depriving the complainant of the means of obtaining payment of the debt alleged to be against the said Charles Mason, and that the grantee in the deed aided in that fraud. This conveyance was after the complainant's levy, and it could have no operation to place the creditor in a position less favorable than he occupied before. Being authorized to take the land in payment of his debts, he certainly cannot be deprived of that right by a

conveyance, without consideration, designed to defraud him of his remedy.

It is objected to the maintenance of the bill, that the administrator of the estate of Charles Mason should have been a party thereto, assuming, that if he were living, he must have been a party. As between the grantors and the grantee in the deed from Mason and wife to Mary M. Tolman, the whole title passed. If the complaint should prevail on the statements in the bill, and he should have a decree, that Mary M. Tolman should convey to him, the estate of Mason could have no conceivable interest.

*Demurrer overruled.*

RICE, APPLETON, GOODENOW, DAVIS and KENT, JJ., concurred.

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DAVID T. CHASE *versus* JACOB B. FLAGG *& al.*

A discharge under the insolvent laws of another State is no defence in the Courts of this State to an action upon a note indorsed before it was due, and before the proceedings in insolvency were commenced, to the plaintiff then and ever since a resident in this State, although the note was made and payable in that State, and both the original parties to it resided there.

ON REPORT from DAVIS, J., presiding.

ASSUMPSIT upon three promissory notes, signed by the defendants, two payable to their own order and indorsed in blank by them, and the other payable to H. S. Lawrence, or order, and indorsed in blank by him.

The defendants introduced their discharge in insolvency under the laws of Massachusetts, upon proceedings commenced subsequently to the giving of all the notes in suit.

It appeared that the notes were all made in Roxbury, Massachusetts, and were so dated, and the two which were payable to the order of the defendants were payable in Boston; that the defendants and Lawrence, to whom all the notes

were given, then resided in Massachusetts and have continued to do so; that Lawrence transferred these notes to the plaintiff, then and ever since a resident of Maine, for a valuable consideration, before they were due, and before the proceedings in insolvency were commenced.

*Shepley & Dana,* for plaintiff.

A discharge under the insolvent laws of the State where the contract was made, will not operate as a discharge of any contracts, except such as are made between citizens of the same State; and the maker of a note, by giving it a negotiable character, contracts with whomsoever may be the legal indorsee *at the time it becomes payable,* and such indorsee, not being a citizen of the State where the discharge is granted, and having obtained a title to the note before an application for the benefit of the insolvent law, is not affected by the discharge. *Ogden* v. *Saunders,* 12 Wheat., 213; *Braynard* v. *Marshall,* 8 Pick., 194; *Savage* v. *Marsh,* 10 Met., 594; *Baker* v. *Wheaton,* 5 Mass., 509; *Banchor* v. *Fisk,* 33 Maine, 316.

*E. & F. Fox,* for defendants.

The discharge is a bar to this action. The cases of *Burrall* v. *Rice,* 5 Gray, 539, *Capen* v. *Johnson,* 5 Gray, 539, (note) and *Scribner* v. *Fisher,* 2 Gray, 43, are directly in point.

The discharge which is granted is entire and complete, a discharge of the *debt* itself, and not merely of the remedy. 2 Kent's Com., 478, n.; *Janine* v. *Smith,* 1 M. & W., 121. Such a discharge was sustained in *Very* v. *McHenry,* 29 Maine, 206.

By the Court.—According to the case of *Felch* v. *Bugbee, ante* page 9, the plaintiff is entitled to judgment for the amount of the three notes in suit.

HUGH M. PLUMMER *& als. versus* THOMAS MORRILL *& als.*

An award, executed in duplicate and delivered by the referees to each of the parties, is thereby published.

When an award is made for the payment of money unconditionally, the party becomes liable upon publication of the award without any demand.

In such case, a suit may be commenced upon the bond given to secure performance of the award, at any time after publication.

ON REPORT by DAVIS, J.

The case is stated in the opinion.

*E. & F. Fox,* for plaintiffs.

*Howard & Strout,* for the defendants.

The bond is collateral to the award, and mere security for its performance; and no action would lie thereon until there should be a breach by the principal obligor; and no breach could occur until he had failed to perform the award within the time allowed him by law. The award provides no time for the payment of the money. In such cases, payment is to be made within a reasonable time. Caldwell on Arbitration, 128, 148; 2 Parsons on Con., c. 3, § 5; Chitty on Con., c. 5, § 3; *Rayson* v. *Windsor,* Brownl., 53.

"With respect to money awarded from one party to the other, and no time mentioned within which it is to be paid, the courts will intend that it is to be paid within a reasonable time." Caldwell on Arbitration, 128.

An award of money, and no time for payment mentioned in the award, is payable "immediately, viz., in a convenient time." Comyns' Dig., Condition G, 5.

What is a reasonable time, (the facts being ascertained,) is a question of law, and must depend upon the circumstance of the case. 2 Parsons on Con., c. 3, § 5; *Cocker* v. *Franklin Hemp and Flax Co.,* 3 Sum., 530; *Darlington* v. *Ulph,* 13 Ad. & El., 207. PATTESON, J.

This bond furnishes no cause of action, until failure of the principal obligor to perform or pay what the referees should

award against him. It is not, therefore, a bond payable presently, as a note on demand, but is, in effect, payable after an award should be made, and after a failure, by the principal obligor, to perform the award within a reasonable time after it should be made should occur, and not before.

The principal obligor was entitled, at least, to the whole day on which the award was made, to perform or pay, as the award might be.

The principal obligor, therefore, had not failed to perform the award, so as to cause a breach of the bond at the time this action was brought, because the time within which he had the right to perform the award had not then elapsed.

The general rule is, that a debtor on bond has the entire day of payment in which to save a breach. *Harris* v. *Blen*, 16 Maine, 175; *Skidmore* v. *Little*, 4 Texas, 301; U. S. Digest, vol. 16, p. 14, § 85; *Erksine* v. *Erksine*, 13 N. H., 436; *Blake* v. *Niles*, 13 N. H., 459; 2 Parsons on Con., c. 3, § 5.

The opinion of the Court was drawn up by

RICE, J.—This is debt on an arbitration bond. The only question presented is, whether the action was prematurely commenced. The case finds, that the referees, after a full hearing of the parties, on the 31st day of December, 1857, at about fifteen minutes before four o'clock, P. M., handed to each of the parties their award executed in duplicate. The defendant, Thomas Morrill, after the award was made and handed to him, conversed about it in presence of one of the plaintiffs and the referees, saying "it was a hard case for him; that he was unable to pay a dollar, and that he pitied his bondsmen." The writ was made at nine o'clock, P. M., of the same day.

The act of the referees was a publication of their award. *Knowlton* v. *Homer*, 30 Maine, 552. The award is for the payment of a sum of money, unconditionally.

When an award is made for a sum of money unconditionally, the party becomes liable to pay, upon publication of the

award, according to its terms, without any demand. *Thompson* v. *Mitchell*, 35 Maine, 281.

In such case, the sum awarded is due presently.

*Defendants to be defaulted.*

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

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RICHARD R. ROBINSON *versus* WORTHY C. BARROWS.

The provisions of the Act of 1855, (c. 166, § 23,) forbidding the maintenance of any action for the value or possession of intoxicating liquors, are limited in their application to liquors liable to seizure and forfeiture under that statute, or intended for sale in this State in violation of law.

Thus construed, the Act is in affirmance of the principles of the common law.

A contract made in violation of a statute is void; and it is not rendered valid by the repeal of that statute.

When the possession of property intended for sale in violation of law is made criminal by statute, no action can be maintained while such statute is in force or after its repeal, for the conversion of such property while the statute is in force.

*It seems*, that if the plaintiff in an action of trover receives the property sued for, into his possession immediately after its conversion by the defendant, and in the same condition as at the time of its conversion, he can recover but nominal damages.

An officer, who has seized intoxicating liquors under proceedings in accordance with the statute, is not responsible for their deterioration occurring without his fault, while they are in the custody of the law.

Nor is he liable for official acts under a sufficient warrant, although the statute by virtue of which the warrant was issued is subsequently repealed.

In actions of trover, the measure of damages is the value of the property converted, at the time the right of action accrues, and interest thereon.

ON REPORT by DAVIS, J.

TROVER for seven casks of ale and a demijohn of whiskey. The defendant undertook to justify under the Act of 1855, (c. 166,) which had been repealed when this suit was commenced.

It appeared in evidence, that the defendant, on the second

day of May, 1855, as marshal and constable of the city of Portland, seized the liquors sued for, *without any warrant*, and kept them in his possession until the fourteenth of the same month, when a warrant was issued by the judge of the police court of Portland. The case was tried in the police court, and carried into the Supreme Court by appeal, where the papers were quashed and a writ for the restitution of the liquors was issued. The liquors were immediately restored to the plaintiff, but the ale had become sour and valueless. There was other evidence in the case. When the testimony was closed, the defendant contended and asked the Court to rule, (among other things,) that if, at the time the ale and whiskey were taken by the defendant, the plaintiff had them in his possession with intent to sell the same in this State in violation of law, he could not recover their value of the defendant in this suit.

But the presiding Judge refused so to rule, but held, that the Act of 1855, being repealed, the plaintiff was entitled to recover the full value of the liquors, notwithstanding that at the time of their seizure he intended to sell them in violation of law.

Thereupon the defendant consented to be defaulted, with the agreement that the case should be reported to the full Court, and, if the ruling of the Judge was incorrect, a new trial should be granted.

*Shepley & Dana*, for plaintiff.

The articles described in the writ were plaintiff 's property, and he was invested with the ordinary rights of an owner. *Preston* v. *Drew*, 33 Maine, 553.

The proceedings of the defendant being illegal, the Act of 1855, even if it were in existence, would not avail him. *Preston* v. *Drew*, above cited; *Dolan* v. *Buzzell*, 41 Maine, 473.

But that Act has been repealed with no saving clause; and the plaintiff is as much entitled to recover the value of this property wrongfully taken from him, as though the Act never existed. If any disability was imposed by the Act, it was

removed when the Act was repealed; and its provisions can afford no refuge to the defendant.

*E. Fox*, for defendant.

The liquors having been intended for sale in this State, in violation of law, the plaintiff cannot recover. *Lord* v. *Chadbourne*, 42 Maine, 429; *Hathaway* v. *Moran*, 44 Maine, 71.

The opinion of the Court was drawn up by

APPLETON, J.—It was enacted by c. 166, § 23, of the Acts of 1855, that "no action of *any kind* shall be maintained in any Court in this State, either in whole or in part, for intoxicating liquors sold in any State or county whatever, nor shall any action of any kind be had or maintained in any Court in this State, for the recovery or possession of intoxicating liquors or the value thereof."

The effect to be given to a similar provision of a previous statute came under the consideration of this Court, in *Lord* v. *Chadbourne*, 42 Maine, 429. It was there held that the section applied to all actions, whether in *tort* or *assumpsit*, and that, in accordance with the case of *Preston* v. *Drew*, 33 Maine, 562, the general language of the statute must be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors, or for their value, as were liable to seizure or forfeiture, or were intended for sale in violation of the provisions of the statute prohibiting the sale of spirituous and intoxicating liquors.

The Court were, by the plain and unambiguous language of the statute, prohibited from permitting compensation to be given for the destruction of liquors kept in contravention of its provisions and for the purposes of their violation. The statute was only carrying out, by express enactment, what, in many States, has been regarded as a principle of the common law. "There are, no doubt, cases," says LAWRIE, J., in *Mohney* v. *Cook*, 26 Penn., 349, "wherein an injured party will be remediless, because of his own fault, even when the fault does not contribute to the accident. A vessel engaged in the slave

trade, piracy or smuggling, and injured by another, or the keeper of a gambling house injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for these offences, nor because their illegal business brought them to the place of danger; but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades and prohibited things, receive no protection."

Since the alleged seizure of the liquors, the statute, under and by virtue of which it was made, has been repealed.

The proceedings against the plaintiff were quashed for informality. It is apparent, from the record, that there has been no adjudication as to the guilt or innocence of Robinson, nor as to the *status* of the liquors seized. They have been neither condemned nor acquitted. In *Lord* v. *Chadbourne,* it was held that, as the question, whether the liquors in controversy, in that case, were held in violation of law, had never been judicially determined, and, as their *status* was a matter essential in determining the damages, if any, that the defendant might offer proof as to that point.

It has been repeatedly decided, that the repeal of a statute does not make contracts valid, which were in violation of its provisions and, consequently, could not be enforced. *Hathaway* v. *Moran,* 44 Maine, 67; *West* v. *Roby,* 4 N. H., 285.

Where a contract is void as against the provisions of a statute, it is not rendered valid by its repeal, and a subsequent promise to perform it is without consideration and cannot be enforced. *Dever* v. *Corcoran,* 3 Allen, (N. B.) 338.

Upon the termination of the proceedings in the complaint against Robinson and certain spirituous liquors, the ale in controversy, in pursuance of the writ of restitution, was restored to the plaintiff and received by him.

If the proceedings in that case were null and void, affording no justification, the defendant is to be regarded as acting without legal authority.

The conversion of the goods was either when they were seized or when the suit on which they were seized terminated.

If the conversion was when seized, it has been repeatedly held, in Massachusetts and in this State, that, in trover, the measure of damages is the value of the property at the time the right of action accrued, with interest thereon. *Johnson* v. *Sumner*, 1 Met., 172; *Kennedy* v. *Whitwell*, 4 Pick., 466; *Hayden* v. *Bartlett*, 35 Maine, 203; *Moody* v. *Whitney*, 38 Maine, 174; *Clarke* v. *Whitaker*, 19 Pick., 309.

If the seizure of the liquors is the alleged conversion, for which this action is brought, it took place when the statute of 1855, c. 166, was in full force. The measure of damages would be the value of the property at that time. The law, as then existing, would limit the rights of the plaintiff and the liabilities of the defendant. But, if the liquors in controversy were then in possession of the plaintiff, for the purpose of being sold in violation of law, the plaintiff, by the then existing law, was not entitled to recover their value. The defendant was not liable in damage. The rule of damage at the time of conversion being the rule by which the rights of the parties are to be determined, the plaintiff would seem not entitled to recover.

If the conversion was when the proceedings against the plaintiff and his liquors were quashed, then the ordinary rule of damages would be the value of the liquors at that time. The conversion would be of liquors more or less damaged. But, the liquors, however much or little damaged, were received by the plaintiff, and by the hypothesis being received as they were when converted, it is difficult to perceive how the plaintiff would be entitled to more than nominal damages.

But, if the proceedings were in accordance with the statute, the officer would not be responsible for any deterioration occurring without fault on his part, while they were in the custody of the law. Nor would he be liable for his official acts under a sufficient warrant, because the statute, by virtue of which the warrant issued, may have been repealed. *Gray* v. *Kimball*, 42 Maine, 299.

*The cause, by agreement of parties, is to stand for trial.*

TENNEY, C. J., RICE, GOODENOW and KENT, JJ., concurred.

DAVIS, J., concurred in the result and delivered the following opinion.

The first question presented in this case, is the right of an officer, under the statute of 1855, to seize intoxicating liquors without a warrant, and detain them in his custody twelve days before entering any complaint, or procuring any warrant. Assuming the right of seizure without a warrant, which is not conceded, the defendant had the right, by statute, "to detain them until a warrant could be procured," *and no longer.* This must be understood as a reasonable time for that purpose. It is obvious, that it would not, with proper diligence, have required more than one or two days. It would be highly dangerous to allow officers to detain persons or property, without legal process, any longer than the time reasonably necessary to procure one. The defendant, by detaining the liquors for a length of time altogether unnecessary and unreasonable, before procuring a warrant, became a trespasser *ab initio. Burke* v. *Bell,* 36 Maine, 317; *Adams* v. *Adams,* 13 Pick., 374. Such was the ruling at *Nisi Prius.*

But, there was evidence tending to prove that the liquors were intended for sale by the plaintiff in violation of law; and the defendant requested the Court to instruct the jury, that if they were so intended by the plaintiff for unlawful sale, the action could not be maintained. This was refused; and the Court ruled, that the statute of 1855, having been repealed, the action could be maintained.

The statute of 1855, c. 166, § 23, prohibited the maintenance of any such action, whether founded in tort or in assumpsit. But in its application to *contracts,* it was merely in affirmance of the common law. No *contract,* made in violation of *any statute,* is valid. Nor does it become valid if the statute is repealed. *Hathaway* v. *Moran,* 44 Maine, 67.

But a man may have a *legal title* to property which he intends to sell in violation of law. And, until he does *some act* concerning it, in violation of law, he is entitled to the protection of the law in his possession of it. As a general rule, a person is not liable to be punished for an *intention* to commit a crime; never, unless he has done some act in fur-

therance of that intention. One may have lumber which he intends to sell without its being surveyed, in violation of the statute. But while he is liable to be punished for the sale, if made by him, the *intention* to sell does not deprive him of his title to the property, nor of his right to the protection of law in his possession of it. And if a special statute should provide, that he should maintain no action therefor, (being applicable to the *remedy* only,) its repeal would entirely remove the obstacle. And, therefore, in the case supposed, an action could be maintained, though the trespass was committed while the statute was in force prohibiting the maintenance of the action.

But the Judge presiding at *Nisi Prius* erred in applying these principles to the case at bar. For there are certain cases in which the *mere possession* of certain articles, with the intention of using them for illegal purposes, is *itself* an offence. And such a possession, *being itself illegal,* is entitled to no protection of law; and the possessor could not maintain an action at common law against a trespasser. It is no offence for one to have possession of unsurveyed lumber, though he intends to sell it in violation of law. And the intention so to sell it would be no bar to an action against a trespasser. But the mere *possession* of obscene books, with the intent to sell, or of counterfeiting materials, with the intent to use them for that purpose, is itself an offence. And, by the common law, no person having such illegal possession could maintain an action therefor against a trespasser. It would be strange, indeed, if courts of justice were under obligation to aid persons in violating the law.

By the statute of 1855, it was not only made an offence to *sell* intoxicating liquors, but the *possession* of them, with the intent to sell them in violation of law, was a distinct offence, subjecting the liquors to forfeiture, and the owner to punishment. If the liquors were intoxicating, and the plaintiff in this case intended to sell them in violation of law, his possession was illegal, and entitled to no protection. In that case the action cannot be maintained. I therefore, concur in the opinion, that it must stand for trial.

SAMUEL WARREN, *Appellant from decree of Judge of Probate, versus* JOHN E. BAXTER, *Executor.*

The term "disinterested and credible witness" in the statute of wills is equivalent to "*competent witnesses.*"

The question of the competency of witnesses to a will, is to be determined by their condition at the time the will is executed.

The interest which, under our present statutes, will disqualify a person from being a witness to a will, must be a present, certain, legal, vested interest, not uncertain or contingent.

The privilege of attending public worship does not constitute such an interest as will disqualify a witness to a will.

The fact that a person is a member of a particular church and society, worshipping in a certain meeting house, or that he owns a pew in that meeeing house, does not, *of itself*, disqualify him as a witness to a will containing a legacy to that church and society.

ON AGREED STATEMENT.

APPEAL from a decree of the Judge of Probate of Cumberland county, approving and allowing the will of James Warren. The will contained a devise to the "Methodist Episcopal Church and Society, worshipping at the Methodist meeting house in the Gorham Corner village." The other facts bearing on the questions raised, are stated in the opinion.

*Rand*, for appellant.

The will was executed January 2, 1858, and is to be governed by the R. S., of 1857, (c. 74, § 1,) which varies from statute of 1841, (c. 92, § 2.)

This will was not duly attested. The witnesses were neither disinterested nor credible, in the legal sense of the latter word. Section 78 of c. 82 of R. S. of 1857, does not apply; see § 80.

Section 75 of c. 115, statute, 1841, is not incorporated into stat. 1857. See also *Hawes* v. *Hilliard*, 23 Pick., 10.

*Swasey*, for appellee.

The opinion of the Court was drawn up by

RICE, J.—The only question presented for our determination is, whether the will of James Warren was duly attested by three disinterested and credible witnesses.

It is agreed that two of the witnesses to the will, Johnson and Pond, are now, and were at the time of the witnessing of the will, members of the Methodist Episcopal Church and Society, worshipping at the Methodist meeting house, in Gorham village, and that each owned one or more pews in said meeting house, and that the other witness, Bailey, owned a pew in said meeting house and attended the services there.

It does not appear whether this society was, or not, an incorporated society.

By § 2, c. 92, stat. of 1841, wills were required to be attested by "three credible witnesses." By § 1, c. 74, stat. of 1857, they are required to be attested by "three disinterested and credible witnesses."

In Massachusetts it has been decided, that the term "credible witness," as used in the statute of wills, means *competent witness.* That is, a witness whom the law will trust to testify before a jury. *Amory* v. *Fellows,* 5 Mass., 219; *Hawes* v. *Humphrey,* 9 Pick., 361; *Haven* v. *Hilliard,* 23 Pick., 10.

As the law stood under the statute of 1841, persons deficient in understanding, and persons having a direct pecuniary interest in the matter in issue, were not deemed competent witnesses, and were not permitted to testify in courts of justice.

The will which is now the subject of controversy was executed Jan. 2d, 1858, since the R. S. of 1857 were in operation. The question of the competency of the witnesses to the will is to be determined by their condition at the time the will was executed. *Patten* v. *Tallman,* 27 Maine, 17.

By § 78 of c. 82, R. S., 1857, parties and others having a direct pecuniary interest in the matter in issue are rendered competent witnesses in courts. But, by § 80, of same chapter, this provision is restrained, so that it shall not apply to the attestation of the execution of last wills and testaments, or

of any other instrument which by law is required to be attested.

The law, therefore, now stands, so far as the question of the competency of the witnesses to the will of the testator is concerned, as it would have stood had the law of 1841 been in force and required the witnesses to the will to be *disinterested* and *credible.*

The interest which will disqualify a person from being a witness must be a present, certain, legal, vested interest, and not uncertain or contingent. 4 Stark. Ev., 745.

The privilege of attending public worship and the advantages of education, although of the highest importance, do not constitute such an interest as will disqualify a witness. *Hawes* v. *Humphrey,* 9 Pick., 350.

There is nothing in this case to show that the legal rights of the attesting witnesses, or either of them, is in the slightest degree affected by these provisions in the will. The fact that two of the attesting witnesses were members of the Methodist Episcopal Church and Society, worshipping in the Methodist meeting house, in the Gorham Corner village, and that all three of them owned pews in that house, does not, of itself, create in them any direct, certain, legal, vested personal interest in the legacy of the testator. It does not appear that there exists in that society any right to tax, or in any way to impose any legal liability upon the witnesses, or that, by their connection with the society, they in any way obtain any rights to the property bequeathed to the society. Their connection with the society may be, and, so far as appears, is entirely voluntary.

The presumption of the law being that all persons of full age are competent to be witnesses, the burden rests on those alleging incompetency to show the fact. That has not been done in this case.

The attesting witnesses are, therefore, within the meaning of the statute, "disinterested and credible," or in other words *competent* witnesses.

*Decree of the Judge of Probate affirmed.*

JOSEPH H. LAMBERT *versus* NATHAN WINSLOW.

One cannot maintain an action for the price of property which was sold in part payment of his notes then held by the vendee, notwithstanding the vendee subsequently transfers such of the notes as were overdue, and to which the law, in the absence of any appropriation by the parties, would appropriate the price of the property sold.

In such case, if the maker of the notes voluntarily pays those so transferred, he must be presumed to assent to the appropriation of the price of the property sold, to the notes still remaining in the hands of the vendee.

ON EXCEPTIONS to the rulings of HATHAWAY, J.

*Shepley & Dana,* for the defendant, argued in support of the exceptions.

*S. & D. Fessenden, contra.*

The case is fully stated in the opinion of the Court, which was drawn up by

DAVIS, J.—The defendant held four promissory notes, given to him by the plaintiff. One of these was given in 1849; another in 1848; and the two others, amounting to about five hundred dollars, were given in 1847, and were secured by a mortgage of certain real estate.

Such being the relative position of the parties, the plaintiff, in 1852, sold to the defendant a quantity of curb-stone, in part payment of the notes. That the defendant took the stone in part payment of the notes, by express agreement, is admitted by both parties.

But the price of the stone was not indorsed on either of the notes, nor was any special appropriation, at the time, made by either of the parties. The defendant afterwards sold the notes, then overdue, which were secured by mortgage, without deducting or indorsing any sum as having been paid thereon. The plaintiff thereupon commenced this suit for the price of the stone. The defendant has filed an account in set-off, embracing the notes given in 1848 and 1849.

To these the plaintiff pleads the statute of limitations, this suit not having been commenced until 1857.

At the trial, the defendant contended that, no appropriation of the price of the stone to the payment of any particular note having been made at the time by the plaintiff, nor by the defendant, he had the right at any time to appropriate the amount to the notes filed by him in set-off. But the Court ruled that, neither party having made any appropriation at the time, the law appropriated it "upon the oldest notes,"—being the notes secured by mortgage.

The defendant then contended, and requested the Court to instruct the jury, that, if the law so appropriated the price of the stone, "any subsequent transfer of the notes by the defendant, after the maturity of the notes, would not give the plaintiff a right of action to recover the value of the stone." This the Court declined to give, but ruled "that, if the stone was delivered in part payment of the notes, and the defendant afterwards sold the notes, then overdue, to a third party, and received the face of the notes, the plaintiff would have a right of action to recover the value of the stone."

Whatever may be said of the rules of law stated to the jury, if taken abstractly, we cannot concur in the application of them to this case. If, the parties having made no appropriation,—the law applied the price of the stone to the payment of the notes secured by the mortgage, they were thereby paid and extinguished to that amount. Whether the plaintiff, by submitting to a foreclosure of the mortgage, afterwards paid the full amount of the notes, does not appear. For the case does not show the value of the mortgaged property. But the transfer of the notes, then overdue, with no payment indorsed, did not render the plaintiff liable to pay the whole, if a part had been paid. And if, knowing all the facts, he has paid the whole amount of them to the indorsee, he must be presumed thereby to have assented to the application of the price of the stone to the other notes. For both parties admit that the stone was sold to the defendant in payment of some of the notes. The plaintiff might, at his option, have

had the price applied to the notes secured by the mortgage, notwithstanding the transfer. But he could not, by waiving this right, prevent the application of the price to any of the notes, and then, the other notes being barred by the statute of limitations, recover the price of the defendant. The defendant never promised to pay for the stone except by receiving it in part payment of the notes.

*The verdict must be set aside and a new trial granted.*

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

GOODENOW, J., concurred in the result.

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BANK OF CUMBERLAND *versus* WILLIAM MAYBERRY.

A note signed and delivered on Sunday, as between the parties, is invalid; but if delivered on any other day, it is valid, though signed on Sunday.

As between the original parties, evidence is admissible to show when a note was in fact signed and delivered, whatever may be its apparent date.

A note signed and delivered to the payee on Sunday, but bearing date on another day, is valid in the hands of a *bona fide* holder, without notice of the defect.

*It seems* that an *accommodation* note, made on Sunday and indorsed by the payee on Monday, then first becomes a completed contract, and is therefore valid.

ON EXCEPTIONS to the ruling of HATHAWAY, J.

ASSUMPSIT upon a promissory note, bearing date July 13, 1857, signed by the defendant, payable to John Dow, in four months, and by him indorsed to the plaintiffs.

The defence was, that the note was signed and delivered by the defendant to said Dow on the *twelfth* day of July, 1857, (Sunday,) between midnight preceding and sunset of that day.

It appeared in evidence, that the note was written on Saturday, was signed by the defendant and delivered to Dow on Sunday, and by him indorsed to the plaintiffs on Monday, the

day of its apparent date; that it was discounted by the plaintiffs, and the proceeds paid to Dow in the regular course of business, and that they had no notice that it was made on any other day than the day of its date.

The Judge instructed the jury, that the facts testified to by the witnesses constituted no defence to the note. The verdict being for the plaintiffs, the defendant excepted.

*J. C. Woodman*, for defendant, in support of the exceptions.

I. The plaintiff may prove there is an error in the date of an instrument. *Trafton* v. *Rogers*, 13 Maine, 321; *Johnson* v. *Farwell*, 7 Maine, 370, 373.

He may prove there is an error in the date of a note, for the purpose of showing it was made a year later than it purports to be; that it was not made on Sunday, and that it was not overdue when he took it. *Drake* v. *Rogers*, 32 Maine, 524.

If the plaintiff can be allowed to prove an error in the date, for the purpose of showing it was not made on Sunday, it follows that the defendant may show that there is an error in the date, and that the note was made and delivered on Sunday.

II. But the question of the admissibility of the evidence cannot now be raised. The evidence was admitted, and the only question now is as to the correctness of the instructions.

1. By R. S., 1841, c. 160, § 26, all business upon the Lord's day, works of necessity and charity excepted, is prohibited. In § 28, the meaning of the term "Lord's day" is defined. The case shows that this note was made on the "Lord's day" within the meaning of the term as there defined.

It has been repeatedly decided that a note made and delivered on that day cannot be enforced. *Towle* v. *Larrabee*, 26 Maine, 464; *Merriam* v. *Stearns*, 10 Cush., 257; *Burtin* v. *Rogers*, 11 Cush., 346; see also 27 Alabama, 281, and

*State* v. *Suhur*, 33 Maine, 39, where the same principle is affirmed.

2. But the further question arises, whether the note shall be held valid in the hands of an innocent holder without notice.

It is apprehended, that this must turn upon the question whether the note was *void*, or only *voidable* in the hands of Dow.

There is a marked distinction between notes that are *void* and those merely *voidable*. "A promise subsequently made will revive that which is *voidable* only; but where the consideration is void in its creation, no promise can set it up again." 1 Com. on Con., 25.

"But the current of recent decisions in England is rather in favor of the view, that the promise of a married woman has not, when given, any legal force, and therefore, is *not voidable but void*, and cannot be ratified by a subsequent promise after the coverture has ceased, nor be regarded as a sufficient consideration for a new promise. And a late case in New York takes the same ground very decidedly." 1 Parsons on Con., 361.

Notes given without consideration, or upon a fraudulent consideration are not void, but voidable and in the hands of an innocent indorsee, &c., they become valid.

But securities for gambling debts, or on a usurious consideration, (under former statutes,) were made absolutely void. Stat., 9 Anne, c. 14; 12 Anne, c. 16; Mass. Stat., 1785, 1783; R. S., 1821, c. 18, § 1, and c. 19, § 1.

Under these statutes, it was held, *that as the security was void*, it was void in the hands of an innocent indorsee for a valuable consideration. 1 Com. on Con., 40, 42; *Lowe* v. *Walker*, Douglas, 736; *Bowyer* v. *Bampton*, 2 Strange, 1155; *Churchill* v. *Suter*, 4 Mass., 161; *Chadbourne* v. *Watts*, 10 Mass., 123; see also 1 Story's Equity, § 345, note 1, where the distinction between contracts which are voidable and those which are void is discussed.

A note, that is void, is a nullity, and there is nothing to transfer by indorsement.

If, therefore, this note in the hands of Dow was *void*, and not merely *voidable*, the plaintiffs cannot recover upon it.

The general rule is, that a contract in violation of a statute is *void*. Chitty on Con., 764. This rule has been almost uniformly applied to contracts made on Sunday, and they have been declared to be *void*. *Kepner* v. *Keefer*, 6 Watts, 231; *Merriam* v. *Stearns*, 10 Cush., 257; *Hussey* v. *Rogeumore*, 21 Ala., 281; *State* v. *Suhur*, 33 Maine, 539; *Towle, Adm'r*, v. *Larrabee*, 26 Maine, 464; *Northop* v. *Foote*, 14 Wend., 249; *Drury* v. *Defontaine*, 1 Taunt., 135; *Wright* v. *Geer*, 1 Root, 474; *Strong* v. *Elliott*, 8 Cowen, 30; *Smith* v. *Sparrow*, 4 Bingham, 84; *Frost* v. *Hill*, 4 N. H., 153; *Shaw* v. *Dodge*, 5 N. H., 462; *Clough* v. *Davis*, 9 N. H., 501; *Allen* v. *Deming*, 14 N. H., 139. In the last case cited, the facts were very similar to those in the case at bar, and it was held, that the plaintiff could not recover.

*Anderson & Webb*, for plaintiffs, argued—

I. The note, being given to pay a note held by the plaintiffs, remained the property of the defendant until it was transferred to them on Monday; and the fact that it was signed on Sunday does not affect its validity. *Hilton* v. *Houghton*, 35 Maine, 143.

II. It is not competent for the defendant to set up this defence to the note when in the hands of an innocent indorsee without notice. *Bloxsome* v. *Williams*, 3 B. & C., 232; *Greene* v. *Godfrey*, 44 Maine, 25.

An innocent indorsee has the right to regard the date on the face of the note as the true date. *Huston* v. *Young*, 33 Maine, 85.

The case of the word "void" in the decisions in relation to contracts made on Sunday, is to be construed as referring to those who are privy to the illegality of the contract. *Fennel* v. *Ridler*, 5 B. & C., 406.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiffs, as indorsees, claim to recover on a note signed by the defendant, and received by them in the ordinary course of business, without notice of any fact impeaching its validity. The note purports to have been made on a day other than Sunday.

The defence interposed is, that the note, notwithstanding its apparent date, was in fact made and delivered by the maker to the payee on Sunday.

A note signed and delivered on Sunday, as between the parties, is invalid. It is otherwise, if it be only signed on that day and subsequently delivered. *Hilton* v. *Houghton*, 35 Maine, 143; *Allen* v. *Deming*, 14 N. H., 139.

If the note in suit was an accommodation note, and without consideration, as between the parties, the payee could not recover. The note would derive its validity from its indorsement. It could not be regarded as an instrument binding and effective until indorsed for the purposes for which it was made. As the indorsement of the note was not until Monday, if it is to be regarded as accommodation paper, it would seem that it was then first delivered as a binding contract, and the action is maintainable.

It is unquestioned law, that a note erroneously dated on Sunday may be shown to have been misdated, and proof may be received of its true date. *Drake* v. *Rogers*, 32 Maine, 524. So too, as between the parties, evidence may be received to prove that a transaction purporting to be of another date was in truth on Sunday.

But this suit is not between the original parties to the note. The plaintiffs claim the rights of *bona fide* indorsees. It is insisted in defence that, the defendant having violated the law and having falsely misdated his note, may, as against those who have relied upon the faith of his name, show that the note, which he caused to be put in circulation, was illegal in its inception, and was fraudulently misdated, for the error in its date could only have been for the purposes of decep-

tion. But the defendant cannot be permitted to set up his own fraudulent misdating of his notes to defeat the rights of those, who parted with value upon the faith that his notes were dated when, by his signature thereto, he represented them to be. In *Huston* v. *Young*, 33 Maine, 85, an attempt was made to show the date of a note wrong, thereby injuriously to affect the rights of an indorsee, but the evidence was rejected. "He," (the plaintiff,) remarks WELLS, J., "had no knowledge of any mistake in the date and had a right to regard it as correctly written. He was authorized to regard the note as the true exposition of the contract between the original parties, and he cannot be prejudiced in it, by any mistake of which he was ignorant." In the present case, it is not questioned that the plaintiffs took the note in ignorance of its false date, and, as between them and the defendant, they have a right to regard its apparent as its real date. In *Begbie* v. *Levi*, 1 Crompt. & Jer., 180, a question arose on an acceptance alleged to have been signed on Sunday. It was, however, denied that it was given on that day, "but, even assuming that it was, the Court," says GARROW, B., "would be clearly of opinion that it would not be competent to the defendant, who alone *had been guilty of a breach of the law*, to set up his own illegal act as a defence to the action, at the suit of an innocent holder of the bill."

It was held, in *Houlister* v. *Parson*, 9 Up. Can., 681, that a note made on Sunday, for goods, is not void in the hands of an innocent indorsee without notice. The same question again came before the Court of Queen's Bench of Upper Canada, in *Crombie* v. *Overholtzer*, 11 Up. Can., 55. "We take it to be clearly settled," remarks ROBINSON, C. J., in the latter case, "that when a statute does not provide that all securities shall be void, which shall be made in furtherance of such dealing as the statute prohibits, but merely prohibits the act and imposes a penalty, such statute has not the effect of making void, in the hands of an innocent indorsee for value, a negotiable instrument, which was made in furtherance of such a transaction." The authorities upon the

subject are most fully examined in an elaborate opinion of COLLIER, C. J., in *Saltmarsh* v. *Tuthill*, 13 Ala., 390, in which it was decided, that a *bona fide* indorsee of a note before its maturity, though the note was made on Sunday, might recover, if he took the same without notice of any facts affecting its validity. So in *State Capital Bank* v. *Thompson*, 42 N. H., 369, it was held, that a negotiable promissory note made and delivered on Sunday, though illegal and voidable as between the original parties thereto, yet, when indorsed before maturity to a *bona fide* holder, without notice of any defect, could not be impeached in his hands.

In *Com.* v. *Kendig*, 2 Barr., 448, there was evidence tending to show the bond in suit, which was an official one, to have been executed on Sunday, but the Court say, "granting that it was so, it is by no means clear that it is void as against those injured by the official misconduct of the officer, and entitled to claim the benefit of the bond, who were innocent parties, and not to be affected by the folly or turpitude of the obligors." "Such a construction of the act," said the Court, "would enable the obligors to take advantage of their own wrong as against persons who cannot, by any possibility, protect themselves. Where both parties are in default, there is a propriety in holding the bond void."

The evidence, that the note was dated on Sunday, cannot control or defeat the rights of the plaintiffs, who are shown to be *bona fide* holders without notice.

*Exceptions overruled.*

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

INHABITANTS OF HARRISON *versus* INHABITANTS OF LINCOLN.

In a pauper action for supplies furnished to A and B, in which it is admitted that the legal settlement of A, at the time the supplies were furnished, was in the defendant town, and the only question is in regard to the settlement of B, the plaintiffs, by proving the prior due solemnization of a marriage between A and B, make out a *prima facie* case.

They are not bound in the first instance to establish affirmatively, that the parties were capable of contracting a legal marriage.

But the validity of the alleged marriage may be impeached by evidence of a former marriage and the continued life of both parties.

If the defendants would avoid the effect of the apparently legal marriage, they must prove the facts which will invalidate it.

If the defendants show that B was legally married to a person other than A, before the alleged marriage to A, and that the former husband was alive less than seven years before the second marriage, the latter, by force of our statute, (R. S., of 1841, c. 87, § 4, c. 160, §§ 5 and 6,) will be held invalid, unless the plaintiffs prove the death of the former husband before the second marriage.

ON EXCEPTIONS to the rulings of HATHAWAY, J.

ASSUMPSIT for supplies furnished to Ebenezer H. Kneeland and Mary Kneeland. It was admitted that, at the time the supplies were furnished, Ebenezer H. Kneeland had his legal settlement in the defendant town, and the only question was in relation to the settlement of Mary Kneeland.

The supplies were furnished in 1857. The plaintiffs proved the due solemnization of a marriage between Ebenezer H. Kneeland and Mary Kneeland in September, 1852. The defendants proved that she was legally married in 1830, to one Smith; and offered evidence tending to prove, that he was alive in 1851, and that she knew he was alive in 1850. There was no direct proof of his death.

The testimony was reported upon a motion to set aside the verdict as being against the evidence.

The presiding Judge, among other instructions, gave the jury the following: —

*That* they were to determine, from the evidence, whether Mary Kneeland was the lawful wife of Ebenezer H. Kneeland.

*That*, if when she was married to Kneeland her former hus-

band was living, her marriage with Kneeland was void, because a violation of law of which she would have been guilty.

*That*, whether or not Samuel S. D. Smith was the man to whom she was married in Vermont, they must determine from the evidence in the case.

*That*, in the absence of any proof to the contrary, the presumption would be, that, at the time of her marriage with Kneeland, she was, as she represented herself to be, *a widow.*

*That* the burden of proof was upon defendants to show that her former husband was living at the time of her marriage with Kneeland.

*That* it had been held in some such cases, that the presumption of the wife's innocence was stronger that the presumption of the life of her former husband, but, that the jury must determine from the whole evidence, whether, or not, they were satisfied that her former husband was living at the time of her marriage with Kneeland.

The verdict was for the plaintiffs for the full amount claimed by them, and the defendants excepted.

*Shepley & Dana*, for defendants.

*A. A. Strout*, (with whom were *Howard & Strout*,) for plaintiffs.

1. The settlement of Ebenezer H. Kneeland is admitted to have been in the defendant town at the time the supplies were furnished. The evidence shows that Mary Kneeland was married to Ebenezer H. Kneeland, Sept. 26, 1852, and that they have since cohabited together as husband and wife. That marriage being legal, the wife would follow and have the settlement of her husband. R. S., c. 24, § 1, mode 1; *Greene* v. *Windham*, 13 Maine, 225.

2. If Mary Kneeland, at the time of her marriage with Ebenezer H. Kneeland, had another lawful husband living, then her marriage with Kneeland would be both invalid and criminal. The presumption in favor of its validity, and of her innocence, must prevail until the contrary is *clearly* shown. The burden of proof, therefore, would be on the defendants,

if they would show that marriage void. This they cannot do, unless they *prove* the former husband *living* at the time of her marriage with Kneeland in 1852. 1 Greenl. Ev. (8th ed.,) §§ 34, 35, 41, 80; *Raynham* v. *Canton*, 3 Pick., 293; *Gray* v. *Gardiner*, 17 Mass., 188.

3. In some cases the presumption of innocence has been deemed sufficiently strong to overcome the presumption of life. But the presumption is not absolute, and the decided cases would seem to indicate, that (as was done in this case,) the whole question should be left to the decision of the jury. *Rex* v. *Twining*, 2 B. & Ald., 385; 1 Greenl. Ev., (8th ed.,) §§ 35 and 41; 3 Starkie Ev., 935; *White* v. *Mann*, 26 Maine, 370.

The opinion of the Court was drawn up by

KENT, J. — The exceptions in this case arise upon the rulings of the Court, based upon the facts which are fully reported. It was admitted that Ebenezer H. Kneeland had a legal settlement in Lincoln. The question in controversy is, whether Mary Kneeland had also such settlement. The plaintiffs claim that she was legally married to Ebenezer, in September, 1852, in this State; and that thereby she acquired a settlement in Lincoln, by following that of her husband. The plaintiffs having proved the due solemnization of a marriage at that time between the parties, with subsequent cohabitation, rested on this point. This evidence did make out a case *prima facie*.

We do not think that the party, who sets up a marriage, to establish a settlement, is bound to go further in the first instance, and to adduce additional evidence to establish affirmatively that the parties were capable of contracting a legal marriage at the time. The law will assume, in the absence of all other evidence and facts, that the marriage regularly solemnized is valid, because it is not to be assumed that either of the parties has been guilty of bigamy, which is a crime; and because it would require proof extending over

the whole adult lives of the parties, and their acts, to negative the possibility of a former marriage.

It is, however, but *prima facie* evidence. The validity of the marriage may be impeached by evidence of a former marriage, and the continued life of both parties. If the plaintiff makes out his case on the first point, then it is clear that the other party, who would avoid the effect of an apparently legal marriage, must prove the facts which will invalidate it.

This was attempted in the present case, and the defendants offered proof of the prior marriage of this woman in Vermont, to another man, in 1830. Another fact, however, is essential to make the second marriage invalid, viz., that the first husband was alive at the time of the second marriage. For convenience, we call each a marriage, although, strictly speaking, but one could be a legal marriage, if the husband in the first was living when the second ceremony was performed.

The defendants here invoke the presumption of law, that, when the existence of a person is once established by proof, the law presumes that the person continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question, or from a continued absence unheard of for seven years.

The case clearly shows, that the first husband had been seen in good health within the year of the second marriage, and before it took place.

The plaintiffs reply by invoking another presumption of law, viz., that when the presumption of life conflicts with that of innocence, the latter is generally allowed to prevail. 1 Greenl. Ev., § 41. They say that a second marriage, if the first husband was alive, was a criminal offence, and would subject the wife to prosecution and punishment, and that, therefore, the law will rather presume death than guilt; and that this applies as well to civil as to criminal cases. 1 Greenl. on Ev., § 35.

In the absence of any statute provision, this presumption

of innocence might possibly prevail; although it would require great faith to apply it to a case like this, where the former husband had been seen within the year of the marriage, and was known by the wife to be living about two years before that event. But, by the statutes in force at the time, the second marriage was in direct contravention of the law.

By c. 87, § 4, of the R. S., of 1841, it is provided, that "all marriages contracted, while either of the parties has a former wife or husband living, shall be void unless the former marriage shall have been dissolved by a decree of divorce."

By c. 160, §§ 5 and 6, of R. S., of 1841, it is provided, § 5, that "every person having a husband or wife living, who shall marry any other person, whether married or single, shall, except in the cases specified in the following section, be deemed guilty of polygamy, and be punished by imprisonment in the State Prison not more than five years," &c.

Section 6, "the preceding section shall not extend to any person whose husband or wife shall have been continually absent for seven years without being known to such person to be living within that time."

The statute not only fixes the term of seven years as the time during which the presumption of life continues, but, declares that a second marriage within that time, is the offence of polygamy, punishable by imprisonment in the State Prison, unless the party wishing to establish a second legal marriage, taking the burden on himself, shall prove, that when the second marriage took place, the first husband or wife was dead. Such a marriage, therefore, is a direct violation of the provisions of a penal law. It is in direct contravention of the letter and the spirit of that law. On well settled and well known principles, such a contract cannot be regarded as valid. It would be a glaring absurdity for the Court to punish the party for polygamy, and at the same time hold the marriage, which creates the offence, valid. No presumption of innocence can overcome the direct prohibition of the statute. We may well adopt the language of the Court, in the case of

*West Cambridge* v. *Lexington*, 1 Pick., 506,—"It cannot be supposed that the Legislature intended to acknowledge the validity of marriages against which they were establishing severe and ignominious punishments. And, if the contract of marriage is to be assimilated to other civil contracts, as it is in most cases of controversy respecting it, it is not easy to see why it is not void, where such marriage is expressly declared void by the Legislature. We speak here of a prohibition relating to the person contracting, and not that which relates to the form of solemnizing the contract." See also, *Damon's case*, 6 Maine, 148.

The first statute having declared that all marriages, where either of the parties has a former husband or wife alive, shall be *void*, the second fixes the time of seven years during which the law presumes that such former husband or wife, unheard of, is alive. Such a marriage, within that time, is therefore void.

We also find a construction of the statute in *Commonwealth* v. *Marsh*, 7 Met., 472, where it was determined upon a state of facts, like those in this case, that the defendant, having been married a second time, when her husband had been absent and unheard of for a less period than seven years, was liable to conviction for polygamy, although she honestly believed, at the time of her second marriage, that her husband was dead.

*Exceptions sustained;*

*Verdict set aside;*

*New trial granted.*

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

JOHN GODDARD *versus* JOHN DEMERRITT *& al.*

Where lumber is delivered on board of a vessel, in accordance with a verbal bargain for it, and the vendee afterwards takes possession of it, claiming it as his own, he cannot set up the statute of frauds to defeat an action brought by the vendor to recover the price agreed upon for it.

ON REPORT.

ASSUMPSIT to recover the price of a lot of lumber alleged to have been sold and delivered by the plaintiff to the defendants.

The evidence reported, tended to show that the defendants agreed verbally with the plaintiff for a lot of lumber, to be shipped from St. John, N. B., to Boston, at fixed prices; that, accordingly, a lot of lumber was shipped by the plaintiff's agent, together with 16,600 clapboards, which he wished the defendants to purchase or dispose of on account of the plaintiff, at a given price; that he sent the survey bill to the defendants, and, after its receipt by them, the plaintiff called on them, and, at their request, made out a bill of the lumber; that the vessel, on which the lumber was shipped, was wrecked and a portion of the cargo lost, but, that she was carried into Provincetown harbor with a part of the cargo; that, at at that place, the defendants took possession of the remaining lumber, including the clapboards, claiming it all as their property, and disposed of it by sale or converted it to their own use.

The deposition of Walter F. Dodge was offered as evidence, and was to be considered, if legally admissible.

*Shepley & Dana*, for plaintiff.

*Rand*, for defendants.

The opinion of the Court was announced by

GOODENOW, J. — The defendants cannot succeed in their defence by force of the statute of frauds. The evidence, without the deposition of Dodge, is sufficient to prove that the

lumber sued for, with the exception of the 16,600 clapboards, was put on board the Batavia, for and on account of the defendants.

For this the plaintiff is entitled to recover according to the prices agreed upon; and, for the clapboards saved, so much in addition, as they were worth after the wreck, in the hands of the defendants, deducting salvage and all expenses.

*Defendants defaulted;—damages to be assessed by the Judge at Nisi Prius.*

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

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## OTIS ADAMS *versus* JOHN GODDARD.

Buildings, erected by the lessee upon leased land, with the permission of the lessor, are personal property.

A lease, conditioned to become void if the lessee "fails to pay all extra insurance," will not be held to be forfeited upon proof of his failure to pay extra insurance, unless it also appears that there was money due for extra insurance.

A "permit," authorizing a lessee to erect a building upon the land leased, and allowing him "to take away, or sell upon the ground, said building so erected, at his own expense, at the determination of said lease," limits the right to *take away* the building, but not the right to *sell* it.

After such building becomes the property of a third person, the cancelling of the lease by the parties thereto, or their assigns, cannot affect his rights; but he may take it away at the end of the term, for which the lease was originally given.

If such owner, at the time when his right to take such building away accrues, uses all reasonable means to do so, but it is withheld from him by the owner of the land on which it stands, under a claim to hold it absolutely as his own, the latter is liable in an action of trover for a conversion of the building.

ON REPORT by DAVIS, J.

TROVER for the conversion of a building. The facts proved by the evidence are stated in the opinion.

*Fessenden & Butler*, for plaintiff.

*Shepley & Dana*, for defendant.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action of trover to recover the value of certain buildings described in the writ, dated, September 15, 1857.

By agreement of the parties the report of the case, *Edwin Parker* v. *John Goddard*, 39 Maine, 144, makes a part of this case; subject to all objections and exceptions therein contained, &c.

The plaintiff offered in evidence and read a bill of sale from Edwin Parker to him, dated July 13, 1854. This bill of sale purports to convey to the plaintiff all said Parker's right, title and interest in and to the addition to the house known as Cape Cottage, erected by Alexander Foss & Co., and standing between the L part and the main body of said house, and on land leased by Alexander Foss of John Neal, Esq., and also the sheds erected by said Foss & Co., on said leased land, being the same property conveyed to said Parker by Tinkham, Adams & Niles, by bill of sale, dated Sept. 20th, 1853.

These buildings were erected by the lessee, by the written permission of the lessor, and subject to the conditions and limitations therein specified, and thereby became personal property.

The lease was dated Nov. 30, 1850, and was for the term of six years from April 1, 1851. The written "permit," was dated Sept. 22, 1852, by which "permission" is hereby given to Alexander Foss, tenant of Cape Cottage, in Cape Elizabeth, to make certain changes, at his own charge, in a part of the premises in the manner and upon the conditions hereinafter mentioned.

"1st. Said Foss to pay all extra insurance upon the premises, for enlargement of builder's risk, immediately and year

by year, during his term, said insurance being six thousand dollars at this time.

"2d. Said Foss to restore and replace every thing removed or changed, to its present condition, with new papering, painting and plastering, so that the dining-room, kitchen, sleeping rooms and servants' quarters, shall be in every particular as good as they now are; and so that all the conveniences thereto appertaining, with cistern, fences, sheds, &c., &c., shall be as they now are, at the determination of his present lease, and wholly at the charge of said Foss, and without delay.

"Upon a strict compliance with said conditions, the said Foss, to be allowed to remove and set back the present addition to the main building, and to put in its place an addition of about eighty by thirty feet, to be finished for drawing-rooms, parlors and sleeping-rooms, at his own charge; and to take away, or sell upon the ground, said building so erected, at his own expense, at the determination of said lease, after said restoration has been made, but not before." This is all that part of the permit given by John Neal to Foss, that becomes material in deciding this case.

The plaintiff, through Parker, has all the rights of Alexander Foss, and the defendant has all the rights of John Neal. Each must take and hold *cum onere*. The dates may be deemed material.

On Nov. 18, 1852, the lease and permit were assigned by the lessee to Foss & Co. On May 18, 1853, Foss & Co. gave a bill of sale of the addition to the house to Tinkham and others, and on Oct. 20, 1853, Tinkham and others gave a bill of sale of the same property to Parker.

Neal conveyed to Goddard, the defendant, Aug. 25, 1853, subject to the right of the occupants at that time, to remove one building on a strict compliance with the conditions to be found in his permit, &c.

On the 25th of Oct., 1853, Foss and Foss & Co., gave up all their interest in or about the premises to the defendant, who was the owner thereof at that time.

They could not sell, or give up, or surrender, to the defendant any thing more than belonged to them at that time. They could terminate the lease if they chose to do so, but could not thereby destroy the rights of third persons.

The conveyance of the addition by Foss & Co., to Tinkham and others, was more than five months before this surrender of the lease, and more than three months before Goddard had any interest in the premises.

When Neal conveyed to Goddard, August 25, 1853, there was no intimation in the deed, that he claimed the addition as real estate, or that it had been forfeited; but, on the contrary, he conveys expressly subject to the rights of the occupants at that time to remove it. At that time there were three parties.—The lessor and the lessee, and the owner of the buildings, built on the land of another, with his consent, which were personal property.

Has this property been forfeited to the defendant by neglect to pay all extra insurance upon the premises for enlargement of builder's risk, immediately and year by year, during his term? Alexander Foss testified, that "said Foss & Co. paid all extra insurance, according to the permit, up to April 27, 1853, after which there was none to be paid, there being no extra risk after that time.

If there had been any thing due the defendant for extra insurance, the plaintiff would not have been authorized to remove the addition from his land, before he had paid or offered to pay the amount. But we are not satisfied, from the testimony, that there was any thing due on that account. The defendant did not claim to keep possession of the building for the purpose of securing such payment, but he claimed it as his own absolutely. If he had had a just claim of this description, he should have stated it, and the amount of it, to the plaintiff, when he went on to the premises for the purpose of removing the building, and restoring the old buildings to their former places.

Was this addition forfeited because it was not sooner removed?

This permit must have a reasonable construction. This structure, comprising the addition, was to be large and expensive, costing several thousand dollars. It is obvious that it would be of much more value where it was placed, and used for the purposes for which it was erected, than for other purposes and in another place. The builder might well expect to receive some adequate indemnity for his outlay, if he could have it remain on the premises, four or five years.

By the terms of the permit, he was allowed "to take away, or sell upon the ground, said building, so erected, at his own expense, at the determination of said lease." This was not intended to limit the right to *sell*, but the right to *take away* the building. Goddard might well have claimed that it should remain on his land, notwithstanding the surrender of the lease, till the six years should have expired. The use of it might have been of much more value to him than simply the ground rent. We cannot come to the conclusion that this property has been forfeited to the landlord, upon either of the grounds taken by him.

Has there, then, been a conversion of it by the defendant to his own use, within the meaning of the law? The plaintiff has done all he could reasonably be required to do, to get possession of his property peaceably. It has been withheld from him by the defendant, under a claim to hold it absolutely as his own, and, as we think, without right.

Whatever doubts might have existed in the former case of *Parker* v. *Goddard*, 39 Maine, 144, as to the evidence proving a conversion, we think there can be no doubt, that the fact is fully proved by the testimony in this case.

According to the agreement of the parties, a default must be entered and judgment rendered for the plaintiff, for such damages as shall be awarded on a hearing before any one member of the Court, and for costs.

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

STATE *versus* THOMAS COLLINS.

When an offence consists of *a series of acts*, or *a habit of life*, the indictment may charge the offence in general terms, and the particular acts which establish the guilt of the party need not be stated.

But, when a statute, creating such an offence, specifies, *in the enacting clause*, the acts of which it consists, the indictment must follow the description in the statute.

If such description is not in the *enacting clause*, the indictment may charge such offence in general terms.

An indictment under the statute of 1858, alleging that T. C., at a time and place named, "did keep a drinking house and tippling shop contrary to the form of the statute," is sufficient.

ON EXCEPTIONS to the rulings of DAVIS, J.

INDICTMENT against the defendant, charging that the respondent, "on the first day of January, in the year of our Lord one thousand eight hundred and fifty-nine, and on divers other days and times, between the first day of January aforesaid and the day of the finding of this indictment, at Portland aforesaid, in the county of Cumberland aforesaid, unlawfully did keep a drinking house and tippling shop, against the peace of said State and contrary to the form of the statute in such case made and provided."

After verdict against him, the respondent moved to arrest the judgment, for the reason that the indictment is insufficient.

The presiding Judge overruled the motion, and the respondent excepted.

The exceptions were elaborately argued by

*L. D. M. Sweat*, for the defendant, and by

*Drummond, Attorney General*, for the State.

BY THE COURT.—In this case the indictment is sufficient. It is true that the prohibition, and the definition of the offence, by the statute of 1858, section 10, are in the same section. But the provisions are in distinct and separate clauses,

as much as in the statute of 1856. In the case of *State* v. *Casey*, 45 Maine, 435, the word "section" was used inadvertently in the opinion of the Court, owing, probably, to the fact that, in the statute then under consideration, the provisions were in distinct sections. But, whether in distinct sections, or clauses, can make no difference. The offence, like that of being a common seller of intoxicating liquors, is made sufficiently certain by the terms used in the enacting prohibitory clause.

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STATE *versus* WILLIAM MAYBERRY *& al.*

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

When the act to be accomplished is in itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished.

When the act is not in itself criminal or unlawful, the unlawful means by which it is to be accomplished must be distinctly set out.

Inasmuch as cheating and defrauding a person of his property are not necessarily criminal at common law, an indictment, charging a conspiracy to cheat and defraud, must contain averments setting out the unlawful means by which the object was to be accomplished.

Crimes referred to in our statutes, as punishable in the state prison, include not only those which *must* be, but also those which are *liable* to be, thus punished.

An indictment, alleging in distinct terms that the defendants conspired to cheat and defraud a person named; that to accomplish that object they made certain representations which are distinctly and formally set out; that these representations were false and fraudulent, and well known by the defendants so to be, and that they were made for the purpose of cheating and defrauding that person, charges a conspiracy, within the strictest definition of the term.

An immaterial averment in an indictment, not contradicting any other averment, not descriptive of the identity of the charge, or of any thing essential to it, nor tending to show that no offence has been committed, may be rejected as surplusage.

Matters of *inducement* need not be set out in an indictment, with that degree of minuteness and particularity, which is requisite in setting out the material allegations, which constitute or give character to the offence charged.

An indictment, alleging that the respondents unlawfully, &c., did conspire, combine, confederate and agree together, one H. P. to cheat and defraud, "by then and there inducing and procuring said H. P. to surrender" certain notes, describes the manner in which they agreed to cheat H. P., and does not make a new substantive charge.

If conspirators carry out or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation of the offence, and given in evidence to prove the conspiracy.

A conspiracy to commit a higher offence merges in that offence, if committed; but in case of a conspiracy to commit a crime of the same grade, there is no merger.

A conspiracy to cheat by false pretences is not merged, though the object of the conspiracy is accomplished.

One good count in an indictment is sufficient to support a general verdict of guilty, though it may also contain defective counts.

The rule, that a party cannot give secondary evidence of the contents of papers in the possession of the other party, unless he has given seasonable notice for the production of the papers at the trial, does not apply to cases in which the opposite party must know, from the nature of the suit or prosecution, that he is charged with the fraudulent possession of the papers.

Exceptions to the refusal of the presiding Judge to instruct the jury in a criminal case, that the respondents cannot be convicted upon a certain count in the indictment, in consequence of the omission therein of their addition and residence, will be overruled, if it does not appear that the respondents were prejudiced by that omission.

Requests for instructions to the jury, upon matters of fact, are rightly denied.

If two persons conspire together to alter a deed, and thereby to cheat and defraud another of valuable papers, by obtaining them of him for the altered deed, by false pretences, and do obtain the papers by the false pretences, the fact, that the alteration so made by them, supposing it to be material, was in fact not material, does not entitle them to an acquittal upon an indictment for the conspiracy.

On Exceptions to the rulings and instructions of Davis, J. There was a motion in arrest of judgment which was overruled *pro forma*, by the presiding Judge. Also a motion to set aside the verdict as being against the evidence.

This was an indictment for conspiracy, and contained four counts, the first two of which are as follows:—

"State of Maine.—Cumberland, ss.—At the Supreme Judicial Court, begun and holden at Portland, within and for the

county of Cumberland, on the last Tuesday of November, in the year of our Lord one thousand eight hundred and fifty-eight: —

"The jurors for said State upon their oath present, that William Mayberry and Stephen P. Mayberry, both of Cape Elizabeth, in the county of Cumberland, laborers, on the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and fifty-eight, at Cape Elizabeth, in said county of Cumberland, did together unlawfully combine, conspire, confederate and agree fraudulently, falsely, maliciously and unlawfully to cheat and defraud one Henry Pennell, of certain valuable papers, instruments, and documents, to wit: of a certain bond or writing obligatory, whereby the said William Mayberry acknowledged himself indebted to the said Henry Pennell in the sum of eighteen hundred dollars, said writing obligatory or bond being then and there signed with the signature and sealed with the seal of him, the said William Mayberry, and also of three promissory notes, each signed with the signature and name of him, the said William Mayberry, the tenor of which said notes is to the jurors unknown, and the said bond or writing obligatory, and the said promissory notes, being all and singular, then and there in full force and not paid, cancelled nor revoked, and, being then and there the property of him, the said Henry Pennell, and then and there being of the value of one thousand dollars; by then and there falsely and fraudulently pretending to him, the said Henry Pennell, that the said William Mayberry was then and there the owner of certain lands and tenements, situated in Gray, in said county, and that the said William Mayberry then and there had good right, then and there to sell and convey to him, the said Henry Pennell, the said certain lands and tenements; whereas, in truth and in fact, they, the said William Mayberry and Stephen P. Mayberry, then and there well knew that he, the said William Mayberry did not then and there own such lands or tenements in Gray aforesaid, and they, the said William Mayberry and Stephen P. Mayberry, then and there well knew that the said pretence that he, the said Wil-

liam, was the owner, as aforesaid, of such lands and tenements in Gray, was then and there untrue, false and fraudulent, against the peace of the State, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Mayberry and Stephen P. Mayberry, at Cape Elizabeth aforesaid, in the county aforesaid, on the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and fifty-eight, unlawfully, fraudulently and maliciously, did conspire, combine, confederate and agree together, one Henry Pennell to cheat and defraud, by then and there inducing and procuring him, the said Henry Pennell, a certain bond, or writing obligatory, signed with the signature and name and sealed with the seal of him, the said William Mayberry, whereby he, the said William Mayberry, acknowledged himself to be indebted to the said Pennell in the sum of eighteen hundred dollars, and also three certain promissory notes, each and all signed with the signature and name of him, the said William Mayberry, the tenor of which said promissory notes is to the jurors unknown, which said bond or writing obligatory, and promissory notes, were then and there the property of him, the said Henry Pennell, and were then and there of great value, to wit: — of the value of one thousand dollars, and were then and there, all and singular, in full force, and not revoked, cancelled nor paid, to surrender, cancel and discharge, under and by means of the false and fraudulent pretence, that he, the said William Mayberry, was then and there seized and possessed of a certain parcel of land, with the buildings thereon, situated in Gray, in said county of Cumberland, and that he had good right then and there to sell and convey the said land and buildings to him, the said Henry Pennell, and that he, the said William Mayberry, would then and there, for the consideration of the surrender, cancellation and discharge of the bond or writing obligatory aforesaid, and of the three promissory notes aforesaid, so as aforesaid held against him by the said Pennell, sell and convey the land and buildings aforesaid, in

Gray aforesaid, to him, the said Henry Pennell; when, in truth and in fact, he, the said William Mayberry, was not then and there seized and possessed, as aforesaid, of such lands or tenements in said Gray, and they, the said William and Stephen P. Mayberry, then and there well knew that he, the said William was not then and there seized and possessed of such lands or tenements in said Gray, and that he, the said William, then and there had not good right then and there to sell and convey to him, the said Henry Pennell, the said lands or tenements situated in Gray aforesaid.

"But they, the said William Mayberry and Stephen P. Mayberry, then and there well knew that he, the said William Mayberry, had before that time, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and fifty-eight, by deed of that date, sold and conveyed to one John Lawrence, of Westbrook, in said county of Cumberland, all the real estate that he, the said William, owned in the town of Gray aforesaid.

"And then and there knowing, as aforesaid, the falsity and fraud of all and singular the aforesaid pretences, they, the said William Mayberry and Stephen P. Mayberry, then and there, as aforesaid, unlawfully, fraudulently and maliciously, did conspire, combine, confederate and agree together, him, the said Henry Pennell, then and there, as aforesaid, by the false and fraudulent pretences aforesaid, to defraud and cheat, against the peace of the State and contrary to the form of the statute in such case made and provided."

The respondents were duly arraigned and pleaded "not guilty."

The government introduced the following testimony.

*Henry Pennell.*—In February, 1838, I bought my house of E. F. Beale, of Norway. He required good personal security, and agreed to take the notes of William Mayberry without a mortgage. The first payable in June, then next, the second, in one year from that June, and the third, in two years from that June.

I informed said Mayberry as to the bargain I could make,

and he agreed to give his notes, and take a deed from Beale of the property, and give me his bond to convey the same to me, upon my paying the notes to Beale. On the 26th of Feb., 1838, the writings were made.

[The defendants' counsel objected to proving the contents of any of these writings, and also seasonably objected to the oral proof, because the bargain was reduced to writing, and because no notice had been given to defendants, or either of them, or their counsel, to produce them, or any of them. But the witness testified further, that the notes given by William Mayberry to Beale, and the bond given by William Mayberry to him (the witness) were delivered by him (the witness) to Stephen P. Mayberry, in June last, for his father, William Mayberry, and that he (the witness) had since made a demand for them of said William Mayberry. And the presiding Judge, being satisfied that said bond and notes were in the hands of the defendants, ruled, that the allegation in the indictment, that they had obtained them from the witness by false pretences, was sufficient notice to them to produce them at the trial; and that, unless they would produce them, the witness might testify as to their contents.]

The witness thereupon testified further as follows:—

I cannot state all the contents of the bond. It was in the penal sum of $1800, and the condition of the bond was, that if I would pay and take up these notes of $1000, and deliver them to him, he would give me a good deed of the property. Said William Mayberry gave Beale three notes, amounting to $1000, payable as before stated. The bond described the said property where I now live, and recited that it had been conveyed to said Mayberry by said Beale, and was the same property described in that deed.

I paid the three notes, at or about the time they fell due, attached them to the bond, and kept them until I delivered them to said Stephen P. Mayberry.

In April, 1858, I took the bonds and notes, called upon William Mayberry, and requested a deed of my property. He denied the whole transaction. I said, if you will stop a

few moments, I will show you what I have got. I then showed him the papers, he hesitated, but finally admitted their correctness, and said, I shall be over soon and will see about it. I waited two or three weeks, and he did not come. I then went over to Cape Elizabeth where he lived, and saw him. He said, I am very busy planting and sowing, and I will be in the city in a few days and will fix up that business—he did'nt come. As the period of twenty years from their date had almost expired, I went to the Register of Deeds—had him make out a warranty deed of the property, and I either carried the deed over to him, or gave it to him, or to his son. He did'nt come over with the deed. I should think I waited three weeks—and then went to him again. He then said, I will not give you a warranty deed of this property, I have concluded not to give you any thing but a quitclaim. I told him I would come over and consult Mr. Fox. I did so, and got Mr. Fox to make a quitclaim of the property from Mr. Mayberry to me. He did'nt sign that. I told him the business had got to be settled up. I had the deed made and showed it to him, and he refused to sign it. Both of the defendants came to my office, and we talked about one half an hour. I wanted William to sign it, and, after consulting Fox, he consented. I then asked him to go to Fox's office and get Fox to acknowledge the deed. His son, Stephen P. Mayberry, spoke up, and said, we have a justice at Cape Elizabeth, who does our business. I delivered it to him, and he carried it out of the office. I afterwards came to my office, and found a note there from Stephen P. Mayberry.

Witness here produced the note, and stated that it was in the handwriting of Stephen P. Mayberry, as follows:—

"Mr. Pennell, Come over at 2 1-2 o'clock. I have to get mother to sign—to our house."

(Signed,) "Stephen P. Mayberry."

About one half an hour afterwards, I saw Stephen, and he said, we are going away, and would rather you would not come till to-night. I told him I would rather come over

in the afternoon, and that he could leave the deed to be exchanged. He said he should not trust it to anybody. I went over after tea, which I took at six o'clock. S. P. Mayberry was at the barn. I said, I have brought over the bond and notes, and we'll shift them. We went into the house, and he passed me the deed, and I passed him the bond and notes. I looked at it, and he said, we want this bond cancelled. He wrote a cancel on the bond, and I signed it, without reading it, and came home.

The next day I handed the deed to the register to be recorded. This is the deed.

I saw the deed before, and this is the same deed, with the exception of the word "not" after the word "meaning," and also excepting the signatures of Mayberry and wife, the witness and magistrate, and date of acknowledgment. It had been altered, after I gave it to Mayberry, by inserting the word "not" after "meaning."

After I discovered the alteration, I went over, with young Mr. Fox, and found Stephen P. Mayberry in the garden. Mr. Fox asked him where his father was—he said, in the house—he asked him to speak to him to come out, that he wished to see him. He went into the house, was gone about five minutes and came out, and halloed for his father. He said his father was up in the pasture catching horses. We went into the pasture and did'nt find him. We went back to the house and could not get in—knocked, and no one came to the door—the door was fastened—we then came over to Portland.

Fox and I went over again that evening—drove up—Fox knocked—a girl came to the door. Fox asked where Mr. Mayberry was—she said, in bed. Fox said, we wish to see him. She lighted us into the room where he was in bed. Fox then tendered back that deed. He said, you have been committing a gross fraud on Mr. Pennell in this deed, in altering it, and I tender it back to you. We stopped a spell. I don't remember Mayberry's answer. He said but very little. Fox made a demand for the bond and notes—Mayberry

denied that he had seen them—he said he hadn't them—hadn't seen them.

The evening the deed was given to me by Mayberry, I did not read it. I carried it to the register's office next morning. I did not know of the alteration until my attention was called to it by the register, a day or two afterwards.

*Mr. Gerrish*, the register of deeds, being called, testified that no one had access to the deed after Pennell left it with him; and, when he recorded it a few days afterwards, he noticed the alteration, and called Pennell's attention to it.

*Frederick Fox.*—The deed (the one containing the alleged alteration) is in my handwriting—prepared at Mr. Pennell's request. I delivered it to my brother, Edward Fox, or to Mr. Pennell. When I delivered it, it was the same as now, excepting the word "not" after the word "meaning"—the date of the acknowledgment—and the signatures of the grantors, witness and justice.

I went over to William Mayberry's with Mr. Pennell, and tendered this deed, and demanded the bond and notes.

I told him the deed had been altered. He asked in what, and I explained to him. He was in bed. He said he would see Mr. Pennell and make it right.

*E. F. Beale.*—Stephen P. Mayberry met me since this indictment, and asked me a question:—question relating to the payment of the notes—was like this,—Do you recollect that Mayberry paid those notes for Pennell? My reply was, that Mr. Pennell paid the notes—that was all.

*John Lawrence.*—I have no deed from William Mayberry of the premises in question—never received any such deed. Such a deed was made by Mayberry and recorded. It was never delivered to me, or to any one for me, by my authority. Stephen P. Mayberry has since requested me to convey the premises to another person.

The question, whether the witness had made such a conveyance, was objected to and excluded.

*Edward Fox.*—Have been counsel for William Mayberry

in some cases, and am now, in one case. Was consulted by Pennell. I read the alleged altered deed, before it was executed to Mr. Pennell, and, I believe, handed it to him. The word "not" was not in the deed when I handed it to Mr. Pennell.

After Pennell had received the deed, S. P. Mayberry came to me, and said, they declined to execute it without some explanations. He said his father would not or should not sign it. He objected, because the deed said his father had received a consideration of $1800, when he had not, and because certain printed words were erased. I explained about the consideration, and stated the reason for erasing the words was, that the covenants of warranty in the deed might avail against his father, in case of any attachment, or prior conveyance by his father.

He finally said, his father should or would sign it. He said they had a justice, and he would prefer to have him go before him.

His father was not present. Stephen very frequently attended to his father's business.

The Government also put in the deed spoken of by Henry Pennell in his testimony.—

"Know all Men by these Presents, That William Mayberry of Cape Elizabeth, in the county of Cumberland, in consideration of eighteen hundred dollars, paid by Henry Pennell of Gray, in said county, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quitclaim unto the said Henry Pennell, his heirs and assigns forever, the following described piece or parcel of real estate situated in Gray, near the corner, bounded as follows:—Beginning on the south-east side line of the county road leading from Gray Corner to New Gloucester, at the corner of land formerly owned by Charles Barrell, and bounded by the said Barrell land on the south-west side and by land formerly owned by Jonathan McKenney on the south-east and north-east, and the county road on the other side,

containing one acre, together with the buildings thereon, meaning not to convey the same estate with the privileges which was conveyed to me by E. F. Beal by deed of February 26, 1838, recorded vol. 156, p. 364, of Cumberland Records, reference being had to the same for a more particular description of said premises.

"To have and to hold, the same, together with all the privileges and appurtenances thereunto belonging, to him, the said Henry Pennell, his heirs and assigns forever. And I do covenant with the said Henry Pennell, his heirs and assigns, that I will warrant and forever defend the premises, to him, the said Henry Pennell, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under me.

"In witness whereof, I, the said William Mayberry, and Jane Mayberry, wife of said William, in token of her relinquishment of her right of dower in said premises, have hereunto set our hands and seals this twenty-ninth day of June in the year of our Lord one thousand eight hundred and fifty-eight.

"Signed, sealed and delivered in presence of Joseph Reed.

"William Mayberry. [L. S.]

"Jane Mayberry." [L. S.]

"State of Maine. — Cumberland, ss. June 29th, 1858. — Personally appeared the above-named William Mayberry, and acknowledged the above instrument to be his free act and deed. Before me,

"Joseph Reed, *Justice of the Peace.*"

No witnesses were called in defence. Upon this evidence the counsel for the respondents presented to the presiding Judge requests for certain instructions, part of which were given, and a part refused. Those given are immaterial, so far as relates to the questions of law raised. Those which were refused wholly or in part are the following: —

4th. That, inasmuch as it is alleged in the *third* count, that the object for which the conspiracy is alleged to have been

formed was accomplished, the respondents are entitled to their verdict upon *that* count.

5th. That, inasmuch as it is not alleged in the *third* count, that the William Mayberry and Stephen P. Mayberry therein named, are the same persons previously named in the indictment—nor that they are of Cape Elizabeth, the respondents cannot be convicted upon *that* count.

6th. That the respondents are entitled to a verdict of acquittal, because the alleged fraud and deception are not such that common prudence and care could not guard against them—nor such as could not have been detected by ocular inspection.

9th. That as to the *third* count, the following, among other allegations, must have been proved, or the respondents be acquitted as to *that* count; viz., that the alleged bond was one whereby William Mayberry acknowledged himself to be indebted to the said Henry Pennell in the sum of eighteen hundred dollars; and that it was signed with the signature, and sealed with the seal of the said William Mayberry; that the three notes described in said count were each signed with the signature and name of said William Mayberry, and in full force and not paid at the time of the alleged conspiracy; and that the insertion of the word "not," as alleged in the said count, was a material alteration of the deed, destroying the whole meaning and effect of the said clause and of the deed.

10th. That there is no evidence whatever in the case of such bond, as is described in said count; no evidence that said notes were each signed with the signature and name of said William Mayberry; no evidence that they were in full force and not paid, but had been paid, at the time of the alleged conspiracy, and so the respondents are entitled to a verdict of not guilty under this count.

The fourth request was not granted; but the presiding Judge instructed the jury that, though the object of the conspiracy was alleged to have been accomplished; yet, if they should find that in fact it was not accomplished, then the conspiracy was not merged, and the defendants would not,

for that reason, be entitled to an acquittal upon the third count, the allegation that it was accomplished being unnecessary and immaterial.

The fifth request was denied, the presiding Judge saying thereupon that such objection to the indictment, not having been taken before pleading to the merits, could not now be raised before the jury; but that, if the omission to insert in the indictment the name of the town of the residence of the defendants tended to their prejudice, they would have their remedy upon a motion in arrest of judgment.

The sixth request was denied.

The ninth request was granted in part, and in part refused.

The jury were instructed that every thing in the count descriptive of the bond and notes must be proved as alleged; that all the allegations in regard to the signing, sealing, signature, and amount of the bond or notes, were material, and must be proved as stated; but that the allegation that the notes, at the time of the conspiracy, were in full force and not paid, was not descriptive of the notes, and was not material; but that, if the defendants conspired, as alleged in said count, to obtain such a bond and such notes as are therein described, and if said bond was then in force, and Pennell then held said notes as vouchers and evidences that he had paid them and taken them up, so as to secure his rights under the bond, the fact that the notes had been so paid, and were not, as such, in force, would not entitle the defendants to an acquittal.

In regard to the remainder of this request, the jury were instructed that the word "not," if inserted in the deed by defendants, as alleged, was repugnant and void, and therefore immaterial; but that, if the defendants conspired together so to alter said deed, and thereby to cheat and defraud said Pennell of the bond and notes, by obtaining them of him for the deed so altered, by false pretences, as alleged in said count, and did so obtain said bond and notes by false pretences, as alleged in said count, then the fact that the defendants failed of their ultimate purpose because the alteration

so made by them, supposing it to be material, was, in fact, not material, would not entitle them to an acquittal.

The tenth request was denied, the jury being instructed that, so far as the allegations were material, it was for them to say whether the facts were proved.

Other instructions were given, such as the case required, to which no exceptions were taken.

The jury returned a general verdict of guilty.

To these instructions, refusals to instruct, and to the admission of parol evidence of the contents of the bond and notes, as stated in the report of the evidence, the defendants excepted.

*John S. Abbott,* for the respondents.

I. Motion in arrest of judgment.

1. The first count is defective. There is no sufficient description of Henry Pennell—"one Henry Pennell." The writing is stated in the alternative, "bond or writing obligatory," and the description of it does not conform to the name given it. The description of the false pretences is too uncertain and vague.

It is not alleged in this count that William Mayberry offered to sell and convey the land in Gray to Pennell, nor that he designed to, nor that there was any purpose on the part of either of them that Pennell should receive a conveyance of them.

There is no allegation that William Mayberry had not then and there good right to sell and convey to Pennell the said land.

If *not the owner,* and he had good right to sell and convey the same to Pennell, it would be all the same.

2. The *second* count has the same uncertainty as to the description of Pennell, of the writing obligatory, and of the land in Gray.

This count is further defective, in this:—It commences with a charge of conspiracy, but, instead of alleging such a crime, it undertakes to allege the actual procuring of the

papers. They unlawfully conspired to cheat, by then and there cheating.

It is necessary to charge distinctly the acts done, which are considered to constitute the *conspiracy*. Conspiring to do an act is one crime — the doing it another.

The count is defective also in this: — It is alleged, that the false pretence was, that William Mayberry was then and there seized and possessed of a certain parcel of land, &c., situated in said Gray, and that he had good right then and there to sell and convey the same to said Pennell, and would do so for the consideration of the surrender, &c., of said papers.

It is not alleged, that William Mayberry had not good right then and there to sell the same; nor is it alleged, that William Mayberry did not, in good faith, intend to convey the same, and did in fact convey the same to said Pennell.

It is merely alleged, in substance, that the respondents knew that William Mayberry had no right then and there, on the 29th of June, 1858, to sell certain lands in Gray, because they then well knew that William Mayberry, on the 7th of June, 1858, had sold and conveyed to one Lawrence all the real estate William Mayberry owned in Gray, on the 7th of June, without alleging that he did not afterwards acquire real estate in Gray.

3. The whole indictment charges no crime. Each count undertakes to charge a *statute* offence. The only statute in relation to it is c. 126, § 12 of the Revised Statutes. It can come only under the clause against conspiring "to commit any crime punishable by imprisonment in the state prison."

Crimes "punishable by imprisonment in the state prison," are those which *must* be so punished. They are not those which *may* be punished by imprisonment in the state prison, or by fine.

Cheating by false pretences is not a crime which *must* be punished by imprisonment in the state prison. It may be punished by fine. It does not, therefore, come within the class which is punishable by imprisonment in the state prison.

Hence, a conspiracy to cheat by false pretences is not an indictable offence under the statute.

Again, it does not appear that the act, which it is alleged they conspired to commit, was a crime. It is not every fraud that is punishable criminally. *Commonwealth* v. *Hersey*, 1 Mass., 137; *Commonwealth* v. *Warren*, 6 Mass., 72; *Rex* v. *Pywell*, 1 Stark., 402; 3 Greenl. Ev., 85, §§ 90, 95, 97; 3 Archbold, 618; *State* v. *Roberts & al.*, 34 Maine, 320.

Again, no count in the indictment particularly and fully sets out and describes the means agreed upon by the respondents to be used, and such means as would be calculated to produce the alleged object. *State* v. *Roberts & al.*, 34 Maine, 320; *March* v. *The People*, 7 Barbour, S. C. R., 391.

An indictment for conspiracy to cheat, which does not set forth the means intended to be used, is insufficient, and is not aided by averments of overt acts done in furtherance of the conspiracy. *Commonwealth* v. *Shed*, 7 Cush., 514; *Commonwealth* v. *Hunt & als.*, 4 Met., 111; *Lambert* v. *The People*, 7 Cowen, 166; 9 Cowen, 578; *The People* v. *Eckford*, 7 Cowen, 535.

The next point I make is, that no *crime* was conspired to be committed, or in fact committed. No fraud was perpetrated. No wrong was done Pennell.

The word "not," which is alleged to have been inserted in the deed, is perfectly immaterial, and does not change or affect the meaning of the deed. Mayberry has *in fact* performed his part of the contract, has *in fact* conveyed to Pennell the land agreed to be conveyed, whether he intended it or not, and has received what he was entitled to receive—the bonds and notes.

Again, the indictment alleges, not only the conspiracy, (if it alleges one,) but also the actual accomplishment of the object of the conspiracy. The conspiracy was therefore merged. *Commonwealth* v. *Kingsbury & al.*, 5 Mass., 106.

II. The exceptions.

1. The contents of certain writings were allowed to be proved, against the objections of the counsel for the respond-

ents. Rule 27, 37 Maine, 576, is in point, and is as binding on the Court, as on counsel or parties.

2. The fourth and fifth requested instructions should have been given, for reasons already stated.

3. The tenth should have been given. Where there is no evidence whatever to support a material allegation in the indictment, the Judge may so instruct the jury, without infringing upon their province.

*N. D. Appleton, Attorney General*, for the State.

The opinion of the Court was drawn up by

RICE, J. — This is an indictment for a conspiracy, and contains four counts. The jury rendered a general verdict against both defendants. The case is presented on exceptions, motion in arrest of judgment, and on a motion to set aside the verdict as against law and against the evidence and the weight of the evidence.

On the motion in arrest of judgment, it is contended that each and all the counts are defective and insufficient to support a judgment against the defendants. As to the first count, it is contended by the counsel for the defendants to be insufficient. Such is obviously the case. It is, therefore, dismissed without further notice.

The second count, divested of its formal and technical averments, alleges, "that the defendants, on the twenty-ninth day of June, A. D., 1858, at, &c., unlawfully, fraudulently and maliciously did conspire, combine, confederate and agree together one Henry Pennell to cheat and defraud, by then and there inducing him, the said Henry Pennell, a certain bond and certain promissory notes, signed by William Mayberry, one of the defendants, of the value of one thousand dollars, to surrender, cancel and discharge, under and by means of the false and fraudulent pretence, that the said William Mayberry, was then and there seized and possessed of a certain parcel of land, with the buildings thereon, situated in the town of Gray, &c., and that he, said William

Mayberry, then and there had good right to sell and convey the same to the said Henry Pennell, and that the said William would then and there, in consideration of the surrender, cancellation and discharge of said bond and notes, sell and convey the said land and buildings to said Pennell, when in truth and in fact, the said William Mayberry was not seized and possessed of said lands and tenements in Gray, and had not good right to sell and convey the same to said Pennell, and that the defendants then and there, well knowing the falsity and fraud of all and singular the pretences aforesaid, did unlawfully, fraudulently and maliciously, combine, conspire," &c.

A conspiracy has been well defined to be a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Commonwealth* v. *Hunt*, 4 Met., 111.

When the act to be accomplished is itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished; but, when the act is not in itself criminal or unlawful, the unlawful means by which it is to be accomplished must be distinctly set out.

Cheating and defrauding a person of his property, though never right, was not necessarily an offence at common law. The transaction might be dishonest and immoral, and still not be unlawful in the sense in which that term is used in criminal law. *State* v. *Hewitt*, 31 Maine, 396. Hence, the mere allegation, that the defendants conspired to cheat and defraud Henry Pennell, would not be sufficient. To sustain an indictment for that cause, it must appear, by the averments in the indictment, that the act was to be accomplished by criminal or unlawful means.

Section 12 of c. 126, R. S., provides, that if two or more persons conspire and agree together with the fraudulent and malicious intent wrongfully and wickedly to commit any crime punishable by imprisonment in the state prison, they shall be deemed guilty of a conspiracy.

Section 1, of the same chapter, provides that whoever designedly and by any false pretence or privy or false token, and with intent to defraud, obtains from another any money, goods or other property, or his signature to any written instrument, the false making of which is forgery, shall be punished by imprisonment not more than seven years, or by fine not exceeding five hundred dollars.

All imprisonment in punishment for crime, for a term of one year or more, must be in the state prison, unless otherwise specially provided. R. S., c. 135, § 2.

Crimes referred to in § 12, of c. 126, R. S., as punishable by imprisonment in the state prison, are such as are *liable*, by statute, to be thus punished, and not such only as *must* be thus punished. *Smith* v. *State*, 33 Maine, 48.

The count now under consideration charges, in distinct terms, that the defendants conspired to cheat and defraud Pennell; that, to accomplish that object, they made certain representations, which are distinctly and formally set out, and avers that those representations were false and fraudulent, and well known by the defendants so to be, and that they were made for the purpose of cheating and defrauding Pennell. This would seem to bring the act charged strictly within the definition of a conspiracy.

But, it is contended that the averment of falsity is qualified by subsequent language, wherein it is alleged that the defendants knew that William Mayberry had sold and conveyed to John Lawrence, of Westbrook, all his real estate in Gray, on the 7th day of June, 1858. If the alleged sale to Lawrence were the only averment of the falsity of the defendants' pretences, there would be force in the position, as it would not necessarily follow, because Mayberry had sold all the real estate of which he was possessed in Gray, on the 7th of June, that he was not possessed of, or had not the right to sell, the same or other real estate in that town, on the 29th day of the same June. But, as we have already seen, the count contains other independent, distinct and affirmative averments of the falsity of the pretences made by the defendants.

The alleged sale to Lawrence is therefore wholly immaterial. It does not contradict any averment in the indictment; it is not descriptive of the identity of the charge, or of any thing essential to it; nor does it in any degree tend to show that no offence was committed. It may be rejected, as it is a general rule that whenever an allegation may be wholly struck out of an indictment, without injury to the charge, it may be rejected as surplusage. Chitty's Crim. Law, 294; *Commonwealth* v. *Pray*, 13 Pick., 359.

There are several objections suggested, which are common to all the counts in the indictment, such as the imperfect description of the estate which William Mayberry pretended to own in Gray, and promised to sell and convey to Pennell; the omission to describe Pennell, by addition or otherwise, and the failure to describe the bond and notes, the cancellation of which the defendants conspired to obtain, which alleged defects the counsel for the defendants contends are fatal to the indictment. These several matters are introduced into the indictment by way of inducement. They do not constitute the material allegation in the indictment, and it is not necessary that they should be described with that degree of minuteness and particularity which is requisite in setting out the material allegations which constitute and give character to the offence charged.

It is also contended that this count is defective, inasmuch as it commences with a charge of conspiracy, but, instead of alleging such a crime, it undertakes to allege the actual procuring of the papers—that they unlawfully conspired to cheat by their cheating. On examination, it will be found that the indictment is not open to this objection.

The allegation is, that the defendants, on the twenty-ninth day of June, 1858, unlawfully, fraudulently and maliciously did conspire, combine, confederate and agree together one Henry Pennell to cheat and defraud. That was the object to be accomplished. Now, how was this to be done? What were the means agreed upon by them by which the act was to be accomplished? The indictment answers. It was to

be done by then and there inducing and procuring Pennell to surrender, cancel and discharge his bond and notes under and by reason of the false and fraudulent pretences set out in the count. That was the manner in which they agreed to cheat. Whether they actually succeeded in inducing and procuring Pennell to cancel and surrender the bond and notes or not, is immaterial. The offence charged, consists in conspiring to induce him thus to act, by means of false pretences.

If the conspirators carry out, or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation of the offence, and given in evidence to prove the conspiracy. *Commonwealth* v. *Tibbetts*, 2 Mass., 536; *State* v. *Murray*, 15 Maine, 100.

There can be no merger in this case. A conspiracy to cheat by false pretences, and actually cheating by false pretences, are offences of like legal turpitude, and punishable in like manner. Both, by our laws are felonies. When there is a conspiracy to commit a higher offence, and the offence is actually committed, the conspiracy is merged; but when both are of the same grade there is no merger. *State* v. *Murray*, 15 Maine, 100; *Commonwealth* v. *O'Brien*, 12 Cush., 84.

The second count being found, on examination, to be good, it is not deemed necessary to examine the two remaining counts in the indictment, for these were substantive offences, and the law is fully settled in this country, that, in a criminal case, one good count is sufficient to support a general verdict of guilty, however defective the others may be. *State* v. *Burke*, 38 Maine, 574. The motion in arrest is, therefore, overruled.

The exceptions. The government was permitted to give in evidence the contents of the bond and notes, described in the indictment, against the objections of the defendant's counsel. No notice had previously been given to the defendants or their counsel to produce said bond or notes, unless the indictment, with a copy of which they had been seasonably furnished, should be deemed such notice.

The 27th Rule of this Court provides that, when written evidence is in the hands of the adverse party, no evidence of its contents will be admitted, unless *previous notice* to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be permitted to comment upon a refusal to produce such evidence without first proving such notice.

This rule introduces no new principle, but is simply in accordance with, and affirmance of, a well established and generally recognized rule of evidence.

The rule which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the case, has been made with good reason, in order that the party may not be taken by surprise in cases where it must be uncertain whether such evidence will be brought forward at the trial by the adverse party. But this reason will not apply to cases where, from the nature of the suit, or prosecution, the party must know that he is charged with the possession of the instrument. 1 Phil. Ev., 441; 2 Stark Ev., 361. Thus, in an action of trover for a bond or note, parol evidence of the instrument may be given although no previous notice be proved. *Scott* v. *Jones*, 4 Taunt. 865; *Howe* v. *Hall*, 14 East, 274. So also in a prosecution for stealing such an instrument, the same rule applies. *Rex* v. *Aikles*, 1 Leach, c. 436; *Commonwealth* v. *Messenger*, 1 Bin., 273. Where a party has fraudulently possessed himself of an instrument belonging to the opposite party, notice to produce is unnecessary. *Gray* v. *Kernahan*, 2 Rep. Const. Ct. So. Car., 65.

The defendants were seasonably furnished with a copy of the indictment. They were therein charged with having fraudulently possessed themselves of the papers referred to, and were not, under such circumstances, entitled to further or special notice to produce them.

The fourth requested instruction was properly withheld for reasons already given. The offence of conspiracy was not merged.

The fifth was also rightly refused. It did not appear that the omission referred to therein tended to prejudice the defendants.

The sixth request was for instructions upon matter of fact, which was for the jury, and not the Court, to determine, and the tenth was of the same character. They were properly withheld. So much of the ninth was given as the defendants were entitled to demand.

We are unable to perceive that any instructions were given or any requests to instruct refused, of which the defendants can rightfully complain.

As to the motion to set aside the verdict, on the ground that it is against the evidence and the weight of the evidence, assuming that question to be legitimately before this Court, which, however, may well be doubted, we can only say that the evidence, in our opinion, clearly shows that the defendants deliberately conspired to cheat and defraud Pennell, and to accomplish that act by pretences which they fully believed were false; which the indictment charges were false, and which the jury have found to be false, and, in view of the evidence reported, we cannot say that the verdict is erroneous. If the defendants failed to accomplish the object for which they conspired, it is manifestly to be attributed to their want of intelligence, rather than to any deficiency of moral turpitude in them.

On the whole, we are of opinion, that the second count of the indictment is sufficient, and that the verdict of the jury is sustained both by law and the evidence in the case. In this view it becomes unnecessary to examine the third and fourth counts in the indictment.

*Exceptions and motions overruled.*

*Judgment on the verdict.*

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

MEMO. BY DAVIS, J.—I concur in the opinion that the second count in the indictment was good. And when either count is good, judgment will not be arrested.

I think the third count was also good. But that is immaterial; for if the evidence did not sustain the second count, a motion to set aside the verdict for that cause should have been made to the Judge who tried the case, at *Nisi Prius*, and not to the full Court. *State* v. *Hill, post.*

## STATE *versus* DAVID HILL.

At common law, the Judge who presided at the trial of a case, had the power, both in civil and criminal cases, to set aside a verdict, when, in his opinion, it was against the evidence.

This rule has been changed by our statute in *civil* cases, in which a motion to set aside a verdict because it was against the evidence must be heard by the full Court.

But, in *criminal* cases, the rule has not been changed, and the Court, sitting as a Court of law, has no jurisdiction of such motions, but they must be presented to, and decided by the Judge presiding at *Nisi Prius*.

ON MOTION to set aside the verdict rendered against the respondent on an indictment for maliciously killing a horse.

*Anderson & Webb*, argued the motion in behalf of the respondent.

*Drummond, Attorney General*, for the State, raised the question of the jurisdiction of the Court to decide this motion.

The opinion of the Court was drawn up by

DAVIS, J.—This was an indictment charging the defendant with the crime of maliciously poisoning a horse belonging to one John Hamilton. After trial and a verdict of guilty, and before judgment, he filed a motion for a new trial, on the ground that the verdict was against the evidence. A full report of the evidence was thereupon made and signed by the presiding Judge; and the case was entered at the next succeeding law term for the Western District, and ar-

gued before the whole Court. It is contended by the Attorney General, that this motion should have been heard at *Nisi Prius*, in the Court for criminal business in Cumberland county; and that the whole Court, sitting to determine questions of law for the Western District, have no cognizance of a motion for a new trial in a *criminal* case on the ground that the verdict is against the evidence.

At common law, the presiding Judge holding the Court for the trial of causes, had power, if a verdict, in his judgment, was against the evidence, to set it aside and grant a new trial. And, if there was ever any doubt that this could be done as well in *criminal* as in *civil* cases, when the verdict was *against* the accused, that question was settled in the case of *Commonwealth* v. *Green*, 17 Mass., 515. This power was conferred by statute upon the Judges of the District Court, as it had been before upon the Court of Common Pleas. R. S., 1841, c. 97, sections 23 to 25. Until 1841, in either Court, it was exercised by the Judge presiding at *Nisi Prius*.

But, by the Revised Statutes of that year it was for the first time provided, that when a motion is made in the Supreme Judicial Court to set aside a verdict as against the evidence, such motion should be presented "to the whole Court" upon a report of the evidence signed by the presiding Judge. R. S., 1841, c. 115, § 101, as amended the same year. This provision, however, applied to *civil* actions only. This is evident from the fact that the provision is in the chapter relating to the "proceedings of the Court in civil actions," and that in the chapter relating to the "proceedings of Court in criminal cases" no such provision is found. R. S., 1841, c. 172. In criminal cases, questions of law, whether raised by exceptions, or upon a report, must have been brought before the whole Court. Same chapter, §§ 40 and 41. But, in such cases, a motion to set aside a verdict, as against the evidence, could still be heard by the presiding Judge at *Nisi Prius*. It might, indeed, have been heard by the whole Court, as then constituted, the law terms then being held in the several counties, at which the Court, in addition to its cogniz-

ance of questions of law and equity, had the same original jurisdiction as at the terms for jury trials. But it was not *necessary* to present such motions to the whole Court, the power of the presiding Judge at the terms for jury trials to set aside a verdict in a *criminal* case not having been annulled by the statute of 1841, but having been left as it was before.

So the law remained, until 1852, when the District Court was abolished, and the Supreme Judicial Court was re-organized. Law terms were no longer to be held in the several counties; but the State was divided into three districts, in each of which the whole Court were required to hold one term every year, to hear and determine questions of law and equity. At these terms the Court have no original jurisdiction. No cases or questions can be heard, except such as are brought from the Courts in the several counties under express provisions of statute therefor. *Baker* v. *Johnson* 41 Maine, 15.

By the statute of 1852, c. 216, § 8, among the cases that may be brought before the whole Court, are "motions for a new trial upon evidence as reported by the presiding Justice," and "all cases, civil or criminal, where a question of law is raised." These cases are those that were provided for by R. S., 1841, c. 115, § 101, and c. 172, §§ 40 and 41. The motions for a new trial upon evidence so reported, were such as could be made in civil actions only, there being no statute provision for such a motion before the whole Court in a criminal case. So it was understood by the Legislature; for, on revising the statutes, this provision was incorporated, as in 1841, into the chapter relating to the "proceedings of the Court in civil actions." R. S., 1857, c. 82, § 33.

Motions to set aside verdicts as against the evidence, have very rarely been made in this State, in criminal cases; and the statutes make no provision for bringing such a motion before the whole Court. It follows, that in criminal cases such a motion must be presented, as formerly in civil actions also, to the Court held for jury trials. The object of the

statute of 1841, c. 115, § 101, seems to have been, to make a verdict final, in a *civil* action, unless set aside by the whole Court. But in criminal cases, in favor of the accused, the power of the presiding Judge at *Nisi Prius* to set aside a verdict against him, if against the evidence, is left unimpaired. Though a verdict *in his favor* is final, and neither the presiding Justice nor the whole Court can set it aside, a verdict *against him,* upon his request, if against the evidence, may be set aside, without requiring him to present his motion to the whole Court. The whole Court, at the law term, as now constituted, have no jurisdiction of the motion presented in the case at bar; and it must therefore be dismissed, to be heard in the county where it was originally presented.

*Motion dismissed.*

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

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FRANCIS SHEPHERD *versus* WATSON RAND.

When final judgment has been entered in an action for the defendant, and the parties are out of Court, the *judicial* power of the Court ceases; as nothing remains to be done, but to tax the costs, which requires merely the exercise of *ministerial* powers; costs being only an incident to the judgment.

But if, *at the term,* the costs are taxed, and an adjudication thereon is had, either party, dissatisfied with the ruling of the Court, may except. Otherwise, where, on appeal from the clerk's taxation, the question is adjudicated by one of the Judges in vacation, or at a subsequent term.

It is not within the discretionary power of a Judge at *Nisi Prius,* to order the action brought forward and entered upon the docket of a subsequent term, not for the purpose of amending the record, but, in effect, to nullify it, so that a negligent party may have an opportunity to except to the decision of a tribunal that he has himself selected, in the taxation of costs.

THIS case was presented on EXCEPTIONS, taken by both parties, to the rulings of DAVIS, J.

This action, which was upon a note of hand, was referred

by a rule of Court. The referee made his report in favor of the defendant, at April term, 1859, awarding him his costs of Court, to be taxed by the Court; the report was accepted and judgment ordered thereon by the Court.

In the vacation, between the April term aforesaid and the next term, the defendant taxed his costs, which was passed upon by the clerk. The plaintiff appealed from the decision of the clerk to a Justice of the Sup. Jud. Court. The question of costs was heard on the appeal, before Judge DAVIS, and decided after the commencement of the next term. The defendant, being dissatisfied with the decision of the Judge on the question of costs, moved the Court for leave to bring forward the action on the docket, in order that he might take exceptions to the ruling of the Judge on the question of costs. The Court ordered the action to be brought forward on the docket and entered on the docket of this term, as a continued action. To this order the plaintiff excepted.

The defendant excepted to the disallowance of fees of certain witnesses, included in his taxation of costs.

*J. C. Woodman,* for plaintiff.

*Davies,* for defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The case finds *that,* at the April term of this Court, 1859, the report of the referee was accepted in favor of the defendant, and for his costs, and that "judgment was ordered thereon"; *that,* at the succeeding October term, the defendant, for the purpose of excepting to the ruling of the Judge upon a question of costs, made a motion to bring the action forward, and it was so ordered. To which ruling, the plaintiff, considering himself aggrieved, has excepted; and the question arises whether the Judge, under the circumstances, was justified in sustaining the motion.

Upon this subject, the law is well stated in *Lothrop* v. *Page,* 26 Maine, 119, which is, that "Every court of record has power over its own records and proceedings, to make them

conform to its own sense of justice, so long as they remain incomplete, and until final judgment has been entered." And further, "It is the well established practice and course of proceeding in such courts, to regard all actions, in which a final judgment has not been entered, whether on the docket of the existing, or a former term, as within the jurisdiction and control of the Court."

And so, in *Sawtelle, pet'r*, 6 Pick., 110, the Court remark, "We are of opinion that, there having been no judgment, it was within the discretionary power of the Court to take off the default, as much as it would have been to order judgment. The case remaining on the docket unfinished, they had jurisdiction over it to sustain either motion."

But those cited were not like the present case. Here the final judgment had been rendered and the parties were out of Court—the judicial power was exhausted, and to be succeeded only by that of the ministerial. The taxation of costs was only *incident* to the judgment, and, if taxed and adjudicated at the same term, might have been the subject matter of exceptions; but not so, if taxed afterwards, when *the* party selects his tribunal, and, whether its decision be satisfactory or otherwise, *both* parties must submit, and the party dissatisfied cannot afterwards resort to another jurisdiction, to be created by nullifying a final judgment, not by any process known to the law, such as error or review—not for the purpose of making the records and proceedings conform to the Court's own sense of justice, but for the sole object of allowing a negligent party to take advantage of such negligence. A Judge at *Nisi Prius* has no such discretion.

The plaintiff's exceptions are sustained, and, consequently, those of the defendant are overruled.

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

THOMAS SHAW, *Adm'r*, *versus* JOHN MUSSEY.

Neither the owner of real estate, in his lifetime, nor his administrator, after his death, can maintain *trespass* against a person who has entered upon and occupied such real estate with the consent of the owner.

The owner of real estate may maintain assumpsit for money had and received against a person who has taken the rents and profits of it, both parties having acted under a mistake as to the title.

ON FACTS AGREED.

TRESPASS for the mesne profits of two stores and half a store from May 9, 1850, to August, 1852, commenced by the plaintiff as administrator of one Merrill. The writ was dated May 9, 1856.

In 1838, the defendant, with the consent of said Merrill, entered into the possession of the two stores, both supposing they were included in a mortgage from Merrill to the defendant. He received the rents of them, and of the other store, of one half of which he was absolute owner, from that time until the death of Merrill, in August, 1852. After Merrill's death, his heirs recovered the two stores in a writ of entry, on the ground that they were not embraced in the mortgage. The plea was the general issue.

Upon these facts the Court was to render such judgment as the law requires.

*Shepley & Dana*, for the plaintiff.

*Rand*, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The alleged trespass in this case was committed by the defendant by entering into the possession of the premises "with the consent of the plaintiff's intestate." Both parties at that time supposed that the premises were embraced in a mortgage then held by the defendant. After the death of the mortgager, his heirs discovered that these premises were not embraced in the mortgage; and they recover-

ed judgment therefor in a real action. In that suit they counted upon their own title as accruing at the time of the death of their ancestor; and to that extent only, is the judgment conclusive.

The administrator is clothed with the rights of, and represents, his intestate. The latter, while living, could not have maintained an action of trespass against the defendant, because he consented to the entry and possession. *Volenti non fit injuria.* That consent was not revoked during his lifetime; and the defendant, having never been liable to him in an action of trespass, is not liable in such an action to the administrator of his estate, by any principle of the common law, nor by any provision of any statute.

The case is not different from what it would have been if the defendant had yielded possession to the heirs without any suit. The mistake in regard to the identity of the premises with those described in the mortgage was mutual. It is true, since the mistake was one *of fact*, the defendant was liable to pay the plaintiff's intestate whatever he received as rents and profits. For this he is still liable to the plaintiff as administrator, in an action for money had and received, unless the demand is barred by the statute of limitations. But, as he is not liable in trespass, according to the agreement of the parties, *a nonsuit must be entered.*

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

ISAAC WINSLOW *versus* EMILY JANE ALLEN.

The levy of an execution upon land bounded on a highway carries the fee in the land covered thereby to the centre of it, if the debtor is the owner of the land, and there is no controlling language in the description.

In the description of land taken on execution, where one line is described as starting at a certain monument and running a given course to the road, "leaving four rods for said road," thence in the same course to a monument, and the line parallel with this, is described in a similar manner, the road is not included.

THIS was an action of TRESPASS *quare clausum* submitted ON FACTS AGREED, which are sufficiently stated in the opinion.

*E. & F. Fox*, for plaintiff.

*Fessenden & Butler*, for defendant.

The language of the appraisers refers to the *easement* and not to the *fee* of the land embraced in the road.

The lines are described as running not to the *sides* of the road, but *to the road.*

This language in a deed, and, therefore, in a levy, carries the fee to the centre of the road. *Johnson* v. *Anderson*, 18 Maine, 76.

The opinion of the Court was drawn up by

TENNEY, C. J.—The close alleged to have been broken and entered, and the trees thereon standing cut and carried away, is covered by a highway four rods in width, and legally located. The question presented, is whether the levy extends over the highway.

It is well settled, that a grant of land, bounded on a highway, carries the fee in the land covered thereby to the centre of it, if the grantor was the owner of the land, and there is no controlling language in the description. *Johnson* v. *Anderson & al.*, 18 Maine, 76. The same principle will equally apply to an extent upon real estate, by the levy of an execution.

In the case before us, the debtor, in the execution under which the levy was made, was the owner in fee of the premises in question; and this might have been taken and set off thereon, subject to the public easement.

The description of the land taken upon the execution is as follows:—"Commencing at a certain stone at the intersection of the old road leading into Westbrook, by the Methodist meeting house, with the said county road leading to Gray, thence S. 60° W. 15 rods, thence S. 76° W. eleven rods and 5 links, thence S. 25° E. 42 rods and 21 links, to the county road leading to Westbrook, leaving 4 rods for said road, thence S. 25° E. 4 rods and 17 links, thence N. 55° E. 31 rods to said county road leading to Gray, thence N. 31½° W. 4 rods and 17 links to said county road leading to Westbrook, leaving 4 rods for said road, thence N. 30½° W. 42 rods, to the first mentioned bounds."

The import of the language, according to its ordinary use, is plain and free from ambiguity and doubt. One of the lines is on a course S. 25° E. *to the* county road leading to Westbrook, *leaving* 4 *rods for a road, thence, on the same course,* for a further distance. Another line, run in a direction somewhat opposite to those just mentioned, is, as a course stated, 4 rods and 17 links in length to said county road, leading to Westbrook, *leaving* 4 *rods for said road, thence, on the same course, &c.* This cannot be treated as manifesting the intention of the appraisers to embrace in the description the land covered by the highway, but to exclude it. If the former was the design, there was no necessity of dividing the lines running on the same course, each into two parts. But, upon the latter hypothesis, the lines terminated at the line of the highway and a new departure commenced at the distance of four rods, "*leaving*" the space between as making no portion of the land intended to be covered by the levy.

The case of *Johnson* v. *Anderson & al.*, before cited, is not perceived to be analagous to the one before us, as it is very clear that the latter is one where the road was designed by the parties to be excluded, but in the former it was other-

wise, under well settled principles. This case is more like that of *Tyler* v. *Hammond*, 11 Pick., 193.

According to the agreement of the parties, the defendant defaulted.

RICE, APPLETON, DAVIS, and KENT, JJ., concurred.

GOODENOW, J., dissented.

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WILLIAM HUNKINS *versus* JOHN PALMER *& als.*

A bond, taken on mesne process, conditioned that the principal shall, "within fifteen days *after the last day of the term* of the Court at which judgment shall be rendered, notify the creditor, &c., to attend his disclosure, is not saved by notice to the creditor within fifteen days *after judgment* but *before the last day of the term* of Court, at which it is rendered, and a disclosure upon such notice.

ON REPORT. DEBT on a bond given on arrest on mesne process. The condition of the bond was, "if the said Palmer shall, within fifteen days after the last day of the term of the Court at which final judgment against him in said suit, notify the creditor," &c. The other facts in the case are stated in the opinion.

*O'Donnell*, for the plaintiff.

*Howard & Strout*, for the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—The R. S. of 1841, c. 148, § 17, provides that a bond may be taken upon the arrest of a person upon mesne process, conditioned that, if the principal therein will, within fifteen days after the last day of the term of the Court at which the judgment shall be rendered in such suit, notify the creditor, &c., to attend at a certain place in the county, and at a time to be fixed, within thirty days after such notice, and not less than fifteen days, for the purpose of disclosure and examination, &c.

At the October term, 1857, the defendant in the action was defaulted. Judgment was rendered November 11, 1857, and, on December 10, 1857, the October term was finally adjourned. The citation to the creditor was issued November 14, 1857, to attend at a place fixed, on December 8, 1857, when the debtor submitted himself to examination before the magistrates selected, and made disclosure, and was discharged.

The citation could not legally issue before the 11th day of December. That, in this case, was prematurely issued and was without effect. *Defendants defaulted;* —

*Judgment for plaintiff, for such sum in damages as shall be found due on a hearing in chancery.*

RICE, APPLETON, GOODENOW and KENT, JJ., concurred.

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FRANCIS O. J. SMITH *versus* JOHN M. WOOD *& als.*

Where a writ was duly served and returned into Court, but erroneously entered upon the docket, in the name of the plaintiff in interest, to which the defendants answered, the Court, at a subsequent term, may, under the provisions of § 10, c. 82, R. S., permit the docket entry to be corrected, so that it will conform to the writ, upon such conditions, as will save the rights of the defendants to file any plea or motion required to be filed at the first term.

EXCEPTIONS from the rulings of DAVIS, J.

From the bill of exceptions, it appears that, in 1858, an action was commenced and entered against these defendants in the name of John G. Myers, by said Smith, in which the defendants seasonably filed a motion calling for the appearance of the plaintiff Myers, and denying the right of Smith to prosecute the action in the name of said Myers. Afterwards Smith discontinued that suit, and commenced another for the same cause, against the same defendants, in the name of said Myers, returnable at January term, 1859.

This writ was duly served. By the mistake of Smith, in

making his list of entries for the clerk, no action was entered except one of "*Francis O. J. Smith* v. *John M. Wood & als.*"

It so remained on the docket, counsel having appeared specially for the defendants. At October term, said Smith filed his motion to amend the docket entries by striking out the name of Francis O. J. Smith, and inserting, instead, the name of John G. Myers, alleging the entry to have been erroneously made upon the docket originally, and not in conformity with the writ returned to the files of the Court at the term of said entry originally, and which has ever since so remained on said files; that the defendants and their counsel had full knowledge of the action and parties designed to be represented by said erroneous entry on the docket.

Upon this motion the presiding Judge would have permitted the amendment prayed for, on condition that Smith would have consented that defendants might file whatever pleas and motions they could have filed the first day of the term when the case was entered, which consent said Smith offered to give. But the presiding Judge was of opinion, that such an amendment would be equivalent to allowing an action returnable at the January term, 1859, but not entered at all, to be entered at this term; and that he had no discretionary authority to allow such an amendment. He therefore ruled, as a matter of law, that such an amendment could not be allowed, and denied the motion.

To which ruling said Smith excepted.

*F. O. J. Smith,* in support of the exceptions.

*E. & F. Fox, contra.*

The opinion of the Court was drawn up by

TENNEY, C. J.—The question before the Court in this matter is, whether the motion filed for leave to allow Francis O. J. Smith to substitute upon the docket, the name of John G. Myers for his own, the action having been commenced in the name of the latter, for his benefit, and having stood in the name of the former, from the time of the entry, at January

term, 1859, till October term, next following, when this motion was filed.

At the time of the filing of the motion, the mover consented that the defendants might file whatever pleas, or motions they could have filed the first day of the term at which the action was entered. But the presiding Judge, holding that the amendment prayed for, would be equivalent to the allowing an action returnable at the January term, 1859, but not entered at all, to be entered at the term, when the motion was filed, and that he had no discretionary authority to allow such amendment, though he would have granted the prayer of the mover, if he had believed the legal power existed to have done so, overruled the motion.

If the alteration upon the docket, which was the subject of the motion, was within the authority of the Court, in the exercise of its discretion, according to the case, the plaintiff in interest has been aggrieved by the ruling, and exceptions lie.

The action was brought in the name of John G. Myers and the writ duly served. The action was not forgotten, as the list of Mr. Smith was made out and handed to the clerk, on which was the action, supposed to be the one, which is now before us on the motion. Knowing that he was the plaintiff in interest, it did not occur to him that Myers was the plaintiff in name. We think the case essentially different from that where no entry at all was made. Every thing is done touching the entry, as was required, excepting that, by a clerical error, the plaintiff's name was erroneously given to the clerk. It is no uncommon occurrence that, at the time of the trial of an action, it is found that the name of a party is erroneous, and, the writ showing such fact, leave is granted to make the correction on the docket, though the error has continued from the time of the entry, for several successive terms. The amendment prayed for, we think, falls within the spirit of § 10 of c. 82, of R. S., so far, that the Court had the authority to allow it, as an act of discretion, on the terms proposed by the moving party. *Exceptions sustained.*

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

WILLIAM HALL, *Complainant, versus* SPENCER DECKER *& als.*

The process, under our statute, to obtain damages for flowing land by a mill-dam is a personal action, and, when the damages demanded do not exceed one hundred dollars, may be served by a constable.

ON EXCEPTIONS.

This was a complaint for flowage of land by the defendants' mill-dam, founded on c. 72, § 4, of the Revised Statutes. The complaint was served by a constable. At the first term, the complainant, upon leave granted, amended the complaint by reducing the claim for damages to one hundred dollars. At the same term the respondents moved to dismiss the complaint for want of sufficient service. The presiding Judge granted the motion, and the complainant excepted.

*A. B. Holden*, for complainant.

*J. J. Perry*, for respondent.

The opinion of the Court was drawn up by

KENT, J.—The ruling of the presiding Judge, which is excepted to, was, that this process, to obtain damages for flowing land, is not "a personal action" within the meaning of the forty-third section of chapter eighty of the R. S., and that, therefore, the service by a constable was not sufficient. The section alluded to provides, that a constable may serve any writ or precept in a personal action, where the damage claimed is not over one hundred dollars.

The process in this case, is *an action*. An action is the lawful demand of one's rights in the form given by law. 3 Black. Com., 116; Co. Lit., 285.

This form is given by statute, and a mode of service pointed out. c. 92, §§ 4, 5.

Is it a *personal* action?

Actions are either real, personal or mixed. Real actions are those brought for the *specific recovery* of lands, tenements or hereditaments. The essential and distinguishing fact that

gives an action the character of a *real* action is, that it seeks to recover specifically the land and its possession. Stephens on Pl., p. 3.

This definition includes all the old actions of writs of right, writs of entry, and ejectment, and our present writ of entry, (c. 104, § 1,) and every form of action where the judgment is for the title and possession of the land demanded. The process of forcible entry and detainer also seeks for possession of the land.

Mixed actions are those which are brought for the *specific recovery* of lands, as in real actions, but have joined with this claim one for damages in respect to such property; as actions of waste, where, in addition to the recovery of the place wasted, the demandant claims damages. Our present writ of entry, in which the statute authorizes a claim for mesne profits, and the action of dower, in which a claim for detention may be inserted, are also examples of mixed actions. Stephens on Pl., p. 3.

Personal actions are those brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract and *other injuries of every description*, the specific recovery of lands and tenements only excepted. Personal actions are, as to *cause* of action, either *ex contractu* or *ex delicto*, as *to place* where to be tried, *local* or *transitory*, as to object *in personam* or *in rem*. 3 Bouvier's Institutes, 2641.

This action is undoubtedly local. It is made so expressly by statute giving the remedy. c. 92, § 4.

But the distinction between real and personal, and mixed actions, does not rest at all upon the question whether the action is local or transitory, but upon the distinction before pointed out.

Personal actions may be local. Actions, which do not seek the recovery of land, may be local by the common law, because they arise out of some local subject, or from the violation of some local right or interest, as waste, trespass *quare clausum*, actions on the case for nuisances to houses, or for disturb-

ance of right of way, or for the diversion of a water course, and the like. These actions are personal, but local. The action of replevin is also local. 1 Chitty's Plead., pl. 271; Gould's Plead., c. 3, § 105; 3 Bouvier's Inst., 2644.

This action for damages for flowing land, does not seek to recover land specifically, and is not, therefore, either real or mixed.

It resembles an action for trespass on land, or, perhaps, more nearly, an action for diverting a water course, or one for damages to a mill by causing the water to flow back upon it.

We think that our statutes intend to keep up, essentially, the old distinctions between real and personal actions, and that, whenever they speak of personal actions, (as in case of references, c. 108, § 1, and in the chapter of limitations of actions, c. 81, and in other places,) they intend all actions, whether local or transitory, that do not seek the specific recovery of lands, tenements or hereditaments. We think this case falls within the class of personal actions intended by the statute. *Exceptions sustained.*

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

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HENRY WILLIS, *Adm'r, versus* JOSEPH S. ROBERTS *& als.*

A devise, payable "at the termination of the widowhood" of the wife of the testator, is an absolute devise, and does not lapse by the death of the devisee before it becomes payable.

A legacy to a married woman, before the recent statutes, did not vest absolutely in her husband.

During her life, he could maintain an action for it in their joint names, but, after her death, her administrator alone could recover it by action.

Where real estate is devised, charged with a legacy to another person, the devisee, by accepting the devise, becomes liable in an action of assumpsit for the legacy.

Willis *v.* Roberts.

ON AGREED STATEMENT. ASSUMPSIT to recover the amount of a legacy alleged to be due from the defendants to the plaintiff's intestate.

Joseph Roberts died Sept. 13, 1835, seized in fee of certain real estate. By his will, which was admitted to probate in October, 1835, he devised the real estate to his wife, during her widowhood, and afterwards to the defendants, in fee, "they paying thereout" to each of his three daughters, (including the plaintiff's intestate, then under coverture,) the sum of two hundred dollars. He also devised two hundred dollars to each of his daughters, "to be paid to them respectively, from the real estate devised to their said brothers [the defendants] after the termination of the widowhood" of his wife.

His wife assented to the provisions of his will, and occupied the real estate until her death, which took place Oct. 20, 1845. After her death, the defendants occupied the land as tenants in common, claiming it under the devise.

The plaintiff's intestate died February 5, 1839, leaving one child and a husband, both still living. The plaintiff was appointed administrator, Dec. 21, 1858, and duly demanded said legacy of the defendants, which had never been paid.

Upon this statement, the Court was to render judgment according to the legal rights of the parties.

*Willis, pro se.*

*Shepley & Dana,* for defendants.

I. The legacy of the plaintiff's intestate was only to take effect upon a contingency, which, in fact, never occurred; it was to be paid to intestate upon the death of her mother. This was made impossible by her own decease during the lifetime of the mother. The legacy never attached.

II. If it ever became payable, it was *payable out of the proceeds of real estate devised to defendants.*

The case finds that the real estate has not been sold, but still remains in defendants, and no proceeds have been received by them and the action is premature.

III. If not premature, it is misconceived.

If the plaintiff is entitled to bring an action it should have been in equity, where the Court could grant relief in such a way as not to be inequitable to defendants.

IV. But at the time of the devise, as well as at the time of the mother's decease, the plaintiff's intestate was under coverture.

Whether, therefore, the legacy accrued at the death of the testator, or of the tenant for life, it was a *chose in action* and vested immediately and absolutely in the husband, in whose name the suit, if any, should have been brought. *Goddard* v. *Johnson*, 14 Pick., 352; *Hapgood* v. *Houghton*, 22 Pick., 480. This is not altered by our statute. *Mace* v. *Cushman*, 45 Maine, 250.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action of assumpsit to recover the amount of a legacy alleged to have been due the plaintiff's intestate, Harriet N. Knight, in her lifetime. By the will of Joseph Roberts, her father, duly proved and allowed, he bequeathes to each of his daughters, Sarah Briggs, Harriet Newall Knight and Frances Woodbury Roberts, the sum of two hundred dollars each, to be paid them respectively from the real estate devised to their said brothers, after the termination of the widowhood of his said wife. The defendants are the brothers of said Harriet. Their father, Joseph Roberts, devised certain real estate to his wife, during the time that she should remain his widow, and afterwards to his three sons, the defendants, equally in fee, they paying thereout, to each of his daughters, the sum of two hundred dollars each.

The bequest was absolute, and the right of Harriet became vested at the death of her father. The time of payment was uncertain, and depended upon the termination of the widowhood of her mother, which might be either by a second marriage or by death; in the lifetime of Harriet or after her decease. In fact, it was after her decease. The defendants accepted the devise. They took it *cum onere*.

They thereby undertook to pay, and became bound to pay the legacies to each of the daughters, or their legal representatives. If they had refused to accept the devise, the land would have descended, as intestate property, to all the heirs, and Harriet, or her representatives, would have been entitled to her share of it, instead of money. *Bowker* v. *Bowker*, 9 Cush., 521.

"The law, operating on the act of the parties, creates the duty, establishes the privity and implies the promise and obligation on which the action is founded." 7 Cush., 340.

The husband of Harriet did not reduce the legacy to possession in her lifetime. The plaintiff must have judgment for the sum of two hundred dollars and interest on the same from October 20, 1845, when the same would have been payable to his intestate, if she had been then alive.

TENNEY, C. J., and CUTTING, J., concurred in the opinion that the action was maintainable.

DAVIS, J. — The legacy, in this case, was absolute. There was nothing contingent but the *time of payment.* The event on which it depended was certain to occur. Therefore the legacy did not lapse by the death of the legatee, before it became payable. The right to it *vested in her* on the death of the testator. *Fay* v. *Sylvester*, 2 Gray, 171.

But the legatee being then *under coverture,* it is contended that the legacy did not vest *in her,* but, that it vested absolutely in *her husband.* Such was held to be the law in the case of *Commonwealth* v. *Manly*, 12 Pick., 175. And, in the case of *Goddard* v. *Johnson*, 14 Pick., 352, the husband recovered a legacy given to his wife during coverture, in a *suit in his own name.*

The doctrine laid down in the case of *Commonwealth* v. *Manly*, was doubted or denied in New Hampshire. *Parsons* v. *Parsons*, 9 N. H., 309, 321; *Coffin* v. *Morrill*, 2 Foster, 352. It is not the law in other States, nor in England. *Blount* v. *Bestland*, 5 Ves., 515. The American authorities are collected in the editor's note. The rule was elaborately

considered in Massachusetts in the case of *Hayward* v. *Hayward*, 20 Pick., 517, where it was held that a *chose in action*, given to the wife during coverture, *does not* vest in the husband, until he reduces it to his own possession. This might be understood as *overruling* the previous cases; but the case of *Goddard* v. *Johnson*, 14 Pick., 352, was expressly *affirmed* in *Hapgood* v. *Houghton*, 22 Pick., 480. If this decision is correct, and the husband, after the death of his wife, may, by a suit *in his own name*, recover a legacy given to her during her coverture, then *her administrator*, as in the case at bar, cannot maintain a suit therefor.

I think the cases in Massachusetts are in conflict with each other, and that the law is correctly stated by DEWEY, J., in *Hayward* v. *Hayward*, 20 Pick., 517. The husband, as the law *then* was, might collect, assign, or release a *chose in action* belonging to his wife; but, until reduced to his possession, or her right was otherwise barred, it remained her property, and did not go to his representatives, upon his decease, but did go to hers, upon her decease.

In case of *her* decease before her husband had reduced such *choses in action* to his own possession, under the statute of 22 and 23 Charles II., relating to the distribution of estates, which was reënacted in New York and some other States, the husband had the right to administer on his wife's estate, and collect debts due to her *for his own use*. But this statute was never enacted in Massachusetts. The husband might administer upon the estate of his wife; but *her* heirs at law were entitled to her property. Statute of March 9, 1784.

But this provision was repealed by the Act of March 12, 1806, and the whole of the *personal* estate of the wife, after paying her debts, was given to her husband, if he survived her. The same provision was incorporated into our statutes of 1821, c. 38, § 19; and, again, into the R. S. of 1841, c. 93, § 16. This provision was in force at the time of the death of the plaintiff's intestate, which occurred Feb. 5, 1839. By it her husband became entitled to all of her personal estate. But he could claim only through the statute of distributions.

And I am of the opinion, though she died before the statutes of 1844 and 1848, that her *choses in action* cannot be collected by her husband, in *his own name.* This suit is, therefore, well brought by the administrator of her estate, and he is entitled to recover.

APPLETON and KENT, JJ., concurred in the opinion drawn up by DAVIS, J.

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LEWIS VANDESANDE *versus* ALBERT T. CHAPMAN *& als.*, AND W. S. LOCKE *& als., Trustees.*

A suit upon a promissory note on the last day of grace, is prematurely commenced, unless a demand be made, or unless the note be payable at a bank, and the suit commenced after banking hours. The insolvency of the maker will not abridge the day of payment.

REPORTED by DAVIS, J.

This was an action of ASSUMPSIT on a promissory note, of which the defendants were makers and indorsers, dated September 14th, 1856, (at Boston,) and payable to their own order in eight months.

It appears, from the report, that the writ was made from a copy of the note on the afternoon of May 16th, 1857, at half-past three of the clock, after the close of bank hours at Boston.

The principal defendants pleaded the general issue, and, by brief statement, set forth their discharge under the insolvency laws of Massachusetts. The assignees of the defendants claimed the funds which had been attached in the hands of the trustees. One of the grounds of defence was, that the action was prematurely brought.

*Shepley & Dana*, for plaintiff.

*Howard & Strout*, for defendants.

BY THE COURT.—Unless the case of *Greely* v. *Thurston*, (4th Maine, 479,) be overruled, we must come to the conclusion, that the suit was prematurely commenced. The insolvency of the defendants cannot abridge the day of payment, which includes the last day of grace, unless a demand be made, or, unless the note be payable at a bank, and the suit is commenced after banking hours. *Plaintiff nonsuit.*

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PRISCILLA T. LOVELL, *Adm'x, in error, versus* JOHN KELLEY.

Judgment will not be reversed on error in a suit against an inhabitant of this State, in which the service was made by leaving a summons at his last and usual place of abode, because at the time of service he was absent from the State and had no actual notice of the suit.

Where it is suggested that a defendant is absent and has no actual notice of the suit, it is in the discretion of the Court to enter up judgment on default, or to continue the action for judgment. The exercise of this discretion cannot be revised on a writ of error.

If there is a regular judgment and award of execution in an action, it is no ground to reverse the judgment on a writ of error that an execution afterwards irregularly issued.

Papers in a case acted upon as evidence are no part of the record.

*Error* does not lie to correct a mistake in the computation of interest, or in computing the amount for which judgment is rendered. The proper remedy is by *review*.

ON EXCEPTIONS to the ruling of DAVIS, J.

WRIT OF ERROR to reverse a judgment against Josiah Lovell, the plaintiff's intestate, at the January term of the Supreme Court for Cumberland county, in the year 1857. The assignment of errors was as follows:—

1. That the defendant, in said case, was an inhabitant of the State, at the time of the service of the writ; but was absent therefrom, at that time, and did not return, until after the sitting and adjournment of said Court without day, and had no notice of the suit.

2. That judgment was rendered on default, without a continuance, defendant out, as provided in chapter 115, of the Revised Statutes, 1841.

3. That no sufficient bond was filed, before suing out the execution, in said suit, in twice the amount of damages and costs, for the security of the defendant in said case, according to the provision of the statute, in such case made and provided. c. 115, § 5, 1841.

4. That plaintiff has taken judgment, without deducting or crediting freight, amounting to twenty-four dollars and twenty-seven cents, which would have left a balance due the plaintiff of only eight dollars and eleven cents, instead of thirty-two dollars and eighty-eight cents.

5. That plaintiff has charged interest on $32,88, for five years and eight months, when, from his own showing, his writ and account being dated December 25, 1856, and judgment recovered by default, giving only twenty-six days for interest, instead of five years and eight months, which would give only five cents interest, instead of $11,17. And the plaintiff, according to his own showing, in his writ and declaration and account annexed, should have taken judgment for only $8,15, and $2,53, costs, instead of $44,34, debt or damage, and costs taxed at $7,21.

6. That the said record and proceedings and the giving of judgment aforesaid, are, in sundry other respects, bad, defective and erroneous.

The defendant in error, by proper pleadings, "denied that a writ of error was the proper remedy of the plaintiff in error, and that any error, in fact or law, existed in the record, or the process in giving the original judgment.

The presiding Judge ruled that no errors existed, and denied the writ; thereupon, the plaintiff in error excepted.

*J. Morgan*, for plaintiff in error.

*Fessenden & Butler*, for defendant in error.

The opinion of the Court was drawn up by

APPLETON, J.—It seems that Josiah Lovell, the defendant in the judgment sought to be reversed by his administratrix, was an inhabitant of this State, and that the writ in the original action was served by leaving a summons at his last and usual place of abode. This is one of the modes of service prescribed by statute. There is, therefore, no error on the face of the proceedings.

It is insisted the judgment should be reversed, because, at the time of the service of the writ on him, the plaintiff's intestate was absent from the State, had no actual notice of the pendency of the suit, and did not return till after judgment. But, in such case, ample remedy is afforded by review, for which provision is made by R. S., 1841, c. 115, §§ 7 and 8. *Holmes* v. *Fox*, 19 Maine, 107.

When a suggestion is made of the absence of a defendant, it is a matter of discretion to enter up judgment on default, or to continue the action from term to term, not exceeding twice, unless for special cause. R. S., 1841, c. 115, § 3. The exercise of this discretion is not a matter of error.

In the original action there was a regular judgment and award of execution. If, in such case, an execution afterwards irregularly issue, it is not a good cause for a writ of error to reverse the judgment. In *Johnson* v. *Harvey*, 4 Mass., 483, the plaintiff sued out his execution without giving the bond prescribed by statute, when the defendant is without the State, but the Court refused to reverse the judgment for that cause.

Papers presented to a common law Court, and acted upon as matter of evidence, are no part of the record. *Kirby* v. *Wood*, 16 Maine, 81. A judgment will not be reversed for errors in the computation of interest. Mistakes in the amount occurring in the rendition of judgment, are to be corrected by review. *Starbird* v. *Eaton*, 42 Maine, 569.

*Judgment affirmed with costs for defendant in error.*

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

DANIEL WOODMAN, JR., *versus* JOHN NEAL.

Where a wife, by an instrument under seal and in terms irrevocable, appoints her husband her attorney, for her and in her name to collect and receive to his own use, the rents and profits of her real estate already under lease, to make repairs, pay taxes, have the general oversight thereof during his life, without accounting to her, and represent her before any court, the husband is thereby authorized to commence an action for an injury to the real estate, *but only in her name.*

THE nature of the plaintiff's demand, and the rulings of the Court, which were excepted to, will be found in the opinion of the Court.

*F. O. J. Smith,* for plaintiff.

The plaintiff was in possession of the premises as tenant for life.

His right of action, for the injury to his estate, and the diminution of his profits, is established upon the principle of the cases of *Starr & al.* v. *Jackson,* 11 Maine, 521; *Lieman* v. *Ritchie,* 8 Pick., 235, and *Noyes* v. *Shepherd,* 30 Maine, 173. See also, 2 Barb. S. C. R., 165.

*Rand,* for defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiff and the defendant formerly owned adjoining stores, each having an interest in the partition wall, and in the foundation cellar wall upon which it stood. In November, 1854, the defendant caused his cellar to be made deeper, by digging out the earth, and building a new wall underneath the other, in the manner usual in such cases. The plaintiff alleges that the wall, and his store, were injured thereby; and he has brought this action of trespass on the case to recover his damages.

It is declared in the writ, that the plaintiff and defendant were, at the time of the injury, "joint owners of the wall," and that the defendant "undermined and removed, and wholly

destroyed large portions of the foundation cellar wall, thereby injuring the whole of the partition wall, and the connecting walls and roof of the plaintiff's store, exposing it to fall, causing the same to weaken and crack, and making it necessary to rebuild the plaintiff's store," &c.

After both parties had introduced their testimony relating to the injury, the defendant proved, by office copies of the deeds, that the plaintiff conveyed the premises before the injury, in June, 1854, to Daniel Gould, and that said Gould, at the same time, conveyed them to Mary Woodman, the plaintiff's wife. These conveyances were subject to a lease given by the plaintiff to Henry Bailey, expiring in 1858.

The plaintiff thereupon, to prove his interest in the premises at the time of the injury, introduced a power of attorney from his wife, of which the following is a copy:—

"Know all men by these presents, That I, Mary Woodman, of Westbrook, in the county of Cumberland and State of Maine, do make, constitute and appoint, and in my stead and place put my husband, Daniel Woodman, jr., my true and lawful attorney, for me, and in my name, to collect and receive to his own use, without account to me, the rents and profits of the store and shop No. 18, in Exchange street, Portland, the same occupied under lease by Henry Bailey & Co., to make all suitable and necessary repairs, changes and alterations in said store, to employ tenants, and to have the general oversight and charge of said property during his natural life, and to use and employ the rents and income thereof for his own use and benefit, paying the taxes on said store, and not accountable to me for said rents; and this power to be irrevocable by me or my legal representatives;—giving and granting unto my said attorney my full power and authority in and about the premises, and to take all due means and process of law for accomplishing the same, and, in my name, to make due acquittances and the discharges therefor; and the person of the constituent to represent before any court or other tribunal whatsoever; with power also an attorney

or attorneys, under my said attorney for that purpose, to make and substitute, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that my said attorney, or his substitute or substitutes, shall do therein by virtue hereof. In witness whereof, I have hereunto set my hand and seal, the seventeenth day of June, in the year of our Lord one thousand eight hundred and fifty-four.

"Mary Woodman." [L. S.]

Upon this evidence, the jury were instructed that the plaintiff, although at the time of the alleged injury he had no title to the premises, might maintain this action for the expenses to which he was subjected in making repairs, if the repairs were rendered necessary by the negligence of the defendant.

The instrument under which the plaintiff claims is an anomalous one. In form, it is a power of attorney, while, in substance, it resembles a lease for life. As such, it seems to have been regarded by the Court, at the time of the trial. And, as between the parties to it, the force and effect of a lease might, in most respects, have been given to it.

But the instrument was given by the wife, and she had the right to determine the form, as well as the substance. As she relinquished all interest in the rents, we may not understand why she did not transfer the premises by a lease, unless it was to keep the property from the creditors of her husband. But she chose to require that, though the plaintiff was to have the beneficial interest in the property, he should manage it "for her, and in her name." To this he assented. The store was then, and at the time of the injury, under a lease to Bailey, previously given. The plaintiff, therefore, had not even the right of occupation. The allegations in the writ, that he was the owner of the store, and "*joint-owner* of the wall" with the defendant, were not true. He merely had the right to collect the accruing rents; but he could only do this for his wife, and in her name. He had no personal rights, in his own name, except to retain rents actually collected. He was authorized to commence an action for an injury like that

described in the writ, and "to represent his wife before any court" having jurisdiction of it. But it should have been brought in her name. *Collen* v. *Kelsey*, 39 Maine, 298.

*Exceptions sustained;—New trial granted.*

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

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ARTHUR LEARY *versus* SYLVANUS C. BLANCHARD.

The secretary of an insurance company is presumed to be the official agent to carry into effect the votes and directions of those who have the management of its affairs, unless the contrary appears.

In a company, whose business is conducted by the president, vice president and secretary, subject to the direction of a board of trustees, the secretary being empowered verbally by the president and vice president, with the knowledge of the trustees, to indorse the premium notes of the company, is thereby authorized to transfer the title of a note indorsed by him.

A note indorsed by the payee, "Pay to A for account" of the payee, is open to the same defences in the hands of A, as it would be in the hands of the payee.

In such case, parol evidence is inadmisble to show that the transfer was absolute.

ON REPORT. ASSUMPSIT upon a promissory note for $801,25, dated Nov. 3, 1855, signed by the defendant and one Smith, since deceased, payable in twelve months from its date.

The principal facts are stated in the opinion. The plaintiff proved (subject to the decision of the Court upon the admissibility of the evidence) that the note was transferred to the plaintiff for a valuable consideration; that the transfer was, and was intended to be, a transfer of all the right and title of the insurance company in and to the note, without any reverting interest to said company, and that the indorsement was not intended to be in any sense conditional or restrictive.

The only evidence of the authority of the secretary to make the indorsement, was his own testimony.

*Rand,* for plaintiff.

The only question raised by defendant in this case, is upon the nature and effect of the indorsement, the authority of Tracy, the secretary, to make it being admitted.

The defendant contends, that the indorsement is restrictive, and that the plaintiff cannot maintain any action upon the note.

But, even if the indorsement should be considered a restrictive one, the plaintiff took the *title* to the note sufficiently to maintain an action thereon. The only effect of the restriction would be to open to the defendants any defence they could make against the insurance company. Story on Prom. Notes, § 138, &c.

But the indorsement cannot be considered as a restrictive one. The intention to make a restrictive indorsement is not to be presumed from equivocal language. Story on Prom. Notes, § 145. And, in this case, the particular meaning and the particular object in using the words of the indorsement, cannot be considered as so clear and certain upon their face, as to enable any Court to speak with full confidence upon their construction. The meaning and object of the words used, cannot be regarded as uncertain. And it is, manifestly, a case of a *latent ambiguity,* to explain which, parol testimony is admissible. And all the testimony in the case proves most clearly, that the transfer of the note from the insurance company to the plaintiff was absolute and without reserve. See Story on Prom. Notes, § 143.

The form of the indorsement is *printed* upon the note; and the fact that it is *printed,* is a circumstance showing that it is the usual form of the insurance company for transferring their notes. And, certainly, it is not to be presumed that the insurance company made only restrictive indorsements and transfers of their notes.

In *Sigourney* v. *Lloyd,* 8 B. & Cress., 622, the indorsement was—"pay to B, or order, *for my use.*" And the same form was used in *Wilson* v. *Holmes,* 5 Mass., 543. And in most of the cases in the books, the words used are "*for my use.*"

And in such cases, the meaning of the words is apparent; and the indorsements were held to be restrictive.

In *Treuttel* v. *Barandon*, 8 Taunt., 100, the indorsement was, "pay *for our account;*" and the indorsee was admitted to testify that he received the bill only as an agent for the indorser. Parol testimony being in this case received in explanation of the meaning of the words used in the indorsement.

It is submitted that the meaning of the words used in the indorsement, "for account of the A. M. Ins. Co.," is uncertain and ambiguous; and the parol evidence in the case is admissible and necessary in explanation.

But, even if the indorsement be restrictive, no demand for the return premium has been *filed in set-off;* and, consequently, no such claim can be deducted from the note sued, even if defendant can set up against plaintiff any defence he has against the insurance company.

In any event there is a balance due to the plaintiff.

*Shepley & Dana*, for defendant.

I. There is no proof that Tracy was authorized to make the indorsement. The authority of the board of trustees, or of any other party, to bind the company, by giving or indorsing notes, is not shown. The indorsing of the premium notes of an insurance company is not one of the legal incidents of its existence, as is the indorsement of business paper in the case of a bank. The law does not presume that, with insurance companies, notes are to be indorsed without some authority for it in their charter. Until the Court has seen the charter, it is impossible to say whether or not, attempted indorsements are made in conformity with that; and it is the duty of the party, claiming under an indorsement, to show that it was legally made.

It is admitted that, where an authority is conferred by parol, the agent himself is competent to prove it, *but not to prove the power of his constituent to give that authority.* That must first be shown *aliunde.*

II. But if the Court are of opinion that Tracy was authorized to make the indorsement, still this was a restricted indorsement, and did not authorize the plaintiff to bring suit on it.

"A holder who takes a bill, the circulation of which is restricted by a restrictive direction and indorsement, cannot sue the drawer or acceptor upon it, but holds the bill or the money raised by him, as the trustee of the restraining party making the restrictive indorsement. *For such words cannot be intended as a mere private direction* to the immediate indorsee, for he is bound to account for the bill without any such direction. Byles on Bills, § 121, 3d ed.; *Sigourney* v. *Lloyd*, 8 B. & C., 622, affirmed in Exch., 5 Bing., 575.

III. This contract (indorsement) was made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, and parol evidence is not admissible to show that, in this particular case, the words were used in any other than their ordinary and popular sense. 1 Greenl. Ev., § 295.

It was not competent for plaintiff, therefore, to show, by Tracy, or in any other way, under the objections of defendant, that the written indorsement, made at the time, did not express the terms of the transfer.

In a precisely similar case, before Judge Pierpont of the Superior Court of New York, it was held that the plaintiff could not maintain the action.

No such title to the note, therefore, is in the plaintiff, as will enable him to bring a suit on it in his own name; and, hence, there was no necessity for defendant to file his claim for return of premium in set-off.

The opinion of the Court was drawn up by

TENNEY, C. J.—The note in suit, dated Nov. 3, 1853, payable to the "Atlas Mutual Insurance Company," in twelve months from date, and indorsed—"pay to Arthur Leary, or order, for account of the Atlas Mutual Insurance Company," and signed by George H. Tracy, secretary, was given for the

premium of insurance on the ship "Detroit," made at the time of the date of the note. The indorsement was made as early as January 26, 1856. The company suspended payment of losses, and its effects went into the hands of a receiver before the maturity of the note. The policy, for which the premium note was given, was surrendered to the receiver of said company by the defendant and his partner, since deceased, and cancelled on March 26, 1856, and during the life of the policy. The amount of the return premium due from the company, to the defendant and his partner, on said surrender, was the sum of $486,57.

Two questions are presented in this case.—1. Has the note been indorsed, so that the action can be maintained against the defendant's objection? 2. If the action can be maintained, was the indorsement restrictive, so that the defence, which would be open in an action in the name of the payees, can be available in this suit?

The secretary of an insurance company is the officer whose duty it is to make and keep the records; and is the official agent to carry into operation the votes and the directions generally of those who have the management of its affairs, unless the contrary in some manner appears.

In the Atlas Mutual Insurance Company, the president, vice president, and secretary were the officers by whom its business was conducted, subject to the direction of the board of trustees, who kept a record of their own acts. Although the secretary was not authorized by any vote of the board of trustees to make the indorsement on the note, he was empowered verbally by the president and vice president, with the knowledge of the trustees, to indorse the premium notes of the company. It does not appear that the board of trustees withheld its consent to this direction. The indorsement being made before the suspension of payment of losses and the appointment of the receiver, the defendant can make no objection thereto. *Cooper* v. *Curtis*, 30 Maine, 488.

2. The indorsement is the same in terms with that referred to in the case of *Truettel* v. *Barandon*, 8 Taunton, 100,

which was an action of trover for two bills of exchange, against a person who was the indorsee of the bills, and who deposited them as security for cash advanced to the indorser by the defendants in the action. The question was, whether the defendants did not take the deposit with sufficient notice that the bills did not belong to him? And the Court answered this question in the affirmative, and the plaintiff was allowed to prevail. But the Court noticed a distinction between such a case, and one where the deposit was by way of discount. And it was said, by BURROUGH, J.—"if the bills had been discounted, and the money received, the amount would have been immediately entered into the account. But, deposited as they were, had they failed, their amount would have been struck out. The bills, therefore, did not form a real item in the account."

In the case at bar, the note was applied, not as security for an indebtedness of the indorser, but to the payment of notes of the company. It was, as between the parties to the indorsement, similar to a discount for cash, and paid over to the indorsers. The indorsement, by its terms, was restrictive, and the ordinary and popular sense cannot be changed by parol evidence. 1 Greenl. Ev., § 295.

Upon the facts of the case, which are admissible in evidence, the action may be maintained. But the same defence is open which would have been allowed, if the action had been for, and in the name of the payees of the note. Since the note was given, a part of the consideration therefor has failed. For the balance, with the interest thereon, since the maturity of the note, judgment should be entered in favor of the plaintiff.

RICE, APPLETON, GOODENOW, DAVIS and KENT, JJ., concurred.

CHARLES STANWOOD *versus* THEODORE S. MCLELLAN *& als.*

A witness cannot be allowed to refresh his memory, by referring to a memorandum taken from his books, when he cannot testify to the fact in question beyond what appears upon them; the books themselves must be produced.

When a person has been led to do certain acts by the admissions of another, the latter is estopped from disputing the truth of those admissions in respect to those acts and that person.

ON EXCEPTIONS to the rulings of DAVIS, J.

TRESPASS to recover the value of certain timber alleged to have been cut by the defendants on the plaintiff's land.

The questions raised, the facts which the evidence tended to prove in relation thereto, and the instructions of the presiding Judge, are stated in the opinion.

The second instruction requested by the defendants, and refused, was as follows:—

If the jury find the plaintiff and Ross both recognized the spotted line as the boundary of the Ross lot, and thereupon Ross sold to defendants all the trees northerly of said line, and the plaintiff, knowing this fact, previous to any trespass, pointed out this line to defendants and their workmen, and acknowledged it as the line, and assented to their cutting up to that line, the defendants are then not answerable in this action for any cutting north of that line, done by them or their authority, previous to their being notified by the plaintiff that said line was erroneous.

*E. Fox* and *Orr*, in support of the exceptions.

I. The witness should have been allowed to refresh his memory by referring to the memorandum.

The paper was not offered as evidence; but the witness, by referring to it, could testify to the facts. He should have been allowed to do so. 1 Greenl. Ev., §§ 90, 436, 437; *Rambert* v. *Cohen*, 4 Esp., 213; *Dalesin* v. *Starke*, ibid, 163; *Tanner* v. *Taylor*, cited by BULLER, J., 3 T. R., 754; *State* v. *Lull*, 37 Maine, 246.

II. The second requested instruction should have been given. The plaintiff was *estopped* by his acts from denying that the spotted line was the true line, so far as the conduct of the defendants was influenced by him. *Hearn* v. *Rogers*, 9 B. & C., 586, 588; *Shuffield R. R. Co.* v. *Woodcock*, 7 M. & W., 582; *Dewey* v. *Bordwell*, 9 Wendall, 66; *Cummings* v. *Webster*, 43 Maine, 194.

*Barrows*, for plaintiff, *contra.*

I. The memorandum was properly excluded. 1 Greenl. Ev., § 437; 3 Term R. 749; *Jones* v. *Strend*, 2 C. & P., 196.

II. The defendants were not injured by the instructions or the refusal to instruct.

They plead a license. Giving a license implies knowledge on the part of the giver, and an intention to waive his rights. The position of defendants, upon their own showing, is that of involuntary trespassers. They have tendered no amends, and seek to take advantage of a mistake of the plaintiff.

The instructions given were sufficiently favorable to them. *Thomas* v. *Thomas*, 2 Harris and Johnson, 506; 3 U. S. Digest, 533, § 78; *Stuyvesant* v. *Tompkins*, 9 Johns., 61; 3 U. S. Digest, 534, § 100.

The opinion of the Court was drawn up by

TENNEY, C. J.—One of the defendants, when he was upon the stand, as a witness, produced a memorandum, taken by him from his books, which were not present, containing a full account of all received from Ross lot, by the defendants, and the payments made on account of the operations, and offered and wished to refresh his memory by reference to the memorandum. The plaintiff objected and the witness was not allowed to do so.

It does not appear that the entries, in the original book, had any relation to the questions at issue; the cutting of the timber and wood upon the Ross lot, under the direction of the defendants, was foreign to the matter on trial, which was, whether the defendants, or those employed by them, had cut

over the line of the Ross lot, on the plaintiff's land. And how the amount of what was received from the wood and timber cut upon the Ross lot, lawfully, was material, does not appear. And the sums received from those who cut under the defendants, upon the Ross lot, entered upon the book of one of the defendants, may have been very different from those which were the real avails of the wood and timber cut. It appears, further, that the witness could not swear to the facts in question, upon this point of the case, beyond that which was supposed to appear upon his books, and, by a well established principle, the books themselves should have been produced, in order that the other party might cross-examine and have the benefit of the witness' refreshing his memory by every part. The exclusion of the memorandum was not erroneous. 1 Greenl. Ev., § 437.

It appeared, that the defendants purchased all the wood and timber on the Ross lot, with the right to cut and take it away in a certain time. The Ross lot adjoined the plaintiff's lot, which did not appear to be separated therefrom by a fence, but, not far from the true boundary, a distinct line, marked by spotted trees and stakes, was traced for a long distance.

There was evidence that the plaintiff told the defendants that this spotted line was the one, to which the defendants should cut the wood and timber; and that, by repeated acts and declarations, he indicated to them and their men employed in cutting, that the line so marked and designated was the one by which they should be governed; and the cutting, for a considerable time, was done accordingly. Afterwards, the plaintiff said that he had caused the line between his and the Ross lot to be run, and he had ascertained that he had made a mistake, in supposing the spotted line was correct, and requested the defendants not to cut thereto, but to limit themselves at the one he had run; and that, subsequent to that notice, the defendants had governed themselves thereby, and had cut nothing beyond the line last indicated by the plaintiff. The presiding Justice instructed the jury, that such evidence, if true, did not amount to a justification of the defendants,

unless the plaintiff at that time knew where the true line was. If the acts of the plaintiff were the result of his ignorance of the place where the true line was, the plaintiff is not thereby estopped in his right to recover in this action.

The true rule in such cases is given by BAYLEY, J., in *Hearn* v. *Rogers*, 9 B. & C., 577, cited by the defendants. "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth with respect to that person, and that transaction."

The case of *Dewey* v. *Bordwell*, 9 Cowen, 66, is in principle analagous to the one before us, and the party who had taken upon himself to fix the boundary between him and his neighbor, though erroneous, but supposed by him to be correct, was estopped from disputing his own boundary, to the injury and rights of the property of the defendants.

The second requested instruction should have been given, and the instructions given to the jury upon this point were not correct.

The instruction, touching the question of damages, to which exceptions were taken, was correct, and the counsel for the defendants do not seem to have relied upon this point in their argument. *Exceptions sustained, verdict set aside, and new trial granted.*

RICE, APPLETON and DAVIS, JJ., concurred.

KENT, J., concurred in the result.

WILLIAM P. PREBLE, *Ex'r, versus* ELLEN T. LONGFELLOW.

A guardian is not authorized by law to make advances from his own means for the maintenance of his ward, but is bound to provide for such maintenance from the income and (if necessary,) the principal of the ward's personal estate, and, if these are insufficient, to obtain license of Court and sell real estate of the ward to provide the means required.

A guardian cannot, by making advancements for his ward's support, make the ward his debtor upon arriving at full age; and an action cannot be maintained by the guardian against his late ward, when of age, to obtain remuneration for such advancements, nor for a balance due him on his guardianship account as adjusted and allowed by the Probate Court.

ON AN AGREED STATEMENT OF FACTS.

In 1854, William P. Preble, the plaintiff's testator, was duly appointed guardian of the defendant, then a minor. The property of the ward consisted of real estate in Portland. The guardian faithfully performed his duties until his death in October, 1857, advancing, from time to time, from his own funds, such sums as were required for the support and education of his ward, besides selling real estate of the minor for the same purpose, under license of Court. He settled several accounts of his guardianship at the Probate Court, the last of which was in September, 1857, by which it appeared that a balance of $477,08, was due to him, for advancements made for the support of his ward beyond what he had received. At the time of settling his last account, he presented a petition to the Court for a license to sell the remaining real estate of his ward for her maintenance, and an order of notice was granted; but the guardian deceased before a license was obtained.

After the death of the guardian, and before the commencement of this action, the defendant became of full age.

If this action can be maintained, judgment is to be rendered for the plaintiff for $477,08 and interest; otherwise a nonsuit is to be entered.

*Deblois & Jackson*, for the defendant.

A guardian is the servant of the Court, and has no au-

thority to expend for his ward's support more than the income of the ward's real estate, without *first* obtaining authority from the Court. If he makes advances from his own funds, he may obtain re-payment under license, but has no remedy against the ward after he arrives at full age. There is no *assumpsit* implied from the relation between him and the ward. To maintain that the guardian may bring his ward in debt, and collect it of him when of age, would put it in the power of the guardian to expend more than the whole value of his ward's property, and hold him liable therefor.

An adjustment in the Probate Court of the guardian's account, showing a balance due him, might be ground for a license from the Court for the sale of the ward's property during the continuance of the guardianship, to remunerate him for such balance; but, if he suffers the guardianship to terminate without being so remunerated, he has no further remedy. Payment may be obtained out of the ward's estate whilst in his hands; but such advances are not the subject of a personal charge against the ward.

The counsel cited in support of his positions, 7 Mass., 6; 13 Pick., 206; 4 Taunt., 765; *Moore* v. *Carson*, 1 Howard's Miss., 53; 2 Sup. to U. S. Dig., 100, 102; *Bybee* v. *Thorp*, 4 B. Monroe, 413; *Simms* v. *Norris*, 5 Ala., 42; *Crymes* v. *Day*, 1 Bailey, 320; *Hassard* v. *Rowe*, 11 Barb. S. C., 22; *State* v. *Cook*, 12 Iredell, 67; *Myers* v. *Wade*, 6 Randolph, 444; *Long* v. *Norcross*, 3 Iredell, 352; *Call* v. *Ward*, 4 Watts & Serg., 118; 2 Kent's Com., 240.

No *brief* of plaintiff's counsel is found with the papers of the case.

The opinion of the Court was drawn up by

TENNEY, C. J. — Guardians are required by the statute, c. 57, § 12, to manage the estate of their wards frugally, and without waste; and apply the income and profits thereof, as far as needed, for the comfortable maintenance of the ward and his family; and, if they are insufficient for that purpose, they may use the principal; and, when any exigency occurs, the

guardian may apply to a proper court, for a license to sell real estate of his ward, and apply the proceeds to the purposes contemplated by his license. These requirements are in harmony with the general legal principles, applicable to the relation of guardian and ward. 2 Kent's Com., 229 to 231, (5th ed.)

From these provisions, it cannot be doubted that the ward is to have the maintenance referred to, from the property belonging to him; without the creation of any debts, unnecessarily, against him by the guardian. And, for the attainment of such an object, the guardian is to appropriate the income and profits of the estate, and the principal, if the income and profits are not sufficient. And money may be obtained by the sale of the ward's real estate, under a judicial license, when it becomes necessary for such maintenance. And it cannot be admitted, that the guardian, by neglecting to exercise the authority conferred to enable him to perform his duty to his ward in this respect, when the means are ample for the purpose intended by the law, can expose his ward to become his debtor after he shall arrive at the age of twenty-one years. The omission to use this authority, is evidence of a want of fidelity in the execution of the trust committed to him by law.

This action is for the recovery of a sum of money advanced by the guardian in the maintenance of the ward from April, 1854, to March, 1857, the guardianship having continued till October 11, 1857, when it terminated by the death of the plaintiff's testator.

The case shows no legal necessity for the delay in the guardian, which is exhibited, to provide the means for the maintenance of the defendant; and there was no reason for his becoming her creditor, after she became of the age of twenty-one years, disclosed by the facts agreed, so that this action cannot be maintained. *Plaintiff nonsuit.*

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

JOHN GOODWIN *versus* JACOB J. MERRILL *& al.*

The provision of R. S. of 1857, c. 18, § 21, that "any person aggrieved" by the selectmen's estimate of damages, on laying out a private way, may apply for a jury on the question of damages, refers only to persons over whose land the way passes, and was not intended to include the petitioner, for whose benefit the way is laid out, though he may be adjudged to pay the damages.

ON MOTION that the Court confirm the verdict of a jury.

In March, 1858, on petition of the present plaintiff, the selectmen of Falmouth laid out a private way for him over land of the defendants, and estimated the damages thereon, which they ordered to be paid by said Goodwin. Goodwin, being aggrieved by the estimate of damages, applied to the County Commissioners for a jury to make a new estimate. The application was granted, a jury was empannelled, and, after hearing the parties, made and sealed up the verdict, and returned it to the Court.

The petitioner moved that the verdict be confirmed, and for his costs.

The respondents objected, that the statute providing for a jury to estimate damages does not extend to petitioners for a private way, and that the respondents are not the proper parties against whom this process should be brought.

The Court, DAVIS, J., presiding, set aside the verdict, and the petitioner excepted.

*W. H. Vinton*, for the petitioner.

*Anderson & Webb*, for the respondents.

The opinion of the Court was drawn up by

KENT, J. — The question in this case is, whether an individual applicant for a private way, which has been laid out by the selectmen and accepted by the town, the damages allowed, to be paid by the individual, can apply to the County Commissioners, and have the damages re-assessed by a jury. The answer to this question depends upon the construction

of § 21 of c. 18, R. S., 1857, which provides for an appeal by "any person aggrieved."

It clearly appears, upon examination of the statute respecting "ways," (c. 18,) that, in relation to county roads, the only party that can appeal, in the matter of damages, is the person whose land is taken. The county, in the case of a county road, is concluded by the estimate of the Commissioners. In such case, the individual only, whose land is taken, may appeal to a jury for an increase of damages. This is apparent from §§ 5 and 6 of this chapter. It is true that, in § 5, it is provided, in general terms, that "*all persons aggrieved* by their estimate of damages, shall present their petitions for redress," but the next section, (§ 6,) clearly limits this right to petitions for *increase* of damages. See also the former statute, R. S. of 1841, c. 25, §§ 5, 6.

The mode of laying out town and private ways is fixed by § 18 to § 26. The provisions as to both are contained in the same sections. The first question which arises is, can the *town* appeal to a jury from the estimate of damages made by the selectmen? This would hardly be contended for, as the selectmen represent the town, and the town way cannot be established, including the award of damages, until it has been accepted by a vote of the town. § 19. It would be a most unjust, as well as absurd construction, to hold that after a town had made its own estimate of damages, and accepted the road with such estimate, it could afterwards compel the individual land owner, whose land had been thus taken without any request or assent on his part, to appear before a jury where the damages would be re-assessed.

The petitioner, however, insists that, where a private way for his convenience is laid out, and he is adjudged to pay the damages, the same reasons do not apply that are applicable to the above cases of county and town ways. This, in one sense, is true. But the respondent, whose land is taken, may as well complain in this case, as in the others, that it is a hardship upon him to be compelled to contest his rights in other tribunals, when he is willing to accept the damages

awarded by the selectmen of the town. He has no option and no voice in determining whether his land shall be taken. His constitutional rights to the enjoyment of his own property can only be protected fully by giving him a right to a verdict of a jury.

By § 21, it is provided, that the damages for a town way are to be paid by the town; for a private way, by those for whose benefit it is laid out, or partly by the town, if it votes to do so. Then follow the words which raise the question in this case—"any person aggrieved by the estimate of damages, on petition to the Commissioners, may have them assessed in the manner provided respecting highways." By the 12th definition in chapter 1, of the statutes, it is provided that "the word person may include a body corporate."

We have seen that a town could not appeal, and yet the words "any person," under the above definition, might include that corporation. In the case of mixed damages, where part is paid by the town, and part by the individual petitioner, could the individual appeal, and the town be refused that right?

Sections 23 and 24 evidently contemplate only an appeal by the land owner, as the provision for costs only gives costs in case of an *increase* of damages. There is no provision in this statute for costs for any other party in case of a *diminution*. Section 24 speaks only of petitions for *increase* of damages.

If we refer to the statute of 1841, c. 25, § 31, which contains the provision on the same subject, it is apparent that the old law contemplated an appeal by the owner of the land only. The provision, that the party who has the right to appeal, may have *his rights* determined by a jury, or by a committee, if *he* can agree with the agent of the town, *or party liable to pay*, shows that the appealing party must be the person who claims damages.

We do not think that the Legislature intended to change the well established doctrine and the uniform practice on this subject, by the language used in the recent revision.

It is urged in argument that, by this rule, an individual may either be obliged to suffer great inconveniences for want of a private way, or be compelled to pay an unreasonable sum as damages. But payment of damages may be suspended, until the land for which they are assessed is taken, (§ 7,) and the petitioner may withdraw his petition before action by the town on the laying out. One adjudication by the selectmen is not final, and further proceedings may be instituted before another board.

If the Legislature had intended that a petitioner might appeal, it would have made some provision for costs in his favor, in case of a reduction of damages. No such provision is found. *Exceptions overruled.*

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

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HANNAH MERRILL *versus* FARMERS' AND MECHANICS' MUTUAL FIRE INSURANCE COMPANY.

A misrepresentation of title, in the application to a *mutual* fire insurance company, avoids the policy.

An assignment of such policy, by the consent of the company, adds nothing to its validity.

ON REPORT.

ASSUMPSIT on a policy of insurance issued by the defendants, a mutual insurance company, brought in the name of the plaintiff for the benefit of one Sprowl. The execution of the policy, and the loss within the term were admitted. The other facts are sufficiently stated in the opinion.

*A. Merrill*, for plaintiff.

*L. Pierce*, for defendants.

The opinion of the Court was drawn up by

APPLETON, J.—The defendants, a mutual insurance company by virtue of their charter, have, upon compliance with the provisions of the law in that behalf, a lien upon the real estate insured. The state of the title, therefore, of the estate upon which the insurance is effected, is a fact material to the assurers, and in reference to which they have a right to truthful answers to their inquiries.

At the date of the policy, the title was in Elijah Atwood, who had given the plaintiff a bond to convey the estate to her upon certain terms and conditions therein specified. In the application of the plaintiff, in answers to the inquiries proposed, she stated that she insured as owner and that there was no incumbrance upon the property insured. It was important to the defendants, for the purpose of making their contract, to know the true situation of the title. The misrepresentation was material and entitles the defendants to avoid the policy. The insurance company have a right to be truly informed as to the extent of the interest of the assured in the premises assured. *Bowditch M. F. Insurance Co.* v. *Winslow*, 3 Gray, 415; *Marshall* v. *Columbian M. F. Insurance Co.*, 7 Foster, 157; *Lovejoy* v. *Augusta M. F. Ins. Co.*, 45 Maine, 472.

It appears that the policy was assigned to one Sprowl, with the assent of the defendants. It is not alleged that a new premium note was given or that the defendants were made acquainted with the facts as to the title. They had a right, at the time of the assurance and of the assignment, to regard the answers given as true. The assent to the assignment, given in ignorance of the truth, cannot be regarded as adversely affecting the corporation. *Eastman* v. *Carroll Co. M. F. Ins. Co.*, 45 Maine, 307.

The action is not maintainable. *Plaintiff nonsuit.*

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

LEMUEL DYER *versus* HANSON WILBUR, *Guardian.*

If a tenant in common takes the whole income, or more than his share of the income of the common property, without the consent of his co-tenant, he is liable to such co-tenant in an action of assumpsit, after demand, for the excess above his share.

But, if he takes the income of a specified portion of the property, *with the consent of his co-tenant*, such action cannot be maintained.

A judgment is not necessarily vacated or annulled by the granting of a review of it, and the rendering of judgment in the action of review.

When final judgment has been rendered on a petition for partition, and then a review granted, and precisely the same partition made and judgment rendered on the review as originally, the former judgment is not affected by the proceedings in review.

The opinion of the Court was drawn up by

KENT, J. — The facts in this case are briefly these. The plaintiff and the parties represented by defendant were owners in common of land. On petition of plaintiff, a partition was ordered and made by this Court, and final judgment for partition entered. Afterwards the defendant petitioned for a review, and it was granted; and, upon hearing, a new partition, as prayed for in the original petition, was ordered, and made and recorded. The new partition is exactly the same as the first, so far as we can discover upon examination.

After the first partition, the parties entered into possession under it, each party occupying, exclusively, the portions assigned. The defendant, as guardian, leased the premises assigned to his wards, and received money from time to time for rent, between the time of the first and second partition. The plaintiff occupied his portion himself, and received no money for rent, but sold a building.

The action is assumpsit, to recover a portion of the money so received by defendant, for rents and profits.

It is now well settled that, if one of the tenants in common takes the whole income, or more than his share of the income, without the consent of his co-tenant, an action of as-

sumpsit may be maintained against him, after demand. R. S., c. 95, § 16.

The plaintiff insists that the property remained in common up to the time of the second division, on the review, notwithstanding the proceedings on the first partition. By the first division, a judgment had been rendered finally, and partition made perpetual. The judgment was as final as in case of a judgment on a debt for a certain sum.

What is the effect of a petition for a review, which is granted, and a new hearing had? It does not of itself supersede or stay execution of the first judgment. This is only effected by the filing of a bond, if the party chooses so to do. Where the first judgment, as in this case, has been executed, and nothing remains to be done, then a review can only give a new judgment, which may be equal to the former, and enable the party on this new judgment to recover back what he was unjustly compelled to pay by the first.

A review is not a writ of error, by which a judgment is reversed, nullified and rendered void *ab initio*. It is a remedial process to enable the party to correct wholly or in part a former judgment by means of a new one. The whole statute on the subject of reviews, chapter 89, proceeds upon this view. It provides that "the judgment in review shall be given without regard to the former judgment," except in certain specified cases. If the original plaintiff recovers more than his first judgment, he does not have judgment for the whole amount as a matter of course, but only for what remains unsatisfied. If the original defendant on review succeeds in reducing the sum recovered in the first judgment, he has judgment and execution for the difference; and the former judgment stands against him; if not paid, it may be off-set. c. 89, §§ 9, 10.

In *Dunlap* v. *Burnham*, 38 Maine, 112, it was held that judgment on review will be rendered as law and justice may require, without any regard to the former judgment, except as provided in the statute; and that, where a defendant on

review obtains a verdict that he did not promise, in a case where, in the original suit, the plaintiff had recovered a sum as debt against him, the judgment on review might be substituted for the former judgment, making that judgment a nullity. This was necessary "to do final and complete justice between the parties."

The Court, undoubtedly, has power to consider one a substitute for the other, when necessary to prevent gross injustice. But, the mere fact, that a review has been granted, and a different result arrived at from that on the first trial does not, necessarily, render void the former judgment *ab initio*, and all acts under it. *Crehore* v. *Pike*, 47 Maine, 435.

The case before us, however, is one where the partition on the review is precisely the same as on the first judgment. The two judgments are identical as to the premises assigned to each party. The second is rather a confirmation than a reversal of the first. The rights and property of the parties seem unaffected by the new partition.

The review has not modified the prior proceedings. It may be doubtful whether the defendant may not as well claim under the first as under the second judgment, as no new division is made, and no change effected. It resembles the case of a review by the original defendant, where the second verdict is exactly the same as the first, which has been fully paid. The first judgment would remain undisturbed, and judgment for costs only would be given on the review.

We cannot perceive how a party, who enters under a final judgment upon the part assigned to him, and occupies it, not as property in common but in severalty, can be required to account, for rents received for that portion, to the other party, who occupies his part also in severalty.

The occupation was only in pursuance of a decree and judgment of the Court. The rents were not received as income of property held in common, but the reverse.

The gross injustice of applying a doctrine to this case, which would compel the defendant to divide equally the money received for rent, with the plaintiff, and not hold the plaintiff

to account for the occupancy of his part, is too apparent to need elucidation.

There is another view. The statute, before referred to, which must now be considered the law of the State on this subject, expressly limits the liability to account, in an action of assumpsit, to the case where the possession is "without the consent of his co-tenant."

In this case, the plaintiff first petitioned for partition; it was granted, and judgment given as he requested. He executed it on his part, by entering into possession of the portion assigned to him as his separate property. He thereby assented necessarily to the defendant's occupancy of the other part in severalty.

It cannot, with any propriety, be said, that the defendant received the rents of his part "without the consent of his co-tenant."

Even if it should be granted that the judgment on the review vacated or nullified the first partition, yet, whilst that was in force, and the parties voluntarily acted under it, and severed their interest and occupancy, the relation of co-tenants, so far as the rent or income was concerned, and the liability of co-tenants to pay over to each other, was at least suspended. By their acts they gave consent that each should occupy in severalty. We do not think that, upon any ground, the plaintiff can recover. *Plaintiff nonsuit.*

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

*Fessenden & Butler*, for plaintiff.

*Shepley & Dana*, for defendant.

## PAUL H. BEAULIEU *versus* PORTLAND COMPANY.

In an action brought by an employee of a corporation to recover damages for a personal injury received while in their service, the burden of proof is on the plaintiff to show negligence on the part of the corporation.

If a company exercises ordinary care to employ servants of good habits, and of competent skill and experience, and to furnish them with approved machinery and apparatus, their responsibility to their employees extends no further. They do not guaranty the faithfulness of their servants, whatever relation of subordination they sustain, in carrying on the business, or keeping the works in such repair as to be always safe.

It is not a sufficient objection to the action of the Court in ordering a nonsuit, that there was some evidence from which negligence on the part of the defendants might have been inferred, unless there was evidence on which a jury might reasonably and properly conclude there was negligence.

THIS was an action of TRESPASS ON THE CASE, brought by the plaintiff to recover damages for a personal injury, which happened to him by the falling of a stick of timber whilst he was in the service of the defendants. The defendants pleaded the general issue, with a brief statement alleging, that the timber, which caused the damage by its fall, was not placed by the defendants or by their negligence, but by certain of their employees, who were persons of ordinary skill and care, &c.

It appeared by the testimony of the plaintiff, that he was in the employment of the Portland Company in 1853 and 1854, and again in 1855, and so on till 1857. The company was engaged in manufacturing locomotives. The plaintiff worked in the setting up shop, from May 19, 1855, to August 26, 1857. There were several loose timbers laid across beams, and shifted from place to place as needed for hoisting. The plaintiff noticed three of them loose in 1853, and one of them lapped on the beams on which it rested about an inch and a quarter or an inch and a half at each end. He notified the foreman, Bartlett, of its dangerous condition, three or four times. Bartlett called him a coward, and ordered him to go to work. Sparrow, the superintendent, was in the room

about twice a day. On the same day that he last called Bartlett's attention to the timbers, one of them fell and struck the plaintiff. He was hurt, and was confined to his bed about three months. The locomotive on which he was at work at the time, was placed on a table, and the work he had to do required him to occupy the position he did.

Other witnesses were called, who testified that the timber in question had been lying loose on the beams for a long time, and had been used with others for hoisting; that it fell on the plaintiff longitudinally, and he was taken up unconscious and partially paralyzed; and that, immediately after the accident, the loose timbers were taken down, by order of the foreman, and, ever since, longer and lighter timbers had been used.

On this testimony, the presiding Judge, DAVIS, J., ordered a nonsuit. The plaintiff filed exceptions.

*McCobb & Kingsbury*, for plaintiff.

A corporation is liable for its own neglect, and for that of certain of its servants or agents. The true rule is that of liability to servants in any particular department for the neglect of the person having charge of that department. *Priestly* v. *Fowler*, 3 Mees. & Wels., 1; *Peterson* v. *Wallace*, 38 Eng. L. & Eq., 51; Pierce on Am. Railways, 305, and cases there cited at note 2; *Russell* v. *Hudson*, 4 Duryea, 39.

The corporation was responsible, at all events, for want of ordinary care in furnishing safe machinery and appliances for their workmen. *Keagan* v. *Western R. R. Co.*, 4 Selden, 175; *Peterson* v. *Wallace*, before cited; Pierce on Am. Railways, 307; Redfield on Railways, 387; *Sherman* v. *R. & S. R. R.*, 6 Barb., 240; *McGrath* v. *Watson*, 4 Ohio, State, 566; *Noyes* v. *Smith*, 28 Vt., 59.

There was evidence tending to show a want of ordinary care on the part of the company. The timber was too short, and obviously so to the eye; it lay loose on the floor beams, and lapped but about one and a quarter inches at each end; it had been there for a long time; and all the loose timbers

were removed immediately after the accident. A railroad company has been held liable for a defect in the axle of a car, though they employed a careful maker, if by great care they might have discovered the defect. *Heman* v. *W. R. R. Co.*, 13 Smith, 665.

It is not shown that the plaintiff was not in the exercise of ordinary care. He notified his immediate superior of the defect. Angell & Ames on Corp., 299; Story on Agency, § 1406.

*Edward Fox* and *E. H. Davies*, for the defendants.

The evidence shows that the timber was placed where it was by the workmen. The negligence was on the part of the plaintiff and his fellows. It is not proved that the superintendent knew of the timber being there, or of its being too short to be safe. The plaintiff informed Bartlett of his fears, but not Sparrow. If Bartlett was negligent, it was the negligence of a fellow workman, and not of the defendants, or their officers.

The rule of law is, that an employee runs all the ordinary risks of the service, and this includes the negligence of his fellow workmen in the same service. *Albro* v. *Agawam Canal Co.*, 6 Cush., 75; *Hayes* v. *Western R. R. Co.*, 3 Cush., 270; *Gilshannon* v. *Stony Brook R. R.*, 10 Cush., 229; *King* v. *Boston & Worc. R. R. Co.*, 9 Cush., 112; *Carle* v. *Bangor & Pisc. R. R. Co.*, 43 Maine, 269; *Tarrant* v. *Webb*, 86 Eng. Com. L., 796; *Wigmore* v. *Jay*, 5 Welsby, 352; *Wiggett* v. *Fox*, 11 Exch. R., 832; *Dagg* v. *Midland R. R. Co.*, 1 Hurstone & Norman, 773; *Vose* v. *Lancashire & Yorkshire R. R. Co.*, 2 H. & N., 732; *Sherman* v. *Rochester & Syracuse R. R.*, 17 N. Y., 133; *Ryan* v. *Cumb. Valley R. R.*, 23 Penn., 385.

The plaintiff saw the danger, and voluntarily continued to expose himself to it, thereby suffering the injury by his own recklessness, and he must take the consequences. *Priestly* v. *Fowler*, 3 Mees. & Wels., 6; *Seymour* v. *Maddox*, 71 Eng. C. L. 732; *Skip* v. *Eastern Counties R. R. Co.*, 24 Eng. C.

L. & Eq. R., 398; *Farwell* v. *Boston & Worc. R. R. Co.*, 4 Met., 59; *Hutchinson* v. *Railway Co.*, 5 Exch., 351.

When the employee is as well aware of the danger as his employer, and suffers injury therefrom, the employer is not responsible. *Dynen* v. *Leach*, 40 Eng. L. & Eq. R., 491; 5 Car. & Payne, 379; *Kennard* v. *Burton*, 25 Maine, 39; *Coombs* v. *Purrington*, 42 Maine, 332.

If any officers in the company were negligent in allowing the stick to remain in a dangerous position, the plaintiff was equally so in working under it knowing it to be unsafe. If a conductor on a railroad is injured in consequence of any defect of machinery which he knew or might have known by ordinary care, the company is not responsible. *Mad River & Lake Erie R. R.* v. *Barber*, 5 Ohio, (N. S.) 54; *Indianapolis R. R. Co.* v. *Love*, 10 Ind., 554.

The defendants, when not acting in their corporate capacity, must act through their employees. The timber which occasioned the injury must have been placed by one of the employees, it matters not which. In Albro's case, in Massachusetts, it was the superintendent who was negligent, and the company was held not to be liable.

The opinion of the Court was drawn up by

DAVIS, J. — The plaintiff was one of the employees of the defendants, engaged in the manufacture of locomotives. While thus at work, in what is termed "the setting-up shop," a stick of timber fell upon him, from the beams overhead, by which he was severely injured. To recover damages therefor, he has brought this suit.

It appears, from his own testimony, that he had been at work for the company several years, during which time there had been some loose timbers lying across the beams, which were used for hoisting, and were shifted about as occasion required. The one that fell down, lapped on the beam less than two inches at either end. The plaintiff noticed that it was dangerous six months before the accident, and called the attention of Bartlett, the foreman of the shop, to the fact.

He also called his attention to it again about the time of the accident; but Bartlett called him a coward, and told him to go to work.

It appears that Sparrow, the general superintendent of the business of the company, was usually in the shop every day; but there is no evidence that he knew any thing of the position of these timbers.

The plaintiff was employed by the day, and he could have left the service of the defendants at any time. But he was desirous to retain his place; and it is not strange that he continued to labor for them, even after he was aware of the danger, when he saw that his fellow-laborers had no fear. Whether, by so doing, he did not voluntarily assume the risk, even if the defendants were negligent, is not the question now before us.

Upon the evidence introduced by the plaintiff, the presiding Judge ordered a nonsuit, and the case comes before us on exceptions to that order. It has been argued with much learning and ability; but it is hardly necessary for us to enter upon any extended review of the numerous authorities cited. Whatever doubts may formerly have been entertained, the doctrine is now well settled, in this country and in England, that if a company exercise ordinary care to employ servants of good habits, and of competent skill and experience in their various departments, and to furnish them with machinery and apparatus of approved construction and material, their responsibility extends no further. They do not guaranty to their employees the faithfulness and diligence of their co-laborers in carrying on the business, or in keeping the machinery in such repair, or the works in such condition, that they shall be always safe. This is a part of the hazard which the employees impliedly assume themselves, whenever they enter into service with each other. *Carle* v. *B. & P. Railroad Co.*, 43 Maine, 269, and cases there cited.

And this rule applies to all who are engaged in the common business, whatever relation of subordination they sustain

to each other. *Hard* v. *Verm. & Canada Railway Company*, Law Reporter for January, 1860, p. 540.

It is argued in this case, that the nonsuit was improperly ordered, because the jury might have inferred from the testimony that there was negligence on the part of the corporation, as well as of its servants. The rule by which Courts should be guided in ordering nonsuits is correctly stated in a recent English case, in the Court of Exchequer;—"It is not enough to say there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which the jury might reasonably and properly conclude that there was negligence." *Cornman* v. *E. C. Railway Company*, Am. Law Register, January, 1860, p. 176.

In the case at bar, the burden of proof was upon the plaintiff to show the negligence of the defendants. And, assuming that there was evidence that some of the fellow servants of the plaintiff were negligent, upon which it is not necessary for us to express any opinion, there is no evidence that would have justified the jury in finding, that, in employing their servants, or in furnishing machinery and apparatus, there was such negligence on the part of the *company* as to render them liable in this action. The exceptions are overruled, and the nonsuit is confirmed.

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

COLEN E. BLAKE *versus* GEORGE H. BLANCHARD *& al.*

An execution against two persons, in which the name of one is erroneously stated, is not void as against the one who is correctly described.

A bond, given by the one who is correctly described, to procure his release from arrest on such execution, is valid.

ON EXCEPTIONS to the ruling of DAVIS, J.

This was an action on a poor debtor's bond, given by the defendants, to procure the release of George H. Blanchard from arrest on an execution against said Blanchard and Charles W. *Coburn*. It appeared that the judgment, on which the execution issued, was against Blanchard and Charles W. *Cahoon*, and that the name of *Coburn* was accidentally inserted in the execution by the clerk instead of that of *Cahoon*. The defendants contended, that the execution was void, the arrest illegal, and the bond given under duress.

The presiding Judge ruled that, as against Blanchard, the execution was valid, and that the plaintiff was entitled to judgment. To this ruling the defendants excepted.

*Fessenden & Butler*, for defendants.

The execution issued against Blanchard and Coburn, purporting to be issued on a judgment against the same parties. The case shows there was no such judgment, and, therefore, the execution was improvidently issued and was void.

If the execution is invalid, all the subsequent proceedings are void. *Stearns & al.* v. *Veasey & al.*, 33 N. H., 61.

The defendants are not estopped by the bond from showing that there was no such judgment and execution as are recited in the bond. *Stearns & al.* v. *Veasey & al.*, above cited.

*Howard & Strout*, for plaintiff.

The opinion of the Court was announced by

DAVIS, J.—The judgment, as against this defendant, was correctly described, as it was in fact. He was not injured by

the mistake in the name of his co-defendant. There was no duress, and the bond is valid. Perhaps he would not be estopped by his bond from showing that there was *no judgment* against him, so that his arrest was unlawful. But he should be estopped from taking advantage of merely technical and clerical errors. If, when arrested, he had been brought before us on *habeas corpus*, instead of discharging him, we should have permitted the clerk to correct the execution. He can be in no better condition. The mistake was not in *his* name. *Exceptions overruled.*

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

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ISAAC DYER *& al. versus* RUFUS BURNHAM.

An action (under § 47, c. 148, of R. S. of 1841,) for a false disclosure by a poor debtor should be brought in the name of the *judgment* creditor.

ON EXCEPTIONS to the ruling of TENNEY, C. J.

This was an action for a false disclosure. The defendant demurred to the declaration. The presiding Judge sustained the demurrer and the plaintiffs excepted.

The declaration alleged that the judgment and execution, upon which the disclosure was made, were recovered by one *David Dyer*, for the sole use and benefit of the plaintiffs, who were the creditors in interest.

*E. & F. Fox*, for plaintiffs.

The plaintiffs prosecuted the former suit and recovered judgment in the name of David Dyer. They were the actual creditors. The remedy is given by statute for *tort* done to whoever is injured by the false disclosure. The plaintiffs are the only ones injured. *Thacher* v. *Jones*, 31 Maine, 533. *David Dyer* could not maintain this action, for he was not a *creditor*, nor was he injured by the falsehood.

*Shepley & Dana*, for defendant.

Separate opinions were delivered by GOODENOW, J., and DAVIS, J.

GOODENOW, J.—This is an action founded on § 47, c. 148, R. S., 1841. This section gives an action to the creditor in the execution, and to him only. The plaintiffs were not the creditors, but only the assignees of the creditor. "The creditor, to whom notice should be given, is the person in whose name the action, in which the judgment was recovered, was brought, although it is stated in the record to have been brought for the benefit of another." 8 Cush., 289. The Court say, "we cannot doubt that the word 'creditor' has always meant the judgment creditor; that is, the party in whose name the suit is brought and the judgment recovered."

"Whenever one person sues and recovers judgment in his own name for the benefit of another, he, being plaintiff on the record, is regarded, in every respect, as the legal judgment creditor, unless it is otherwise provided by statute."

*Exceptions overruled;—*

*Judgment for Defendant for costs.*

DAVIS, J.—I do not think the word "creditor," when used in chapter 148 of the Revised Statutes, necessarily refers to the judgment creditor. If there is nothing on the record to show that any other person is the creditor *in interest*, the debtor is under no obligation to recognize or notify any one but the nominal creditor. But I see no reason why any rights given to creditors by the statute are not given to the creditors *in interest*. If they are rights of action, such creditors alone can commence them, or discharge them.

The right claimed in the case at bar is incident to the judgment debt. It cannot be separated from it. And therefore, though I think it is given to the assignee, as the judgment has been assigned, I have no doubt that it should be prosecuted, as in other cases, *in the name of the assignor*.

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

JAMES HARTSHORN *& al. versus* ASA H. PHINNEY *& al.*

If a defendant causes to be entered upon the docket an offer to be defaulted for a specified sum, but has no time fixed for its acceptance, the plaintiff may accept it at any time before it is revoked.

If the plaintiff subsequently accepts the offer, he is not entitled to costs from the time it was made, but the defendant is.

ON EXCEPTIONS to the ruling of APPLETON, J., presiding.

ASSUMPSIT. On the second day of the return term the defendants caused to be entered on the docket an offer to be defaulted for a specified sum, but had no time fixed for its acceptance by the plaintiff. The case was not tried, but, at a subsequent term, the plaintiff accepted the offer. The defendants claimed costs from the time of making the offer, but the presiding Judge ruled that they were not entitled to costs, and ordered judgment for the plaintiffs with costs up to that time, and the defendants excepted.

*Fessenden & Butler,* for defendants, in support of the exceptions.

*Shepley & Dana,* for plaintiffs, *contra.*

The defendants are not entitled to costs. The provisions of the statute fixing the rights of the parties, where an offer is made, have already received an adjudication. *Stone & al.* v. *Waite,* 31 Maine, 409; *Wentworth, Adm'r,* v. *Lord,* 39 Maine, 71.

The first part of the section does not deprive the plaintiffs of costs.

The language is, "if the offer is not accepted *within such time as the Court orders,*" &c. The plaintiffs here have not failed to accept the offer within the time fixed by the Court, because the defendant did not request the Court to make any order in the matter; and, until that is made and the plaintiffs have failed to comply with it, they are entitled to full costs, and the defendants to none.

The opinion of the Court was drawn up by

DAVIS, J.—In the case of *Gilman* v. *Pearson*, 47 Maine, 352, in which the defendant offered to be defaulted, but had no time for acceptance fixed, as he might have done under the statute of 1857, it was held that he was entitled to recover his costs from the time of his offer. In that case it was not accepted; in the case at bar the offer was accepted at a subsequent term.

In the case cited, it was held that the provision for having the time for acceptance fixed, being for the benefit of the defendant, it is at his option, whether to avail himself of it. If he does, and the offer is not accepted within the time, "he then has all the advantages of it, without being bound by it." But, if he has no time fixed, the plaintiff may accept it, if not revoked, at any time before trial.

By R. S., 1841, c. 115, § 22, in order to entitle a defendant to costs, after an offer to be defaulted, the plaintiff must have "proceeded to trial." If he accepted the offer before trial, the defendant recovered no costs. *Pingree* v. *Snell*, 42 Maine, 53. But this was so held, on the ground that the statute of 1835, c. 165, § 6, was changed by the R. S. of 1841, so as to require a *trial* as one of the conditions requisite to entitle the defendant to costs. By the R. S. of 1857, the statute of 1835 is substantially reënacted. The provision making the defendant's right to costs depend upon a trial of the case, has been entirely omitted. The only condition is, that the plaintiff shall "fail to recover a sum, as due at the time of the offer, greater than the sum offered," in which case the defendant recovers costs from that time. The case at bar is within the statute; and the defendant is entitled to his costs from the time of his offer. The plaintiff is entitled to no costs since that time. *Exceptions sustained.*

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

## WILLIAM WOODBURY *& als. versus* GEORGE BRAZIER.

The owners of a vessel have a legal right to take it from the custody and control of the master, whenever and wherever they see fit to do so.

The *compensation* of the master depends solely upon his contract with the owners; but, as their agent, he is entitled to be reimbursed for his necessary expenses *while in their service.*

A master, employed under a general contract at one place to go to another and take charge of a vessel, is in the service of the owners, as soon as he starts, and they are bound to re-pay the expenses of his journey.

When he is discharged in a foreign port, he is no longer in their service, and cannot recover of them the expenses of his homeward passage.

The laws of the United States, allowing extra pay to seamen discharged from an American vessel in a foreign port, do not apply to the master.

When the compensation of the master is monthly wages, and a commission, he is entitled to his commission upon sums received as *demurrage.*

ON FACTS AGREED.

ASSUMPSIT by the plaintiffs, as *owners* of a vessel, against the defendant, as *master,* for an alleged balance of the earnings remaining in his hands.

The facts are stated in the opinion.

*Barnes,* for plaintiffs.

1. The defendant had no right to charge his expenses in going to New York, because the right to compensation for service, or to make charges on the ground of service, commenced only when and where the service commenced.

2. He had no right to charge for his expenses in returning from Havre, after his discharge, because, by the laws of shipping, on such facts as are now agreed, shipowners may terminate the service of the master, when and where they please. His rights to compensation, or to make charges in the nature of compensation for expenses afterwards incurred for himself, then ceases.

And, as to such expenses, incurred before or after the term of employment, the rule of law is the same in all contracts for service, whether on sea or land.

3. The defendant is not entitled to retain his commissions on the sum collected as *demurrage.*

Demurrage is well known in the law of shipping to be a mere reimbursement of expenses incurred, when the charterer suffers the ship to be delayed. Under such delay, seamen's wages and subsistence, and other like expenses, would be a dead loss to the owners, if not defrayed by demurrage. Such reimbursement is no gain to the owners. It calls for no ability or skill on the part of the master. He has no service to render in regard to it, except simply to collect it and account for it.

He cannot, therefore, have commissions on it, or make any profit out of it. To allow him a commission on demurrage money, instead of stimulating him to activity and the exercise of skill, would tend to a contrary effect. It would make it for his advantage to have the ship delayed, to the loss of his owners in all other respects. The interest on their capital, the cost of insurance and the wear and exposure of the ship, would be running on to their injury. The master might enjoy a delay in a favorite port, if, besides his wages and his interest in the freight, he was to have also commissions on the very stores consumed in the delay by himself and the crew, and on the wages of a large and expensive crew.

It is obvious that the activity of a skilful master may greatly shorten the time required for loading a ship, as compared, all other things being equal, with the case, where the master may make a personal profit out of the delay.

If his commissions are confined to the productive freight, this tends to secure his activity in shortening delays as much as possible.

Such being the reasons for the law, *such is the law* governing a contract, for commissions, stated as the contract is, in this case.

*Anderson & Webb*, for defendant.

1. The defendant rightly retained the amount of his expenses to New York. His services commenced as soon as he started.

2. The sum received for demurrage was as much the earnings of the vessel, as if received for freight. He is entitled to his commissions upon it.

3. The cost of his passage home from Havre was rightly charged.

It cannot be reasonably pretended that either party designed that the contract should be abruptly terminated at the pleasure of one, without regard to the rights of the other. If the captain had wantonly abandoned his office in a foreign port, where it would have been injurious to the owners, he would have been liable to them for damages. He had agreed to sail their ship on a general freighting business, and could have no right to leave his duty at his mere caprice. The indefinite time for which the engagement was made could have no effect upon the rights and obligations of the parties, or, if there is any difference, it is that, under a general engagement for hire and service, the parties would be required to close their relations cautiously, so as to avoid damage to either, while, in case of contract for a particular voyage or a specific period, the end would be gained by the performance of the voyage or the expiration of the time, and neither plaintiffs or defendant could complain that his discharge of the duties voluntarily assumed had left him in an unfavorable position, or imposed loss on him. But, although it may be contended, that shipowners may at any time displace a master whom they have appointed, with or without any specific arrangement as to the length of his employment, there is no reason or justice in the proposition that such dismissal can be made without compensation to him.

The opinion of the Court was drawn up by

DAVIS, J.—The owners of a ship have a legal right to take it from the custody and control of the master, at any time, and in whatever place. If a seaman is discharged from an American vessel in a foreign port, he is entitled to extra pay, under the laws of the United States. But no such provision is made for the master. His compensation depends

entirely upon, and is limited by the terms of his contract with the owners. All considerations of justice, and equity, are presumed to have received the attention of the parties, and to have been provided for, at the time of making the contract. If not, it is their own fault, or misfortune. Courts of justice cannot *make* contracts for parties; they can only construe and enforce them. They can no more insert stipulations improvidently omitted, than strike out those which the parties have inserted.

The defendant, in August, 1854, residing and then being in Portland, agreed with the owners of the ship Portland, who also resided at the same place, "to be the master of the ship, his compensation to be twenty dollars per month, and five per cent. commissions."

As the agent of the plaintiffs, he was entitled to be reimbursed for all his necessary expenses *while in their service.* It becomes necessary, therefore, for us to determine when his employment for the plaintiffs commenced, and when it terminated.

It is agreed, that, after the contract was made, "he went to New York, from Portland, to take charge of the ship." He was in the employment of the owners from the time of starting. He went, not for any business of his own, but *for them,* in their service. The contract attached the moment he began to act for them; and his capacity as master, did not depend upon his being personally on board the ship, or in the same port. He might have been acting as master, in purchasing supplies, seeking freights, or otherwise, some time *before* leaving home. That he was thus acting from the time when he commenced his journey, we cannot doubt. Such is the reasonable construction of the contract. His expenses in going to New York he rightfully charged to the owners of the ship, and retained the amount from their funds in his hands.

He was discharged, in September, 1857, in Havre, in France. "He came thence to New York, in a packet steamer, paying for his passage one hundred and fifty dollars."

After his discharge, he was no longer in the service of the plaintiffs, and could rightfully charge none of his expenses to them, because not made in prosecuting their business. It would seem no more than just, as they discharged him in a foreign port, for them to pay his expenses in returning home. But he knew his liability to be so discharged; and he might have made provision for it in his contract. Not having done so, he must abide the consequences of the oversight. He could not have recovered the amount of his expenses from the owners; and he had no right to retain it from their funds.

He made several voyages while he was master, upon one of which, while waiting for a cargo of guano at the Chincha Islands, he received $1120, for *demurrage*, which became due by the terms of the charter for the voyage. Upon this sum he charged to the owners, and retained from their funds, five per cent. for his commissions. This he had a right to do. A vessel lying in port, waiting for a cargo, needs the care of a master. And if the owners are receiving pay for it, under a charter which the master has made, he is entitled to commissions thereon, as much as upon any other earnings of the vessel, unless a distinction is made by his contract, which excepts such earnings therefrom.

According to the agreement of the parties, judgment is to be rendered for the plaintiffs for one hundred and fifty dollars, with interest thereon from October 10, 1857, when demand of payment was made.

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

THE PROPRIETORS OF UNION WHARF *versus* JOHN MUSSEY.

A bond given to obtain an injunction *ex parte*, under the provisions of § 11, c. 96, of the R. S. of 1841, conditioned to pay "all such damages and costs, (if any,) as shall be sustained and *awarded*" against the applicant, in consequence of the injunction, is valid and may be enforced.

The words in such bond "and awarded against said M.," being in addition to the requirements of the statute, may be rejected as surplusage.

ON EXCEPTIONS to the rulings of DAVIS, J.

DEBT upon a bond, given to procure an injunction under the provisions of § 11, c. 96 of the R. S. of 1841. The bond was conditioned to pay "all such damages and costs, (if any,) as shall be sustained and *awarded against said Mussey*, in consequence of said injunction." It appeared in evidence, that the equity suit, in which the injunction was obtained, was decided adversely to the defendant, and that judgment was rendered against him for costs, which he had paid before the commencement of this suit; and that, in the equity suit, no damages were awarded against him.

After the evidence on the part of the plaintiffs was out, the presiding Judge ordered a nonsuit, on the ground that the action could not be maintained, in consequence of there having been no award of damages in the equity suit.

*E. & F. Fox*, for plaintiffs.

The bond was given by the defendant, by order of Court, and in compliance with the statute, to obtain an *ex parte* injunction, asked for by him. It was his duty to furnish the bond according to the statute. If the party, by the use of words not in the statute, have furnished such a bond as, taking all it contains, is a nullity, the Court will reject the superadded words as surplusage, or as the result of a mistake, or a fraud upon the Court. *Merryfield* v. *Jones*, 2 Curtis' C. C. R., 306; 18 Illinois, 309; 6 California, 399; 3 Foster, (N. H.) 198; 20 Conn., 486; *Mason* v. *Fuller*, 12 Louis. An. R., 68; 36 Maine, 28; Comyn's Dig., Condition, G., 12; 26 Maine, 531; 16 Conn., 192; 4 Ohio, N. S., 502.

*Rand*, for defendant.

By terms of condition of bond, defendant bound himself to pay to plaintiffs "all such damages and costs, (if any,) as shall be sustained by said proprietors, *and awarded against said Mussey*, in consequence of said injunction."

The only question raised, and the only issue presented by the pleadings is, whether the defendant has paid all damages and costs sustained *and awarded against him.*

To make out a case, plaintiffs must prove, not only that they have sustained damage, but that those damages have been ascertained, fixed, *awarded*, in some manner or by some tribunal.

After the damages have been so ascertained or awarded, if not paid, an action may be brought upon the bond; but, until then, until there has been an *award* in some way, or by some tribunal, there cannot be any breach of condition of bond.

Plaintiffs, not proving any award of damages, were properly nonsuited.

The surety upon such a bond cannot be compelled to defend a suit to ascertain the amount of damage sustained. See *Bein* v. *Heath*, 12 Howard, 176; 1 U. S. Dig., (1847,) 110, (185,); 18 U. S. Dig., (1858,) 426, (131–2.)

The opinion of the Court was drawn up by

APPLETON, J.—By R. S., 1841, c. 96, § 11, it was enacted that any Justice of this Court might issue writs of injunction "in all cases of equity jurisdiction, when necessary to prevent injustice," provided, "the applicant shall file a bond with sufficient sureties *to respond to all damages and costs.*"

The bond, in case of an *ex parte* injunction, is given in the absence of the party to be enjoined, and it is the duty of the applicant to furnish the bond prescribed by the statute, and the Court may, upon such compliance, grant the prayer of the bill. The bond, in the case before us, was conditioned that, "if the said Mussey shall pay or cause to be paid to said proprietors, all such damage and costs, (if any,) as shall be

sustained *and awarded against said Mussey in consequence of said injunction*, then this obligation to be void."

There is no provision in the statute, by virtue of which, when the injunction is dissolved, damages can be awarded the party enjoined, against the applicant for the injunction. The clause in the condition of the bond, by which the obligor therein was to pay, or cause to be paid, "the damages and costs, (if any,) sustained *and awarded*," exceeds the requirements of the statute. It is urged that the bond, by reason of this excess, ceases to be a statutory bond; that it is immaterial what damages may have been sustained, if none have been awarded; and that, as none were or could have been awarded in the original equity process, the plaintiffs in this action are remediless. The defendant having paid the costs, as no damages have been awarded against him, claims that he has performed the conditions of his bond.

The bond in suit was intended as and for a statutory bond. The condition to pay costs and damages is in conformity with the statute. The question to be determined is, whether the defendant, who, by giving the bond obtained the injunction, has avoided the obligation of the condition to pay damages and costs sustained, by inserting the words, "*and awarded*," &c.— or, whether the superadded words are to be rejected as a mere nullity, and the bond is to be construed as if these words were not contained therein.

The law upon this question, it is believed, will, upon examination, be found to be well settled by an almost entire concurrence of authorities.

In *Dixon* v. *U. S.*, 1 Brock., 178, it was held, by MARSHALL, C. J., that a statutory bond which contains more than the statute requires, will not be vitiated by the surplus matter, but the Court will reject the surplusage as a mere nullity, and construe the bond as if such surplus matter were not contained in it. The same principle was reaffirmed by that distinguished jurist in *U. S.* v. ———, 1 Brock, 195.

In *Hazard* v. *Layton*, 4 Harrington, 512, BOOTH, C. J., says, "we cannot accede to the proposition to the extent urged by

the counsel for the defendants, that, in all cases where the statute requires a bond to be taken, if one part of the condition conforms to the terms of the statute and another part does not, or if any part required by statute is omitted, the whole of the bond and condition is void. But if a part of the condition is for the performance of things required by the statute, and another clause or part is for the performance of a matter contrary to the statute, the illegal part does not vitiate that which is legal, but may be rejected as surplusage, unless the statute expressly enacts that the bond shall be void, if the condition does not conform to the statute, or contains matter contrary to it."

In *Polk* v. *Plum*, 2 Humph., 500, REESE, J., says, "The question, therefore, in general, and also as to bonds merely statutory, seems, upon authorities, well settled, and that superadded and distinct conditions not imposed by the statute may be rejected as illegal, and the conditions required by the statute be enforced as valid."

In *Speck* v. *Com.*, 3 W. & S., 324, it was held that, if an Act of Assembly prescribe the form of the condition of a bond, and specify the nature of the acts and duties which the officer shall be bound to perform, it may be considered directory, and, notwithstanding it may designate acts and things to be done beyond those specified in the Act, it is good against the sureties, unless the Act prescribe the form of the bond and provides that it shall be taken in that form and in no other. "The leading principle on this subject which runs through all the cases," remarks BURNSIDE, J., in *Shunck* v. *Miller*, 5 Barr., 250, "is that, when a statute only directs the condition of a bond, and does not avoid it should it not conform to the directions, and something more than the condition is added to it, the bond may be allowed to cover the authorized part of the condition. Gilpin's R., 179. But it is otherwise when a statute authorizes a bond to be taken in a particular manner and for a particular purpose, and declares, if it be not so taken, that the bond shall be void. Then the bond must follow the words prescribed, and it is not good for any purpose, how-

ever lawful in itself, if it be not conformable to the statute." "When a statute," remarks HOPKINSON, J., in *U. S.* v. *Brown*, Gilp., 179, "authorizes a bond to be taken in a prescribed manner, or for certain expressed purposes, and declares that, if not so taken, then the bond shall be void, then it may not stand good for any purpose, however lawful in itself, if it be not conformable to the statute, but, when the statute only directs the condition of the bond and does not avoid it, if it does not conform to the directions and something more than that condition is added to it, the bondsmen are allowed to cover the authorized part of the condition, and so much may be recovered under it and no more." "My opinion on the point is," says WASHINGTON, J., in *U. S.* v. *Howell*, 4 Wash., 20, "that, when the statute requisitions are of a bond, to prosecute substantially, the terms of it must conform to the requisitions of the statute, and, if it go beyond, it is so far void, at least, as it exceeds these requisitions."

There being no mode in which damages could have been judicially *awarded*, no breach could be assigned of that part of the condition. In the case of a probate bond, it was said by WILDE, J., in *Hall* v. *Cushing*, 9 Pick., 395, "that in an action on such a bond the plaintiff cannot be entitled to judgment, unless the bond is conformable to the statute in all its material parts, and if more be added than the law requires, although it will not vitiate the whole bond, unless the matter be illegal, yet no breach can be assigned in any part of the condition not included within the requisitions of the statute."

In *Kavanaugh* v. *Saunders*, 8 Greenl., 422, the bond in suit was given for the purpose of liberating a debtor committed to prison on mesne process. The condition was, that Saunders, (the debtor,) will not depart without the exterior bounds of the jail yard, until lawfully discharged, *and will surrender himself to the jail keeper, and go into close confinement as is required by law.* It was there urged, that, as the words in Italic, in cases of commitment on mesne process, are to be omitted, that the whole instrument was void. But it

was held, that the last condition, not being required by the statute, did not vitiate the bond; and that, being insensible and uncertain, it might be rejected without affecting the residue as a statute bond. If the condition of an obligation was insensible at the making, the obligation is single. Com. Dig. Obligation, E. "If the condition is in the conjunctive, and one branch is sensible, certain and possible, and the other not, it is a good condition for performing the former, and the latter is to be wholly disregarded. Cro. Eliz., 780."

Applying the principles of the law to the bond in suit, the words "*and awarded,*" *&c.*, may be rejected as surplusage, and the residue is good as a statute bond. So, as there was no legal mode of assessing damages in the equity suit, the clause may be regarded as insensible and impossible, and the condition be regarded as good as to that branch of it, which is sensible, certain and possible.

Indeed, it would seem that, from the literal language of the bond, the action may be sustained. It is to pay the damages and costs, (if any,) sustained and awarded in consequence of the injunction. The language does not indicate in what suit they are to be awarded. They are to be awarded if sustained. Such was the manifest intention of the bond. As they could not be awarded in the equity suit, and as they were to be awarded, it must be done by the Court having jurisdiction. They can only be awarded legally here. If damages have been sustained, and if they should be awarded in this action, they will have been sustained and awarded in consequence of the injunction, which is in strict conformity with the terms of the condition. Such was the decision in *Roberts* v. *Dust*, 4 Ohio, N. S., 502, where the defendant obtained an injunction and gave a bond conditioned "to pay all money and costs due, and to become due from all moneys and costs which should be *decreed* against him, in case said injunction should be dissolved, and it was held in a suit on the bond for damages sustained by plaintiff, in the stoppage of his mills, that such a loss was included in the bond, al-

though the decree of the Court dissolving the injunction was for the costs of suit only."

The case of *Bein & al.* v. *Heath*, 12 How., 168, seems principally relied upon in the defence, but, upon examination, it will be found materially differing from the one at bar. It seems that, by the statutes of Louisiana, an injunction may be obtained to stay execution upon an order for the sale and seizure of mortgaged property, and that the sureties are treated as parties to the suit, and, if the party obtaining an injunction fails to support it, judgment is given by the Court before which it was pending, against the sureties for debt, interest and damages. The proceedings in the Circuit Court of the United States are, by its rules, declared to be in conformity with the practice of the High Court of Chancery in England. A Court, proceeding according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. When the injunction in that case was granted, the Court ordered the injunction to issue as prayed for, upon the complainant's giving a bond with sureties to answer all damages which the defendant might sustain in consequence of the injunction, should the same be thereafter dissolved. The bond given was not in accordance with the order of Court, but with the form used in the State Courts of Louisiana, in cases where the law requires an injunction bond to stay execution on a judgment on order of seizure and sale, and conditioned to pay "the said Mary Heath, the defendant, in said injunction, and plaintiff in case of seizure and sale, all such damages as she may *recover* against us, in case it should be decided that the said injunction was wrongfully obtained." The bond given was not in conformity with the practice of the Court, nor with the special order given in that case. The bond, in fact given, was held to be one under the statutes and practice of Louisiana, and, being such, the sureties must be deemed to have entered into such a bond, and, as no judgment was or could have been entered by the practice of the Circuit Court, it was decided that the

condition of the bond was not broken, and that no action could be maintained upon it.

So far as the case of *Bein & al.* v. *Heath*, is in favor of the position taken by the counsel for the defendant, it is adverse to the whole current of authorities, and cannot be regarded as sound law. *Exceptions sustained.*

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

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J. CLEMENT BEGG *versus* GEORGE P. WHITTIER.

In *trover*, after default, the defendant is entitled to be heard in the assessment of damages by the Court, he having moved for a hearing before the final adjournment of the Court, and before judgment had been entered up.

After default in actions, where the amount of judgment depends upon mere calculation, the damages are determined by the clerk; although the theory of the law is, that this is done by the Court.

But, where the damages do not depend on calculation merely, a default admits only the liability of the defendant, not that the plaintiff has sustained the damages by him alleged.

*It seems*, that, for special reasons, the damages may be ascertained by a regular jury, if the plaintiff seasonably moves therefor; otherwise, he will be deemed to have waived any right to a jury, and then, the damages are to be determined by the Court.

At a hearing in damages, in open Court, either by a jury or by the Judge, if illegal testimony, (duly objected to,) be admitted, *it seems*, that exceptions will lie for that cause.

THIS action was TROVER. At the third term after entry, on the first call of the docket, the action was marked for trial. On the third day, the case was called up in its order, and, no one appearing for the defendant, (his counsel being temporarily absent from the State,) he was defaulted. On the 29th day of the term, the defendant's counsel appeared, and moved to have the default taken off, which motion was denied by DAVIS, J., presiding. He then moved that the defendant be heard in damages, and that such an entry be made upon the docket, which being refused, he filed exceptions.

*F. O. J. Smith* and *J. O'Donnell*, in support of the exceptions, cited *Hayden* v. *Bartlett*, 35 Maine, 203; Colby's Practice, 226. In an action of *trespass* the defendant has a right to be heard in damages after default. *Crommett* v. *Pearson*, 18 Maine, 345. In an action of *tort*, the defendant may be heard in damages if he moves for it. *Jarvis, in error*, v. *Blanchard*, 6 Mass., 4. After default, the defendant can have no review, but the Court will grant relief in damages. *Perry* v. *Goodwin*, 6 Mass., 498. In the case at bar, the damages are unliquidated, and the Court have no data to ascertain the amount without proof *aliunde*.

The opinion of the Court was drawn up by

APPLETON, J.—In the English practice, upon default, the plaintiff is entitled, as of right, to a writ of inquiry, and an assessment of damages by a jury, unless he consents that they be assessed by a master or a prothonotary appointed by the Court. *Blackmore* v. *Flemyng*, 7 T. R., 442. The defendant, having suffered default, has no such election. He has no right to a jury to assess damages. *Price* v. *Dearborn*, 34 N. H., 482.

In our practice, where the amount depends upon computation, the damages are determined by the clerk. The theory of the law, however, is, that this is done by the Court. It is therefore the duty of the Court, in cases of not mere computation, to give judgment for such damages as they shall find the plaintiff has sustained, unless the plaintiff shall move to have a jury to inquire into damages, in which case judgment is to be entered for such damages as they shall assess. Howe's Practice, 226; *Crommett* v. *Pearson*, 18 Maine, 344. The default merely admits the fact of liability as set forth in the declaration, not the amount of damages alleged to have been sustained. If the defendant be defaulted, the Court assess damages, unless, for special reasons, they order an inquiry by a jury. *Bowman* v. *Noyes*, 12 N. H., 302; *Willson* v. *Willson*, 6 Foster, 240; *West* v. *Whitney*, 6 N. H., 314. If not done by the Court, it may be done by one of the regular juries

at court. *Chase* v. *Lovering*, 7 Foster, 295. If not claimed by the plaintiff to be done by the jury at the time, the right to an assessment of damages by them is waived. The only question submitted to the jury is the amount of damages. It seems, too, that the Court may appoint a master, or assessor, to whom the assessment will be referred, and his report, being accepted, or adopted, by the Court, fixes the amount for which judgment is to be rendered. *Price* v. *Dearborn*, 34 N. H., 486.

Where, after a default, damages are assessed for the plaintiff, either by the jury or the Judge, in open Court, and the Judge admits illegal testimony, it seems, the party aggrieved may file exceptions to such admission and bring the question before the whole Court. *Storer* v. *White*, 7 Mass., 448.

*Exceptions sustained.*

*The defendant to be heard in damages before the Court.*

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

JAMES B. J. LIBBEY *versus* JOHN G. TOLFORD *& al.*

In a lease of a store, there is no implied warranty, that the building is safe, well built, or fit for any particular use.

If there be no stipulation between the parties to a lease in respect to repairs, the tenant takes the risk of the future condition of the premises, and is bound to keep them in repair.

If the landlord, after the lease is entered into, and being under no legal obligation to make repairs, promises to make them, the promise is without consideration, and will not support an action.

ON EXCEPTIONS to the ruling of DAVIS, J.

ASSUMPSIT to recover damages to the plaintiff's goods in a store leased by him of the defendants, caused by the want of sufficient repairs, which it was alleged the defendants promised to make.

The testimony tended to show that the store, at the time of the hiring, was in good and tenantable condition; that the lease was by parol; that afterwards the store was out of repair, and the plaintiff notified the defendants of the fact; that they promised from time to time to repair it, but failed to do so; and that, in consequence of the want of repairs, the plaintiff's goods were damaged.

Upon this evidence, the presiding Judge ordered a nonsuit and the plaintiff filed exceptions.

*J. Morgan*, for plaintiff.

*Deblois & Jackson*, for defendants.

The opinion of the Court was drawn up by

APPLETON, J.—In the lease of a store or warehouse, there is no implied warranty that the building is safe, well built or fit for any particular use. *Dutton* v. *Gerrish*, 9 Cush., 89. So, in a lease of a house, there is none that it is reasonably fit for habitation. *Foster* v. *Peyson*, 9 Cush., 243; *Cleves* v. *Willoughby*, 7 Hill, 83. On a demise of the vesture of land for a specific term, and at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. *Sutton* v. *Temple*, 12 Meess. & Wels., 52. Nor of a house, that it shall be reasonably fit for habitation. *Hart* v. *Windsor*, 12 Mees. & Wels. 68. Nor is it implied that it shall continue fit for the purpose for which it is demised, as the tenant can neither maintain an action, nor is he exonerated from the payment of rent if the house is blown down or destroyed by fire, or the occupation rendered impracticable by the act of God or the King's enemies. *Ib.* When it is agreed that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. *Surplice* v. *Farnsworth*, 49 E. C. L. 574.

In *Gott* v. *Gandy*, 2 Ell. & Black., 845, (75 E. C. L.,) the plaintiff brought an action against his landlord for neglecting to make substantial repairs to the premises, after notice

that they were in a dangerous state, by reason of which the premises fell during the tenancy and injured his goods. The Court held that no obligation on the part of the landlord to make repairs arose from the relation of landlord and tenant. "The absence of authority to show a duty, as between landlord and tenant," remarks ERLE, J., "is very strong against the existence of such a duty." In the absence of any special agreement, the tenant takes the risk of the future condition of the premises leased. "The tenant," remarks, SAVAGE, C. J., in *Mumford* v. *Brown*, 6 Cow., 75, "takes the premises for better and for worse; and cannot involve his landlord in expense for repairs, without his consent."

In the present case, it does not appear that there was any agreement, when the contract of leasing was entered into, that the landlord should keep the premises in repair. If there be no stipulation between the parties to a lease on the subject of repairs, the tenant is bound to keep the premises in repair. *Long* v. *Fitzsimmons*, 1 Watts & Serg., 530.

The lease and its terms and conditions were made. The duties of the parties were left as at common law. The landlord was under no obligation to repair either by express contract or by implication of law. By law the duty to repair devolved upon the tenant. It is not in proof that the premises were out of repair when the tenant entered upon their occupation. The landlord, being under no legal obligation to make repairs, promised the tenant, who was under such obligation, to make them. The promise was without consideration. It was no part of the original agreement. It was made while the tenant was occupying the premises. The action cannot be maintained. *Exceptions overruled.*

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

HENRY PEYRET *versus* JOHN COFFEE.

An action of the case, under § 4, c. 125, of R. S., for the recovery of property lost in gambling, may be maintained without a previous demand.

The provision of R. S., c. 81, § 114, that the time of the defendant's absence from the State "shall not be taken as a part of the time limited for the commencement of the action," applies to actions upon the statute to recover property lost at gambling.

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

CASE under the statute to recover back the property lost in gambling, April 25, 1858. The writ was dated Feb'y 28, 1859. The plea was the general issue, with a brief statement, alleging that the action was not commenced within three months after the alleged cause of action accrued. The evidence was, that the plaintiff lost the property sued for to the defendant in gambling, that a few days after the defendant left the State, and did not return until a few days before this action was commenced.

*A. Merrill*, for the plaintiff.

*Shepley & Dana*, for defendant.

1. There was no demand of the watch by the plaintiff, nor refusal to deliver by the defendant. This was an essential preliminary to the maintenance of the action. 2 Greenl. Ev., § 644, and cases cited.

2. The action is barred by the statute of limitations. This is a statute remedy and must be strictly followed. *Plummer* v. *Gray*, 8 Gray, 243.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of the case, under R. S., 1857, c. 125, § 4, to recover the value of a watch lost at a faro table, of which the defendant was the keeper.

It is objected that the plaintiff has not proved a demand. But the statute does not require a demand, and we can impose no requirements which the statute has failed to make.

It is next urged that the plaintiff did not bring his action within the three months next following the loss. But the proof shows fully that the defendant left the State within a day or two after the loss, and did not return till within two or three days before the action was commenced. By R. S., 1857, c. 81, § 114, the time of the defendant's absence "shall not be taken as a part of the time limited for the commencement of the action." The suit was seasonably commenced.

*Defendant defaulted.*

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

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SAMUEL M. KNIGHT *versus* ISAIAH FRANK.

It was not the intention of the Legislature that the provisions of § 2, c. 45, of the R. S. of 1857, should change those of 1841 and 1846, relating to usurious contracts; and if a plaintiff, before trial, voluntarily indorses upon his note the amount of usurious interest taken or retained, it will not be considered that "the damages are reduced by proof, either by the oath of the party or otherwise," so as to entitle the defendant to, or deprive the plaintiff of, costs.

EXCEPTIONS from the ruling of DAVIS, J.

This was an action brought upon a promissory note and submitted to the Court, without the intervention of a jury, reserving the right to except.

There was evidence tending to show that the sum of eight dollars and forty cents, included in the note, was for usurious interest. And the defendant testified, that that sum, which is indorsed on the note as paid on the day the note is dated, was not then or at any time since paid by him.

The indorsement of that sum upon the note was made by the plaintiff, before any evidence had been introduced, and before the writ was read at the trial or issue had been joined.

The defendant contended that he, and not the plaintiff, was entitled to costs. But the Court ruled that the plaintiff was entitled to judgment for the amount due upon the note,

(deducting the sum indorsed,) and for his costs. The defendant excepted.

*Fessenden & Butler*, for plaintiff.

*Vinton*, for defendant.

The opinion of the Court was drawn up by

APPLETON, J.—By R. S., 1841, c. 69, § 7, costs were denied the plaintiff and allowed the defendant, on usurious contracts, "provided the *damages shall be reduced by the oath* of any of the defendants, when there are more than one, by reason of such usurious contract."

By the Act of July 22, 1846, c. 192, costs were denied the plaintiff and allowed the defendant, in all usurious contracts, "provided the damages shall be reduced by *proof* of such usurious interest." By this, it will be perceived, that the *proof* of such usurious interest is not limited to that by the oath of the party.

It has been judicially determined under each of these statutes, that where the plaintiff voluntarily indorses upon his contract the usurious interest taken and reserved, that the defendant is not, and that the plaintiff is, entitled to costs. *Cummings* v. *Blake*, 29 Maine, 105; *Hankerson* v. *Emery*, 37 Maine, 16; *Lumberman's Bank* v. *Bearce*, 41 Maine, 505.

It is provided by R. S., 1857, c. 45, § 2, that if, in any usurious contract, "the damages are *reduced by proof* of such excessive interest by *the oath of the party, or otherwise*, the plaintiff shall recover no costs, but shall pay costs to the defendant." The reduction of damages must be by proof. It was, obviously, the intention of the Legislature to condense the provisions of the Act of 1841 and of 1846, on this subject, into one section, but not to change or alter the law. Whenever the plaintiff, therefore, voluntarily indorses upon his note the amount of usurious interest before trial, the damages are not reduced by proof, either by the oath of the party or otherwise, and this section does not apply. *Exceptions overruled.*

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

JOHN W. BLODGETT *& als. versus* JACOB CHAPLIN *& als.* AND JOHN K. CHAPLIN, *Trustee.*

A person cannot be charged as trustee by reason of the conveyance to him of real estate, or any interest therein, though such conveyance be fraudulent as to creditors.

But one will be charged as trustee, if he has in his possession any goods, effects or credits of the principal defendants, held under a conveyance fraudulent as to creditors, although the principal defendant could not have maintained an action against him.

The character of the purchase of the defendants' goods by the alleged trustee may be tested by the honesty of the parties in other acts, which are a part of the same transaction.

A conveyance will not be held to be fraudulent and void as to creditors, although the motives of the vendor were fraudulent, unless the vendee had knowledge of the fraudulent intention, and assisted in carrying it into execution.

Of the evidence necessary to show that a conveyance is fraudulent and void as to creditors.

ON EXCEPTIONS to the ruling of DAVIS, J.

The alleged trustee duly made his disclosure and was charged, whereupon he filed exceptions.

The contents of the disclosure, so far as they affect the questions raised, are stated in the opinion.

*N. S. & F. J. Littlefield,* for plaintiffs.

*Howard & Strout,* for trustee.

The opinion of the Court was drawn up by

TENNEY, C. J.—This suit is against Jacob Chaplin, Caleb A. Chaplin and John P. S. Gray, a co-partnership under the name of Chaplin, Gray & Co., and John K. Chaplin is summoned as trustee, who has disclosed in the case and is charged thereon, to which adjudication exceptions are taken; and the whole matter comes before the law Court. R. S., c. 86, § 79.

In March, 1861, a short time before the service of the writ on the trustee, he held, against Jacob and Caleb A. Chaplin,

three promissory notes of hand, and another against Jacob Chaplin alone, the whole sum, with interest at that time, amounting to $1327,08.

In the disclosure of the trustee to interrogatory 22,—were you informed by either of the Chaplins that they were hard pressed for money?—the answer is, that, on the day of the sale of the stock of goods, by the co-partnership to him, Caleb A. Chaplin informed him, that money was hard, and that he could not pay him, and that they should have to secure his demands some way. At that time, on the proposal of the said Caleb, he purchased the stock of goods belonging to the partnership, estimated, without any particular examination of all the several articles, at the sum of $1500. At the same time, he took a conveyance of the store and certain land, over twelve acres, from Caleb A. Chaplin, valued at the sum of $500. As a part of the same transaction, he purchased of Jacob and Caleb A. Chaplin a quantity of staves, cooper's shop and tools, sleigh, shooks, buffalo robes, gig and harness, valued at the sum of $227. And of Caleb A. Chaplin, a bond from one Pease, for the conveyance of a parcel of land, on the payment of certain notes therein described, valued at the sum of $100, and a mortgage, given by one Lakin to Caleb A. Chaplin, of certain real estate, at the price of $100, taking an assignment of the bond and mortgage.

The sum of $1000 of the price of the stock of goods was discharged by the same amount due upon the notes held by the trustee, before mentioned, and, for the balance, of the consideration for the transfer of the goods, as Jacob and Caleb A. Chaplin could sell only $1000 worth of the stock of goods, John P. S. Gray having an interest in them, and it not being convenient to select $1000 worth of said goods, the trustee purchased the entire stock of Jacob and Caleb A. Chaplin and John P. S. Gray, and gave his note for the sum of $500, payable in six months, to said Chaplins and Gray.

The balance of the notes held by the trustee, against Jacob and Caleb A. Chaplin, being the sum of $327,08, after deducting the sum of $1000, was paid by the consideration of the

assignment of the Pease bond, and that of the conveyance of the staves, the cooper's shop and tools, sleigh, shooks, buffalo robes, gig and harness, within the sum of eight cents. The consideration for the conveyance of the store and the land was discharged by the trustee's note of $300, payable in two years, and his note for $200, payable in three years. For the estimated value of the Lakin mortgage, he gave his note for the sum of $100, payable in one year. All the notes given by the trustee were negotiable.

All the property which Jacob Chaplin, Caleb A. Chaplin and John P. S. Gray proposed to sell to the trustee, was purchased by him, excepting some shooks in Muddy river. The trustee does not know whether his purchases embraced all the attachable property of the firm and the several members thereof, or not.

It further appears from the disclosure, that the trustee employed John P. S. Gray, one of the firm, to sell out the stock of goods, after the purchase, with the exception of a small portion, which the trustee took into his own custody.

All the property obtained by the trustee, in payment of his claim of the sum of $1327,08, and that which he purchased and for which he gave his negotiable promissory notes, amounting to the sum of $1100, equal in the whole to $2427,08, were attachable in suits of the partnership creditors against the firm, so far as we can judge from the disclosure. By the transaction, if *bona fide* and free from fraud, no part of this property was subject to attachment, at all. The goods, to the amount of the sum of $1000, belonging to the co-partnership, had been appropriated to the payment of pre-existing debts of two of the members of the firm, instead of that of the same two members, which was purchased by the trustee at the same time.

The trustee stood in the relation of cousin to Jacob and Caleb A. Chaplin, and he was a brother to the wife of the latter.

Upon the foregoing facts, we are to see if the motives of those who conveyed the property to the trustee were honest,

or otherwise. We must look at those facts by themselves, and, in connection with their intentions in the transaction, so far as such intention is disclosed by what was said by the vendors and grantors, in the several instruments made.

It is proper to remark that the trustee cannot be charged by reason of any purchase of real estate, or interest therein, but, if charged at all, it must be on account of the purchase of the stock of goods belonging to the co-partnership; but the character of that purchase may be, to some extent, tested by the honesty of the parties in other acts, which made a part of the same transaction.

Again, the motives of the vendors of the stock of goods may have been fraudulent; but to hold the trustee chargeable, he must have had knowledge of the designs of the vendors, and have aided them in carrying those designs into execution.

It has been already stated, that the trustee, on the day of the purchase, and before the purchase, was informed by Caleb A. Chaplin, that money was hard, and that he could not pay him; and that "we" should have to secure the trustee's demands some way.

John K. Chaplin subjoins to his answer to the twentieth interrogatory, which is, "I think that Caleb A. Chaplin, proposed to sell me the store," the following, "in addition to my answer to question number twenty, I recollect, that Caleb A. Chaplin proposed to sell me the Union store and twelve acres of land besides, and to assign to me the Lakin mortgage, saying that he had some debts of 'honor' to pay, and that if he turned out all his personal property he could not pay those debts of 'honor,' and he wanted me to purchase the real property, and wanted my notes for the same to raise money on, and for the sake of obtaining a settlement of my demands against them, I purchased the property, and this was done on the day I purchased the goods in the store."

The foregoing exhibits the embarrassed condition of the firm and its members, and the full disclosure of it to the trustee. He was willing to aid them in placing the personal

property of the firm in a situation where it could not be reached, as he evidently supposed, by its creditors, by direct or foreign attachment. The amount of the sum of $1000, of the goods belonging to the firm, which he could not hold by an attachment to secure his claim against individual members of it, if its creditors had vigilantly looked after and enforced their rights, was withdrawn, (if the attempt shall prove successful,) from their control by attachment, and applied to the discharge of the amount of his claim, which was not against the firm, and the residue of the value of the goods put into his negotiable promissory note, and, if negotiated *bona fide* to partnership creditors, was delaying them till the maturity of the note.

It cannot be doubted, that if the purchaser of the stock of goods was allowed to stand protected by law, that the effect would be "to delay, hinder or defraud" the creditors of the partnership "of their just and lawful actions, suits, debts, accounts, damages," &c., in the language of the statute of 13th Eliz., c. 5,—and that, under all the facts and circumstances of the case, it falls within the provisions of R. S., c. 86, § 63, that "if any alleged trustee has in his possession any goods, effects or credits of the principal defendant, which he holds under a conveyance fraudulent and void, as to the defendant's creditors, he may be adjudged trustee on account thereof, although the principal defendant could not have maintained an action against him." *Glass* v. *Nichols*, 35 Maine, 328.

*Exceptions overruled.*

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

STATE *versus* JOHN DAMERY.

If the incompetency of a witness, for any cause, becomes manifest by legal evidence, at any stage of the trial, his testimony should form no part of the evidence to be considered, if seasonably objected to.

Objections to the competency of a witness, known to the party objecting, are not seasonably taken, if not made before his examination.

And if they first become known after the examination has commenced, they are waived if the witness is suffered to proceed after the discovery.

The only evidence to show the incompetency of a witness on the ground of *infamy*, is the record of his conviction and judgment thereon by a Court having jurisdiction.

The refusal of a presiding Judge to grant delay in a trial, for the purpose of obtaining such record, is no ground for exceptions.

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

INDICTMENT for MURDER.

The case is stated in the opinion.

*McCobb & Kingsbury*, for the respondent.

1. The objection was made as soon as it was known to the prisoner's counsel. If the objection is taken as soon as it is known to *counsel*, it is sufficient. *Commonwealth* v. *Greene*, 17 Mass., 516, 537.

2. The presiding Judge *ruled* that the objection came too late.

3. His ruling cannot be sustained. The authorities are decisive. 1 Greenl. Ev., § 421, and cases cited in the notes. *Butler* v. *Tufts*, 13 Maine, 302; *Skillinger* v. *M'Cann*, 6 Maine, 364; *Commonwealth* v. *Greene*, 17 Mass., 515; *Flagg* v. *Marr*, 2 Sumner, 487; *Swift* v. *Deane*, 6 Johns., 523, 528; *Davis* v. *Barr*, 9 Serg. & Rawle, 137; 8 ibid, 444; *Sloat* v. *Wood*, 1 Blackf., 71; *Needham* v. *Smith*, 2 Vernon, 463; *Jackson* v. *Laborne*, 11 Mees. & Wels., 685; 10 ibid, 141; *Vaughan* v. *Worrell*, 2 Swansb., 400; Stark. Ev., part II, 120, 154; ibid, part IV, 756; *Shurtleff* v. *Willard*, 19 Pick., 202.

*Drummond, Attorney General*, for the State.

1. There was no *ruling* of the presiding Judge. He *inti-*

*mated* his views of the law upon a supposed case, or upon the assumption that the *prisoner* knew of the objection, though his counsel might not.

2. The counsel requested delay, and the Judge refused to grant it. This was a matter within his discretion, and exceptions do not lie. 4 Pick., 302, 304; 14 Pick., 221; 41 Maine, 405, 409, 565; 34 Maine, 200; 35 Maine, 116, 478; 37 Maine, 190, 246; 38 Maine, 173; 39 Maine, 78, 173, 532.

3. The request was made too late.

The old rule was, that objections to the *competency* of a witness, *for any cause*, must be made before he is sworn in chief. 1 Gilbert's Ev., 282; Swift's Ev., 109; Peake's Ev., 129; 1 Stark. Ev., 121; Phill. Ev., 148; 1 Greenl. Ev., § 421; Roscoe's Crim. Ev., 165; 2 Russel on Crimes, 586; *Turner* v. *Pearte*, 1 T. R., 719, 720.

This rule was relaxed for the convenience of parties, and to save time in cases in which the incompetency is shown by *the testimony of the witness himself*, but not in cases in which the incompetency must be shown, (as in this case,) by testimony *aliunde*. *Watson's case*, 2 Stark., 158, [140;] *Shurtleff* v. *Willard*, 19 Pick., 202; *People* v. *McGarrer*, 17 Wend., 460; Roscoe's Crim. Ev., 165, in notes; *Commonwealth* v. *Greene*, 17 Mass., 538.

*Evans*, for the prisoner, replied.

The opinion of the Court was drawn up by

TENNEY, C. J.—The defendant was on trial for the crime of murder. A witness was sworn and testified to certain facts pertinent to the issue, when "the counsel for the accused interposed, and stated that they had just been apprised that the witness, at the time of the transactions testified to, was a convict of an infamous offence, undergoing sentence, which disqualified him from being a witness, and requested delay, to produce the record of it. The Judge intimated that, though such record would be admissible, to affect the credibility of the witness, it was too late now to raise the objec-

tion to his competency; that the objection should have been made before the witness was sworn, or at least, before he had commenced his testimony;" and the witness then proceeded in his testimony, and stated other facts. The foregoing quotation from the case involves the only point raised in the argument before the whole Court, and is all which appertains to the question presented.

The ancient rule, requiring that objections to the competency of a witness should be made before the oath was administered, has been relaxed in modern practice, and it has long been held that, if the incompetency was manifest from legal evidence at any stage of the trial, the testimony should constitute no part of the evidence, to be considered.

This change in the rule is conceded by the Attorney General, in cases where the incompetency is shown by other evidence than that of a record, but he contends that the relaxation does not extend to objections founded on evidence of the latter character. We see no sufficient reason for such distinction, and we are not satisfied that the authorities clearly and fully recognize it.

In the case of *Commonwealth* v. *Green*, 17 Mass., 515, where a new trial in a capital case was sought, on the ground that a witness for the government had been convicted of an offence which disqualified him as a witness, and that conviction was not shown at the trial, the Court, after commenting upon the grounds of the necessity of showing this by *record*, says, "it being the rule, then, that objections to the competency of a witness, founded on conviction of crime, must be made at the trial, and when the witness is offered to be sworn in the cause, who is since found to have been convicted, the trial was not for that cause erroneous or irregular, and a new trial cannot, on that account, be demanded as a right." That part of the language, just quoted, in these words—"and when the witness is offered to be sworn in the cause," may seem to favor the position taken in behalf of the government, but, when the remarks of the Court upon this point are examined together, it will be seen that this refers to the *trial*

generally, and not to the precise moment, when the witness objected to is first offered; for it is said, previously by the Court, in the same case, that whenever that objection, (infamy,) is made to a witness, it must be supported by the record of the conviction and judgment. "These must be produced and offered when the witness is about to be sworn, *or at farthest, in the course of the trial.*" In the case of *Commonwealth* v. *Green*, the discovery of the infamy of the witness was not made till after the trial and conviction; and hence, no question arose, whether the record, if introduced after the witness had been sworn, would have sustained the objection.

The rule is well settled, for obvious reasons, that objections to the competency of a witness must be made before his examination, if known to the party objecting, or they will not avail. And if this knowledge is first acquired after the examination of the witness has commenced, the objection is waived if the witness is suffered to proceed after the discovery. *Donelson* v. *Taylor*, 8 Pick., 390.

These principles, however, which have been invoked in argument, are inapplicable to the case before us. The motion to the Court for delay, was upon the ground that the counsel for the accused had just been apprised that the witness was a convict of an infamous offence. If it be conceded that this language necessarily implies that this information was *first* communicated to them immediately before the motion to the Court was made, nothing shows that it was not fully known to the prisoner long before the trial began. If the party is aware of the facts on which the objection is founded, he must make the election to rely upon it as soon as the opportunity to make it is presented; and, failing to make it at that time, he is presumed to have waived it forever. 1 Greenl., Ev., § 421.

But the most formidable obstacle, in the way of sustaining the exceptions, is, that no legal evidence, to show that the witness was incompetent, was offered, or that any such evidence is exhibited by the case to have existed. Such evidence

as could be admitted to establish the incompetency of the witness at the time of trial, on the ground of his infamy, was the record of a Court having jurisdiction of the conviction and the judgment. As we have seen from the case of *Commonwealth* v. *Green*, "these must be produced and offered, when the witness is about to be sworn, or at farthest in the course of the trial. All the books, which treat of this subject, are positive and express in the declaration, that the party must be prepared with the record, or, as some of them express it, come with it in his hand; or he shall not be heard against the competency of the witness. This rule is strict, and ought to be so." "Not only must infamy be proved by record, but the objection shall not be heard without a record."

The government, by its officers, waived none of its rights. The record being indispensable, as the basis of a hearing upon the question of incompetency of the witness for infamy, was not before the Court, and could not be treated in any manner as having an entity. We should be doing injustice to the presiding Judge, to hold that he made the legal ruling, as upon a record of a Court of competent jurisdiction, that though the record was sufficient to establish the guilt of the witness of an infamous offence and a judgment thereon, the objection being after the witness began to testify was too late to affect his competency. It was only an *intimation* of an opinion, upon the supposition that the facts should turn out to be, from an exhibition of the record, as the counsel stated they had just been *apprised* they were. There was no hearing, as there could be none. All the right to be heard, upon a production of the record afterwards, before the close of the trial, was preserved to the party accused. The "intimation" abridged in no degree that right. If the Judge had ruled, upon the production of the record, and such hearing as counsel should have been allowed, that it was too late to exclude the witness before the evidence was closed, exceptions could have been taken, and a question of law duly presented. But the motion was for delay, in order to obtain the

record; that was the only motion; that motion was overruled by the Judge in the exercise of his discretion, it being for him to determine, under all the circumstances, whether the delay was necessary to secure to the accused a fair trial, and whether he was entitled to that delay.

*Exceptions overruled.* — *Judgment on the verdict.*

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

## COUNTY OF ANDROSCOGGIN.

INHABITANTS OF AUBURN *versus* INHABITANTS OF HEBRON.

The *insanity* of a person does not prevent his continuous residence in a town for five years, from operating to establish his settlement therein.

If an insane person be removed to a town in which before he had no residence, by the direction of his guardian, to remain for no definite period, and is there supported by his guardian for five successive years, with no intention on the part of the *guardian* to remove him, the settlement of the ward, in that town, will be thereby fixed.

FROM the papers in the case, (the *briefs* of the counsel and the opinion of the Court,*) it appears, that this was an action to recover of the defendant town for the support of one *Daniel Bates*, an insane pauper, whose legal settlement, the plaintiffs allege, was in Hebron. From the year 1849 to the time this action was brought, the said Bates had been under guardianship.

*Record, Walton & Luce*, for plaintiffs, made the following points:—

1. That an insane person is capable of gaining a settle-

* No copy of the case came to the hands of the Reporter.

ment in his own right, by five years residence. *Augusta* v. *Turner*, 24 Maine, 112; *New Vineyard* v. *Harpswell*, 33 Maine, 193.

2. That a residence, established for an indefinite period, the person having no established home any where else, constitutes, for the time being, a legal home, and, if continued for five years, will give a settlement under our pauper laws, however precarious may be the tenure of such a home. *Wilton* v. *Falmouth*, 15 Maine, 479.

3. That, if an act of the will is necessary to establish a home, the will of the guardian of an insane person is sufficient. *Holyoke* v. *Haskins*, 5 Pick., 20.

*T. A. D. Fessenden*, for the defendants, argued that this case was distinguishable from the cases cited by the plaintiffs' counsel, and all other cases in this State, where it has been held that a person *non compos mentis* has himself gained a settlement by a residence of five successive years.

In this case, the pauper has been insane, and incapable of the *intention* that is required, in order to acquire a settlement by residing in a town. "He must be there with an intention to remain, or, at least, without an intention of removal. *Turner* v. *Buckfield*, 3 Maine, 229.

The case cited by the plaintiffs, *Holyoke* v. *Haskins*, 5 Pick., 20, decides that the guardian of an idiot has the same power over his ward, that the parent has over his child. He has the custody of his person and may appoint his place of residence. His domicil may be changed by the direction, or with the assent of his guardian, whether express or implied.

It is the intention of the *guardian* of an insane person, combined with his actual residence, that gains a settlement for his ward.

Did *Bates* "reside and have a home" in Hebron, for five continuous years? He boarded at Keen's, in that town, for more than five years; but was it the intention of the guardian when he placed him there, that he should remain that time, or, at least, without an intention of removing him? In *Warren*

v. *Thomaston*, 43 Maine, 406, the Court say, "dwelling place and home mean some permanent abode or residence, *with an intention to remain*," and cite *Turner* v. *Buckfield*, 3 Maine, 229; *Jefferson* v. *Whitefield*, 19 Maine, 293.

The guardian paid his ward's board by the week. He testifies "I hired him kept by the week, for no definite length of time. I placed him there until some circumstances took place that I could move him to a better home." It was not, therefore, the intention of the guardian that Hebron should be his permanent home. He did not fix upon that place as the permanent residence of his ward, without an intention of removing him.

The opinion of the Court was drawn up by

KENT, J.—It has been settled in the cases of *Augusta* v. *Turner*, 24 Maine, 112, and *New Vineyard* v. *Harpswell*, 33 Maine, 193, that a person *non compos*, or insane, may acquire a settlement in his own right by five years continuous residence in a town.

It had before been decided that such persons might acquire a settlement by dwelling and having a home in a town at the date of its incorporation, or of the passage of the Act of 1821.

The facts in this case clearly establish the residence of the pauper in Hebron, for more than five successive years, and under circumstances that would fix his settlement, if he had been of sound mind. The cases before cited determine that this fact of insanity will not prevent such residence from operating to establish a settlement.

In this case, it appears that the pauper had a guardian, and it is contended that this fact distinguishes it from those referred to. It is urged that, as a continuing residence, to be operative under the pauper law, must be with an *intention* to remain, or without any present intention to depart, that the guardian's will and intention is substituted for the pauper's, and that he stands wholly in his place and speaks and acts for him.

If this proposition were granted, we think the facts show that the guardian's intention was, that the pauper should take up his residence in Hebron for an indefinite time, and that he did not, during the five years, have any intention that he should depart. He says he "never had another home in contemplation for him than Keen's; that he hired him kept at Mr. Keen's for no definite length of time." He also says, that he "placed him there till some circumstances took place, that I could move him to a better home." There is no evidence that these circumstances did take place, nor that the new home contemplated was in another town, nor that the guardian had any intention to remove him from Hebron during the five years.

The pauper was, therefore, a resident, having his home the requisite number of years, in the defendant town, and had no intention himself, or by guardian, to change it during those years. *Defendants defaulted.* —

*Judgment for amount claimed in writ, and interest from date of writ.*

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

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ANDROSCOGGIN RAILROAD CO. *versus* AUBURN BANK.

*It seems*, if one pledges, as collateral, a demand on which interest is accruing at stated periods, some of which occur before his debt, so secured, becomes due, such pledge necessarily implies an authority to the pledgee, to collect and receive the interest as it becomes payable, and hold it, on the same terms as the demand itself; especially, if the collateral be a bond, with interest coupons attached, which the pledgor does not cut off, before the bond is pledged.

Where a railroad company pledged *its own bonds* as collateral for the payment of debts contracted by the company, and the pledgee cut therefrom and collected of the agents of the company the interest coupons that afterwards became due, such acts cannot operate as a conversion of the bonds by the pledgee.

REPORTED from *Nisi Prius* by GOODENOW, J.

TROVER, to recover certain railroad bonds. The most material facts, appearing from the report, are, in substance, that the plaintiffs hired of the defendants, on the 24th day of September, 1855, one thousand dollars, upon their promissory note, signed for them, by their treasurer, as principal, and by seven persons, as sureties. [From the testimony in the case, it appeared that the sureties were directors of the plaintiff corporation.] The plaintiffs pledged to the bank, as collateral security for the payment of the note, $2000, par value, in bonds of the plaintiff railroad company, with semi-annual interest coupons attached.

On the 15th of December following, the defendants discounted for the plaintiffs a similar note for $500, with $1000 in bonds, as collateral. And, on the 17th of January, 1856, a third note for $1000 was discounted, with $2000 in bonds as collateral for its payment.

These notes were renewed from time to time, the bonds and coupons remaining pledged for the security of each successive note.

On January 24th, 1857, the above notes were renewed by a similar note for $2800, on four months, and this was renewed May 23d, 1857, by a similar note for $3000, on six months, maturing November 14th, 1857, the bonds and coupons remaining pledged as collateral security for each successive note.

This last note remained overdue till December 28th, 1857, when it was renewed by two notes, each dated December 26th, 1857, payable in six months, one for $2000, and the other for $1000, both of a similar character to the one first described.

To secure these last two notes the aforesaid bonds and coupons of the plaintiff railroad company, amounting at par to $6000, were left pledged in the hands of the bank as collateral security for said notes. On a portion of the bonds, the coupons were payable on April 1, 1857, and thence semi-annually every six months; and on the remainder of the

bonds the coupons were payable June 1, 1857, and thence every six months.

All these coupons, except one, were attached to the bonds when first left by the plaintiffs, but such as had become payable, namely, two coupons from each bond, were cut off by defendants previous to October 12th, 1857, as hereafter stated.

The defendants cut off from the bonds whatever coupons were payable up to October 12th, 1857, and on that day sent them to the Merchants' Bank for collection, but they were not then paid, but were again presented January 15th, 1858, and they were then paid out of funds provided by the plaintiffs. The amount so received by the defendants, being $354, was retained by the bank, in the place of the surrendered coupons, to secure the payment of the notes, as stated by the officers of the bank, and no part of said notes has since been paid; and the whole amount, principal and interest, minus the said $354, received on said coupons as aforesaid, is still due and uncollected.

The plaintiffs placed in the Merchants' Bank, Portland, money for the payment of such coupons as were attached to bonds negotiated and were due. The defendants presented the coupons, cut off as above, at the Merchants' Bank and received the money from the officers of the bank, who delivered the coupons to the plaintiffs, in whose hands they have ever since remained.

Previous to such presentation and payment, notice had been published by plaintiffs—"that all overdue coupons of the mortgage bonds of the Androscoggin Rail Road Company, will be paid on the fifteenth day of January, 1858, at the Merchants' Bank in Portland."

Similar, and other bonds, had before this, been negotiated by the plaintiffs with other parties, and were absolutely held by such parties.

Before commencement of the suit, plaintiffs demanded of defendants payment of the bonds at $100 or par value, and offered to take the aforesaid notes in part payment therefor.

The depositions of several witnesses accompanied the report, as part of the case.

The Court to enter a nonsuit or default as the rights of the parties require.

The depositions in the case are somewhat voluminous. The bearing of the testimony on some points is indicated by the counsel in their arguments.

*Shepley & Dana,* for plaintiffs.

The bonds in controversy were pledged as collateral security for the payment of certain of the plaintiffs' notes, which the defendants held. They were signed by the directors, in their individual capacity, as sureties, with the express understanding, as stated by one of the witnesses, that the funds of the company were to take care of them. The sole interest of the sureties was, that the value of the collateral should not be diminished by the conduct of the bank.

The plaintiffs had actually sold and transferred other of their bonds, the interest on which they were to pay as it accrued.

Before they had raised the money for this purpose, the defendants, on or about October 12, 1857, cut off from the bonds lodged with them by the plaintiffs, as collateral to their six months note, dated May 23d, 1857, all the coupons due at that date, and presented them at a bank in Portland to be paid. The case shows that the note was not then due. Subsequently the note was renewed by two six months notes, dated Dec. 28, 1857; and, on the 14th January, 1858, before these notes matured, the defendants again presented the coupons at bank for collection, and, on the 15th, received the whole amount, viz., $354.

This severance and collection of these coupons was an unjustifiable act on the part of the defendants, and amounts to a conversion of the bonds, of which the defendants were mere bailees.

The law is well settled, that the bailee may only exercise any other acts than safe keeping of the thing pledged, where

the use of the thing may be necessary for the preservation of the deposit, or is authorized by the depositor. Story on Bailments, § 89.

It cannot be pretended here, that there was any previous authority given by the plaintiffs that the coupons should be collected, or any ratification of the act after it was done. The testimony of the president, who pledged the bonds, is explicit.

Defendants may claim that they were justified in presenting these coupons by the notice, because it includes "*all overdue coupons.*" The bonds had not been put in the market or sold. They, and the coupons annexed, were the property of the plaintiffs, and the coupons were no more overdue and payable by the company, in the sense of the notice, or in a legal sense, than those which remained in the treasurer's safe, awaiting a market.

The case does not come within the class in which the deposit will be diminished in value unless used; but it may be contended that there were two parties to the notes, the makers and the indorsers or sureties, and, that it was the duty of the bank to the sureties, to collect the interest on the deposit as it matured.

Under the facts in this case the position is wholly untenable.

The bailee has no right to do more than safely keep the pledge, *unless it is for the interest of the pledgor or his sureties, that the pledge be used.*

It will not be pretended that it was for the interest of the plantiffs that the coupons should be collected, for, if paid, it would be with plaintiffs' money. And the interest of the sureties was identical with that of the plaintiffs.

Until breach of condition, the bailee has no other right over a pledge of this nature than that of possession. Courts look with great jealousy on any exercise of dominion on the part of the bailee, who is not allowed to sell the pledge, *even after breach* of condition. The subject is much discussed in *Wheeler* v. *Newbold*, 5 Duer, 29, and 2 Smith, 392, where it

is held that, until after failure to perform the principal obligation, the bailee cannot collect the interest on the collateral.

In the case at bar the coupons were collected months before the notes were payable.

*C. W. Walton*, for the defendants.

The bonds were *pledged*, not *mortgaged*. The contract by which they were pledged was entirely silent as to the power of the pledgees over them. It laid no restrictions; imposed no terms. The law is to determine what rights were conferred, and what duties were imposed upon them.

From an examination of the authorities, it will be found, that it is not only the *right*, but the *duty* of holders of pledged bonds, notes and other like securities, to receive the money due upon them as fast as it becomes payable; and, if it is not paid voluntarily, to demand it.

This is precisely what the defendants, in this case, did; nothing more, nothing less. They demanded and received payment of the overdue coupons.

The plaintiffs contend that this was an unjustifiable act on the part of the defendants and amounted to a conversion, not only of the coupons collected, but of all the other coupons, and the bonds themselves; so that an action of trover can be maintained for them, notwithstanding the notes, to secure which they were pledged, have never been paid. The defendants, on the other hand, contend that, in all this, they have done no more than it was their right and duty to do.

It was their *right*, because their own security depended upon it. It was to the collateral alone they looked for safety against loss. The overdue coupons could then be collected, and a small amount thus realized from the collateral, while delay might occasion a loss of the whole.

It was their *duty*, because, having the possession and control of these securities, good faith to the owners, whoever they might be, and the sureties on the notes to secure which they were pledged, required the defendants to take care that no loss or depreciation in value should take place through

their negligence in not presenting them for payment at the proper time, and while payment could be obtained. If, through the lapse of time and the insolvency of the responsible parties, the coupons collected by defendants had been lost, would not the sureties have justly complained? Would they not have said to the defendants, "if you had presented these coupons for payment at the proper time, they would not have been lost; the loss is the result of your negligence, and you must bear it."

Generally, if not universally, it is so clearly for the advantage of the pledgor to have his securities collected for him by the pledgee, that few cases will be likely to arise where he will be the complaining party for such action on the part of the bailee. Take the case of a pledged note, payable on time, with a poor maker and a good indorser. Is it not the duty of the bailee to present the note for payment when it becomes due, and, if paid, receive the money, if not, notify the indorser? In fact, in all cases, where pledged securities are liable to become worthless or greatly depreciated in value from lapse of time, is it not the duty of the bailee to guard against such loss by the use of reasonable efforts to collect the money as fast as it becomes due?

It is certainly the right of debtors to pay their bonds, and other like securities, as fast as they become due. And if they are pledged, what is to be done? If the pledgee cannot rightfully receive the pay, how can payment be made? No one else can receive it, for that would defeat the purposes of the pledge.

In this case, the defendants did not sell the bonds or coupons. They only surrendered the overdue coupons to the plaintiffs or their agent, on the receipt of payment of the amount due upon them. And the plaintiffs themselves have ever since had possession of them. In doing this, the defendants violated no express agreement, for none was ever made. Certainly they were under no moral or equitable restraint, for their debt had been overdue and dishonored for nearly, if not quite, two years.

If, then, these defendants had a right, under the circumstances, to present these overdue interest coupons and receive the amount due upon them, it will require no additional argument to prove they had a right to surrender them to the plaintiffs, for such is the express stipulation in the bonds, that the interest will be paid on *surrender* of the coupons. If to surrender, of course they had a right to separate them from the bonds, for they could not otherwise be surrendered. In fact, *coupons*, as their name indicates, are made to be cut off.

To the point, that the bailees had the right to receive payment on the collateral, when the whole or a part of it becomes due before the principal, counsel cited and commented upon *Wheeler* v. *Newbold*, 2 Smith's N. Y. Rep., 392; *Russell* v. *Hester*, 10 Ala., 535, (7 U. S. Dig., 77, § 19); *Com. Bank of N. O.* v. *Martin*, 1 La. Ann. R., 344, (9 U. S. Dig., 62, § 24); *Chambersburg Ins. Co.* v. *Smith*, 11 Penn. State R., (1 Jones,) 120, (10 Dig., 58, § 14); *Lee* v. *Baldwin*, 10 Geo., 208, (13 Dig., 74, § 24); Am. Leading Cases, vol. 2, pp. 349, 350.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiffs hired money of the defendants, giving their promissory note therefor, and pledging, as collateral security, some of their bonds, with interest coupons attached. Their note was renewed from time to time, without payment of any part; and, some of the coupons upon the bonds becoming due in the mean time, the defendants presented them for payment, and received the amount due thereon. The plaintiffs claim that this was a conversion of the bonds; and they bring this action of trover for the value thereof.

If the question were really before us, we probably should come to the conclusion that a pledgee of credits, to secure a debt due from the pledgor to himself, might properly collect the accruing interest, even before his own demand is due, and hold the amount in pledge. Such an act has no analogy to the using of a chattel by the pledgee thereof. If one pledges as collateral, a demand on which interest is accruing at stated

periods, some of which occur before his debt, so secured, becomes due, such pledge necessarily implies an authority to the pledgee to collect and receive the interest as it becomes payable, and hold it on the same terms as the demand itself for the principal. Especially is this the case where the debtor pledges as collateral a bond, with interest coupons attached, which he might cut off before pledging the bond, but does not do it.

But the case at bar involves no such question. The plaintiffs pledged as collateral, not the bonds of third persons, but *their own bonds.* On these bonds, *they themselves,* by their agents, paid the accruing interest coupons to the defendants. That such payment, voluntarily made by themselves, with the knowledge, or the means of knowledge, in regard to the whole matter, operated as a conversion of the bonds by the defendants, is a proposition that requires no consideration.

*Plaintiffs nonsuit.*

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

## POLLY GAMMON *versus* BENJAMIN P. BUTLER.

Although a contract, not in writing, for the sale of land, is within the statute for the prevention of frauds, and cannot be legally enforced, it, nevertheless, is morally binding, and for the purposes of justice and equity, may, in some cases, be upheld.

*Thus*, the party advancing money under such a contract cannot recover it back, if the other party has the power and has been ready, on his part, to perform the contract.

Where one had received, from his wife, money of her own, for a specific purpose, and without her knowledge pays it to a person with whom he had orally contracted to purchase a farm, in part payment therefor, and fails to pay the balance, the wife cannot recover back the money from the person to whom it was paid by her husband.

For the protection and encouragement of trade and commerce, a different rule has been established, in relation to money belonging to one person and wrongfully or even feloniously taken from him and paid to another, without his knowledge or consent, than that, which applies to other kinds of personal estate.

REPORTED from *Nisi Prius* by TENNEY, C. J.

THIS was an action for money had and received, in which the plaintiff claimed to recover of the defendant the sum of one hundred dollars. To sustain the action, her counsel called her as a witness; and her testimony tended to prove, that she delivered to her husband one hundred dollars in bank bills, to be carried by him to New Sharon and given to her children, residing there; that the money was hers, a part of the proceeds of the sale of some real estate she owned in her own right; that she never gave any authority or consent that her husband should pay it to, or deposit it with the defendant; and, when she was informed the defendant had received it, she demanded it of him.

From other testimony in the case, it appeared that the plaintiff's husband, sometime before he received the money, had made a contract, not in writing, with the defendant to purchase a farm of him, and to pay $200, and give his notes for the balance of the purchase money to be secured by a mortgage of the farm. He paid to defendant the $100, he

had received from his wife to take to her children, but *Gammon* did not inform him that the money was his wife's; and promised that he would soon pay the remaining $100 and give the notes and mortgage to complete his contract to purchase the farm; but *Gammon* failed to do so.

The defendant has ever since been ready to perform his part of the contract.

*Record & Luce*, for plaintiff.

*N. Morrill*, for defendant.

The opinion of the Court was drawn up by

MAY, J.—The verbal contract, made by the plaintiff's husband with the defendant for the purchase of the Prairie farm, so called, seems to have been a fair one. No fraud or misrepresentation is pretended. The defendant received the money, now sought to be recovered, in pursuance of the contract, and in part payment for the farm which he was to convey to the husband upon, and only upon, the performance of certain conditions. The evidence shows that he has always been in a condition to perform his part of the contract, and ready and anxious to do so. As between him and the other party to the contract, he appears to be without fault.

In view of these facts, the contract, though within the statute of frauds, is not utterly void; and, nothwithstanding it cannot be enforced at law, is morally binding, and for the purposes of justice and equity, may, in certain cases, be upheld. Thus, the party advancing money, under such a contract, cannot recover it back so long as the other contracting party is able and willing to perform on his part. To this extent, it is well settled that an oral contract for the purchase of lands, or an interest in lands, will be upheld. *Richards* v. *Allen*, 17 Maine, 296, and *Coughlin* v. *Knowles*, 7 Met., 52, are cases directly in point.

If we assume that the identical money paid to the defendant belonged to the plaintiff, and that it was paid by her husband without her knowledge or consent, in violation of the

specific purpose for which he received it, will the plaintiff stand upon any better ground than her husband would, if the money belonged to him? The facts show that the defendant took the money in the usual course of business, and upon a consideration sufficient in the eye of the law to entitle him to retain it as against the husband, and without notice or reason to suspect that the money or any portion of it belonged to the plaintiff. Under such circumstances, we do not think the plaintiff can recover. Had the property her husband put away been any thing else but money, she might have reclaimed it, or in some appropriate action have recovered its value.

But, for the protection and encouragement of trade and commerce, a different rule has been established in relation to money belonging to one person, and wrongfully or even feloniously taken from him, and paid to another without his knowledge or consent, than that which applies to other kinds of personal estate. In such a case, notwithstanding the party paying it away had no authority or right to use it, still, if the party who receives it took it in the usual course of trade or business, and for a valuable consideration, in ignorance of the circumstances by which the payor came by it, he will be entitled to hold it as against the former owner from whom it was tortiously taken or stolen. Such is the law, and no case has been cited to the contrary. *Miller* v. *Race*, 1 Burr., 452, and several cases there cited are directly in point.

So, too, the same doctrine is recognized with approbation in the case of *Mason* v. *Waite*, 17 Mass., 560, by PARKER, C. J., who, in closing the opinion in that case, says—"had Sargeant," the stage-driver, who received the money from the plaintiff to carry to Boston for a specific use, "paid the money to an innocent person for a valuable consideration, or to satisfy a debt of his own, the case might have been different; as it would be mischievous to require of persons, who receive money in the way of business or payment of debts, to look into the authority of him from whom they receive it." In this case, the plaintiff recovered because his money went into

the hands of the defendant as the winner of it at a faro table.

That bank notes or bank bills are generally treated as money, the same authorities which have been cited, fully show. In *Miller* v. *Race*, where the same ground was taken which has been urged upon us in behalf of the plaintiff, Lord MANSFIELD says—"the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz.,—to goods, or to securities, or documents for debts. Now they are not goods, not securities, nor documents for debts, nor are they so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes." In our judgment, any rule of law tending to destroy that currency would be highly detrimental to the interests of trade and business, and, therefore, against public policy. That bank bills, in this and other States, are regarded as money for all purposes but that of a legal tender, and for that also when not objected to, appears from the whole current of authority. Parsons, in his valuable treatise on Commercial Law, chapter 9, § 4, p. 90, when speaking upon the subject of bank notes, says—"they are intended to be used as money, and, while a finder or one who steals them has no title himself against the owner, still, if he passes them away to a *bona fide* holder, that is, a holder for value without notice or knowledge, such owner holds them against the original owner." In view of the fact that the defendant in this case is such a holder, and of the preceding authorities, which are based upon a wise public policy, this action cannot be maintained. *Plaintiff nonsuit.*

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

ELBRIDGE G. HINDS *versus* DANIEL S. JONES, *Executor.*

An action does not lie against the husband, as an executor *de son tort*, for acts of his wife, done without his knowledge. Otherwise, where he advises or aids her in the commission of the wrongful acts; for every one, thus participating, becomes a principal.

REPORTED by KENT, J.

The plaintiff claims that Joseph Additon, at the time of his decease, was indebted to him, and brings this action against the defendant, as executor *de son tort*, of the estate of said Additon, to recover the amount of the alleged indebtedness.

The plaintiff offered to prove his account as declared on, and also, that Mary A. Jones, daughter of the deceased and wife of defendant, embezzled goods and effects of said deceased, liable to administration, without taking out letters testamentary thereon and giving bonds accordingly, and performed other acts, sufficient to render any person (other than a married woman) liable to an action of the creditors, or other persons interested, as an executor, (*de son tort,*) according to R. S., c. 64, § 32, &c., and that all these acts were done by her after the decease of said Additon and while she was the wife of the defendant.

Plaintiff further offered to prove, provided the action could not be maintained on the foregoing evidence offered, that of all said acts of his wife, defendant had knowledge at the time, and counselled, advised, consented thereto, directed her in the same, and assisted therein, as her husband.

Thereupon the parties consent that the action be reported to the full Court, and, if the Court shall be of opinion that the action can be maintained against the defendant on the foregoing proof first offered, or, if it can be maintained on the whole proof offered, the case shall stand for trial; otherwise the plaintiff to become nonsuit.

*Goddard & Goodenow*, for the plaintiff.

*Williams*, for the defendant.

The opinion of the Court was drawn up by

MAY, J. — The defendant is sued as an executor *de son tort*. The acts relied upon to charge him as such, are the acts of his wife. They were committed during the coverture, and are conceded to have been such as ordinarily would render the person committing them liable as an executor in his own wrong. Two questions are presented to our consideration. 1. Is the defendant liable in this suit by reason of the acts of his wife, committed without his consent or knowledge? 2. If not so liable, is he liable if he had knowledge of the acts when committed, "and counselled, advised, consented to, and directed her in the same, assisting therein as her husband?"

An executor *de son tort* is one who derives no authority from the testator, but who assumes the office by virtue of his own interference with the estate of one deceased. He intrudes himself into the office without lawful authority. Toller on Executors, 37; 1 Bouvier's Law Dic., 389, under the words "Executor *de son tort*, and authorities there cited. Our Revised Statutes, c. 64, § 32, are in affirmance of the common law in this particular. Such intermeddling, or intrusion, is in effect holding out one's self as executor, and authorizes the conclusion that he hath a will of the deceased wherein he is named as executor, but hath not yet taken the probate thereof. 12 Mod., 471. Such conclusion is to be inferred from the character of the acts. 2 Greenl. Ev., § 343.

The unauthorized acts of the wife, committed in the absence of her husband and without his knowledge, do not seem to lay the foundation for any such conclusion, as against him. They authorize no such presumption. Such acts cannot be deemed his acts, within the meaning of our statute, nor of the common law. Any legal liability for damages, occasioned thereby, arising wholly from the marital relation, if any such liability exist, does not make them his acts. He cannot, therefore, be charged as an executor *de son tort* on account of them. It would be manifestly unjust, especially since our statute depriving the husband of all interest in her estate, to

hold him liable as an executor in his own wrong, for the acts of his wife in relation to all such property of persons deceased, as she might choose to interfere with, or claim as her own, by reason of heirship or otherwise, without his knowledge or consent.

Whether a married woman can, in any case, be charged as an executor *de son tort*, need not now be determined. That a *feme covert* is not capable, at common law, of the office of executrix, without the consent and concurrence of her husband, is very clear. 2 Black. Com., 503; 2 Bacon's Abr., Tit. Executors and Administrators, 374. So, too, under our Revised Statutes, c. 64, § 17, if a *feme sole*, being an executrix or administratrix, marries, she thereby vacates the trust as fully as if dead. But if the wife, during coverture, is incapable of being an executrix, it by no means follows that her husband may be charged as an executor *de son tort* by her unauthorized acts.

In regard to the second question, there can be no doubt but the husband is to be regarded as having himself done all such acts as were committed by the wife, with his assistance, direction or advice. In the commission of such tortious acts all who participate are principals. This is the well settled law in cases of trespass. Nor is it necessary, in order to make one a principal, that he have a manual participation in the act. He may not even be present. It is sufficient if he aid, advise or direct. The acts of the wife, therefore, when committed under such circumstances, are the acts of the husband, and will render him liable as executor *de son tort* in the same manner as if committed by himself.

*Action to stand for trial.*

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

JAMES PENLEY *versus* ALVIN WHITNEY.

In an action on a *penal* statute the declaration must allege the offence to have been done *contra formam statuti*, or in language equivalent thereto, unless the facts alleged constitute an offence or ground of action at common law.

Penal actions are not embraced in § 12 of c. 131, R. S., by which the words "contrary to the form of the statute" are made immaterial in *indictments* and *complaints*.

In a penal action, where the declaration states the offence in the language of the statute, and concludes with the words, "whereby, by force of section two, (creating the offence,) and twenty-three, (providing the remedy,) of the twenty-third chapter of the Revised Statutes of the State of Maine, an action has arisen to the plaintiff," &c., such allegation was held to be equivalent to alleging the offence to have been committed "contrary to the form of the statute."

EXCEPTIONS from the ruling of MAY, J.

This action was not upon the law docket, but comes up under the provisions of c. 77, § 18.

It was commenced before a justice of the peace, from whose judgment the plaintiff appealed. At *Nisi Prius*, the defendant filed a general demurrer to the declaration in the writ, which was joined by the plaintiff. The Court overruled the demurrer and adjudged the declaration to be sufficient; to which ruling the defendant excepted.

The action is to recover of the defendant the penalty referred to in chapter 23, §§ 2 and 23 of Revised Statutes, for allowing cattle to go at large in the highway, without a keeper.

*Record & Luce*, in support of the exceptions.

*Goddard & Goodenow, contra.*

The questions argued in this case, appear from the opinion of the Court which was drawn up by

CUTTING, J.—Since the opinion in *Lee* v. *Clarke*, 2 East's R., 333, pronounced in 1802, it has been invariably held by subsequent decisions, both *English* and *American*, that in an action on a penal statute the declaration must allege the fact

to be done *contra formam statuti*, or *in language equivalent thereto;* unless the same facts would constitute an offence or ground of action at common law; and we are not disposed, at this late day, without the aid of legislation, to obliterate so many legal monuments of the law, to avoid defects in the declaration now before us, if defects there be. A recent statute has rendered those words immaterial, in *indictments* and *complaints*, but *penal* statutes, not being therein mentioned, still retain that one attribute of legal strictness.

It has been also held, that the words, whereby and by force of the statute, an action hath accrued, &c., are not equivalent to the words, contrary to the form of the statute. But the declaration in this case proceeds further than any other controverted declaration ever before presented. After stating the offence in the words of the statute, it concludes in the language following:—"Whereby, by force of sections two, (creating the offence,) and twenty-three, (providing the remedy,) of the twenty-third chapter of the Revised Statutes of the State of Maine, an action has arisen to the plaintiff," &c.

Now, while we adhere to the strictly technical rule, founded on good considerations, no doubt, although difficult to be perceived by the practical and common mind, still we would not extend it, unless an omission so to do would tend to the prejudice of the defendant. Not being at present so impressed, the *Exceptions must be overruled.*

RICE, APPLETON, GOODENOW and DAVIS JJ., concurred.

# COUNTY OF FRANKLIN.

## INHABITANTS OF JAY *versus* INHABITANTS OF CARTHAGE.

An officer, while in office, may amend his records according to the facts, provided the rights of third persons are not thereby prejudiced.

To prove the doings of selectmen, in committing a person to the Insane Hospital, their original record is admissible, as well as a transcript, or duly authenticated copy of it.

The town from which a person is legally committed to the Insane Hospital, is authorized by statute to recover the expenses incurred of the town in which such person has his legal settlement.

To entitle the plaintiffs to recover in such case, they must give notice to the defendants within three months after such expenses were paid, as in ordinary pauper cases.

When no payment is made by the defendants, a notice once given is sufficient to charge them for all sums expended for three months prior to such notice, and all sums afterward accruing up to the commencement of the action, unless barred by the statute of limitations.

When such notice is signed by the *selectmen*, and it does not appear that other persons had been chosen as *overseers of the poor*, it will be presumed that the selectmen acted in that capacity, and the notice be held to be sufficient.

The same presumption applies when the notice is directed to the *selectmen* of the defendant town. It will be held valid, unless it appears that the *selectmen* were not, *ex officio, overseers of the poor*.

From the known practice of towns in this State to choose but three selectmen, it will be presumed that that number was chosen, unless the contrary appears.

A judgment on *nonsuit* in a former case between the same parties, for the same cause of action, is no bar to a second suit, when it appears that the former case was not tried on the merits.

ON REPORT by GOODENOW, J.

ASSUMPSIT to recover of the defendants the expenses of committing to the Insane Hospital, and amounts paid at said Hospital, for the support of Lydia B. Smith, wife of Laban

Smith, whose settlement was alleged to be in the defendant town.

The defendants denied all the allegations in the declaration, except the payment of the amounts alleged to have been paid.

The plaintiffs introduced *Laban Smith*, who testified that he was married to Lydia B. Smith in 1848, and moved into Carthage in July of the same year, and resided there until October, 1854, without intermission, or receiving aid as a pauper.

Also, *Joshua Lake*, who testified that a notice to the defendants was mailed at North Jay or Wilton, in April or May, 1857, and was afterwards produced by the defendants in another action between these parties. He also testified to other notices, sent after payments made subsequently to the first notice, but, in the view taken by the Court, this evidence does not become material.

Also, the notice spoken of by the last witness. It was directed to the *selectmen* of Carthage, and was signed by two persons calling themselves *selectmen* of Jay.

Also, the original record of the proceedings of two of the selectmen of Jay in committing the said Lydia B. Smith to the Insane Hospital. The record purported to be amended by said selectmen, while still in office.

The defendants introduced a certified copy of said record as it was before it was amended.

Also, the record of a judgment, in a case between the same parties, in which the plaintiffs sued for the first item in the account sued for in this action. In that case judgment was rendered for the defendants on a *nonsuit*.

The plaintiffs introduced parol evidence showing that said judgment was not rendered on the merits.

The case was then submitted to the full Court upon so much of the evidence as was legally admissible.

Only so much of the evidence is here reported as bears on the questions of law, raised in the case, and decided by the Court.

*R. Goodenow*, for plaintiffs.

The record of the doings of the selectmen, being in conformity with the requirements of the statute, is proof of the facts therein stated. *Eastport* v. *East Machias*, 35 Maine, 402; *Eastport* v. *Belfast*, 40 Maine, 262.

The amendment of this record, (if necessary,) was properly made.

The judgment in the former action is no bar to this, inasmuch as that case was not decided on its merits. *Lord* v. *Chadbourne*, 42 Maine, 443, and cases there cited.

*J. S. Abbott*, for defendants.

I. There is no *legal* evidence in the case, of the alleged inquisition and commitment. The selectmen are required to keep a record and furnish a copy, &c.

The only *legal* evidence is a copy of the record authenticated by the selectmen. The original document is not admissible. *Eastport* v. *East Machias*, 35 Maine, 402.

The copy introduced by the plaintiffs is not sufficient. It does not appear by that, that the selectmen followed the requirements of the statute.

It does not appear, even if the original record is admissible, that the proceedings were in accordance with the statute.

It does not appear that more than *two* selectmen were present and acting.

It would seem that, inasmuch as they act judicially in such cases, that all must be present.

But in this case it does not appear, even, that a majority acted.

Towns may choose *three*, *five* or *seven* selectmen. There is no proof as to how many were chosen. The Court can no more conjecture that three were chosen, than that seven were. And the burden to show that a majority acted, being upon the plaintiffs, they must fail.

II. There was no legal notice proved. The notice was addressed to the *selectmen*, and signed by *two selectmen*. It

should have been addressed to the *overseers* and signed by the *overseers.*

III. The record of the judgment in the former case is a bar to this suit. The parol evidence introduced by plaintiffs, in relation to it, was not admissible. *Oxford* v. *Paris,* 33 Maine, 179; *Bangor* v. *Brunswick,* 33 Maine, 352.

The opinion of the Court was drawn up by

CUTTING, J.—That an officer, while in office, may amend his records, according to the facts, has been so long settled as to become, almost, an axiom of the law, subject, however, to certain limitations and reservations, as to the rights of third parties, which do not arise in this case.

A question has been raised, whether the original record was admissible, instead of a certified copy, and we have been referred to the case of *Eastport* v. *Machias,* 35 Maine, 402, where the converse of the proposition was urged by counsel; but the Court held that the doings of the selectmen "must be proved by the production of that record, or by a transcript or duly authenticated copy of it." An authority which is directly opposed to the party citing it, and which sustains the admissibility of the record.

The proceedings of the selectmen of *Jay* appear to have been conformable to the requirements of the statute, under which they were had; the insane person was legally committed to the hospital, and her expenses created an immediate liability on the plaintiffs, which they have discharged; and they now seek to recover the same of the defendants, in whose town such insane person had her settlement at the time, which they are authorized by the statute to do, "in the same manner as if incurred for the ordinary expenses of a pauper."

To recover such expenses, it is incumbent on the plaintiffs to show that they gave written notice to the defendants, within three months after such expenses were paid, of their claim for reimbursements. *Bangor* v. *Fairfield,* 46 Maine, 558.

It should not be inferred, however, that unless the claim due at the time of the first notice was paid by the party notified, any subsequent notice is necessary as preliminary to the recovery of subsequent advancements. In the case under consideration, no payments have been made by the defendants, and, therefore, if any notice has been legally proved, it will be sufficient to charge them for all sums expended three months prior to such notice, and all sums afterwards accruing, unless barred by the statute of limitations.

The plaintiffs contend, and have introduced evidence, if legally admissible, tending to show, that they have at four different times given such notices to the defendants, who, notwithstanding, insist that the proof is wholly defective, which proposition is to be considered.

*Joshua Lake,* a witness called by the plaintiffs, testified, that "the first notice was mailed at *North Jay* or *Wilton*, in April or May, 1857, and produced by the defendant town in another action between these parties." The original notice, (marked 3 in the report,) we understand, was produced at the trial, and thus identified by the witness, which sufficiently establishes the fact that it was received by the persons to whom directed.

But, it is urged that the notice was signed by the selectmen and not by the overseers, and therefore was not such an official notice as the statute requires.

By the ninth section of R. S., 1840, c. 5, each town, at the annual meeting in March or April, is required to choose "three, five or seven persons, inhabitants of the town, to be selectmen and overseers of the poor, when other persons shall not be chosen to that office." The statute of 1821, c. 122, § 3, of which the preceding section is a transcript, received a judicial construction in the case of *Garland* v. *Brewer*, 3 Maine, 198, to the effect, that when it does not appear that a town has elected any overseers, the presumption is, they had not, and the selectmen act in that capacity. This decision was cited with approbation and affirmed in *Ashby* v. *Lunenburg*, 8 Pick., 563.

It is true that, in *Rowe* v. *Beale*, 15 Pick., 123, the Court remark, that—"The statute having provided that, in certain cases, the functions of overseers shall be discharged by selectmen; when an act is done, *which, upon the face of it* indicates that it could only be done by the selectmen, acting as overseers, when there are no overseers, there is a sufficient notice that they were acting in that capacity." Now, upon the face of the notice under consideration, it appears that the selectmen were acting in a twofold capacity; *first*, as selectmen, in determining the insanity of the person and issuing the process of commitment to the hospital; and *secondly*, as overseers, in notifying the defendants of their proceedings and calling on them for reimbursement, thus strengthening the presumption that they were *ex officio* overseers.

*Again*, it is contended that the notice was improperly directed; it being to the selectmen instead of the overseers in the defendant town. But the same presumption which we have already considered as arising in favor of the plaintiffs, would equally attach to the defendant town, until it was repelled by some evidence of the existence of a board of overseers in addition to that of selectmen. The plaintiffs, in thus addressing their notice, assumed the responsibility, which, so far as the testimony discloses, or rather fails to disclose, was justifiable.

It is *further* contended that two of the selectmen only have acted, and that there is no evidence as to the number of the selectmen chosen by the town, whether three, five or seven, as authorized by statute. Under the circumstances, this is a very sharp point raised by defendants' counsel, and one probably not contemplated by the plaintiffs, when they agreed upon the report; and, if the point raised be successful, it will only disclose another instance of the folly of too readily withdrawing a good cause from the jury and the rulings of the Judge at *Nisi Prius*, and referring the same for a final decision to the law Court, on a report full of *latent* technical objections. But it is our duty to consider the question, and give the party raising it, all his legal rights and ad-

vantages, which we will now proceed to do in the language of the Court in *Nottingham* v. *Barrington*, 6 N. H., 306,—"it is objected, that the notice, of the sums expended for the support of the paupers, does not appear to have been signed by a major part of the selectmen. But, it is well known that towns in this State, very rarely, if ever, choose more than three selectmen, and we think it very safe to presume that there was no more than three selectmen in Nottingham, until the contrary is shown. We should the more readily act upon such a presumption in cases of this kind, because, if the fact be otherwise, in any case, it can easily be shown by the records of the town. These notices are usually signed by two or three selectmen, and no one before *ever thought* of requiring evidence that they were a major part of the selectmen."

And, *finally*, the defendants rely upon the *nonsuit* in a former action as a bar to this. This proposition is equally untenable. See *Lord* v. *Chadbourne*, 42 Maine, 443; *Knox* v. *Waldoboro'*, 5 Maine, 185.

*Defendants defaulted for the items in account annexed, (except those of interest,) on which judgment is to be rendered with interest from the date of the writ.*

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

SAMUEL WHITE, 2d, *versus* ELEAZER C. ELWELL *& al.*
SAME *versus* REUBEN HUTCHINSON *& al.*

One who cuts the hay of another and puts it into the latter's barn, under a verbal agreement by which the hay is to be divided, and one half assigned to him for his services, has the rights of a tenant at will.

Such right would continue until the tenancy should be terminated, or the property removed, if done within a reasonable time.

After the hay is divided, the tenant has the right to enter within a reasonable time, and remove it, and the owner could not revoke the license so as to prevent it.

If, in such case, the owner of the barn forbids the tenant entering to take away the hay, he may do it forcibly, at a reasonable time, and in a reasonable manner, doing no more injury than reasonably necessary to obtain and carry away his hay.

ON EXCEPTIONS to the ruling of KENT, J.

These cases were tried together. They were TRESPASS for breaking and entering the plaintiff's barn and carrying away his hay. The taking of the hay was admitted. The evidence showed that the plaintiff owned a farm with a barn upon it, in the town of Weld, where the acts complained of were committed.

At the trial, the plaintiff claimed, and introduced evidence tending to show that, in July, 1859, he contracted orally with the defendant Elwell to cut the hay on his farm, and put it into the barn, and also cut the bushes upon a certain lot; that it was agreed that, if Elwell performed his part of the contract, the hay was to be divided equally, and Elwell was to have one half for his services; that nothing was said about how long time Elwell was to have the right of keeping his part of the hay in plaintiff's barn, or when it should be divided; that Elwell, with the assistance of Pratt, one of the defendants in the second case, to whom he had agreed to give one half of his share of the hay, cut the hay and put it in the barn, but did not cut the bushes; that the plaintiff then locked the barn and kept the key, and had never divided the hay with Elwell; that, in December following, he allowed Pratt

to take away one quarter of the hay; that, for the purpose of getting Pratt's hay, the latter, in the presence of the plaintiff, measured the mow and divided the hay into halves, and then divided one half into quarters, and immediately took away one quarter; that the plaintiff allowed one Hutchinson to take away from the other quarter a load for Elwell, at the same time Pratt took his, but sent word by said Hutchinson to Elwell, that he should not deliver any more hay to Elwell until he settled for not cutting the bushes; that, subsequently, the defendants came with teams for the remainder of Elwell's share of the hay, but the plaintiff refused to deliver or allow them to take the hay, and told Elwell, he could have no more of the hay till he settled for not cutting the bushes; that the next day, the defendants in the first action came with their teams for the hay, and the plaintiff forbade their entering his premises, or taking the hay, but they forcibly broke into the barn and carried away a portion of the quarter Pratt had measured out, and from which Hutchinson had taken the load for Elwell; that the defendants in second action came, and, though forbidden by plaintiff to come on his premises, entered the barn and carried away a portion of the same hay.

The defendants in both cases contended and offered evidence tending to show, that the contract was made between the plaintiff and Pratt, and that he contracted with Elwell; that, whether the contract was made with Pratt or Elwell, the cutting of the bushes was an entirely independent contract; that the hay was actually divided, and the part of Elwell and Pratt set out to them.

The plaintiff claimed that, even if the hay was divided, and there was an implied license for Pratt and Elwell to take it away, it was revocable, being oral, and that he did revoke it, and, for their subsequent acts, the defendants were trespassers.

The Judge, in his general charge, instructed the jury, among other things, that if they should find the bargain was made with Pratt that he was to cut the grass at the halves, that the

plaintiff was to furnish barn room for the whole hay; that it was divided by and between the parties, Pratt and White, and one half assigned to each, and, if Pratt, by the bargain, was to have the right to come and take his part away after such division, then it was a license by plaintiff to Pratt to enter on the land and into the barn, and take it at a reasonable time and in a reasonable manner, doing no more injury than reasonably necessary to obtain and carry away his hay.

But, if they should find the contract was made with Elwell, and not with Pratt, was it, or not, for one half of the hay to be put in the barn and kept, and to be taken away as in the other case? If so, the property in the one half would not pass to Elwell until a division was made between him and the plaintiff, and he would have no right to enter and take it until such division. Was there, in fact, a division of the hay made by Pratt in the presence of the plaintiff, and did the plaintiff assent to that division? If he did, and took the part assigned to him as his half, understanding and agreeing that the other part was to be, and was then set apart and divided as the part for Elwell, which was to be and was at the same time divided between Pratt and Elwell, then the plaintiff's title and interest in that half, so set out, would be divested, and Elwell would be owner of it, and would have the right to enter and take it away under the rule before stated.

The plaintiff's counsel requested the Court to give the following instructions:—

1st. That if the jury find that the barn belonged to the plaintiff, and the hay was in it by defendants' consent, and, if they find that the hay was the property of the defendants alone, they had no right to break the barn to take it or any part of it away, without the consent of the plaintiff; and, if they did break the barn, that the defendants are liable. This was given, with the addition—if a condition of the agreement was that the party cutting the hay might come and take it away, that would be a license to enter, as stated in general instructions.

2d. That if the defendants had a license to put the hay in

the barn, that forbidding the defendants to enter to take the same, would have the effect to avoid the implied license to take it, by breaking or by entering to take it. Not given, except as stated in the first request; but the jury were instructed that the plaintiff could not revoke the license, if there was one in the contract, without assent of the other party.

The presiding Judge declined to give the requested instructions, except as above stated.

The verdict was for the defendants in both cases, the jury finding, by a special verdict, that the contract was made with Elwell, and the plaintiff excepted.

*W. W. Bolster* and *L. H. Ludden*, for plaintiff.

1. The contract being by parol, the interest of Elwell, by force of R. S., c. 73, § 10, was merely that of a tenant at will.

2. There was no authority given to take away the hay. At most, it was an implied license. Such a license is always revocable, when *executing*. *Cook* v. *Stearns*, 11 Mass., 553.

Such licenses, as the one in this case, are always revocable at any time before they are *fully executed*. *Ruggles* v. *Lesure*, 24 Pick., 187, and cases there cited.

The plaintiffs having revoked this license before the defendants entered his premises, they had no authority to do so, and the presiding Judge erred in withholding the requested instruction.

*Randall & Winter*, for defendants.

The opinion of the Court was drawn up by

DAVIS, J.—It is admitted by the counsel for the plaintiff that, upon the findings of the jury, the rights of Pratt and Elwell were those of "tenants at will." This is correct. *Cheever* v. *Pearson*, 16 Pick., 266. Such a right would continue until the property was removed, (unless sooner terminated by a notice under the statute therefor,) if the property should be removed within a reasonable time. *Gilmore* v. *Wilbur*, 12 Pick., 120.

If Elwell and Pratt put the hay into the plaintiff's barn by his permission, they had the right, after it was divided, to enter and take it away within a reasonable time. The plaintiff might revoke the license as to its *remaining* there, giving them a sufficient time to remove it. But the proposition, that he could so revoke it that they would have no right to take it away, is absurd.

It was substantially a sale of one half of the hay by the plaintiff, the other half thereof being cut in payment. The right of the vendees to enter and take it away cannot be doubted. *Nettleton* v. *Sikes*, 8 Met., 34. The jury must have found that the hay had been divided by the parties before it was taken. There was no error in the instructions given, or in refusing to give those which were requested and not given.

*Exceptions overruled.*

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

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STATE *versus* NOAH G. COFREN.

On the trial of an indictment for being a common seller of intoxicating liquors, no evidence of any acts of the respondent committed more than two years before the indictment was found, can legally be introduced.

When an offence consists of a succession of acts, the indictment may properly charge that the offence was committed on a given day "and on divers other days and times between that day and the day of the finding of the indictment." Such an indictment is not bad for duplicity.

In such case, it is not fatal to the indictment that the time embraced in the charge commenced more than two years before the indictment was found.

ON EXCEPTIONS.

INDICTMENT against the respondent for being a common seller of intoxicating liquors, found at the term of the Court held on the third Tuesday of October, A. D., 1860. The indictment alleged that the offence was committed "on the first day of September, 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 September, aforesaid, and the day of the finding of this indictment."

After verdict against him, the respondent moved in arrest of judgment, because,—1st. The indictment alleges that the defendant was a common seller, from September 1st, 1858, up to the finding the indictment; whereas it is not competent to include within the time charged more than two years time, as the time charged is barred by the lapse of two years.

2d. The charge is that defendant was a common seller at divers and sundry times, between said September 1st, 1858, and the date of the finding said indictment. The indictment contains but one count, and is therefore double.

The presiding Judge (GOODENOW, J.,) overruled the motion, and the respondent excepted.

*Linscott & Pillsbury*, for respondent.

This prosecution is barred by the lapse of two years after the offence was committed. 39 Maine, 354.

Every allegation, therefore, in the indictment may be true, and yet the defendant be entitled to an acquittal.

In such cases, judgment should be arrested.

In an indictment, every material fact necessary to constitute the offence charged must be set forth with *certainty, as to the time.* 35 Maine, 205.

The only certain time charged in this indictment is the first day of September, A. D., 1858. But an offence committed on that day is barred by the statute of limitations.

Nor is the indictment aided by the allegation of "and on divers other days," &c.

This destroys the prerequisite of certainty, and introduces other offences into the same count, and thus makes the indictment bad for duplicity.

*Drummond, Attorney General*, for the State, cited, *State* v. *Hobbs*, 39 Maine, 212, and *The People* v. *Stanwood*, 9 Cowen, 655.

The opinion of the Court was drawn up by

TENNEY, C. J.—The defendant was indicted and convicted of being a common seller of intoxicating liquors, without any lawful authority, license or permission, on the first day of September, A. D., 1858, and on divers other days and times, between said first day of September, aforesaid, and the day of the finding of the indictment. The defendant filed a motion in arrest of judgment:— 1st. Because a longer time than two years is included in the indictment, within which he is charged with being a common seller, &c. 2d. Because the defendant being charged with being a common seller at sundry times, between the first day of September, 1858, and the date of the indictment, which contains but one count, the indictment is therefore double.

In a case of this kind, no evidence can be legally introduced of any acts of the defendant committed more than two years before the indictment was found. But the fact, that the time in the charge commenced more than two years before the finding of the bill, is no objection to the indictment.

When the offence, from its nature, presupposes a succession of acts to constitute it, it is not improper that it should be charged as having been done on different days and times, within a specified period; and no evidence can be heard against the accused of acts done either before or after this time; and the form in this case is unobjectionable and constitutes but one offence.

Any evidence tending to show that acts were committed by the defendant, at any time during the period covered in the indictment, which were pertinent, were admissible, provided they did not take place beyond two years before the finding of the indictment. *State* v. *Hobbs*, 39 Maine, 212; *Commonwealth* v. *Elwell*, 1 Gray, 463. *Exceptions overruled.*

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

WILLIAM WHITTIER *versus* JOSEPH D. PRESCOTT AND THE MAINE STATE SEMINARY AND LIT. INSTITUTE, *Trustee.*

One who has received a gratuitous gift of money, will not be chargeable therefor as the trustee of the donor, in a process of foreign attachment, although the debt sued for existed prior to the gift, if the case does not disclose that the donor was insolvent or largely indebted.

THIS action was brought upon a judgment recovered in the year 1852, for about $50, debt and costs. The principal defendant was defaulted. From the disclosure of the trustee, it appeared that Prescott made a donation to the institution, long since the rendition of said judgment.

The plaintiff filed allegations, setting forth that the gift was gratuitous and fraudulent as to creditors.

The case was submitted upon the disclosure of the trustee and the plaintiff's allegation. GOODENOW, J., presiding at *Nisi Prius*, ruled that there was not sufficient evidence in the case to show the gift was fraudulent as to creditors. The plaintiff excepted.

Upon presentation of the case to the whole Court, it was held, as is stated in the marginal note.

*Exceptions overruled.*

# COUNTY OF OXFORD.

HIRAM DAY *versus* JOHN M. SWIFT.

A delivery of personal property to one as collateral security, where there is no *written* conveyance of it, cannot be regarded as a mortgage.

To avail himself of such security as a *pledge*, he must retain possession of the property. If he permits it to go back into the hands of the pledgor, and he sells it, the vendee will acquire a good title thereto.

ON REPORT.

TROVER for a horse. *Jedediah Estes* testified,—I sold and delivered the horse to the plaintiff, for signing a note with me, as my surety, for $80, payable to defendant. Think defendant was present when I delivered the horse to plaintiff. Sometime afterwards he let me have the horse to use. Sold him to defendant afterwards, and informed him that plaintiff owned the horse. At the time of sale to defendant I agreed to pay the plaintiff for the horse. Soon after let the plaintiff have some sheep in part payment, about $15 worth. Plaintiff did not agree to re-sell the horse to me, before I sold to defendant. Have made no other payment towards the note.

*The plaintiff* was called by his counsel as a witness, and testified; "I bought the horse of Estes. Paid him by signing with him the note for $80. The defendant was present when the horse was delivered to me, and I signed the note. It was payable in one year. I gave Estes no authority to sell the horse. I have paid the note. Estes has paid a small sum towards the note.

"The sale to me was absolute. He sold the horse to me as security for signing that note. After the purchase, I took the horse to use."

Judgment to be rendered according to the legal rights of the parties.

The case was entered in 1859, and continued to be argued in writing.

*Gerry*, for defendants, submitted on brief.

No argument for plaintiff was furnished.

The opinion of the Court was announced by

DAVIS, J. — The plaintiff signed a note for the sum of eighty dollars, as surety for Estes, and took delivery of the horse in controversy as collateral security. As there was no *written* conveyance, it was not a *mortgage*. It could not be *recorded*. Neither can it avail the plaintiff as a *pledge* for he did not *retain* the possession. He delivered the horse back to Estes, who afterwards, sold him to the defendant. The defendant thereby acquired a good title as against the plaintiff. *Judgment for the defendant.*

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

GODFREY GROSVENOR *versus* MOSES CHESLEY.

The sum of six cents is not to be treated as so trifling in amount as to be disregarded, so that a person can be deprived of it, because it is a "trifle."

Under our present statutes, when an execution has been levied on real estate, and, *before* it has been returned and recorded, it is ascertained that the levy is invalid for any reason, the creditor may waive the levy, and resort to any other remedy for the satisfaction of his judgment.

But, *after* the execution is returned and recorded, if the levy proves to be invalid, the creditor's only remedy is *scire facias* to revive the judgment; an action of debt will not lie.

The present statutes are applicable to a case now pending, in relation to a levy made before they were enacted, because they touch the *remedy* and not the *right*.

By the "repealing clause" in the Revised Statutes, all rights existing by virtue of former statutes are preserved, but the proceedings to enforce them are to conform to the provisions of the Revised Statutes.

ON REPORT by GOODENOW, J.

DEBT on a judgment. The facts proved are stated in the opinion.

*J. C. Woodman*, for plaintiff.

*J. J. Perry*, for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiff recovered the judgment upon which this suit is brought in the year 1836. An execution was issued by the clerk of the Court which rendered the judgment, dated July 7, 1836. Upon this execution a levy, by an extent on real estate, was returned on July 26, 1836, by the officer who made the same; and the execution and levy were duly recorded, on September 17, 1836. On October 12, 1842, a deed, with covenants of warranty and seizin, was made to Joseph Freeman, Jabez C. Woodman and William Dale, which was recorded, of the same real estate described in the levy, reference being made thereto in the deed.

The execution, before mentioned, recited a judgment corresponding in all respects with that upon which the present suit is brought, excepting that the debt or damage was stated in the execution to be the sum of $107,51, when, in the record of the judgment, it is the sum of $107,57. But the testimony offered by the plaintiff is full and satisfactory, that this discrepancy, between the record and the recital thereof in the execution, was a clerical error merely, and that the execution, upon which the levy was made, was supposed to be one taken out upon the judgment in suit. And, it is not shown, or suggested, that the plaintiff had at that time recovered any other judgment against the defendant. It is agreed, that the plaintiff had no knowledge of the existence of the error, and, it appears, that his attorney was alike ignorant, till long after the levy.

By the decisions of this Court and of the Courts of Massachusetts, made while this State was a part of that Commonwealth, the sum of six cents is not to be treated as so trifling in amount as to be disregarded, so that a person can be deprived of that sum, or its value, because it is a "trifle." The cases referred to upon this subject, of these Courts, contain the doctrines, in which we concur. But the question is not, whether six cents is to be regarded as of no value, but, whether the levy upon the execution issued upon the judgment obtained, though containing an error, by which the plaintiff, by his own negligence, lost that amount of his judgment, is to be treated as a nullity, and a judgment be rendered in this suit for the full amount of the former judgment, and interest thereon, more than twenty-two years after it was supposed by the creditor to have been satisfied.

As we have no doubt that the plaintiff considered that his execution was upon the judgment, which he has described in his writ, and that the same was satisfied, we should hesitate to allow him to recover in this action, if the question was fairly before us, whether he could do so or not.

We think the question is not before us, so that we can pronounce an opinion, which can bind the parties. The plaintiff has mistaken his remedy; and, therefore, no judgment can be rendered in his favor in this action.

The case of *Ware, Ex'r,* v. *Pike,* 12 Maine, 303, is relied upon by the plaintiff as decisive, that the action of debt can be maintained, for the cause set forth in the writ. That was an action of debt upon a judgment, apparently satisfied by a levy upon real estate, the title to one half of which turned out to have been in the debtor, and from which the plaintiff's testator had been evicted by a higher and better title upon a writ of possession issued upon a judgment against him. The execution on which the levy was made had been returned to Court, and the execution and levy duly recorded, the creditor having received seizin and possession of the premises set off, at the time of the levy. The action was sustained under the statute of 1823, chapter 210. EMERY, J., in

delivering the opinion of the Court, says, "we conclude, therefore, that the remedy, under the statute of 1823, chapter 210, is cumulative, and not exclusive; and that the action of debt on such a state of facts, as disclosed in these pleadings, may well be sustained." This decision was in accordance with the construction put upon a similar statute of Massachusetts, passed in the year 1785, entitled "an Act providing a speedy method for doing justice, when, through mistake, executions are levied on real estate not belonging to the debtor," in the cases of *Hatch* v. *Green*, 12 Mass., 195; *Gooch* v. *Atkins*, 14 Mass., 378.

But, since the decision in the case of *Ware, Ex'r*, v. *Pike*, the Revised Statutes of 1841, and of 1857, have introduced an important change in reference to the matter under consideration. By the former code, chapter 94, § 22, it is provided, "if *before* execution is returned or recorded, it should appear that there is an error or defect in the proceedings which would render the levy void, or that the estate levied upon was not the property of the debtor, or not liable to be seized on execution, or that for any reason it cannot be held thereby, the creditor may waive the levy, and it shall be considered null and void; and he may resort to any other remedy for satisfaction of the judgment." Section 23, of the same chapter, provides the remedy of *scire facias*, if, *after* the execution is returned or recorded, it should appear to the creditor, that the estate levied upon was not the property of the debtor, or not liable to be seized on execution, or that it cannot be held thereby.

It is quite manifest, that if it should appear to the creditor, as last above stated, *after* return or recording of the execution, the error must be corrected in *scire facias;* but, if the mistake shall be discovered *before* the return of the execution, or before it shall be recorded, he is not thus restricted, but he may resort to any other remedy. This view was taken by the Court in Massachusetts, under statute provisions similar in all respects to those in the statute of this State just cited. *Dennis* v. *Arnold*, 12 Met., 449.

In the case at bar, the execution was returned and recorded, and it falls within the provision of § 23 of c. 94.

The statutes of 1841, or of 1857, in the revised code, are applicable to this case, notwithstanding their enactment was since the levy was made on the plaintiff's execution. These provisions touch the remedy and not the right. By the repealing Act, in the R. S. of 1841, § 1, on page 782, c. 210 of the Acts of 1823, is repealed; and, in § 2 of the same chapter, it is provided that all rights of action in virtue of any Act repealed, as before mentioned, and all actions and causes of action which shall have accrued in virtue thereof, or founded on any of said repealed Acts, are saved to all persons, in the same manner as if such Acts had never been repealed; but the proceedings, in every such case, shall be conformed, when necessary, to the provisions of the Revised Statutes. Repealing Act in R. S. of 1857, § 2.

According to the agreement of the parties, the plaintiff is to become *Nonsuit.*

CUTTING, MAY, GOODENOW and DAVIS, JJ., concurred.

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CHARLES G. KNOX *versus* WILLIAM TUCKER.

In an action of trespass *quare clausum* for breaking and entering the plaintiff's close, by the defendant's cattle, in order to sustain the defence that the cattle were lawfully on the adjoining close, and escaped therefrom in consequence of the neglect of the plaintiff to maintain his part of the partition fence, it must appear that there has been a division of the fence, either by fence-viewers, by a valid agreement between adjoining owners, or by prescription.

The division must be such as to impose on the plaintiff the obligation to build and maintain a legal fence, upon a certain, well defined portion of the line.

If there has been no such division of the fence, each party is bound, at his peril, to keep his cattle upon his own land.

An agreement for the division of the line fence, by adjoining owners, in order to be binding on them and their privies, must be in writing.

In a case in which a line fence was built in separate portions by the adjoining owners, and maintained by them in the same manner for more than twenty-five years, some agreement or grant, by which a legal division of the fence was established, may well be presumed.

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

TRESPASS *quare clausum*, in which the plaintiff alleged that the defendant's cattle broke and entered his close.

The defence was, that the cattle were lawfully in the adjoining close, and escaped therefrom through the neglect of the plaintiff to maintain his part of the partition fence.

It was admitted that the plaintiff was entitled to recover, unless the evidence established the defence.

The evidence was that, about thirty years before the trial, one Forbes owned the plaintiff's lot, and one Roberts the adjoining lot; and at that time, while they were occupying and improving their lots, Forbes built a certain portion of the fence, and Roberts a certain other portion of it, and that these fences had ever since been recognized as the division fence; that the part of the fence built by Forbes was rebuilt by the occupant of his lot in 1853; that Roberts said, when he built his fence, that a division of the fence had been agreed upon; that the cattle were being depastured by the owner of the Roberts lot, for the defendant, and escaped into the plaintiff's close through that part of the fence built by Forbes.

*W. W. Bolster*, for plaintiff.

At common law, the tenant was not obliged to fence against his neighbor, but each was bound, at his peril, to keep his cattle on his own close. *Rust* v. *Low*, 6 Mass., 90; *Little* v. *Lathrop*, 5 Maine, 357.

Our statute has changed the common law, only in cases in which there has been a legal division of the fence in some mode. *Lord* v. *Wormwood*, 29 Maine, 282.

A parol division is not sufficient. *Ellis* v. *Ellis*, 39 Maine, 527. There is not sufficient evidence to establish a division by prescription. The time has not been long enough. *Binney* v. *Hull*, 5 Pick., 503.

*M. T. Ludden*, for defendant.

The opinion of the Court was drawn up by

KENT, J. — It is admitted that the plaintiff is entitled to recover, unless the facts stated by witnesses constitute a defence. The facts alleged, and relied upon are, that the cattle were lawfully on the adjoining close, and, that they escaped therefrom in consequence of the neglect of the plaintiff to maintain his part of the partition fence. R. S., c. 23, § 5.

It is now the well settled law in this State, and in Massachusetts, that the neglect, which is made a bar to recovery in an action of this kind, can arise only from a division of the fence, either by fence-viewers, acting under the statute, or by a valid and binding agreement between the parties owning adjoining lots, or by prescription.

The division must be such as imposes the obligation, upon the party injured, to build and maintain wholly, upon a certain well defined portion of the line, a legal fence. The general rule is, that every man must, at his peril, keep his cattle on his own land; and, it is no defence if he shows that his neighbor had no fence, or an insufficient one. The only defence he can set up is, that his neighbor had neglected to maintain the portion of the dividing fence which had been assigned to him in one of the ways before stated. *Sturtevant* v. *Morrill*, 33 Maine, 62; *Webber* v. *Closson*, 35 Maine, 26; *Lord* v. *Wormwood*, 29 Maine, 282; *Thayer* v. *Arnold*, 4 Met., 589. The owner of the cattle is responsible, although he is not the owner of the close from which the cattle escaped, and, although they were depastured on hire by the owner of the close. *Sheridan* v. *Bean*, 8 Met., 284.

In this case, no statute assignment by fence-viewers has been produced, nor any written agreement between the owners in relation to a division, and no sufficient evidence of any parol agreement. There is the declaration of one party, that a division had been agreed upon, but no evidence that the other party assented; and, according to the

case of *Heath* v. *Ricker*, 2 Maine, 72, such agreement, to be binding on parties and privies, must be in writing. *Little* v. *Lathrop*, 5 Maine, 357, citing *Rust* v. *Low*, 6 Mass., 90.

It appears that, about thirty years ago, the occupants of the adjoining lots built in separate portions a fence, extending about 82 rods to a brook, but, as it would seem, not the whole extent of the dividing line. This fence remained until 1853, when the plaintiff's part was rebuilt, not on the same line, but ranging from the line on to plaintiff's lot. There had been a dispute about the fence for the last five years, and plaintiff had removed part of the fence. There being no statute assignment, and no written agreement being produced, the only remaining question is, whether the facts above stated establish an obligation by prescription. To prove a prescriptive right, or duty, proof of usage may be admitted. *Heath* v. *Ricker*, 2 Maine, 74.

In the leading case of *Rust* v. *Low*, 6 Mass., C. J. PARSONS says, — "Prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time. Ancient assignments by fence-viewers, and ancient agreements made by parties, may have once existed and be now lost by lapse of time."

*Binney* v. *Prop'rs of Hull*, 5 Pick., 504, is a case where the Court finds that a prescription is established by long continued occupation, although there was no direct evidence of any actual division in fact. In this case, we have the fact that, about thirty years before the trial, this dividing fence was actually built in separate portions by the owners. It never was a joint fence on any part of the line. We know that it was, from the time it was first erected, a fence built by the respective owners, each building a distinct portion. This occupation continued undisturbed and unquestioned for, at least, twenty-five years. When the plaintiff rebuilt his part in 1853, he made no claim on the owner of the adjacent lot to build it as a joint fence, although he built it for a line fence. He took no steps to call on fence-viewers. The tendency of modern decisions and statutes has been to diminish the length

of time required to establish or limit rights by prescription or by statutes of limitation. In view of the facts in this case, we conclude that we may safely presume some original grant or agreement between the parties by which a legal division of the fence was established. *Plaintiff nonsuit.*

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

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JACOB LOVEJOY *versus* GEORGE W. LUNT.

The term "highest bidder," used in the statute authorizing collectors to sell real estate for unpaid taxes, means the one who will pay the tax, &c., for the least quantity of land.

A sale of real estate, by a collector to pay the taxes assessed thereon, is invalid if the whole tract is sold, and the collector does not certify, in his return to the town clerk, *that it was necessary to sell the whole to pay the taxes, &c.*

Such sale of the real estate of a resident is invalid, unless the collector's return shows that he gave the owner or occupant ten days' notice of the *time* and *place* of sale.

ON REPORT by GOODENOW, J.

REAL ACTION. The case is sufficiently stated in the opinion.

*Jacob Lovejoy*, demandant, *pro se.*

*Howard & Strout*, for tenant.

The opinion of the Court was drawn up by

KENT, J.—The demandant claims title by virtue of two deeds from the collector of taxes of the town of Peru, who sold the land for the non-payment of taxes assessed in the years 1850 and 1851. In order to sustain the tax title, it is necessary for the party claiming "to prove that the collector complied with the requisitions of law, as to advertising and selling such real estate." Act of 1844, c. 123, § 16.

The tenth section of the same Act authorizes and directs

the collector, in case of non-payment for nine months, to give notice "of his intention to sell *so much* of the real estate, as may be necessary for the payment of said tax and all charges." By § 11, he is authorized to sell to the highest bidder, "*so much* of the real estate as may be necessary to pay the tax then due," &c.

The notices of sale appear to be in accordance with the provision. But, by the returns made to the town clerk, of the doings in making such sale, as required by § 18 of said chapter, it appears that he sold the *whole* parcel to demandant, he being the highest bidder therefor.

He does not certify that it was necessary thus to sell the whole, in order to pay the tax and charges, or that no person would pay the same for a less quantity of land.

The "highest bidder," named in the statute, is the one who will pay the tax for the least quantity of the land. It may be "necessary" to sell the whole tract, but this necessity should appear in the return. It is not sufficient to state simply that the whole tract was sold to the highest bidder.

This point was decided in the case, *Loomis* v. *Pingree*, 43 Maine, 311.

The statute of 1849, c. 131, § 1, required that, upon an intended sale of real estate of a resident, the collector should notify the owner or occupant of the time and place of sale, in writing, ten days before the sale.

The collector, in his return, certifies that he gave such notice of the "*time*" of sale, but does not state that it also contained a notice of the *place*.

There are other points, in which it is contended that the proceedings are fatally defective, but it is unnecessary to discuss them. *Judgment for the tenant.*

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

CLARK S. EDWARDS *versus* THE GRAND TRUNK RAILWAY CO.

Executory contracts of sale are within the statute of frauds.

Agreements, to furnish articles to be manufactured in a particular manner by the party contracting, are not within the statute.

But the fact that the article contracted for does not exist at the time of the contract, but is to be manufactured, will not, necessarily, take the case out of the statute. It must also appear that the particular person, who is to manufacture it, or the mode, or materials, enter into and make part of the contract.

When the party contracting is bound to receive an article bought or procured by the other party after the contract, it is within the statute.

A contract by a railroad company "to take all the wood a person would put on the line of their road during the season, at the same price they had paid him before for wood, or more, if the wood was better," is within the statute.

In order to take the case out of the statute, there must be, not only a *delivery* but also an *acceptance* of the wood furnished, so that the buyer can take no exception to the quantity or quality.

Where, by the contract, the wood is to be "measured and inspected the next spring," there is no such acceptance as will take the contract out of the statute, if there had been no such measuring and inspecting.

ON EXCEPTIONS to instructions of GOODENOW, J.

ASSUMPSIT for 250 cords of wood. The writ contains three counts; one for not accepting the wood; another for wood sold and delivered, and the third for services performed and materials furnished.

The plaintiff's testimony is stated in the dissenting opinion of GOODENOW, J.

The counsel for defendants requested the Judge to instruct the jury, that the case was within the statute of frauds and could not be maintained.

But the Judge declined so to instruct the jury, but did instruct them, (among other things,) that, if the facts were as stated by the plaintiff, the case did not come within the statute of frauds.

The verdict being for plaintiff, the defendants excepted.

*Barnes*, for defendants.

*Walton*, for plaintiff.

The opinion of the Court was drawn up by

KENT, J.—The presiding Judge instructed the jury, that "if the facts were as stated by plaintiff, the case was not within the statute of frauds." The facts, as stated by plaintiff, are, that the agent of the defendants said to him that they, (the defendants,) would take all the wood he would put on the line of the road that season at the same price they had paid him before for wood, or more, if the wood was better."

The first count in the writ is for not accepting the wood put on the line of the railroad.

Was the ruling of the Court on this point correct? This depends upon the decision of the question—was this "a contract for the sale of goods, wares or merchandize," within the meaning of the statute of frauds? R. S., c. 111, § 5.

It was a contract to be executed in the future; but it has been often decided that executory contracts of sale are within the statute. *Hight* v. *Ripley*, 19 Maine, 137.

A distinction has been made between contracts for the *sale* of goods, and agreements to furnish articles to be *manufactured* in a particular manner by the party contracting. The latter class are held not to be within the statute. *Abbot* v. *Gilchrist*, 38 Maine, 260.

The fact, that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not, necessarily, take the case out of the statute. It must also appear that the particular person, who is to manufacture it, or the mode and manner, or materials, enter into and make part of the contract. *Hight* v. *Ripley*, 19 Maine, 137; *Fickett* v. *Swift*, 41 Maine, 68.

If a man agrees to purchase one hundred boxes of candles at a fixed price, although both parties understand that the candles are not then manufactured, but are to be thereafter, yet this is essentially a contract of sale. The fact that they are to be afterwards manufactured makes no part of the con-

tract. But if the bargain had been that the party should manufacture the candles from a particular lot of tallow, or that they should be manufactured by a particular person, it would be an agreement for manufacture, and not for sale. *Gardner* v. *Joy*, 9 Met., 177; *Lamb* v. *Crafts*, 12 Met., 353.

A test, in some cases, is whether the person, contracting to take the article, is bound to receive one which may be bought or procured by the other party after the contract. If he is, then it is a case of sale.

In the case before us, there was no agreement for any particular wood; no stipulation that it was to be cut from plaintiff's land, and no limitation of time when it should be cut. The contract might be fulfilled by the delivery of wood already cut or bought of another person. There was no element in the bargain which implied a "*manufacture*," of an article, within the most liberal definition of that word. It was very clearly a case of sale within the statute. *Winterman* v. *Meigs*, 4 Cush., 499.

Was there any acceptance of the wood, within the other clause of the same statute?

The language of the statute, on this point, requires that there should be an acceptance, as well as delivery. There must be not merely the act of delivery, but there must be such an acceptance by the vendee as vests the property, so that he can take no exceptions to the quantity or quality. *Maxwell* v. *Brown*, 39 Maine, 98.

In this case, by the testimony of the plaintiff, there had been no acceptance. He says, that, "of course, it was to be measured and inspected in the Spring, and always was." There was no evidence that any agent of defendants had accepted the wood, or done any act from which an acceptance could be inferred.

The case, on both points, is within the statute, and the ruling of the Judge on this point was erroneous.

*Exceptions sustained.—New trial granted.*

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

GOODENOW, J., dissenting.

In determining whether the instructions of the Judge to the jury were or were not correct, it must be considered as proved, that the defendants, by their agent or agents, duly authorized, in the month of June, 1855, agreed with the plaintiff, to take all the wood he would put on the line of their road that season, at the same price they had paid him before for wood, and more, if the wood was better; and that, in September, 1855, the plaintiff had cut and hauled, and then had over two hundred cords on the line of the road, hauled according to the agreement made with Mr. Corser, in June; hard and soft wood together, better, in the opinion of the plaintiff, as a whole, than the lot put on and sold by him to the defendants the winter before; and that the plaintiff gave notice to Mr. Corser of the fact, and, at the same time, remarked to him that he wanted his wood measured up, as he wanted his money; that Mr. Corser made no objection to the quantity, quality, time or place of depositing the wood, but, on the contrary, said to the plaintiff, that *they would send Mr. Hodgkins, of Poland, to measure it.* Subsequently, in October, 1855, the plaintiff saw Mr. Corser again, at Bethel, and he told the plaintiff, he would have the wood measured up in a few days, as soon as they had measured some they had bargained for with Mr. Chapman; that there was no misrepresentation or deception on the part of the plaintiff; that he had fully and honestly done all he could do or was bound to do by the terms of the agreement; that, while he was performing on his part, no intimation was made to him, by the defendants, that they should not receive and pay for the wood; and that, after full performance on his part, Mr. Corser twice agreed with him, in September and October, *to send a surveyor and have the wood measured.* It seems to me that this was a contract executed. Performance on the part of the plaintiff, and ratification or acceptance on the part of the defendants, by their duly authorized agent, "after they had the means of exercising their right of rejection." The quantity was uncertain and to be ascer-

tained by admeasurement, to be made by the defendants. The price depended on the quality. *Id certum est*, &c.

If, by reason of the statute of frauds, the plaintiff cannot recover upon this state of facts, it should be regarded as a statute to promote, rather than to prevent, frauds. If it was not a contract executed and ratified, it was an agreement entered into to be performed within one year, and not a contract of sale.

"When the contract is a contract of sale, either of an article then existing, or of *articles which the vendor usually has for sale in the course of his business*, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately." "But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement." 21 Pick., 207. And why? Because one party may, otherwise, be greatly injured by the fault of the other. He cannot be left *in statu quo*.

He has made sacrifices and incurred expenses, which he would not have made but for the agreement. Men are bound to act in good faith. They are not at liberty to deceive and injure each other, with impunity.

A man may be as essentially injured by cutting and hauling his wood, under an agreement, and then not having it received and paid for, as by manufacturing a carriage, or any other article, under an agreement, and then not having it received and paid for. Where the reason is the same the law is the same. Where the contract is for "*an article which the vendor usually has for sale in the course of his business*," it may well be otherwise; as in the case of candles or tallow. They may be kept without deterioration, or readily find another market. But wood, in large quantities, in the country, can only find a ready market at or near the railroads; and its de-

terioration, when exposed to the weather, is rapid. No prudent man would cut his growing wood, in the country, in large quantities, without knowing when and where he could find a market for it. If the plaintiff has been deceived and injured by the defendants, they should not be allowed to take advantage of their own wrong. The statute should have a reasonable construction.

In *Irvine* v. *Stone*, 6 Cush., 508, cited by counsel for the defendants, the cargo of coal was to be delivered in Boston, by the terms of the agreement. The defendants countermanded the order for the coal, before its arrival in Boston, and positively declined receiving it.

In *Mining Co.* v. *Glass Co.*, 9 Cush., 116, the coal was not consigned to the party ordering it, but, on the contrary, was consigned to the plaintiff's own agent. There was an attempt to prove a usage, "that when coal ordered is delivered on board a vessel *consigned to the party ordering it*, that is a compliance with the order, and the coal is thereafter at the risk of the party ordering it. But the facts did not bring the case within the usage as proved. The court say, "the bill of lading gave the defendants no right to, or control over the coal, and when indorsed and offered to the defendants' agent, was promptly rejected." They also say, "when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed and forwarded, the seller is *functus officio*, and can do nothing more, except so far as he may have a right of stoppage *in transitu*."

In *Maxwell* v. *Brown*, 39 Maine, 98, the coal was to be delivered at Portland, the vessel in which it was shipped was wrecked, and the coal never arrived at Portland. The defendant was to pay freight, but designated no vessel by which it should be sent. "The coal was shipped by the plaintiffs on board a vessel chartered by them, and consigned to the defendant, and the master signed a bill of lading in the usual form, engaging to deliver the coal to the defendant *upon his paying the freight*."

In *Sewall* v. *Fitch*, 8 Cowen, 219, the Court say, "formerly the King's bench held that the statute did not apply to executory contracts." (*Towers* v. *Osborne*, 1 Stra., 506; *Clayton* v. *Andrews*, 4 Burr., 2101.) In neither of those cases, however, was it necessary to rely upon such a principle. The first was for a coach, to be made; and the second for grain, *to be yet threshed*. So that those cases were rightly determined, upon a wrong principle, as has since been held, both by the Common Pleas and King's Bench. In *Randeau* v. *Wyatt*, (2 H. Bl., 63,) Lord LOUGHBOROUGH said, the case of *Towers* v. *Osborne* "was plainly out of the statutes, not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable." The same point was decided in *Cooper* v. *Elston*, (7 T. R., 14,) where the King's Bench adopt *Randeau* v. *Wyatt*, "as sound law, admitting the distinction there taken." See also *Bennett* v. *Hull*, 10 Johns., 364, and *Crookshank* v. *Burrell*, 18 Johns., 58.

It does not appear by the facts stated, whether the wood furnished by the plaintiff was deposited by him on his own land, or the land of the defendants, or on that of a stranger. But it does appear to have been deposited on *the line of the road, according to the agreement*, and at the place or places where the defendants agreed to receive it. It may not appear that the wood to be furnished was in growing trees, at the time the agreement was made, but it may be fairly inferred that such was the fact. It was to be as good as the wood which had been furnished by the plaintiff before. It might be better. It was uncertain. And the price was also uncertain. How can this be regarded as a contract of sale, till the wood was cut, hauled and delivered! When cut, hauled and delivered, the law would imply a promise to pay so much as it was worth, without proof of any previous agreement. Upon proof that it was as good as the sample, the plaintiff would be entitled to the same price the defendants had paid him be-

fore; upon proof that it was worth more, or better, the plaintiff would be entitled to recover more. In my opinion, the exceptions should be overruled, and there should be judgment on the verdict.

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JOSIAH A. JUDKINS *versus* JOHN REED.

A collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from competent authority, is protected against all illegalities but his own.

His return is *prima facie* evidence of the facts stated therein.

A man cannot have a residence for purposes of taxation in two towns at the same time.

When a town line passes through the house of a person, his residence will be held to be in that town in which the most necessary and indispensable part of his house is situated, especially if the out buildings and other conveniences are in that town.

NO BRIEF for plaintiff came into the hands of the Reporter.

*E. Winter*, for defendant.

The opinion of the Court was drawn up by

GOODENOW, J. — This is an action of trespass, *de bonis*. The defendant justifies as a collector of taxes of the town of Roxbury, for the year 1855. He produces in evidence his tax bills and warrant of commitment, for that year, with his return thereon, his official bond duly approved, authentic copies of the records of said town of Roxbury, showing his election and qualification, also copies of said records, showing the election and qualification of the assessors of said town. His warrant is in usual form, and signed by said assessors. A collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from competent authority, is protected against all illegalities but his own, and his return is *prima facie* evidence in his favor, of the facts therein stated. The plaintiff appears, by the tax bills, to have been assessed

in Roxbury in 1855; and, by the return of the defendant on his warrant, it appears that $7,07 remained unpaid at the time of the alleged trespass; and that the defendant took the cattle by virtue of said warrant, &c.

We do not perceive any irregularities in the proceedings of the defendant, in seizing, advertising and selling the property and disposing of the proceeds thereof.

It is a question of fact, whether the plaintiff was or was not, on the first day of April, 1855, a resident in Roxbury. And, in my opinion, the evidence reported greatly preponderates in favor of the position that the defendant, on that day, had his legal residence in Roxbury, and was liable to be taxed, and was legally taxed in that town.

The case finds that, in 1848, the plaintiff purchased a farm situate partly in Mexico and partly in Roxbury, and that, in 1852, he built a house on said farm, on the line, so that the house stood partly in the town of Mexico and partly in the town of Roxbury. The plaintiff changed his residence from Mexico to Roxbury when he moved into this house in 1852. His domicil was in one or the other of these two towns. It could not be in both. In which, depends upon no one fact, but upon all the facts in the case. 23 Pick., 170.

Only a small part of the house is in Mexico. The most necessary and indispensable part is in Roxbury, as well as the other buildings and conveniences.

Upon the whole, we perceive no good reason why the justification set up by the defendant is not established by the evidence; and none has been pointed out to us for our examination and consideration, by the plaintiff's counsel.

*Plaintiff nonsuit.*

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

THOMAS J. REED *& als. versus* ABRAHAM REED, JR.

A tenancy at will is determined by the death of the lessor, and the lessee thereupon becomes tenant at sufferance; and is not entitled to notice to quit.

The owner of the fee may enter at any time and put an end to the holding of a tenant at sufferance, or he may maintain his action of ejectment without notice.

WRIT OF ENTRY. Upon the facts in the case, as stated by the parties, GOODENOW, J., presiding at *Nisi Prius*, was of the opinion that the plaintiff's action was maintainable. The defendant thereupon consented to a default, to be taken off, if, in the opinion of the full Court, the plaintiffs were not entitled to recover, upon the statement of the facts admitted by the parties.

The case was argued by

*Walton*, for plaintiffs, and by

*W. W. & S. A. Bolster*, for the defendant.

The material facts sufficiently appear from the opinion of the Court, which was drawn up by

APPLETON, J.—This is a writ of entry. The defendant entered upon the demanded premises as the tenant at will of Lewis Reed, who deceased in June, 1858. The demandants, it is admitted, are the heirs at law of said Reed.

The tenancy at will was determined by the death of the lessor. *Ferrin* v. *Kenney*, 10 Met., 294; *Rising* v. *Stannard*, 17 Mass., 282. The defendant, thereupon, became tenant at sufferance. That relation has not been changed. As such, he is a mere holder without right, and not entitled to notice to quit. His original entry was lawful, but his right to longer hold the premises was at an end. The owner of the fee may enter at any time and put an end to his holding, or he may maintain his action of ejectment, without notice. *Kelley* v. *Waite*, 12 Met., 300; *Kinsley* v. *Ames*, 2 Met., 29; *Hollis* v.

*Pool*, 3 Met., 350; *Robie* v. *Smith*, 21 Maine, 114; *Benedict* v. *Morse*, 10 Met., 223; *Hildreth* v. *Conant*, 10 Met., 298.

*The default to stand.*

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

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BENJAMIN F. CHADBOURNE *& als. versus* AYERS MASON *& al.*

In deeds and levies, courses and distances can be controlled only by monuments. Parol evidence is inadmissible to show an error in the course of a line in the return of a levy.

When all the calls in a levy are answered, and yet the land levied upon cannot be distinctly known and identified, the levy is void.

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

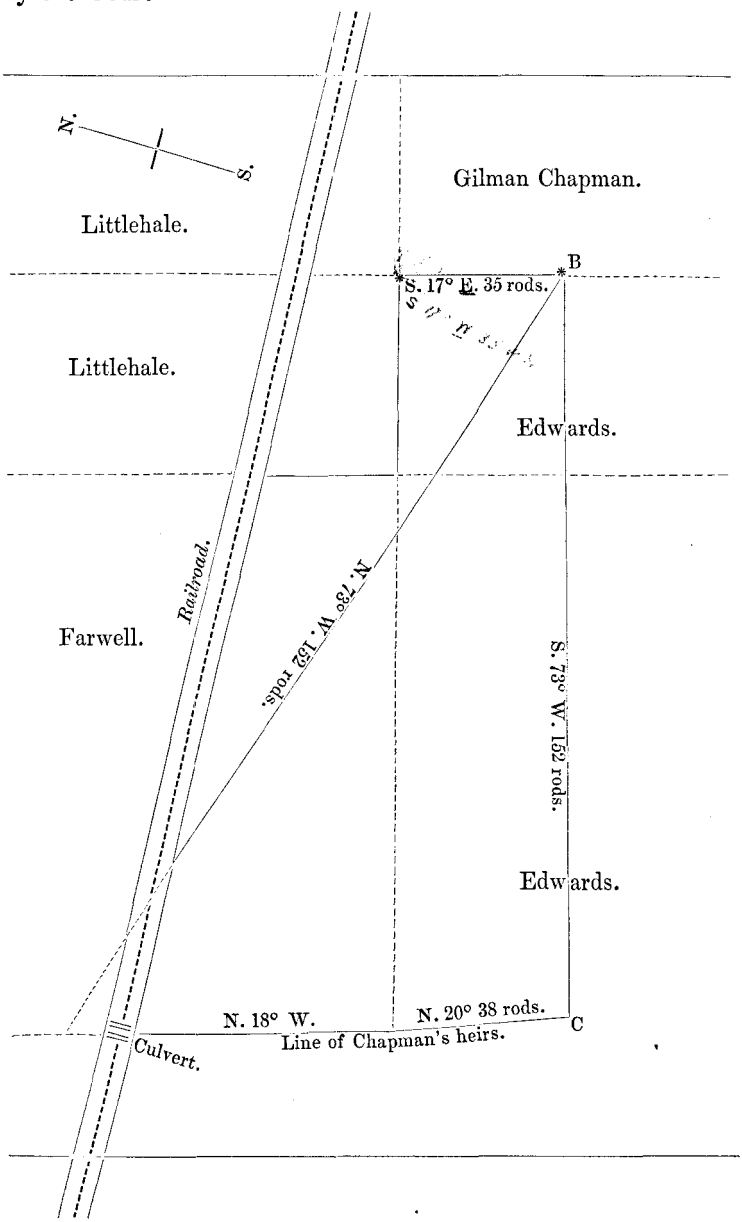
WRIT OF ENTRY. The plaintiffs claim under a levy of an execution against one Edwards. The land levied on is thus described in the appraisers' certificate, to wit, "Beginning at the corner of land on the line between Gilman Chapman and the said Edwards, then running south seventeen degrees west on the said line between said Chapman and Edwards, thirty-five rods to stake and stones; thence north seventy-three degrees west, one hundred and fifty-two rods; thence in a northerly direction until it strikes the line of land owned by the heirs of George Chapman; thence on said Chapman's line to a stone culvert in the said railroad; thence," &c.

The surveyor appointed by the Court testified that "he run the line marked on the plan 'S. 17° E. 35 rods,' to the point marked B, where was a monument as agreed by the parties, from which he run the two lines, one north seventy-three degrees west, the other south seventy-three degrees west, as shown by the plan; thence, from the point marked C, the line extending northwardly, as appears by the plan."

*D. Hammons*, for plaintiffs.

*A. Black*, for defendants.

The following is intended as a copy of the plan, sufficiently accurate to understand more readily the questions considered by the Court.



The opinion of the Court was drawn up by

CUTTING, J.—The view taken by us may render the question as to the legality of the amendment immaterial; its materiality being wholly dependent upon our construction as to the true boundaries of the levy, which, if favorable to the defendant's proposition, not only avoids the necessity of the amendment, but demonstrates the correctness of the original count.

We perceive no such latent ambiguity in the officer's return descriptive of the levy, as to admit parol evidence to show his or the appraisers' intention, especially when such testimony is offered for the purpose of altering the course of one of the principal lines to the extent of thirty-four degrees, and thereby of enlarging threefold the disputed territory. Even equity forbids such permission, as against the rights of a third party intervening. *Lumbert* v. *Hill*, 41 Maine, 475. And the law is none the less severe in the construction of deeds; *Linscott* v. *Fernald*, 5 Maine, 496, in which case, in the deed then under consideration, north was inserted instead of south, and proof of the intention of the surveyor and scrivener was ruled to be inadmissible to show a mistake, when the course would equally well agree with all the other courses and monuments in the deed.

Courses and distances, whether in a deed or levy, can be controlled only by monuments. The existence of the latter may be shown by parol evidence, while the former cannot. Such we apprehend to be the general rule, by the aid of which we will proceed to the consideration of the boundaries disclosed in the levy, as contended for by the respective parties.

The beginning of the description neither party controverts. The line described as running "thence south seventeen degrees west, on said line between said Chapman and Edwards, thirty-five rods to stake and stones," it is urged, should have been seventeen degrees east, as run by the surveyor appointed by the Court. Here the two courses, the one in the levy and the other in the survey, vary thirty-four degrees, and the error is in the direction of the line of the former. But the

monument controls, and not the line, with which construction both parties are apparently satisfied, for the controversy originates on the departure from that monument.

The second line runs from the before described monument, as shown by the return, "north, seventy-three degrees west, one hundred and fifty-two rods," and there terminates at no designated monument; consequently, there is nothing to control the course. There being then no controlling monument at the termination of the second as there was at the first, parol evidence is not admissible to vary the course, and thus reform the levy. Had the law been otherwise, there would have been no necessity of invoking equity, as was the case in *Lumbert* v. *Hill*.

But, it is contended that, because there was a mistake in the running of the first line, of thirty-four degrees, it is to be inferred that the same mistake was continued, and, consequently, the second line should have been south, instead of north, thus varying from the line of the levy just the same number of degrees. The refutation of such proposition is that the course of the first line was controlled by a monument and not by parol evidence. We find here, then, two lines, one, the line of the levy, running *north*, and the other, the line of the survey, *south*, and both seventy-three degrees *west*, one hundred and fifty-two rods, and terminating at no monument.

The third line, indicated in the levy, runs from the end of the second line, "in a northerly direction, until it strikes the line of land owned by the heirs of George Chapman," which line the surveyor says, when run from the termination of his south line, or the line contended for by the plaintiffs, is "north, twenty degrees west, thirty-eight rods, to the end of line of land owned by George Chapman's heirs." Had the return of the officer been as specific as the survey, in giving the course and distance, we might possibly have dispensed with a monument at the end of the second line, because its termination might readily have been discovered, by retracing the course and distance from the line of Chapman's land, which is a monument. But, in the return, we have no such *data*.

The fourth line in the levy is described as follows:— "Thence, on said Chapman's line, to a stone culvert in the railroad." And, in the survey, "thence, on said line, north, eighteen degrees west, to railroad culvert." The remaining boundaries become immaterial, since their correctness is admitted by both parties.

We will now advert to the return, or levy, and consider whether all its calls have been answered by courses and monuments so as to transfer title to any portion of the lot to the plaintiffs.

According to the survey and plan before us, the second line terminated at the railroad, "thence in a northerly direction until it strikes the line of land owned by the heirs of George Chapman." And it appears, on inspection, that a line running in that direction would strike the line of such heirs, and thereby answer the call, but in what place it would so strike is entirely uncertain, since no degrees qualifying the "northerly direction" are named. The other calls appear also to have been answered. Such, then, being the case, it presents an additional reason why parol testimony was inadmissible to change the course of the second line as contended for by the plaintiffs.

But the statute requires that the return "shall describe the estate by metes and bounds, or in such other manner that it may be distinctly known and identified." And we have seen that all the calls in the levy have been answered, yet the land levied upon cannot be distinctly known and identified, and thus presenting such a *patent* ambiguity as to render void the whole proceedings. Consequently, the plaintiffs must fail on their first count.

In relation to the second count, embracing the land described in the second levy, there appears to be no controversy. On that count, judgment is to be rendered for the plaintiffs, and damages, if any, are hereafter to be assessed as agreed by the parties.

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

JESSE BUCKNAM *& als. versus* ARTHUR P. GREENLEAF.

The verdict *affirmed by the jury* is the verdict in the case.

When a verdict in favor of one party has been affirmed by the jury, the presiding Judge has no power to enter a verdict for the opposite party, though it appears by the affidavits of the jurors, and the written verdict by them handed to the clerk, that they intended to find for such party.

If the verdict affirmed, was not the verrict found by the jury, it may be set aside *on motion.*

ON EXCEPTIONS to the ruling of GOODENOW, J.

REPLEVIN. The plea was *non cepit* with a brief statement. The jury came into Court with a written verdict signed by their foreman. It was read by the clerk,—"the jury find that the defendant *did take* the goods," &c. The verdict was so affirmed and ordered to be recorded; and the jury were discharged.

Afterwards, upon suggestion that the written verdict was incorrectly read by the clerk, and it appearing, by the written verdict and the affidavits of the jurors, that they intended to return a verdict for the defendant, and the clerk not having actually recorded the verdict which had been affirmed, the presiding Judge ordered the verdict for the defendant to be recorded, and judgment to be rendered thereon.

To this order the plaintiffs excepted.

*S. Boothby,* for plaintiffs.

When a verdict has been pronounced in open Court, and before it has been affirmed, mistakes merely formal may be corrected by the Court, or by the foreman; errors of substance can be corrected only by directing the jury to reconsider the case, and bring in a new verdict. *Snell* v. *Bangor Navigation Co.*, 30 Maine, 337; *Root* v. *Sherwood*, 6 Johns., 68; *Blackley* v. *Sheldon*, 7 Johns., 32; Howe's Practice, 257.

If the verdict has been affirmed by the jury, and constructively recorded, the power of the jury in relation has been fully exhausted, and any reconsideration or change in it, though by the order of the Court, is invalid. *Snell* v. *Bangor Nav-*

*igation Co.*, 30 Maine, 337; 16 Serg. & Rawle, 414; *Goodwin* v. *Appleton*, 22 Maine, 453; *Little* v. *Larrabee*, 2 Maine, 37.

The verdict is constructively recorded when it is affirmed by the jury and before they are discharged. Howe's Practice, 258; 3 Black. Com., 378; *Snell* v. *Bangor Navigation Co.*, above cited.

"The only effectual and legal verdict is the public verdict, in which the jury openly declare to the Court that they have found the issue for the plaintiff or the defendant." 3 Black. Com., 377.

*W. W. Virgin*, for defendant.

The written verdict was the verdict of the jury. It was that they agreed upon and returned into Court with. The error was the error of the clerk. The Court has the power to correct the error of its recording officer.

The cases of *Little* v. *Larrabee* and *Snell* v. *Bangor Navigation Co.*, cited for plaintiffs, decide that, after a verdict is affirmed, the jury cannot correct a mistake which *they* have made. They do not approximate the case at bar.

In this case, the written verdict was the one affirmed. It was passed to the clerk by the jury, and he read that, as they supposed, and they affirmed *what they handed to him, and not what he read.*

*Drummond*, for plaintiffs, in reply.

The written verdict is no part of the record. "The only real verdict is the one openly pronounced and affirmed in Court." The jury may *write* a verdict, but may change it at any time before *affirmation*. After it is *affirmed*, their power over it ceases. *Snell* v. *Bangor Navigation Co.*, 30 Maine, 341.

The verdict is constructively recorded before it is affirmed. The jury affirm the recorded verdict. That record cannot afterwards be changed by them or the Court.

BY THE COURT.

The verdict, as found by the jury, *has never been affirmed.*

The affirmation was of the erroneous verdict. According to the authorities, *the exceptions must be sustained.* The defendant, on his motion, is entitled to have the verdict set aside. *Snell* v. *Bangor Navigation Co.*, 30 Maine, 337; *Withee* v. *Rowe,* 45 Maine, 571.

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

GOODENOW, J., dissenting.

I do not concur in the opinion, that the verdict, as found by the jury, *has never been affirmed.* They *did affirm* the verdict which was signed by the foreman and handed in by them to the clerk. It was that verdict the clerk undertook to read to them. What was written was more certain than any parol testimony, as to the accuracy of the reading of the clerk, and should control. It must be regarded as the *record* until it is extended by the clerk. It is the basis of his record, as much so as his minutes are upon his docket.

I consider the affidavits of the jurors immaterial. The Court had abundant evidence without them to authorize the judgment on the verdict.

There was no "erroneous verdict" in the case.

I should much lament the weakness of the Court, or the refinements of the law, if, when a verdict has been found and written, and signed and returned into Court, and received and filed as a part of its records, if the party, in whose favor it was, cannot have the benefit of it. Surely, one unlearned in the law might well exclaim, "much learning hath made thee mad."

All the cases cited in the argument are unlike the case at bar.

No attempt has been made to alter the verdict actually found and rendered; but only to give effect to it.

It should be remarked, that the *form* of the verdict would not indicate to any one, *not a lawyer*, whether it was for the plaintiffs or the defendant.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## EASTERN DISTRICT.

## 1860.

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## COUNTY OF HANCOCK.

---

JOHN J. MAY *& al. versus* ISAAC H. THOMAS.

Where a trader's goods, such as are usually kept in a variety store, were attached on mesne process, and sold, by consent of parties, notwithstanding the officer sold them in gross, contrary to the intent of the statute, which requires him, in such case, "in his return, to describe particularly the goods sold, and the price, at which each article or lot, describing it, was sold," such sale will pass the title to a *bona fide* purchaser.

The true rule, as adopted in this State, is, that an officer's sale of goods, by public auction on judicial process, he being authorized by law, and having an official jurisdiction over the proceedings, will pass the debtor's title, to a *bona fide* purchaser, notwithstanding the directions of the law may not have been complied with.

THIS was an action of TRESPASS, brought against the sheriff of the county of Hancock, for certain goods attached by him on a writ, as the property of one E. H. Stockbridge. This case was presented on a statement of the facts, and was elaborately argued in writing by

*Wiswell*, for the plaintiffs, and by

*E. Hale*, for the defendant.

The material facts will be found in the opinion of the Court, which was drawn up by

CUTTING, J.—The facts disclosed in this case, are, in substance, as follows, viz.:—Prior to January 15, 1855, one *E. H. Stockbridge*, residing in Ellsworth, where he occupied a store, was possessed of certain goods and merchandize. On that day, Isaac Fenno, purporting to be his creditor, sued out a writ and delivered the same to one *G. W. Buckmore*, then sheriff of the county, with orders thereon to "attach sufficient property, to wit, goods in and about store and house." And, afterwards, on the same day, Austin Sumner & Co., other creditors, instituted like proceedings. On the first writ, the officer made the following return, viz.:—

"Hancock, ss. March 6, A. D., 1855.—By virtue of this writ, I have attached a stock of goods, valued per invoice at $3357, property of the defendant, and, by agreement of parties, on the 4th day of March, I advertised the same, by posting up notices of the time and place of sale in three public places in the town of Ellsworth, and, on the 6th day of March, I sold said goods to *May & Co.*, through their agent, *E. H. Stockbridge*, for $2300, they being the highest bidder, and, after deducting my fees, there remains in my hands, subject to this judgment, $2260." And, on the second writ, the same return, "subject to the judgment of the first writ." At the April term of this Court, the officer was permitted to amend his returns by annexing thereto the "invoice," at the foot of which was his certificate of the sale, substantially the same, although not so particular, as his returns.

After the sale, the goods remained in *Stockbridge's* store, as a portion of his stock, from which he retailed, professing to act as the agent of the present plaintiffs, until sometime in 1858, when *Anderson, Sargent & Co.*, the present defendants in interest, holding sundry notes against Stockbridge, dated

in July and December, 1857, directed Thomas, the present nominal defendant, to attach the same as the property of Stockbridge, for which act the present suit was commenced.

Hence, the principal question presented is, whether the sale by the sheriff on *mesne process*, as appears from his official returns, was sufficient to pass the legal title in the goods to May & Co., the present plaintiffs.

The officer's return is very defective in many particulars. He attached on the 6th, advertised on the 4th, and sold on the 6th of March. He set up at auction the whole invoice of goods, such as are usually kept in a variety store, and struck them off in gross, thus disposing of property valued at $3357 for $2300; whereas, by the statute of 1841, c. 117, § 10, then in force, "the officer, who shall make such sale, shall, in his return thereof, particularly describe the goods sold, and the price at which each article or lot, describing it, was sold." A provision very necessary to create competition between bidders of ordinary means instead of a few capitalists. But, still, the question returns, did a sale so imperfect pass the title?

It has been settled, by a series of decisions in this State and Massachusetts, that property of the debtor, capable of a visible possession and delivery, when seized and sold on *execution*, would be transferred to the purchaser, notwithstanding any irregularities in the proceedings of the officer. *Clark* v. *Foxcroft*, 6 Maine, 296; *Tuttle* v. *Gates*, 24 Maine, 395; *Ludden* v. *Kincaid*, 45 Maine, 411; *Titcomb* v. *Union M. & F. Ins. Co.*, 8 Mass., 335. And several reasons have been assigned for such a conclusion. One, by PARSONS, C. J., in *Ladd* v. *Blunt*, 4 Mass., recognized by this Court in *Clark* v. *Foxcroft*, first cited, to the effect, that, "when goods sufficient to satisfy the judgment are seized on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution."

Another reason was given by PARKER, C. J., in *Howe* v. *Starkweather*, 17 Mass., 343, that, "generally, a purchaser of

chattels at a sheriff's sale, having received the goods and paid for them, will have the property, notwithstanding any irregularity in the proceedings of the officer making the sale. Purchases would not be made, and the interest of both debtor and creditor would suffer, if sales made by one having lawful authority, and appearing to have exercised it lawfully, should be avoided on account of some irregularity, which could not be known at the time." But the learned Judge proceeds — "even, in such cases, the officer ought to show a compliance with the law, or the purchaser would be unable to maintain his property." Now, it would seem that the latter is, in some sense, in conflict with the former paragraph; for it is difficult to perceive how an irregularity, if substantial, can be compatible with a legal compliance; if not essential, it would be harmless, and such an objection hypercritical. WESTON, J., in *Clark* v. *Foxcroft*, in commenting upon that opinion, rejects the concluding remarks; and SHEPLEY, J., in *Tuttle* v. *Gates*, referring to the same case, observes, "it cannot, however, be admitted that the title of the purchaser, as against the debtor, will depend upon the return of the officer showing that the directions of the law have been observed in the sale of goods capable of a visible possession and delivery; the sheriff must be presumed to have obtained the full value; and, if he did not, through any misconduct, he would be liable to make full compensation to the party injured."

It is true, that, in the cases cited, the Courts were discussing the effect of officers' proceedings on *execution*, but most of the reasons assigned will as well apply to sales on *mesne process* when authorized by law.

We are aware that the numerous American decisions touching the question now under consideration, are conflicting, and apparently irreconcilable, but we think the true rule, as adopted in this State, to be, that a sale of such goods as are in controversy, made by an officer at public auction, on judicial process, he being authorized by law and having an official jurisdiction over the proceedings, will transfer the debtor's title to a *bona fide* purchaser, notwithstanding the directions of the

law may not have been complied with. And, according to the agreement of the parties, *the action is to stand for trial.*

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

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ARNO WISWELL *& als., Receivers of Hancock Bank, versus* JOHN N. STARR *& als.*

Each stockholder in a bank is liable to make good all losses sustained by the pecuniary inability of the directors, by whose mismanagement the bank has sustained a loss, to an amount *not exceeding the amount of his stock at the time.*

Each stockholder is also liable, at the expiration of the charter, for the redemption of *all unpaid bills*, in proportion to the stock he then holds. The sum to be contributed by each will be in proportion to the whole number of shares actually held at the expiration of the charter, whether such holders are within or without the jurisdiction of the Court.

If the whole number of shares, necessary to make up the capital stock named in the charter, does not appear on the books, or otherwise, to be held by any persons, the liability will be apportioned according to the number of shares actually held, and not upon the whole capital named in the charter.

When one of the receivers named in the bill is also a stockholder, the bill cannot be sustained, as the same person cannot be both a complainant and respondent, but the bill may be amended on motion.

The charter of a bank expires, within the meaning of the statute, when an injunction is made perpetual.

BILL IN EQUITY. A general demurrer was filed to the bill.

The case was argued in writing by

*J. A. Peters*, in support of the demurrer, and by

*Rowe & Bartlett, contra.*

The opinion of the Court was drawn up by

CUTTING, J.—The bill, in substance, alleges *that* the Hancock Bank was incorporated March 21, 1853, with a capital of $50,000, in shares of $100 each, and subsequently went

into operation; *that*, on September 19, 1857, the Bank Commissioners represented to a Justice of this Court, "that, upon examining said bank, they were of opinion that its condition was such as to render its further progress hazardous to the public," &c., and prayed "for an injunction to restrain said incorporation from further proceeding with its business." &c.

Whereupon, on September 21st, a temporary injunction was granted, which, on September, 30th, on a hearing, was modified; and on November 20th, of the same year, was made perpetual, and the complainants were duly appointed receivers, qualified, and proceeded in the regular discharge of their duties.

And, it is further alleged, *that* all the property of the bank, when reduced to cash, was $8,605,64, and that the claims against the bank, presented and allowed, amounted to the sum of $16,107,70; *that* John N. Starr was an original and present holder of ten shares, together with twenty-one others, owning in like manner one hundred and sixty-seven shares; *that* twenty-seven other individuals, not originally, were stockholders on September 30, 1857, owning one hundred and ninety-nine shares; *that*, since that time, seven others have transferred their stock, being fifty-seven shares; and, to four persons, nineteen shares have been transferred, five of which were to *Samuel Waterhouse*, one of the receivers; *that* the receivers, in their own names, but, in behalf of the claimants, file this bill in equity against the persons named and liable as stockholders, praying that they shall be made to contribute to the payment of the debts of the corporation.

To this bill, *John N. Starr*, alone, appears by his counsel, and files a general demurrer. We say that he alone appears, because, the term "and others," is too indefinite to create a responsibility. Thus presenting various questions, under the general banking law, for the first time to be adjudicated.

The statute in force, at the time the Hancock Bank was chartered, was that of 1841, (Act of Amendment, c. 1, § 8,) and we cite only those sections having application to the questions raised.—Section 1, "every bank which now is, or

shall hereafter be incorporated under the authority of this State, except savings banks, shall be governed by the following rules, and subject to all the duties, limitations, liabilities and provisions contained in this chapter."

Section 45. "The holders of stock in any bank, at the time when its charter may expire, shall be liable, in their individual capacities, for the redemption and payment of all bills, which may have been issued by said bank, and which shall remain unpaid, in proportion to the stock they may respectively hold, at the dissolution of the charter," &c.

Section 46, among other things, provides that—"any holder of any bill or bills issued by any bank, which bill or bills, after the expiration of its charter, shall remain unredeemed, and which may have been duly demanded of such bank, may pursue his remedy by a bill in equity, to be prosecuted in the Supreme Judicial Court."

Next in order is the statute of 1855, c. 164, which proposes not to change, alter, or increase the liabilities of stockholders, but, in some respects, to change the remedy by transferring certain powers to the receivers, for § 9 contains this language:—"Nor shall any thing in this Act be construed to increase the amount for which the stockholders of any bank may be liable, under existing laws." Still, notwithstanding the liabilities of stockholders were so guarded, §§ 4, 5 and 6, of the same chapter, instead "of all bills, which may have been issued by said bank," refer to claims and claimants—terms sufficiently comprehensive to embrace all the indebtedness of the bank.

After a perpetual injunction and the appointment of receivers, § 6 provides that—"If it be made to appear to the Court, that the assets aforesaid are insufficient to pay the said claims against the bank, said receivers shall forthwith file their bill in equity, in their own names, but in behalf of the claimants, against the persons who are or were stockholders of such bank, and, by law, may be liable to contribute to the payment of its debts," &c.

The statute of 1857, which is a revision of all prior stat-

utes upon the subject of banking then in force, provides remedies for the creditors, by a bill in equity against the stockholders, upon the event of certain contingencies, viz.:—

*First.*—In case of the pecuniary inability of the directors, by whose mismanagement the bank has sustained a loss, each stockholder shall be liable therefor, to an amount not exceeding the amount of his stock at that time. § 43.

*Second.*—The holders of stock in any bank, at the expiration of its charter, shall be liable in their individual capacities for the redemption and payment of all bills issued by said bank, and remaining unpaid, in proportion to the stock they then hold. § 46.

*Third.*—The receivers, after their appointment, instead of the claimants, are to file their bill in equity, in their own names, but in behalf of the claimants, against the persons liable as stockholders to contribute to the payment of the debts. §§ 73, 75.

The charter of the Hancock Bank expired by operation of law, on November 20, 1857, when the injunction was made perpetual and the receivers were appointed. *Crease* v. *Babcock*, 23 Pick., 334. At that time, as the general law was, under which they accepted the charter, each stockholder became liable, in their individual capacity, for the redemption and payment of *all bills* issued by the bank, and remaining unpaid, in proportion to the stock they *then* held, which proportion is not limited to the amount of their stock, as in case of loss by the mismanagement of the directors; but they are not responsible for all the debts or claims of the creditors, and the claims denominated debts in § 73, and so described in the bill, must be construed to mean only the unpaid bills. Any other construction would increase the liability of stockholders by legislation subsequent to chartered rights, and would be directly opposed to the express declaration of the Legislature in their public Act of 1855, before cited.

All the stockholders should be embraced in the bill, but only such can be made to contribute, who are within the jurisdiction of this Court, by residing or having attachable pro-

perty within the State. And, although the bill is against all, jointly, yet each may answer severally and independently, and the sum to be contributed by each, will be in proportion to the whole number of shares held at the expiration of the charter, whether such holders were within or without the jurisdiction.

It appears, that the capital stock was $50,000, and should have been represented by the holders of 500 shares, whereas, it is alleged that, on September 30, 1857, a short time before the final injunction, only 376 shares were so represented. It is true that the statute of 1841 required that one half, at least, of the capital stock should be paid in, in gold and silver money, before a bank could go into operation, which fact was to be ascertained and certified to the office of the Secretary of State, by the Bank Commissioners, aided by the oath of a majority of the bank directors, and, in like manner, the other half within twelve months from the date of the charter. But the bill avers that the charter was accepted—the corporation organized and went into operation. It is to be presumed that the State Commissioners discharged their official duties, that the directors' oaths were not false, that the semi-annual returns were made correctly and in good faith, and that the corporation, from its organization, during a period of some years under State supervision, was conducted according to law; but when, or in what manner, the deficient shares were lost, or merged, it no where appears. Whatever may be the legal relations between the corporation and its members, it would be inequitable in those who have put the machine in motion, to escape responsibility to the public under a plea of fraud and deception.

The bill bears date September 29, 1859, and, not being for a discovery or praying for an injunction, need not to be verified by oath. The transferring of shares, subsequent to the dissolution of the corporation by the perpetual injunction, can have no effect to relieve the prior holders of such shares from their responsibility, nor even during the pendency of the temporary suspension, unless transacted in good faith, and not

with a design to escape existing liability. *Marcy* v. *Clark*, 17 Mass., 330.

It is inferable, from an allegation in the bill, that *Samuel Waterhouse, Esq.*, at the time he was appointed a receiver, was a stockholder in the bank, and has been declared against as such. He cannot be both a complainant and respondent; the latter he must be, as has been shown, the former he would not have been, had such fact come to the knowledge of the Judge, before his appoiniment. Under existing circumstances, the rules of equity may, on motion, permit his name to be stricken out of the bill, and the majority of the receivers proceed. *See* R. S., c. 1, § 4, clause 3. But, at present, for that cause, the bill is defective, and the

*Demurrer sustained.*

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

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GEORGE K. GRIFFIN, *App't, versus* GEORGE PARCHER, *Adm'r.*

The "additional *time* not exceeding, in the whole, eighteen months," allowed by statute to creditors of an insolvent estate to prove their claims before the commissioners, means time in which the creditors may prove, and the commissioners may act, upon the claims to be proved.

The statute (c. 66, § 4, of R. S. of 1857,) manifestly intends that eighteen months, *in the whole*, should be given to the creditors, in which to present their claims; therefore the limitation of the time to eighteen months "from the date of the commission," contained in the statutes of 1841, was omitted.

APPEAL from a decision of the Judge of Probate for the county of Hancock. The case was presented to the full Court, on a statement of facts agreed upon at *Nisi Prius* by the parties.

The questions presented by the case were argued by

*Waterhouse*, for the petitioner, and by

*Wiswell*, for the administrator.

The material facts are stated in the opinion of the Court, which was drawn up by

APPLETON, J. — The estate of Henry S. Jones having been represented insolvent on the 17th of June, 1857, commissioners of insolvency were appointed, and a commission issued, allowing creditors six months in which to present and prove their claims. On the sixth of January, 1858, the time was extended three months. On the 28th of April, a further extension of four months was allowed.

The present petition for the allowance of further time was filed on the 15th of June, 1859.

There have been but thirteen months, within which the commissioners could have acted upon claims presented for their adjudication, and less than two years from the issuing of the commission had elapsed, when this petition was presented.

The Judge of Probate refused to grant the prayer of the petition and allow further time, on the ground, that the time allowed by law to creditors, to bring in and prove their claims, had expired, and that he could not legally allow any additional time for that purpose.

By R. S., 1821, c. 51, § 25, the Judge of Probate is empowered to appoint commissioners of insolvency, "and six months and such further *time*, not exceeding eighteen months in the whole, shall be allowed by the said Judge to the creditors to bring in and prove their claims; at the end of which limited time such commissioners shall make their report."

Upon this statute the inquiry arises, whether the *time* of eighteen months is eighteen months from the issuing of the commission, whether the same be open or not, or whether it means eighteen months while the powers of the commissioners are in full force, and in which claims may be proved. It is apparent that if the former alternative presents the true construction, the creditors may have much less than the required time, and that such will always be the case if any time intervenes between the termination of one commission and the issuing of another.

This question was made in *Todd* v. *Darling*, 2 Fairfield, 34, and it was there decided, that the time between the termination of one commission, and the issuing of another, was not to be included within the eighteen months, but that the commission could not be opened after the statute limitation of four years had attached. "The Court of Probate," remarks WESTON, J., "in cases of insolvency, is to allow six months and further time, not exceeding eighteen months in the whole, to creditors to bring in and prove their claims. In this period, the time between the termination of one commission and the issuing of another is not to be reckoned. It is no part of the time in which creditors may prove their claims, which can be done only while the commission is open. But, in order to give effect to the limitation of four years, for the protection of the estate, the commission ought not to be opened after that limitation has attached." *Parkman* v. *Osgood & als.*, 3 Greenl., 417.

By R. S., 1841, c. 109, § 6, "the period of six months after the appointment shall be, in the first instance, allowed for the creditors to present and prove their claims; and, if necessary, an additional time, not exceeding eighteen months in the whole, *from the date of the commission*, at the discretion of the Judge, may be allowed for the reception and examination of claims generally, or of any particular claim or claims to be specified in the order of the Judge."

By this section it appears that, after the expiration of eighteen months "*from the date of the commission*," the Judge of Probate was interdicted from further action.

The law stood thus till the revision of 1857, when, by c. 66, § 4, it was enacted, after giving the commissioners power to appoint a time and place for meeting, that "six months after their appointment shall be allowed, in the first instance, for the presentment of claims. An additional time, not exceeding in the whole, eighteen months, may be allowed therefor, or for any particular claim or claims specified in the order of the Judge."

This section is, substantially, coincident with the statute of

1821, relating to the same subject matter. By that, the creditors, at the discretion of the Judge, were allowed eighteen full months in which to prove their claims. The words "*from the date of the commission*," which limit the time in the revised statutes of 1841, c. 109, § 6, are stricken out. Their insertion in that statute had the effect of changing the law of 1821, in reference to the time allowed creditors. The striking out these words was not without purpose or object. The law of 1821, which had received the construction of this Court in *Todd* v. *Darling*, 2 Fairf., 35, was thereby revived.

The "additional time, not exceeding in the whole eighteen months," means time in which the creditors may prove, and the commissioners may act upon the claims to be proved. The creditors, in this case, have not had eighteen months in which their claims could have been proved, nor can they ever have it unless the petition for extension of time be granted. The statute manifestly intends, that eighteen months *in the whole* should be given to the creditors in which to present their claims. The petitioner is entitled to the allowance of further time, as prayed for.

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

## SAMUEL BOWZEY *versus* GEORGE W. NEWBEGIN.

Under the statute exempting from attachment "one pair of working cattle," a *bull* used for work is exempt, although the owner has no other cattle.

THIS was an action of TRESPASS, against an officer, who, by virtue of an execution against the plaintiff, seized and sold a *bull*, which the plaintiff claims was exempt by the statute from attachment and seizure. The plaintiff owned no other cattle. He occasionally worked the bull in a short yoke to draw his firewood, and for other labor. The bull was also kept by plaintiff for other uses.

The only question was, whether the animal, under such circumstances, was intended to be exempted by the statute, under the designation of "one pair of working cattle."

*Wiswell*, for the plaintiff.

*G. Peters*, for the defendant.

PER CURIAM. — The bull being used for work, is exempt from attachment under the statute. *Defendant defaulted.*

## JOSEPH W. OSGOOD *versus* JOHN HOLYOKE.

By c. 114, § 33, of R. S., 1840, (c. 81, § 31, of R. S. of 1857,) no attachment of real estate "shall be valid, unless the plaintiff's demand, on which he founds his action, and the *nature* and *amount* thereof, are substantially set forth in proper counts, or a *specification* of such claim shall be annexed to such writ."

And where there was an attachment of real estate, on a writ, in which was a count for money had and received, but no specification of the claim to be proved under it, was annexed to the writ, it was held that, there being no sufficient specification of "the nature and amount of the plaintiff's demand," such attachment was void.

The rights of the parties are dependent upon the facts disclosed by the declaration; not upon such as may be subsequently proved or ascertained.

Osgood *v.* Holyoke.

Where, in addition to the money count, there was, also, one declaring specially on a note of hand, and judgment was rendered generally upon the declaration, but was entered up for the amount of the note only, the attachment of real estate, on the writ, was held to be invalid. — GOODENOW, MAY and KENT, JJ., dissenting.

REPORTED by RICE, J.

WRIT OF ENTRY. The demandant claims title to the parcel of land in Ellsworth, described in his writ, under a levy thereon, of an execution against one Williamson, the same having been attached on the original writ on which judgment in the action was rendered.

From the case, it appears the writ contained two counts, declaring in one count, on a promissory note for $125, and interest; in the other, generally for $500, for money had and received. *Ad damnum* $600. Judgment was rendered on default, for $131,68, and costs. The writ of execution was levied within thirty days from the rendition of judgment.

After the attachment on the writ, but before the levy of the execution thereon, Williamson sold and conveyed the land to the defendant by deed, which was recorded, on the day of its date.

The validity of the attachment was controverted, because there was no specification of claim under the money count in the writ. To determine this question, the case was reported to the full Court; the plaintiff to become nonsuit, if the attachment should be held to be invalid.

*Godfrey & Shaw*, for the defendant, argued that no valid attachment, as against a purchaser, or a subsequent attaching creditor, was made on the writ. R. S., 1840, c. 114, § 33.

As to the object of the provision of the statute, reference was made to the opinion of the Court in *Saco* v. *Hopkinton*, 29 Maine, 268.

There was nothing to prevent another demand from being substituted, in place of, or added to, the one sued. Another note, overdue and unpaid, could have been introduced. *Payson* v. *Whitcomb*, 15 Pick., 212; *Fairbanks* v. *Stanley*, 18 Maine, 296.

There was nothing to indicate that the note, which was properly declared on in a distinct and sufficient count, was the demand relied upon to sustain the count for money had and received.

*J. A. Peters*, for plaintiff.

It must be confessed that the validity of the attachment is, by no means, free from doubt; that the reasons for declaring it void, can be strongly stated. On the other hand, what is the argument in favor of the validity of such an attachment? It can be briefly stated.

1. The *prima facie* presumption from the writ is, that the special count is intended as a specification for the money count. Such would be the *apparent* construction of the writ.

2. The writ is thus *valid*, because the writ does disclose *in fact* the "amount and nature" of plaintiff's demand, and becomes *void* only by his proving something under his money count, which, in its *nature* and *amount*, is *not* described in his writ.

3. Nothing else appearing, why is not a money count a clear and definite statement and specification, that defendant owes plaintiff so much money, which he received of his money, as money, and nothing else? Supposing the proof was literally as the count runs, that it was so much cash coin, or money which defendant received for plaintiff,—could any specification make it more definite?

This case was argued in 1859, and continued for advisement. The opinion was announced in 1862.

The opinion, adopted by a majority of the Court, was drawn up by

APPLETON, J. — It would seem that a valid attachment might, according to the opinion of the Court in *Fairbanks* v. *Stanley*, 18 Maine, 296, be made on a writ containing only the money counts.

After the attachment, the effect of which was considered in that case, the statute of 1838, c. 344, was passed, which

became embodied in R. S., 1840, c. 114, § 33, and is still continued in force in the revision of 1857, c. 81, § 31.

By that Act, it was provided that no attachment "shall be valid, unless the plaintiff's demand on which he founds his action, and the *nature* and *amount* thereof, are substantially set forth in proper counts, or a specification of such claim shall be annexed to such writ."

The writ, in the suit, *Hancock Bank* v. *Williamson*, contained a count specially on a note of hand, and for money had and received, but no specification of the claim to be proved under the latter count was annexed to the writ.

The money count contained no sufficient specification of "the nature and amount" of "the plaintiff's demand." Judgment was rendered generally upon the declaration. Under the money count, another note or notes than that described in the declaration might have been introduced. The note declared upon might have been omitted and formed no part of the judgment. Other and different notes or claims might have formed the basis of the judgment. The declaration contains no specification, by which the substitution of another demand could be prevented. The *nature* of the plaintiff's claim is not sufficiently indicated by the money count.

The rights of the parties are dependent upon the facts disclosed by the declaration; not upon such as may be subsequently proved or ascertained. The writ must set forth "the nature and amount" of the plaintiff's claim, else the attachment is declared to be invalid. "The intention of the statute must have been," remarks WELLS, J., in *Saco* v. *Hopkinton*, 29 Maine, 268, "to require an attaching creditor to furnish such information by his writ, to subsequent attaching creditors and purchasers, as would enable them to know what his demand was, and that it should be so specific as to prevent any other demand from being substituted in the place of that sued. When the demand is not exhibited by the counts in the writ, it must be made to appear by a specification of it annexed to the writ. Information more certain and definite

was required to be given, than could be obtained from the general counts."

The construction of the section in question, as given by this Court in the case of *Saco* v. *Hopkinton*, must be regarded as affirmed by the Legislature, by its subsequent reënactment, in the same language, in the revision of 1857. Such is the universal rule. *Myrick* v. *Hasey*, 27 Maine, 9.

*Plaintiff nonsuit.*

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

MAY, GOODENOW and KENT, JJ., dissented.

KENT, J., dissenting.

In my view, the fair construction of the statute is, that the writ must contain, in some count or counts, or in a specification, a substantial, i. e., a sufficiently particular description of the nature and amount of a claim or claims, so that any person reading it would understand both. In this case, there is a sufficient description of a note for $125. There is also a general count for money had and received. A person reading this writ would have notice of a claim for the note. He would not have sufficient notice of any particular claim under the money count. The question is, whether the insertion of the money count renders the attachment void, when the record shows that the judgment was taken for no more than was declared for in the specific count, and this fact appears sufficiently from the judgment, which is for note and interest. It is very clear that, if he takes judgment for any thing under the money count, in a case like this, the attachment is vacated. But why should it be thus vacated in case of a judgment on the specific count only, merely because there is a general count in the writ, under which nothing is claimed at the time of judgment?

The reason upon which the provision of the law is based is correctly stated in *Saco* v. *Hopkinton*, 29 Maine, 271. It is, that attaching creditors or subsequent purchasers may have such information by the writ as would enable them to know what the demand was, and to prevent any other de-

mand from being substituted for the one sued. This object is secured when there is in the writ a specific description of a note of hand, to the extent of such a claim. A person reading the declaration must say, I see that this defendant is sued for a note for $125. I also see, that there is a money count, without any specifications, and this I may disregard, because, if the plaintiff claims any thing beyond the amount of the note, his attachment will be void.

In the case in the 29th Maine, before cited, the Court expressly says, that in that case "*neither* of the counts, nor the account annexed, furnish the necessary information." This case is essentially different. Here, there is one count, that is sufficient, and the judgment appears to have been for the amount claimed in that count only.

It has often been decided, that if a plaintiff declares for items secured by a lien, and for other items not so secured, and takes judgment which includes items of both kinds, that he loses his right to enforce his lien by that judgment and his execution thereon. But, it has never been determined, that the mere fact, that unsecured items or claims are set forth in the writ, will alone defeat the lien right, if the judgment included no such item, but was based entirely on those to which the lien attached.

No wrong or injustice, in cases like the one before us, can result to a subsequent attaching creditor or purchaser, if the judgment includes no claim or debt, except the one or more specifically set out in the writ on which the attachment is made. What I intend to determine is, that, when it satisfactorily appears that the judgment includes only the items specifically and substantially set forth in proper counts or specifications, the mere fact that there are other general counts, without specification in the writ, but on which nothing is recovered, will not defeat the attachment.

It is urged in the opinion of the majority of the Court that, although the judgment rendered may be no more than the amount covered by the count on the note, yet it is within the range of possibility, that the judgment may have been render-

ed on the money counts. If it were so, I do not see that any subsequently attaching creditor or purchaser is wronged. The judgment is for no larger sum than he had notice of, and it can make no difference to them, on what count the judgment is rendered. But it looks to me like very nice refining, to doubt that a judgment, which exactly covers the debt and interest due on a note described in a sufficient count, was rendered on that count.

The opinion also says, "that the rights of the parties are dependent upon the facts disclosed by the declaration, not such as may be subsequently proved or ascertained." But surely, as it seems to me, a plaintiff who should, by leave of Court, strike out all the money counts, after ascertaining that he had not made any sufficient specifications to enable him to take judgment safely on such money counts, and who should take a judgment only on his special and specific counts, would not lose his attachment.

INHABITANTS OF ELLSWORTH *versus* INHABITANTS OF HOULTON.

Not only the expenses incurred by a town for the support of a pauper there residing, but also the expenses incurred in burying him at his death, are recoverable of the town in which he had a legal settlement, if the requirements of the statute have been complied with.

A town, liable for expenses for the support of a pauper, when incurred, is not relieved from its liability by reason of the death of the pauper. It is immaterial why there was no removal; whether from sickness, death or other sufficient cause.

The statute which provides that the notice shall contain a request to remove the pauper, could not have been intended to apply to a case, where the death and burial of the pauper had occurred, before the time allowed to give the notice had elapsed, and the notice had been actually given.

Nor is the notice insufficient for the want of the date, if it be in all other respects regular and sufficient, it being proved that it arrived at the post-office in the town chargeable, before the expiration of the three months from the time the supplies were furnished and the funeral expenses paid.

Ellsworth *v.* Houlton.

The statute requires that the overseers of the poor, thus notified, shall, within two months, return a written answer, stating their objections to the removal of the pauper, if he has not been removed. The town giving notice was entitled to know whether the pauper's settlement was admitted or contested; and the notice should have been answered, though it contained no request for his removal.

No answer having been given, the town thus notified is, by the statute, estopped from contesting the settlement of the pauper in that town, in a suit brought to recover the expenses previously incurred for his support and funeral.

REPORTED by RICE, J.

This was an action to recover the sum of $32, for supplies furnished and expenses paid on account of one *James Cox*, a pauper, whose settlement is alleged to be in the defendant town.

It is admitted that said Cox was a pauper, and that the plaintiffs furnished supplies and paid for his funeral expenses to the amount charged.

The plaintiffs introduced a notice addressed to the overseers of the poor of Houlton, without any date, and is as follows:—

"You are hereby notified that James Cox, aged about fifty years, who had his legal settlement in your town, has been chargeable in this town as a pauper, and we have been providing for him at your expense.

"Mr. Cox was taken sick in this town, in March last, and died on the 6th of April, inst. The expense, on account of his sickness and funeral, amounts to about thirty dollars and eight cents, which you are requested to forward at your earliest convenience. "L. D. Jordan, } *Overseers of Poor,*
} *Ellsworth.*"

It appeared from the certificate of the postmaster at Ellsworth, that the letter was received and registered April 10, 1860, and, from a certificate of the postmaster at Houlton, of the (registered) letter.

If, upon the case as reported, the plaintiffs, in the opinion of the Court, can maintain the action, the defendants are to be defaulted; otherwise the action is to stand for trial.

*A. Wiswell*, for the plaintiffs.

By § 24, c. 24, R. S., towns are required to relieve persons found destitute, and having no settlement therein, and, in case of decease, decently bury them, the expenses whereof to be recovered of the town liable.

This was done by plaintiff town, and due notice was given to the defendants, which they neglected to answer. Are the defendants, by such neglect estopped to deny the settlement of the pauper?

The notice given was in compliance with § 27 of said chapter, but no request was made for the removal of said pauper, he being at the time dead and buried.

By § 28, of the same chapter, in case of neglect to answer said notice within two months, the town is estopped to deny the settlement, "in an action brought to recover for the expenses incurred for his previous support and for his *removal*."

Since towns are obliged to relieve destitute persons and, in case of decease, bury them, the framers of the statute evidently intended to give towns an adequate remedy for the recovery of such expenses as they were obliged to incur, including *burial* and all legitimate expenses, incurred within three months next before giving notice.

The neglect to answer the notice, is made by the statute a peremptory bar to the denial of the settlement. This should be so; as, in this case, unless the defendants are estopped from denying the settlement of the pauper, the plaintiffs have lost all remedy on any other town where his legal settlement may have been, by neglecting to give notice to such other town.

Our statute is similar to the Massachusetts statute in force when the case of *Topsham* v. *Harpswell*, 1 Mass., 518, was decided. By neglecting to answer the notice, the defendants impliedly acknowledged the settlement of the pauper to be in their town, and should be holden for all legal charges.

*A. F. Drinkwater*, for the defendants.

The plaintiffs rely, not upon evidence that the pauper's settlement was in the defendant town, but upon the alleged fact,

that their notice to the defendants was not answered, and that therefore they are estopped by the statute, in this action, from denying his settlement.

The notice was insufficient;—(1,) Because it is without date;—(2,) It is signed "L. D. Jordan, Overseers of Poor, Ellsworth." No such authorities are known in the statutes; nor does the case find that Jordan was one of the overseers of the poor of Ellsworth.

Section 28, of c. 24, creates an estoppel, when the facts and circumstances exist, contemplated by §§ 27 and 28 of that chapter, viz.:—(1,) That the person has actually become chargeable as a pauper, is living at the time of notice, and liable to removal. (2,) A request to remove him. (3,) Neglect to return, within two months, a written answer, stating the objections to his removal.

The notice contained no request to remove the pauper, as required by statute. But it notifies the defendants that the pauper was dead and buried—that he required no further assistance—and that his removal had already been effected. It was, at most, only a request for reimbursement of the expenses incurred in the support and burial of the pauper.

As the notice contained no request to remove, defendants cannot be held to return a written answer stating their objections to removal.

What was there in the notice which required an answer? The statute *requires*, that the answer shall be simply a statement of objections to removal, and nothing else. Such an answer, in this case, would have been absurd. Would plaintiffs have been benefitted by it? And are they injured by a neglect to return it? The harsh doctrine of estoppel, therefore, should not be applied to defendants for neglect to perform an idle and senseless act.

So severe and unjust has been the operation of this statutory bar, that Courts in Massachusetts and this State have restricted its application. *Leicester* v. *Rehoboth*, 4 Mass., 180, and *Turner* v. *Brunswick*, 5 Greenl. 31.

The case of *Topsham* v. *Harpswell*, 1 Mass., 518, relied on

by plaintiffs' counsel, is widely different from this. All the preliminaries necessary to create the estoppel are there found.

The point there decided was, that a plaintiff town could recover for the support and *burial* of a pauper, which we have admitted. The point here raised is that, without a living pauper and a request to remove, no obligation to answer arises, and consequently no estoppel.

The opinion of the Court was drawn up by

APPLETON, J. — This action is brought to recover the expenses of the last sickness and burial of one James Cox, incurred within three months before the notice required by R. S., 1857, c. 24, § 27, was given.

(1.) Paupers, while living, are supported, and, when dead, are buried at the public charge. It is the duty of the overseers of the poor to relieve those falling in distress and, in case of their death, to bury them. When these expenses are incurred at a place other than that of the pauper's settlement, they may be recovered after due notice of the town where his settlement is.

By c. 24, § 24, "overseers are to relieve persons destitute, found in their towns and having no settlement therein, and, in case of decease, decently bury them; the expenses whereof, *and of their removal*, incurred within three months before notice given to the town chargeable, may be recovered by the town incurring them against the town liable, in an action commenced within two years after the cause of action accrued, and not otherwise," &c.

If the expenses of removal are not incurred, it is obvious they cannot be recovered. They are additional to other expenses, only, when incurred. The expenses of support may be incurred and those of removal not. Unless there be a removal there can be no expenses of removal. But, because there is no removal, the town chargeable is not to be exonerated from the payment of other expenses, properly incurred, and of which due notice has been given. It is immaterial why there was no removal — whether from sickness, death or other

sufficient cause. The preceding expenses are none the less incurred, and, being incurred, are none the less due. It was the duty of the overseers to incur the expenses in question, and it is the intention of the statute that the town, where the settlement of the pauper is, shall remunerate the town where his settlement is not, for expenditures properly made.

The plaintiff town were bound by the statute to make the expenditures, for the repayment of which this action is brought. A town liable for expenses for the support of a pauper, when incurred, is not relieved from its liability because of the decease of the pauper, before his removal. The town not chargeable is not to have these expenses imposed upon it because, by the act of God, the removal of the pauper became impossible.

(2.) It is urged that the notice given is insufficient, because it contains no request for the removal of the pauper.

By R. S., 1857, c. 24, § 27, "overseers are to send a written notice, signed by *one* or more of them, *stating the facts* respecting a person chargeable in their town, to overseers of the town where his settlement is alleged to be, *requesting them to remove him*, which they may do by a written order directed to a person named therein, who is authorized to do it."

The expenses of support and burial had been rightfully incurred. If death and burial had intervened before notice was given, the removal had ceased to be necessary or proper. As the removal was thus improper and unnecessary, a request to remove would be absurd and supererogatory. The notice given stated all the facts. It did not request a removal, because no removal was desired, and if none was desired, it would be absurd to require a request to do what was not wanted to be done.

(3.) All that is required of a notice is, that it should be so clear and precise, as to the persons charged, and as to the official character of the persons sending the notice, that its purpose and object can be fully understood. It may be sufficient, though not signed by the overseers in their official

character. *York* v. *Penobscot*, 2 Greenl., 1. So, if it be signed by the chairman of the selectmen *eo nomine*. *Garland* v. *Brewer*, 3 Greenl., 197; or by the chairman of the overseers. *Kennebunkport* v. *Buxton*, 26 Maine, 61; *Cutler* v. *Maker*, 41 Maine, 594. So if it be signed by one overseer in behalf of all. *Dover* v. *Deer Isle*, 45 Maine, 169. The statute requires only the signature of one overseer, and that the report shows to be the case with the notice sent.

(4.) The notice was not dated. But the evidence shows when it was placed by the plaintiffs in the post office of their town for transmission, and when it was received at the post office of the defendant town. The supplies were furnished and the funeral expenses paid within the three months prior to the time when the notice reached Houlton. The most favorable date for the defendants would be the day on which the letter reached their town and was or might have been received by them. But if that were to be regarded, the notice was seasonable. The letter, too, would show when it was mailed. The notice, whether the day when mailed at Ellsworth and the postage paid, or when received at Houlton, is to be deemed its date, was in sufficient season. c. 24, § 29.

(5.) A notice "*stating the facts* respecting a person (the pauper) chargeable in their town," but omitting the request "to remove him," was sent to the defendant town. The death of the pauper had rendered the request for removal no longer necessary or proper. The notice given, we have seen, was sufficient to charge the defendant town with the expenses incurred, within the true intent of § 27.

If the notice given was the one required by § 27, then, by § 28, "overseers receiving *such notice* are, within two months, if the pauper is not removed, to return a written answer, signed by one or more of them, stating their objections to his removal." The defendants need not object to his removal in the present case, because it was not requested, and if requested was not proper. It is insisted that they were not bound to answer. But the statute requires either an answer

or removal. The town notifying were entitled to know whether the settlement of the pauper was admitted or contested. If admitted, they would be relieved of all further inquiry. If contested, they would then ascertain whether to resort to the town notified, or to look elsewhere for remuneration. The defendant town were excused from removing, but not from answering.

Neither removing the pauper, nor returning "a written notice" within two months, the town duly notified "is estopped to deny his settlement therein, in an action brought to recover for the expenses incurred for his previous support and for his removal." The expenses sued for, are those provided for in § 24. The expenses incurred by virtue of the section last referred to, are those of which notice is to be given by § 27. When notice is thus given, if neither removal of the pauper, when requested, is made, nor answer given, the town notified is estopped from contesting the settlement of the pauper in their town, in a suit brought for such expenses previously incurred.

The cases cited are not at variance with these results. In *Turner* v. *Brunswick*, 5 Greenl., 31, it was held that the estoppel, created by the neglect to answer, does not apply to cases where the settlement can be shown to be in the town giving notice. The defendants might undoubtedly show the settlement of the pauper in the plaintiff town—but that they do not seek to do. In *Leicester* v. *Rehoboth*, 4 Mass., 180, it was held that this estoppel, from neglect, did not apply as to subsequent expenses. Where the defendants had, when notified, paid the amount claimed, they were allowed, in another suit for *after expenses*, to contest the settlement. The estoppel, by the express words of the statute, is limited to an action "for the expenses incurred *for his previous support.*" It does not affect *after expenses.* *Defendants defaulted.*

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

ROBERT T. CARLISLE *versus* JAMES MCNAMARA.

The allegations, in the plaintiff's writ, that the defendant falsely and fraudulently affirmed, that one A, whose note he held, was then in good credit and business at B, and was responsible; that plaintiff was, thereby, induced to take the note for his wagon, whereas the defendant knew that A had failed and absconded and was irresponsible, discloses a case of cheating by false pretences for which the defendant, on proof, is liable to indictment.

The plaintiff is, therefore, an incompetent witness in his own case, "unless the defendant offers himself as a witness." R. S., c. 82, § 79.

Whether "the cause of action implies an offence against the criminal law," so that the plaintiff is to be excluded as a witness, is to be determined by the allegations in the writ.

EXCEPTIONS from the rulings of KENT, J.

THIS was an action on the case for deceit. The substantive allegations in the plaintiff's writ are that, the defendant being possessed of a certain wagon, and the plaintiff of another wagon of the value of seventy dollars, the defendant, to induce the plaintiff to exchange wagons, offered the plaintiff a promissory note he held against one Atwood for forty-five dollars, and then and there, falsely and fraudulently, affirmed to the plaintiff, that said Atwood was at that time engaged in business in Bucksport, was responsible and in good credit; that the plaintiff crediting the defendant's affirmations, received the said note in exchange for the plaintiff's wagon; that said Atwood was then without property or credit, had failed in business and absconded, &c.

The defendant excepted to the ruling of the Court, admitting the plaintiff to testify in his own behalf, his counsel having seasonably objected to the plaintiff as incompetent to testify, the defendant not having offered himself as a witness.

*J. A. Peters & Hinckley,* in support of the exceptions.

*Wiswell, contra.*

The opinion of the Court was drawn up by

APPLETON, J.—The allegations in the plaintiff's writ disclose a case of cheating by false pretences, for which, on proof, the defendant would be liable to indictment. *State* v. *Mills*, 17 Maine, 211; *State* v. *Philbrick*, 31 Maine, 401; *State* v. *Dorr*, 33 Maine, 498.

By R. S., 1857, c. 82, § 79, a limitation is imposed in the general admission of parties as witnesses.—"Parties are not to be witnesses in suits when 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, and such defendant shall be held to waive his privilege of not testifying when his testimony might criminate himself." Whether "the cause of action implies an offence against the criminal law," is to be determined by the allegations in the writ. As they set forth an offence against the criminal law, the plaintiff was improperly allowed to testify.

*Exceptions sustained and new trial granted.*

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

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WILLIAM STONE *versus* SARAH LOCKE.

As a general rule, the prevailing party, in equity, is entitled to costs; but the rule will be enforced or not, at the discretion of the Court, as the facts and circumstances of each particular case may require.

After a final decree in favor of a party, to entitle him to costs, there must be an express order or decree of the Court therefor.

Where a bill was dismissed from the docket, for want of prosecution, on motion of the defendant, the action cannot properly be brought forward, at a subsequent term, on motion, to obtain an order for his costs.

*It seems* the proper proceeding for him, after dismissal, for want of prosecution, is to apply for an order to discharge the decree dismissing the bill.

But his application will not be favored, where the bill was regularly dismissed, if it be for the sole purpose of agitating the question of costs.

Stone *v.* Locke.

THIS was a suit in EQUITY, and was heard upon bill, answer and proofs. The order of Court was that the bill should be dismissed, unless other persons should be made defendant parties. See *Stone* v. *Locke*, 46 Maine, 445.

This order was certified to the clerk of the Courts for the county of Hancock, and by him entered upon his docket. At a subsequent term, on motion of the defendant, the Court ordered an entry of "Bill dismissed." The action was brought forward upon the docket, and, at the next term, the defendant moved for an order for costs; which was allowed by RICE, J., presiding. The plaintiff filed exceptions.

*J. S. Rowe*, for complainant.

*J. A. Peters*, for defendant.

The opinion of the Court was drawn up by

RICE, J. — The principal matter in controversy between the parties has been heretofore disposed of by the Court. The question of costs only is now presented. By the docket of the county Court, it appears that an order from the law Court was received and entered at the May term, 1860, of the following tenor: — "Bill dismissed, unless amended, upon payment of costs." At the October term, 1860, the following entry appears: — "Death of Wheeler suggested by defendant. Bill dismissed." At the April term, 1861, the entry is — "Costs for defendant."

To the last order, allowing costs for the defendant, the plaintiff objected, on the ground that the case had been finally disposed of at the October term, and was improperly brought forward by the clerk; that it was in fact out of Court, and that costs could not then be legally allowed.

As a general rule, the prevailing party in equity, as well as in law, is entitled to costs. But, in equity, this rule is not universal, and is enforced or not, at the discretion of the Court, as the facts and circumstances of each particular case may require. *Saunders* v. *Frost*, 5 Pick., 260; *Clark* v. *Reed*, 11 Pick., 446, 449; *Bryant* v. *Russell*, 23 Pick., 508; Dan. Ch. Pr., 1520.

The rights of the parties are determined by the final decree. There must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost. *Connable* v. *Bucklin*, 2 Aik., 221; *Travis* v. *Waters*, 12 Johns., 500.

If the final decree is silent as to costs, the Court will not grant them on a subsequent application, unless there is a rehearing on the merits. Dan. Ch. Pr., 1516, note.

The method by which the restoration of a case, after dismissal for want of prosecution, is effected, appears to be by obtaining an order to discharge the decree dismissing the bill; but the Court will not restore a bill which has been regularly dismissed, for the mere purpose of agitating the question of costs. Dan. Ch. Pr., 953.

The bill in this case was dismissed from the docket, on motion of the defendant, for want of prosecution, in conformity with a decree of the law Court. The question of costs was not reserved. The case was therefore finally disposed of at the October Term, 1860, and improvidently brought forward to the succeeding April term by the clerk. Being thus out of Court, and not having been legally restored and opened for re-hearing, the subsequent action thereon, with reference to costs, was unauthorized. *Exceptions sustained.*

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

# COUNTY OF WASHINGTON.

ASA HOW *versus* HARRIET HOW, *Adm'x.*

A, by written contract, stipulated with B to do certain things during the lifetime of B and his wife, and of the survivor. After the decease of A, his administratrix refused longer to perform the contract. In a suit by B against the administratrix, the Court directed the jury, neither party objecting thereto, to return the amount of damage for one year, as, from the sum so found, the amount for which the verdict should be, could be ascertained by computation.

Under this direction, the jury returned a general verdict for a specified sum as damages, which was afterwards amended, by order of the full Court, by inserting the amount, which was the value of the annuity, as ascertained by Wigglesworth's table, for the expectation of life of the plaintiff's wife, who was much younger than the plaintiff.

ON REPORT by APPLETON, J.

This was an action of ASSUMPSIT on a special contract, dated December 17th, 1846, by which the defendant's intestate promised to keep upon a farm a certain amount of stock and farming utensils, and to do certain other things stipulated in the contract.

It was contended for the plaintiff that he, having a farm well stocked and provided with implements for its use, caused all the property to be conveyed to his son, Mark How, who gave to the plaintiff a lease of the farm during the natural life of himself and that of his wife.

Mark Howe improved the farm and supported the plaintiff and his wife thereon, and performed his contract of December 17th, 1846, until the year 1854, when he died. His widow was appointed administratrix of his estate. The next year after her husband's decease, the defendant left the farm, carrying away with her nearly all the stock and farming tools. This action was brought in the year 1857.

There was testimony introduced by plaintiff, to show the damage he suffered by the non-performance of the contract, and the injury to the farm caused thereby.

It appeared in evidence, that the stock and farming tools on the farm were received by the defendant's intestate from John How, who had them of the plaintiff, at whose request they were delivered to Mark How.

The defendant's counsel offered evidence to prove, that the defendant was prevented from performing the contract by the acts of the plaintiff; that the intestate received a deed of the farm from one Fisher, whose claim upon the farm he paid for the conveyance of the same to him; but the Court excluded the evidence.

1st. The defendant's counsel requested the Court to instruct the jury, that the contract declared on was without consideration, as between Mark How and the plaintiff.

2d. That the contract, having been fulfilled by the intestate in his lifetime, was not binding on his administratrix.

3d. That the contract was for the benefit of the farm, and for the purpose of keeping up its fertility; that the intestate and her family were entitled to maintenance out of the increase of the place; and, in case of the failure of the intestate or his administratrix to keep the personal property named in the contract upon the farm, if the Court shall consider that the contract is binding upon the estate, the plaintiff is not entitled to recover any more than the value of his proportion of the use of such personal property during his life, and that proportion is to be ascertained by distributing, *per rata*, the value of such use among the different members of the family and the farm.

4th. That, if the contract was binding upon the administratrix, the plaintiff could not recover any damages which accrued to his wife.

The presiding Judge did not give the requested instructions any further than they are contained in the following instructions: —

The presiding Judge directed the jury to inquire if the

contract in question was founded in a good consideration; and, if so, was the contract broken? That, by this contract, the intestate, Mark How, bound himself to keep on the place where plaintiff then lived, the stock and tools as specified, to the amount of $419, during life of plaintiff and wife; that this contract was binding on him, and, in case of death, on his estate; and that defendant would be liable to damages for a breach of the same. The presiding Judge suggested to the counsel, that the jury find the annual damages and that the verdict be amended by inserting such sum as the plaintiff would be entitled to recover, at that annual rate, for the lives of himself and wife, that being only a matter of computation. To this, though the counsel did not specially assent, as no objection was made, the jury were directed to find the annual damages the plaintiff sustained by reason of the defendant's non-performance of the contract of December 17, 1846; that, in considering this question, they would bear in mind that some of the stock would not be of any value to plaintiff, as he would be obliged to feed them and take care of them, and this expense should be considered in ascertaining the damages for not having kept the stock and tools on the place. The jury were also directed to find the annual damages upon the principle contended for by the defendant.

The jury found a general verdict for plaintiff, assessing damages at $43,65, and found specially, that, on defendant's principle of assessment, they should be $21,82½. If the action is not maintainable, a new trial is to be granted. If the rulings, (except as damages,) were erroneous, the case is to stand for trial; and if both modes of assessing damages are erroneous, then the case is to stand for trial. If the damages are to be according to either mode of computation, the Court may determine, and the verdict shall be amended accordingly.

*J. Granger*, for the plaintiff.

*Talbot*, for the defendant.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action of assumpsit, on a special contract, dated Dec. 17, 1846. The plaintiff, having a farm with live stock and farming tools, conveyed the same to the defendant's intestate, Mark How, who was his son, and who undertook to carry on the farm, and to maintain the plaintiff and his wife, and keep on the farm the same amount of stock and farming tools as the plaintiff then had on the same, and to pay the taxes, and furnish the plaintiff and his wife with a horse and carriage whenever they desired, during their natural lives and the life of the survivor. Mark performed the contract during his lifetime. He died in the year 1854. Harriet How administered on his estate; and the jury have found that she has not performed the obligation, contained in the contract, since the decease of Mark How. Under the directions of the presiding Justice at the trial, the jury found the damages to the plaintiff, for one year, to be in amount $43,65. The verdict does not state that the jury estimated the damages only for one year, but it is fairly to be inferred from the report of the Judge, and that the defendant acquiesced in this mode of settling the damages, without objection. As the chances of life of the plaintiff and his wife, and the value of an estate for life, were matters of computation, the Judge suggested to the counsel, that the jury find the annual damages, and that the verdict be amended, by rendering judgment for such sum as the plaintiff would be entitled to recover, at that annual rate, for the life of himself and wife. To this no objection was made on either side, and the Judge directed the jury to find the annual damages the plaintiff sustained by reason of the defendant's non-performance of the contract declared on.

What was the value of this annuity of $43,65 on the 8th of April, 1855? The plaintiff was then seventy-six years of age, and his wife's age was sixty-four years. By Wigglesworth's table, the expectation of life of Mrs. How, the wife, it is alleged, would be thirteen years, and that the value of the annuity of $43,65, for thirteen years, was $410. If there is no mistake in this calculation, the plaintiff is entitled to

have the verdict amended accordingly, and to have judgment rendered for that amount, with interest on the same from the 8th of April, 1855, to the time of the rendition of the same. *Id certum est, quod certum reddi potest.* We are of opinion that this question has been fully and fairly litigated, and that the jury have passed upon it, under instructions which were unobjectionable, and that there is no such error in the form of the verdict, or in the ruling of the Justice presiding, as to require a new trial.

*Judgment for* $410, *damages, and interest from April* 8, 1855, *and for costs.*

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

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JOHN S. FOGG *versus* EZRA T. SANBORN *& al.*

By reason of c. 82, § 44, of the R. S., no action can be maintained upon a demand which has been entrusted to an attorney for collection and by him discharged for any consideration however small.

The assignment of such demand does not affect the discharge, unless the attorney's authority is revoked by the assignee *before* the discharge.

Where a negotiable note has been given in settlement of an account, and a judgment has been afterwards obtained upon the account and discharged by one duly authorized, for any valuable consideration, no action can be maintained by the original creditor either upon the note or the judgment.

ON REPORT.

The material facts in the case appear in the argument of counsel and the opinion of the Court.

*G. W. Dyer,* for plaintiff.

1. The plaintiff makes out a *prima facie* case.

2. The defence is, that, before the suit, Nickerson, who had been employed as an attorney to collect the debt, settled it for *thirty per cent.*, and gave discharges.

It is incumbent upon the defendants to show that the de-

mands in suit "had been entrusted to Nickerson for collection or settlement," and that Nickerson was acting as the attorney for the owners of the demands in suit at the date of the (so called) discharges.

Have the defendants done this?

The note *never was* entrusted to Nickerson for collection or settlement. Nickerson *never* had the note.

Mrs. Burbank was the owner of the demands in suit at the date of the (so called) discharges.

Nickerson says that he had no authority to compromise, except what was contained in Fogg & Burbank's letter of November 13, 1852; so, that he had no authority from Mrs. Burbank or Manning.

If any authority, whether general or special, had been given to Nickerson by Fogg & Burbank, or by Fogg, in the name of Fogg & Burbank, that authority came to an end, February 22d, 1854, by the assignment to Mrs. Burbank, who then became owner.

Nickerson had notice before the date of the (so called) discharges, that the claim in his hands had been assigned to Mrs. Burbank, as matter of fact. As matter of law it makes no difference whether he had notice or not.

Nickerson does not pretend to act as the attorney of Mrs. Burbank; he refers to the letter of Fogg & Burbank of Nov. 13, 1852, as his only authority, and signs the (so called) discharges as attorney for Fogg & Burbank.

The discharge, or release of Sanborn, should have been pleaded to the action of Fogg & Burbank, as defendants, as this discharge, or release, was prior to the rendition of judgment in that suit, and it was not legally admissible in the case at bar. *Thacher & als.* v. *Gammon*, 12 Mass., 868, affirmed in *Footman* v. *Stetson*, 32 Maine, 17; *Bird* v. *Smith*, 34 Maine, 68.

Neither the writing to Sanborn, or that to Moody, avoids or discharges the judgment, neither instrument being under seal. *Sewall & al.* v. *Sparrow*, 16 Mass., 26; *McAllister & al.* v. *Sprague & al.*, 34 Maine, 296.

*E. B. Harvey,* for defendants.

The opinion of the Court was drawn up by

CUTTING, J.—This is an action of debt, upon a note signed by the defendants, payable to the order of Fogg & Burbank, in six months from June 3d, 1852, for the sum of $314,62. And, also, upon a judgment recovered by Fogg & Burbank against the defendants, for $368,10, debt, and $34,65, costs, at the October term, 1855, of the Supreme Judicial Court for the county of Waldo.

In defence it appeared, that the original account, for which the note was given, was enclosed in a letter to an attorney residing in Waldo county, for collection. The letter was introduced and reads thus:—

"Boston, 13th Nov., 1852.—F. S. Nickerson, Esq.—Dear Sir,—Enclosed we hand you the amount of our demand against Messrs. Sanborn & Moody, which was made into a note June 3d, six months, for three hundred fourteen dollars and sixty-two cents, and is now in one of the banks in this city. If necessary, we will get the note and forward to you. Should you see a probability of obtaining something on the claim, we would like to have the effort made; but, if otherwise, should say—let there be as little expense as possible.

"Fogg & Burbank by C. Ward."

It further appeared, that *Nickerson* brought the suit on the account and recovered the judgment now set forth in the plaintiff's writ. That subsequently, on March 31, 1855, he, as the attorney of record, upon the payment of twenty per cent., discharged *Sanborn,* and, on December 10th, of the same year, on payment of ten per cent., discharged *Moody* from all claim by virtue of the judgment and executions issued thereon. This the attorney was authorized to do by virtue of the statute of 1851, c. 213, § 1, then in force, and since continued in the revision of 1857, c. 82, § 44, which provides that—"No action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full dis-

charge of it, by the receipt of money or other valuable consideration, however small."

But, it is contended by the plaintiff's counsel that the judgment was not founded upon the note, but upon the account, which was discharged by the note. It appearing that the note was negotiable, the defendants in the former suit might have availed themselves of such fact in defence to that suit on the original account, subject, however, to an amendment in the discretion of the Court, by adding the money counts, under which the note would have been admissible as evidence. However that may have been, it is neither legal nor equitable for the present plaintiff of record, who ordered the process and recovered the judgment, now to invoke such a technicality, and at the same time rely upon his judgment, when, in fact, the note and account were both entrusted to the attorney's care, or, at least, subject to his control; for, as stated in the letter, "*if necessary, we will get the note and forward to you.*"

It is again urged, by the plaintiff's counsel, that *Burbank* died in June, 1852, and, on Feb. 22d, 1854, *Fogg*, as surviving partner, transferred his interest in the note to the widow of his deceased partner, and that *William Manning*, as her agent, had certain correspondence with the attorney in relation to the demand, and, it is contended, from the evidence thus introduced, that the attorney's authority was terminated or exceeded. But, upon an examination of the testimony touching this point, which is to be found in the depositions of *Nickerson* and *Manning*, and letters and documents annexed, we find the proposition not to be sustained. *Manning* never countermanded any authority previously conferred on the attorney by the letter enclosing the original demand, or wrote him upon the subject, until Nov. 13, 1856, which was long after the payment and discharge of the judgment, and excuses himself for such neglect by stating that he thought it unnecessary, so long as he held the note in his own hands.

Had the note been negotiated to a *bona fide* holder, for a valuable consideration, before its maturity, such an excuse might have been entertained. But the facts were far other-

wise, and the present plaintiff in interest must share the same fate as the plaintiff of record, which is—

*Plaintiff nonsuit.*

RICE, APPLETON, DAVIS and KENT, JJ., concurred.

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JOHN T. WALLACE *versus* INHABITANTS OF COLUMBIA.

If at any time during a term of the Court there is no supernumerary juror present, and a vacancy occurs on either panel, it may be filled by causing a talisman to be returned, instead of transferring one from the other jury.

But a juror can be thus returned from the by-standers only for some particular case then to be tried, for which alone he should be sworn.

It is too late, after the trial, to object that a juror was irregularly returned and sworn, if the facts were known to the party before the trial, and it does not appear that he was thereby injured. (R. S., c. 82, § 73.)

Motions to set aside a verdict, and grant a new trial, cannot be determined at *Nisi Prius*. (R. S., c. 82, § 33.)

THIS was an action upon the case, to recover damages for injuries, which the plaintiff alleged he sustained, by reason of a defect in a road which the defendants were bound to keep in repair.

The jury returned a verdict for the plaintiff. The defendants filed a *motion to set aside the verdict* as being against the evidence, and an additional motion, in which they set forth that Mason H. Wilder, who acted as one of the jurors in the trial of said action, was not duly drawn and summoned as a juror for said term of the Court, nor was he returned from the by-standers or from the county at large to complete the panel in the trial of said cause, in consequence of there not being a sufficient number of jurors duly drawn and summoned, who could be obtained for the trial of said cause; nor was the said juror returned by the sheriff or his deputy or coroner, or any other disinterested person appointed by the Court, to sit as a juror, in the trial of the cause.

"Upon the foregoing motion, it having been made to appear to the Court that a vacancy had occurred upon the second jury, and for the trial of another cause, the Court directed a talisman to be drawn for said jury, whereupon the sheriff returned said Mason H. Wilder, the talisman who served upon said jury, and was selected by the sheriff to serve in all cases in which a talisman might be called for by the Court, during the term, and having been sworn to render a true verdict in all causes that might be committed to him during the term, according to the law and the evidence given. And it appearing that the number of traverse jurors drawn for this term had been reduced below twenty-four, and the second jury just having been employed for a day in the trial of another cause, and the first jury being empaneled for the trial of this case, and a juror thereon excused by reason of interest, the Court directed a talisman to be returned for said jury, whereupon the clerk called upon a drawn juror, but the Court suggested that, as the regular jury had been employed for some time, it would be better to take a talisman, and the clerk thereupon called the said Wilder, who was placed upon the jury, having been duly sworn as aforesaid, and not sworn again. And the counsel for the defendants knew that said talisman had not been re-selected or re-sworn in this cause, at the commencement of the trial, and made no objection to the sitting of said talisman. In view of said facts, MAY, J., presiding, overruled the said motion, to which the counsel for the defendants excepted."

*Hayden & Talbot*, for the defendants.

The person objected to was not rightfully on the jury.

(1.) No such case existed as authorized the selection of a talisman. R. S., c. 82, § 67.

(2.) He was not selected in the manner prescribed by the statute.

(3.) The juror not having been properly selected and sworn, there was nothing in the acts of the counsel of the defendants which should deprive them of the right to avail themselves of the objection contained in their motion.

In many cases, which are familiar to the Court, it has been held, that it was too late to make the objection after a verdict, if the party making it knew the fact before verdict, and then did not make the objection. The present case differs from the adjudged cases in a decisive particular, viz.:—the objection in these cases was founded on *facts* which were known to exist by the party, who afterwards made the objection, and were *not judicially* known to the Court. In this case, the objection is founded on a mistake of law, made by the presiding Judge, and which, it may well be supposed, the counsel did not see the force of at the time any more than the Judge. It was the duty of the Judge to see that a lawful jury was impaneled for the trial of the cause, and the defendants ought not to suffer for a mistake made by the Court in matter of law, when cognisant of all the facts, simply because their counsel, with no better knowledge of the facts, was not learned enough in the law to detect the mistake at once. When the Court make a decision in matter of law, counsel may well be expected to consider it correct, till they have had an opportunity for consideration and examination of authorities.

In the adjudged cases, the persons to whom objections were made were *jurors*, entitled to serve in other cases, and only disqualified from sitting in the particular case by some *fact* affecting his relation to the particular case.

In this case the person was no *juror;* could not sit in *any* cause, and his inability to sit was a matter purely of law, and not of fact. He was not even sworn to give a true verdict in this cause.

*Bradbury & Walker*, for the plaintiff.

The opinion of the Court was drawn up by

DAVIS, J.—Traverse jurors must be sworn in the order of their names upon the alphabetical lists. The first twelve constitute the first jury; the next twelve the second. If, at any time during the term, there are no supernumeraries present, and there is a vacancy on either panel, we have no doubt it may be filled by causing a talisman to be returned, instead of

transferring one from the other jury. But a juror can be thus returned from the by-standers only for some particular case then to be tried, for which alone he should be sworn. If the occasion for a talisman recurs, one should be returned and sworn again, as before. If jurors are wanted for the term, new venires should be issued therefor. R. S., c. 82, § 68.

The juror objected to was not properly returned, nor sworn, in the case at bar. But the facts were known to the defendants before the trial; nor does it appear that they were injured by the irregularity. It was too late for them to make the objection afterwards. R. S. c. 82, §§ 73, 74.

The action is for damages occasioned by a defect in a highway which the defendants were bound to keep in repair. It is urged, that the way was safe and convenient for travel, and that the verdict is against the evidence. There was testimony upon both sides; the question was one for the jury entirely; and, whatever we might think, from the report of the evidence, it does not so clearly appear that the verdict was the result of any bias, prejudice, or mistake, that it should be set aside by the Court.

It is said that the damages were excessive. It would not be easy for the Court, in a suit for *personal* injuries, which were said by some of the witnesses to be permanent, to revise the estimates of the jury, if we knew what they were. But neither from the report, nor from the arguments of counsel, can we ascertain what the amount of the verdict was. The elements which are the basis of it are so intangible, that it ought not to be set aside for being too large, unless it is so excessive as to justify the conclusion that the jury were influenced by improper considerations. *Motion overruled.*

There should have been no ruling upon the motion at *Nisi Prius.* R. S., c. 82, § 33. *Exceptions dismissed.*

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

GEORGE HATHAWAY *versus* INHABITANTS OF ADDISON.

Where a person was taxed for personal estate, by the assessors of a town, of which he was not an inhabitant, and was compelled to pay the tax, which he paid under protest, or where it was paid by seizure and sale of his property, and the money paid into the town treasury, he may recover the same, in a suit against the town for money had and received, without proof that the acting officers of the town, who assessed, collected and received the money, were legally elected and qualified.

Nor will his right to recover in such action be affected by the fact, that the person assessed owned real estate, in the town, which was not taxed; for the tax assessed was wholly unauthorized and void, and was not a case of over valuation, where the remedy is by application to the assessors for an abatement.

The identity of a book, as the records of a town, may be established, to make it admissible in evidence, by other witnesses than the officers of the town.

In the absence of any record evidence that the officers of the town were duly sworn, the fact may be proved by parol testimony.

If the record be silent as to the mode in which officers were elected, the presumption will be, without proof to the contrary, that they were chosen in the manner required by law.

EXCEPTIONS to the rulings of MAY, J.

THIS was an action of ASSUMPSIT to recover back $45,80, assessed upon the plaintiff's poll and personal estate, as an inhabitant of Addison, in the year 1855, alleged to have been paid to the defendants' collector under protest; also $36,17, assessed for the year 1856, for which his property was seized and sold by the collector, and for $10, for costs and charges.

The plaintiff had been for sixteen years a resident in Addison, prior to 1854; and there was evidence tending to show, that, in the autumn of that year, the plaintiff removed from that town, although he remained there some portion of the time, attending to some unsettled business; *that* the tax, for the year 1855, was paid by plaintiff to the acting collector of the defendants' under protest; and, that the acting collector for the year 1856, seized and sold personal property of plaintiff's to satisfy the tax for 1856; *that* the collector paid the money to the treasurer of defendants.

The bill of exceptions contains the evidence introduced at

the trial, the facts material to the questions raised by the case are clearly indicated by the opinion of the Court.

The first instruction requested by the defendants' counsel related to the burden of proof, and was given to the jury.

The second and third requested instructions are substantially contained in the *fourth*, which was:—

4. That the plaintiff cannot recover in this action without proof, among other things, that the assessors, treasurer and collector for the years 1855, and 1856, were legally chosen, qualified and sworn; that the taxes were unlawfully assessed; were paid under duress of his person or seizure of his property, or by compulsion and under protest, or collected by the seizure and sale of his property against his consent and in violation of law, and that the money so collected was paid over to the treasurer of the town, or to some other legal officer or agent of the town, authorized to receive it.

5. That the plaintiff cannot recover back from the town the amount of taxes paid by or collected of him in the years 1855 and 1856, if there be *no proof* that he was *compelled* to pay any portion thereof by duress of his person or seizure of his property, or that any part was paid under protest and to avoid such arrest or seizure.

6. That the charge of cost and damage in the account annexed, and the fees and charges of the collector for the seizure and sale of plaintiff's property in 1856, to satisfy the tax assessed upon the plaintiff for that year, cannot be recovered in this action. [This instruction was given.]

7. That, if they should find that the plaintiff owned *real* estate in Addison on the 1st day of April, 1855, and the 1st day of April, 1856, for which he might be lawfully assessed in Addison, although he was not an inhabitant of Addison at the times of said assessments, then, and in that case, the assessment of the plaintiff for *personal* property in those years for which, if not an inhabitant, he was not liable to be assessed, would, be a case, of *over* taxation and not one of *illegal taxation*, for which this action could be maintained.

8. That, if they shall find that the plaintiff was not an

inhabitant of Addison on the 1st day of April, 1855, and on the 1st day of April, 1856, and, therefore, was unlawfully and illegally assessed in Addison for his personal estate for those years, the assessors not being "*by law required to assess*" any person not an inhabitant of their town for his personal estate, the town is not responsible for the assessments so made, and that this action cannot be maintained.

The Court gave the jury the 1st and 6th of the requested instructions; and declined to give them either of the others; but instructed them, that if they should find that the plaintiff was not an inhabitant or resident of Addison, on the 1st day of April, 1855, and on the 1st day of April, 1856, and was assessed in said town in those years by the rightly acting assessors of said town, and said taxes were collected by a person acting as collector, directed by commitments and warrants from said assessors, to collect the same, and by him paid to the person acting as treasurer of said town in those years; and the same was paid out upon the orders of the selectmen of said town for town purposes, then the plaintiff will be entitled to recover back the same; provided, that he paid the same because he had a reasonable apprehension, at the time of such payment, that his body would be arrested and committed to prison, if he did not pay; or if he suffered his property to be taken for the payment thereof, by reason of any threats of the collector that he should be so arrested and imprisoned, and paid the same to avoid such arrest and imprisonment; or if the money was paid under protest and denial of his liability therefor, at the time of such payment, and for the purpose of avoiding an arrest or seizure of his property; if paid under any such circumstances, the payment would not be voluntary.

The verdict was for the plaintiff; and the jury found specially that the plaintiff was not an inhabitant of Addison on the first day of April of either of the years 1855 or 1856.

The several questions raised by the exceptions were elaborately argued by

*J. A. Lowell*, for the defendants, and by

*Bradbury*, for the plaintiff.

The opinion of the Court was drawn up by

MAY, J. — The taxes sought to be recovered back, as having been illegally assessed and paid by compulsion, were assessed by the acting assessors of the defendant town, in the years 1855 and 1856. The writ contains three counts, one of which is for money had and received. The tax for each year was assessed upon personal estate only; and it was not at the trial, nor is it now contended that any portion of such estate was liable to taxation in the town of Addison, unless the plaintiff was an inhabitant on the first day of April in those years for which the assessments were made. Such habitancy the jury have distinctly negatived.

It appears that exception was taken, at the trial, to the admission of the town records, because the book purporting to be such, offered by the plaintiff, was not identified by the town clerk. Its identity, as the record book of the town, was shown by another witness. We know of no rule of law which requires the identification of such a record by any officer of the town. It is sufficient if it be proved by any competent witness who knows the fact.

Parol evidence was also admitted, against the objection of the defendant, to prove that the assessors and collector for 1855 were duly sworn. Such testimony, in the absence of any record evidence, was clearly admissible. *Cathill & als.* v. *Myrick*, 12 Maine, 222; *Kellar* v. *Savage & als.*, 17 Maine, 444.

It was also objected that the record of 1855 was deficient in not stating that the assessors and other town officers were chosen by ballot. It simply stated that they were chosen. The presiding Judge ruled that such a record was sufficient to show a legal election. Such ruling is in accordance with the law of this State. In the case of *Mussey* v. *White & al.*, 3 Maine, 290, it was held that a record, silent as to the mode of choice, when unimpeached, authorizes the presumption that the mode adopted was the legal mode; and we have no doubt

that a record, stating that certain persons were chosen, imports a legal choice.

Again, it is contended that the record of the annual March meeting for 1856, from which it appears that the selectmen and assessors, and other town officers, were chosen and sworn, shows that the meeting was illegal, because it was not held at the place named in the warrant. It was notified to be holden "at the school-house in District No. 8, in said town," and the record shows that, at the time and place appointed, the meeting was called to order, and a moderator was chosen and sworn by the clerk. The record then states, that the meeting was then adjourned to Col. James Curtis' Hall, and the residue of the business appears to have been transacted there. The record does not state, in words, that any vote to adjourn was taken, or show any particular reason for such adjournment. The language of the record sufficiently shows that the adjournment was the act of the meeting, and fully authorizes the presumption that it was done by vote.

The right of the inhabitants of a town, who are authorized to vote in town affairs, to adjourn meetings, when called for that purpose, from time to time and place to place, as they may think proper, cannot for a moment be doubted. Immemorial usage has sanctioned such right, and it may properly be exercised unless prohibited by some statute. None such has been cited, or is known to exist. Nor is it necessary that the record should state any reason for the adjournment. The voters assembled are the sole judges of that.

Again, it is urged that the general instructions which were given to the jury were manifestly erroneous. They were based upon the idea that where a person not liable to be taxed, and over whom the assessors have no jurisdiction, has been unlawfully assessed by persons assuming to act as the assessors of a town, and such tax has been collected, against the will and protest of the person taxed; or paid by him for the purpose of avoiding the arrest of his body or the seizure of his property, and paid over by the acting collector, to the acting treasurer of the town, and by him paid out, upon the

orders of the selectmen, for town purposes, the money so received and used may be recovered back in an action for money had and received, notwithstanding the acting agents of the town who participated in the assessment and collection of the tax, and the treasurer who received it, may not have been severally qualified as the statute requires.

The action for money had and received is an equitable action, and in such action the plaintiff may recover any monies in the hands of the defendants, which they cannot conscientiously retain. It does not follow, because the assessors, the collector, or the treasurer of the defendant town may have been unauthorized or acted illegally for want of proper qualification, that the town who have received the fruits of their illegal action may not be held liable. Nothing is better settled than that a person or corporation having money in their possession which they are not entitled to retain, or which has been received by persons professing or assuming to act as their agents, without authority, and been paid over to such person or corporation, or which has gone to their benefit by the direction or assent of their authorized agents, may be recovered back in an action like this. Even in cases where the agents or wrongdoers are personally liable, there is, at the common law, a cumulative remedy against the party who has had the money or the benefit of it. The law, as now settled, implies a promise to repay the money so held or used, whether the party who has it or has had the benefit of it be an individual or corporation. *Joyner* v. *The third School District in Egremont*, 3 Cush., 567; *Briggs* v. *Inhabitants of Lewiston*, 29 Maine, 472.

Until the statute of 1826, c. 337, § 1, providing that assessors of towns and certain other corporations should not be made responsible for the assessment of any tax which they were required by law to assess, and the liability, if any, should rest solely with such corporation, the assessors being responsible only for their own personal faithfulness and integrity, any person unlawfully assessed had an election of remedies. He might proceed by an action of trespass against the asses-

sors, and recover all the damages occasioned by their wrongful acts; or he might waive the tort and bring assumpsit against the corporation, and recover the amount of money which had gone into its possession or to its benefit under the direction of its lawful agents. The leading purpose of the statute was not to give a new remedy as against corporations, but was to relieve faithful town officers from liability, and to provide that the remedy then resting upon corporations should be the only one to which the party injured should be entitled in all cases to which the statute applies. In cases where it did not apply, the remedies were left as they existed before. If, however, the statute enlarges the remedy, so as to make the corporation liable where it was not before, it did not take away the cumulative remedy, which, by the common law, was then resting upon the corporations to which it relates. In the case before us, the jury must have found that the taxes were illegal, and that the money which was obtained from the plaintiff was paid out by the acting treasurer of the town, upon orders drawn by the selectmen, and that it was used for the purposes of the town. The authority of the selectmen does not appear to have been questioned at the trial.

The jury must also have found, under the instructions given, that the taxes were paid by the plaintiff, either because he had a reasonable apprehension at the time of such payment that his body would be arrested and committed to prison, if he did not pay; or, that he suffered his property to be taken for the payment thereof, by reason of some threats of the collector that he should be so arrested and imprisoned, and paid the same to avoid such arrest and imprisonment; or, that the money was paid under protest and denial of his liability at the time of payment, for the purpose of avoiding an arrest, or the seizure of his property. The evidence upon which the jury so found is not fully reported, but this is not material, as there is no motion in the case to set aside the verdict as against the weight of evidence. The jury were instructed that a payment under any of these circumstances would not be voluntary. That such instruction was correct,

we think, the cases decided in this State and Massachusetts will show.

The case of *Smith* v. *Inhabitants of Readfield*, 27 Maine, 145, is a case where both the law and the fact were referred to the Court. In considering the question whether the payment of the plaintiff's taxes was voluntary, the Court say, "there is no proof that he was compelled to pay any portion of them by duress of his person or property, or *that any part was paid under protest and to avoid an arrest of his person or a seizure of his property.*" This language clearly implies, that if the payment had been made under protest, and for the purpose of avoiding an arrest, or seizure of his property, it would not have been voluntary. The Court further say, that "the mere fact that the taxes were paid to collectors, who had warrants for their collection, affords no satisfactory proof of a payment by duress; and that, "to constitute such payment, there should be proof of an arrest of the body or of a seizure of the property; or proof authorizing the conclusion that such an arrest or seizure could be avoided only by payment." Unless there were circumstances and facts proved, showing that such arrest or seizure would be made if the taxes were not paid, the plaintiff could not be presumed to have paid the money by compulsion, or for the purpose of avoiding such arrest or seizure. The question is one of motive. Was the money paid voluntarily, or was it paid under the force of constraining circumstances? It could not have been a voluntary payment, if the purpose for which it was paid was to avoid an arrest of the body or a seizure of property. The question before us, is not how other persons than the plaintiff would have been affected, by the circumstances in which he was placed, but what effect must have been produced by the existing circumstances upon his mind to render the payment involuntary. Whether such effect was produced was for the jury. It could not have been a voluntary payment if made under any of the circumstances which the jury have found. No such fact was found in the case of *Smith* v. *Readfield*, just cited, but it must have been

found in the case before us, to use the precise language of the Court, in that case, as before quoted, that a payment was made by the plaintiff "under protest and to avoid an arrest of his person or a seizure of his property."

In the case of *Preston* v. *Boston*, 12 Pick., 7, it is said, in the opinion by SHAW, C. J., that, where a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received.

In the case of *Wright* v. *Boston*, 9 Cush., 233, the same learned Judge, in view of the authorities, says, that the only ground upon which a party is allowed to pay a tax and afterwards maintain an action to recover it back, is when the tax is wholly void, a mere nullity; when a party can have no action, or take no appeal, and when the collector appears with his warrant, he must pay or have his person arrested or property taken, then he pays under a species of duress; and as the tax was wholly void, as when the party was not an inhabitant and not liable to pay any tax, the city or town cannot equitably retain it.

As it appears, in the present case, that the plaintiff was not an inhabitant of the defendant town, and that the assessments were wholly illegal, and the money, so much of it as was not obtained by a seizure and sale of his property, was paid under protest, and for the purpose of avoiding the arrest of his person or a seizure of his property, we think there can be no doubt that such payment was involuntary, and falls within the principle of the preceding cases; nor do we perceive, in view of the facts which the jury must have found, under the instructions given them, any legal reason why the verdict should not stand. The instructions are sustained.

The only remaining question is, whether any of the requested instructions which were refused ought to have been given. The first and sixth were given. The second and third are substantially alike, and so far as they are incon-

sistent with the instructions given, they ought to have been withheld. In some particulars, if the views which we have taken are correct, they are manifestly erroneous. The same is true of the fourth request. The fifth was substantially given in the general instructions, but not in the precise words of the request. The presiding Judge may of right select his own language, provided it convey to the jury the legal principle which is sought, and is in harmony with the law. That he does so affords no legal ground of complaint.

The seventh requested instruction is based upon the fact that the plaintiff owned real estate in the defendant town, in the years 1855 and 1856, for which he was liable to be taxed. It is admitted that the assessments in controversy were only upon personal estate, and the plaintiff, as the jury have found, was a non-resident.

In the case of *Preston* v. *Boston*, before cited, it is said by SHAW, C. J., that "the real estate of a non-resident owner is to be regarded as a distinct subject of taxation from the poll, income and personal estate of the domiciled resident, to be by law distinctly assessed, and in regard to which persons aggrieved have separate and distinct remedies." In this case, the plaintiff owned real estate in Boston, for which he was taxed, with personal estate for which he was not liable to be taxed in that city, by reason of his residence being in the town of Medford, and the Court held that it was a case of illegal taxation and not of over valuation, and that his remedy was the same as that of any other non-resident, who should be erroneously taxed, as not being liable at all, and his action at law was maintained. We are not aware of any difference between the statutes of Maine and Massachusetts which calls for a different rule.

The case before us is a much stronger case for the plaintiff. Not being taxed for his real estate, the entire tax for each year was illegal and void. It is not a case like that of *Preston* v. *Boston*, of an erroneous entry upon the plaintiff's valuation of some property not liable to be taxed, with other estate which was liable. It differs, also, from the case of

*Stickney* v. *Bangor*, 30 Maine, 404, where the plaintiff was an inhabitant and liable to be taxed, and the error consisted in taxing him with personal estate which he did not own, in the same list with other personal estate which he did own. Some portion of the plaintiff's tax was therefore legal, and, for that reason, it was a case of over valuation, and the plaintiff's remedy was an application to the assessors for an abatement.

In the present case, the entire assessments are mere nullities, and it is not perceived how the plaintiff's ownership of real estate, for which he might legally have been taxed as a non-resident, can justify the assessors of the defendant town in taxing him for personal estate not liable to taxation in that town. The assessments being entirely void, the plaintiff was under no necessity of applying to the assessors to abate his tax. It is not a case of over valuation, but of entire illegal assessments. *Howe* v. *Boston*, 7 Cush., 273; *Herriman* v. *Stowers & als.*, 43 Maine, 497.

The eighth requested instruction was properly withheld. Its fallacy consists in supposing that the defendants could be held liable only by reason of the statute passed in 1826, before cited, and reënacted in the R. S. of 1841, c. 14, § 56, and in the revision of 1857, c. 6, § 29. If the assessors were not required by law to assess the taxes complained of, and were, notwithstanding the statute, still held liable for their acts, as this Court have settled in *Herriman* v. *Stowers & als.*, just cited, then, as we have already seen, the statute not applying, the plaintiff was left to the remedies which the common law affords. The request entirely overlooks the fact that the defendants had received the plaintiff's money wrongfully, and that it had been used for their benefit by direction of their lawful agents, their own selectmen.

*Exceptions overruled — and*
*Judgment on the verdict.*

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

NOTE BY CUTTING, J. — It appears that the plaintiff, at the time of the assessment, was not a resident of the defendant town, and, consequently, the

assessors had no jurisdiction, and the tax was unauthorized, and, having been paid under protest, the plaintiff is entitled to recover. To such a conclusion the opinion finally comes, and, in that conclusion, I concur. The other points raised and settled in the opinion, were all favorable to the defendants, and, consequently, become wholly immaterial to the decision. I do not concur in all of the conclusions, which are only *dicta* and unnecessary to the result.

## LEWEY'S ISLAND RAILROAD COMPANY *versus* JOHN BOLTON.

In order to enforce a liability imposed wholly by statute, the plaintiff must show that the statute has been strictly complied with.

The charter of a railroad company authorized it to sell the shares of delinquent subscribers, and made the subscriber liable for the difference between the proceeds of the sale and the amount due from him. The charter and by-laws required that the subscriber should be notified of the assessments thirty days before the order of the directors to sell the shares, that the sale should be by public auction, at the post office in C., and that the treasurer should give the subscriber a notice in hand signed by the treasurer, or by a director in his behalf; *Held;* —

1. That a notice of the assessment thirty days *before the sale* is not sufficient;
2. That a sale otherwise than by public auction, or at any other place than the post office in C., is invalid; —
3. That a notice of the sale given to the subscriber in hand, not signed by the treasurer or a director, is insufficient.

When a notice is required to be given by posting it in *a conspicuous public* place, it is not sufficient to prove that it was posted in a *public* place.

When the charter of a railroad company authorizes the sale of the stock of a shareholder to pay unpaid assessments thereon, such sale is not valid if it is not for a legal assessment, or if it includes any illegal assessment.

If such charter provides that no assessments shall be laid upon any share to a greater amount than $100, in the whole, any assessment beyond that sum is void.

If the charter fixes a sum as the minimum for the capital stock, no legal assessment can be made until that amount of stock is subscribed in good faith, by men *apparently* able to pay, and for shares to bear their equal part with the others.

A subscription for "preferred stock," which is to draw ten per cent. interest at once, cannot be reckoned to make up the amount of capital stock required by the charter.

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

The case is fully stated in the opinion.

*F. A. Pike,* for plaintiff.

*G. W. Dyer,* for defendant.

The opinion of the Court was drawn up by

KENT, J.—The writ in this case contains but one count, and, in that, the plaintiffs declare, that the defendant subscribed for two shares in the capital stock of the company; that certain assessments had from time to time been made on said shares; that the defendant, after due notice, had neglected to pay the same; that the treasurer of the company had, according to law, advertised and sold the same for such unpaid assessments to a third party, for a sum less than the sum due, and that the defendant has become liable to pay the difference between the sum due and the sum for which they were sold.

The action is not brought upon the promise in the subscription, to pay the assessments from time to time, as they might be made. It is not upon an open, executory contract to take and pay for two shares. But it is based upon the statute liability, which arises only after legal assessments and a neglect to pay, and a sale for non-payment and a deficiency after applying the proceeds of sale. It assumes that the defendant is owner of the two shares, and that he has neglected to pay legal assessments, and that his shares have been sold and transferred to another by the company according to the statute and by-laws. To sustain this action for the deficiency, upon the ground of this statute liability, the terms of the statute must be strictly complied with. *Portland & Saco Railroad Co.* v. *Graham,* 1 Met., 1; *Lexington & W. Cambridge Railroad Co.* v. *Staples,* 5 Gray, 522.

The charter of this company, (Private Acts of 1854, c. 217,) authorizes the directors to make assessments, and provides, that "the treasurer shall give notice of all such assessments, and in case any subscriber or stockholder shall neglect to pay any assessment for the space of thirty days after such notice

is given as shall be prescribed in 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."

The same section provides that the delinquent subscriber or stockholder shall be held accountable to the corporation for the deficiency.

It appears by the by-laws, adopted by the company, that the notice of assessments may be given by publication, or "by a personal notice from the treasurer of the company," and, in case the directors shall order a sale under the fourth section of the Act, above quoted, the treasurer shall give forty-eight hours notice of the time and place of sale, by posting "notices of the same in two conspicuous public places in the city of Calais, and shall notify such delinquent subscriber, whose stock is to be sold, by leaving or causing to be left a copy of said notice at his place of residence, or by giving him in hand such notice, to be signed by the treasurer or by one of the directors in his behalf."

The directors, on the 11th of December, 1857, by vote, ordered the treasurer to sell the defendant's shares, on account of non-payment of assessments, at auction, on the 18th of December, at the post office in Calais.

1. The defendant objects that there is no evidence that thirty days notice had been given of the assessments before the order to the treasurer to sell. The only evidence on this point is the testimony of the treasurer, who says that "he notified him of all the assessments more than thirty days before *the sale.*" This notice might have been less than thirty days before the order to sell. It must appear affirmatively that the defendant had neglected to pay at least thirty days before the order to sell.

2. The order to sell, in accordance with the terms of the charter, was to make sale at public auction to the highest bidder. It does not appear by the testimony of the treasurer, which is the only evidence on this part of the case, that the shares were sold at public auction, or that the notice of sale

contained any reference to a public sale. It does not appear that the sale was at the post office *in Calais.* There are manifest deficiencies in the proof.

3. It does not appear that the notice of the time and place of sale, which the treasurer says he gave defendant in hand, was signed by the treasurer, or by a director, in his behalf.

4. The by-laws of the company require that the notices, of the time and place of sale, shall be posted in "two conspicuous public places" in the city of Calais. The testimony is that they were posted in two *public* places in that city. It was decided in *Bearce* v. *Fossett,* 34 Maine, 575, that an officer's return, that he posted the notices in a *public* place, without saying in a public *and conspicuous* place, as required by the statute, is insufficient. Perhaps, if it had been shown that a notice properly signed had been given in hand to defendant, that fact, as to him, might have been sufficient, notwithstanding the defect in proof as to the posting.

5. It appears from the records of the directors, that assessments had been made from time to time to the amount of $100, each share; and after this, at one time, another assessment of $100, each share, was voted. This last vote was probably passed on the assumption of the invalidity or doubt of the legality of the former assessments. It provides that whatever sum had been *paid* on former assessments should be allowed on the new, towards the payment thereof. But it does not abrogate or disannul the former assessments in terms. The charter provides that "no assessments shall be laid upon any share in said corporation, of a greater amount in the whole than $100." It does not appear whether the shares were sold for non-payment of all the assessments, or only upon the last. It is very clear that a share could not be legally assessed more than $100, or be sold for non-payment of assessments beyond that sum. What was in fact done at the sale, on this point, does not appear. As the records stand, the defendant's shares are assessed $200, each, and stand apparently charged with all, except $10, on each, paid before the last assessment. It should, at least, appear clearly that

the sale was for some legal assessment and did not include any illegal one. *Stoneham Branch Railroad Co.* v. *Gould,* 2 Gray, 277.

The foregoing reasons are sufficient to require us to order a nonsuit, as the case stands. But, as it is possible that these defects might be remedied upon a more minute examination of the records or the witness, we have looked into the other points raised, and are strongly impressed with the conviction that there are insuperable difficulties, beyond those before indicated, in the plaintiffs' case. Without entering minutely into the consideration of all the facts and arguments on the various points, we are not satisfied that the whole of the $200,000, the minimum sum required by the charter as the capital stock, has ever been subscribed within the fair intendment of the statute, It is well settled that such subscription is required before any legal assessment can be made. *O. & L. Railroad Co.* v. *Veazie,* 39 Maine, 571.

It is also settled that the subscription must be made in good faith, by men *apparently* able to pay, and for shares to bear their equal part. *Penobscot Railroad Co.* v. *White,* 41 Maine, 512. It seems to be conceded that the subscriptions by Jones & Rockwood, for 225 shares, were made by men not apparently responsible. The whole number of shares subscribed for on the books appear to be 2557.

We cannot doubt that the subscriptions by the directors and contractor, on book B, for 380 shares, were made under the votes of July 31, and August 4, 1855. By those votes, the shares taken under them, were to be preferred stock, and to draw ten per cent. interest forthwith, and the treasurer was authorized to execute necessary papers to carry the bargain into effect. Such a subscription, with a preference which gave to the shares the place and value of bonds, cannot be regarded as within the intention of the requirement. If we deduct the above shares, 605 from 2557, the remainder is 1952 only. The facts in relation to the last subscription, for 800 shares by the directors, are not very clearly stated in the testimony. Enough however, appears, to raise a very seri-

ous question, whether that subscription was such that the company thereby secured an actual sale of, or a subscription for the 800 shares, to be thereafter held by individuals, who were to bear their proportionate share of the expense incurred by the corporation. According to the agreement of the parties, *Plaintiff nonsuit.*

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

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STATE *versus* THE INHABITANTS OF CALAIS.

The conditional acceptance, by a town, of a road laid out by the selectmen, is void.

And the road cannot be established *by user*, so that the town would be bound to keep it in repair in the summer, where, by the erection of a dam below, it was overflowed, so that it was only traveled in the winter, upon the ice.

ON REPORT. INDICTMENT for a defective highway.

The evidence tended to show, that the highway described in the indictment consisted of two ways laid out at different times, one called the Nevins road, and the other the road between the Nevins road and the outlet of Eastern lake.

The facts established by the evidence, so far as the questions of law raised in the case are affected, are stated in the opinion.

After the evidence was out, it was agreed to enter a verdict of guilty, *pro forma*, and that the whole evidence should be reported, and submitted to the full Court to determine whether any part of the road described in the indictment was legally established; and if any part, whether such part was defective, and to render such judgment as the facts of the case and the law require, either by a *nol. pros.* or by affirming the verdict.

*E. B. Harvey*, for defendants.

*J. Granger*, for the State.

The opinion of the Court was drawn up by

APPLETON, J.—The defendants have been found guilty of not keeping two of their roads in sufficient repair, and the questions are presented whether the verdict rendered against them shall be set aside in whole or in part or judgment shall be rendered thereon.

It is conceded that the Nevins road was duly laid out, and is one which the defendants are bound to keep in repair. The evidence in relation to its condition is somewhat conflicting, but no sufficient reasons are perceived for setting the verdict aside.

It was decided in *Christ's Church* v. *Woodward*, 26 Maine, 172, that the conditional acceptance of a town or private way is void. In that case, the vote of the town was to accept the street in controversy, "provided the damages shall not exceed thirty-five dollars."

It is denied that there is a legal road from the Nevins road, so called, to the mill at the outlet of Eastern lake. The road in question was duly laid out by the selectmen, and, at a regular town meeting on April 3, 1827, the town voted "to accept the road laid out by the selectmen, from the termination of the road laid out for Jonathan Nevins and others to the mill at the outlet of the Eastern lake, *on condition that there be no more taxes worked out on said road than the taxes raised on the mill property and inhabitants that live on said road.*" The acceptance being conditional cannot avail the State.

The road thus located continued till 1835, when it was overflowed by a dam erected at the outlet of Eastern lake and continued till 1854. The way thus covered by water was only traveled in the winter upon the ice. Such travel on the ice cannot establish, by user, a road, for non-repair of which in summer, a town can be indicted.

The verdict is to be set aside, unless the attorney for the State will enter a *nol. pros.* as to that portion of the road in-

dicted, which lies between the Nevins road and the outlet of Eastern lake.

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

EDMUND MUNROE *versus* ROBERT C. STICKNEY *& al.*

The report of commissioners to make partition of real estate cannot receive a construction more favorable to the party to whom land is assigned, than the language of a grantor in a deed.

Where, in a partition of mill property, a particular mill is assigned to one of the parties, he takes thereby the land on which the mill stands, with the various easements upon the lands of his co-tenants, necessary to the full and perfect enjoyment of his share.

But his right is to be construed in reference to the existing state of the property, and he acquires, by the partition, no land not covered by the mill and its appendages, at the time of the partition, though such land may be subject to such easements as may be incident to his share.

WRIT OF ENTRY. ON REPORT of the evidence by MAY, J.

The demandant was the owner of eleven-sixteenths of certain property in Calais, including sundry mills, George Downes of one-sixteenth, and J. M. Robbins of four-sixteenths. Legal partition had been made of three-sixteenths of the eleven held by the plaintiff, by which he became the owner in severalty of one of two saws and one undivided half of the other in the Madison Mill; also partition of three of the four-sixteenths held by Robbins, giving him the Franklin Mill and one undivided half of the stream saw in the Washington Mill; also partition of one-sixteenth held by George Downes, to whom was assigned one-half of the Dyer Mill, the other half having been conveyed to J. Dyer by the plaintiff.

Commissioners appointed to make partition in 1825, on the petition of E. H. Robbins, the then owner of three-sixteenths of the property, assigned to him, amongst other estate, "the

water privilege occupied by the saw mill called Franklin, and marked on the plan No. 7, and one undivided half of the stream saw of the Washington mill, marked on the plan No. 2." This, through several intervening conveyances, became the property of the tenants. They had, however, other rights, derived from Robbins, and also from a deed from the demandant, but not such as to affect this case.

The demandant, in his writ, claimed a described piece of land adjoining the Washington Mill, of which he alleged he had been disseized by the tenant. The tenants, in their brief statement, alleged title in themselves in severalty to a part of the demanded premises, and as tenants in common with the plaintiff and others of the residue.

It appeared in evidence that the tenants had erected an addition to their mills, and had widened the flume above and enlarged the channel below, thereby increasing the quantity of water used in their mills, and had occupied and used the parcel of land demanded in this action.

The case was taken from the jury, and the facts reported for the full Court, to draw such inferences as a jury might draw, and enter such judgment as the law and facts should require.

The case was elaborately argued, and the evidence reviewed and commented upon, by

*J. Granger*, for the demandant, and

*F. A. Pike*, for the tenants.

The opinion of the Court was drawn up by

APPLETON, J.—In the division among the proprietors of certain lands held in common, in the town of Calais, upon the petition of E. H. Robbins, jr., there was, besides other lands, which have no bearing upon the present case, set off to the petitioner, "the water privilege now occupied by the said mill, called the Franklin, and *one undivided half of the stream saw of the Washington mill*, marked on the plan No. 2." The title of Robbins to the half of the stream saw of the Wash-

ington mill is now vested in the tenants, and the inquiry arises, how much land passed by virtue of the language of the report.

The report of the commissioners, by whom partition was made, cannot receive a more favorable construction than if it were the language of the grantor in a deed. No principle is better established, than that land cannot pass as appendant to land. In *Leonard* v. *White*, 7 Mass., 6, SEDGEWICK, J., says, "by the grant of a mill *cum pertinentiis*, the close where the mill is, or the kiln there, does not pass without some further expression." In *Hasty* v. *Johnson*, 3 Greenl., 282, it was decided that a deed of a mill dam and falls, and a right to the road and landing, conveys only an easement in the road and landing. In *Thompson* v. *Androscoggin Bridge*, 5 Greenl., 62, a grant of a saw mill, with a convenient privilege to pile logs, boards and other lumber, conveys only an easement in the land used for piling.

In *Blake* v. *Clark*, 6 Greenl., 436,—"The saw mill, without any further description," says WESTON, J., "was set off by the commissioners appointed to divide the estate, to Thatcher Blake, one of the demandants. Doubtless, by this term, the fee of the land, upon which the mill stood, would pass. Lord COKE enumerates a variety of terms which, being used in a conveyance, carry lands; and he states to what extent. Coke Lit., 146. The land passes, because included in the term used. The word mill, or *molendinum*, is not among those to which he adverts; and probably no authority can be adduced in which it has been held to convey *ex vi termini* any part of the adjoining land. That upon which it stands, may be regarded as including land over and upon which the slip, if it has one, or any other necessary projection from the mill, passes. The term may embrace the free use of the head of water, existing at the time of the conveyance, as also a right of way or any other easement, which has been used with the mill, and which is necessary to its enjoyment. We are not satisfied it can or ought to be further extended." In *Moore* v. *Fletcher*, 16 Maine, 62, the words mill privilege, or privi-

lege of a mill, was held to mean the land on which the mill and its appendages stand, and the land and water actually used with the mill, necessary to its enjoyment. But the conveyance is to be construed with reference to the actual and rightful state of the property at the time of the conveyance. The "conveyance of a mill, or of land on which a mill is situated, carries with it, as incidents of the mill," says BELL, J., in *Dunklee* v. *Wilton Railroad Co.*, 4 Foster, 489, "the right to raise the mill pond, and to flow the lands above, as high as the dam has been usually kept up, and to maintain the dam and flume, which are necessary to support the water at that height, and to support and use the penstocks, aqueducts and channels, which are necessary to convey the water to the mill, and the channels and raceway which are necessary to conduct the water from the mill to the stream, in the manner in which they have been kept and used immediately previous to the conveyance, so far, at least, as the grantor had the right to convey such privilege."

It is apparent, therefore, that, by the partition, Robbins took the land upon which the mill stood, with the various easements upon the lands of his co-tenants necessary to the full and perfect enjoyment of his share, and that the plaintiff cannot injuriously interfere with the rights thus acquired. The plaintiff is entitled to recover the land described in his writ not covered by the mill and its appendages, at the time of the partition, subject to the easements of the tenant in and upon the same.

The words "thence by a line running in a south-westerly direction to the flume of the machine shop," as used in the description, evidently indicate the penstock or conductor of the water, at or near the corner of the machine shop, and not that part of the flume which is further up stream, as the defendants contend. *Defendants defaulted.*

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

EDMUND MUNROE *versus* ROBERT C. STICKNEY *& al.*

An action may be maintained, and nominal damages recovered, for the wrongful diversion of water from a mill, although no actual injury be sustained.

TRESPASS ON THE CASE. On facts reported by MAY, J.

This action was between the same parties, and related to the same property as the preceding. The evidence affecting the case was substantially the same.

*J. Granger*, for the plaintiff.

*F. A. Pike*, for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—The tendency of the evidence is to show a diversion of water from the plaintiff's mill, arising from the acts of the defendants, which constitute the foundation of this suit. Wherever a right is invaded, the law presumes damage. Indeed, though no actual injury be sustained, an action may be maintained for the wrongful diversion of water from the plaintiff's mill, and nominal damages be recovered. *Butman* v. *Hussey*, 3 Fairf., 407. If one suffers his rights to be invaded, and acquiesces in an adverse claim for more than twenty years, this adverse enjoyment by lapse of time will ripen into a perfect title.

From the data before us, it is impossible satisfactorily to determine the value of water power at Calais, or the amount diverted, and the damages consequent thereupon. The defendants are to be defaulted, and the damages to be determined by the Court, or some one appointed by the Court for that purpose.

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

EDMUND MUNROE *versus* EPHRAIM C. GATES.

Where the proprietor of a mill, and of a definite proportion of the water power or flow of water in a stream, makes a change in a sluice way which occasions an increase of back water injurious to the mill of a neighboring owner, who is also part owner of the water power, the latter may maintain an action therefor.

But if the mill injured by the change is under lease, at the time of the injury complained of, and the rent not dependent on the result of the suit, only nominal damages will be awarded.

Where there were several mill privileges originally owned together, but afterwards, for a long series of years, occupied by different persons in severalty, and from time to time transferred from one to another by deed, levy or descent, the Court is authorized to infer an ancient partition amongst the several proprietors, and a division of the water privilege into proportionate parts, as it has been used and occupied, excepting so much as may have been parted with by common consent.

ON REPORT of the evidence by KENT, J.

This was an ACTION OF THE CASE, for alleged injuries to the plaintiff's mill, tried at October term, 1854; the verdict then rendered was afterwards set aside, and a new trial ordered. Writ dated Sept. 20, 1853.

It appeared by the testimony, that there were eight mill privileges owned by the original proprietors of the township of Calais, all on the upper mill dam, at Milltown, on the river St. Croix, and entitled to equal shares of the water power. In process of time, these fell into the hands of different owners, and, by three successive partitions, seven-sixteenths were set off to individual proprietors in severalty. It does not appear that the other nine-sixteenths were ever parted by any legal process; but it was in evidence that the plaintiff had occupied and taken the rents and profits of one of the mills, called the Columbus, since 1818. The defendant became the owner of the Franklin mill and privilege, in 1853, it having been assigned to E. H. Robbins, jr., by partition, in 1825, from whom, through intermediate conveyances, the defendant derived title. The Franklin mill was rebuilt in 1852–3, and enlarged in size and machinery, so as to require and use more

water, and its raceway was filled up some three feet. In 1852 and 1853, the Columbus mill was rented for $700 a year. The rent was not dependent on, or to be affected by the result of the present suit.

There was evidence from sundry witnesses, introduced by the plaintiff, tending to show that, up to the time when the defendant's mill was rebuilt, the Columbus was never troubled by back water, unless during a freshet, but since that time it had been seriously affected by back water; that the raceways of the two mills met at the foot of the Franklin, and that the meeting of the two currents caused back water to the Columbus; and that the Columbus sawed less lumber in 1853, in consequence of back water.

The defendant introduced testimony tending to show that the new raceway of the Franklin mill was as good in all respects, and as favorable for the Columbus mill, as the old one; and offered to prove that the wing dams on the English side occasioned back water to both the Franklin and Columbus mills. This testimony the Court excluded, and, under the instructions given by the presiding Judge, a verdict was returned for the plaintiff with nominal damages.

This verdict was set aside by the full Court, and a new trial granted, as reported in 42 Maine Reports, 178, the Court determining that the evidence excluded should have been admitted.

The case was tried anew at April term, 1860, KENT, J., presiding.

In addition to the testimony introduced at the former trial, the defendant called J. Y. Nash, who testified, among other things, that he was a millwright, and had made repairs on both the Franklin and Columbus mills; that the Franklin mill had never been troubled with back water until since the abutment was built on the English side in 1854, but had been since; that the Columbus had been obstructed by back water since the Franklin was rebuilt; and that he supposed the latter was partly caused by the mill venting more water into the raceway, from some of her buckets being broken.

The plaintiff called Oliver Dow, who testified that he was the partner of Nash, and had worked on both mills; that the Columbus was not troubled with back water until the Franklin was rebuilt in 1853; that one reason of the trouble was, that the Franklin vented so much water in the raceway of the Columbus, and another reason was, that they had set seven posts, thirteen inches square, in the centre of the Columbus raceway, causing the water to run to the right, instead of a direct course; that the water from the Columbus meets and clashes with the water from the Franklin; that he was at the mills the week before, and there was no back water from the abutment on the English side upon the apron of the Columbus.

It was agreed to submit the case, upon the evidence, so far as admissible, to the decision of the full Court, the Court to draw such inferences as a jury might, and to enter such judgment as the law requires, and, if for the plaintiff, to assess the damages.

The case was submitted without argument.

*Downes & Cooper*, for the plaintiff.

*T. J. D. Fuller*, for the defendant.

The opinion of the Court was drawn up by

RICE, J. — This case was before this Court on a former occasion. 42 Maine, 178.

The injuries of which the plaintiff complains are, diverting the flow of water from the flume of his mill, thereby diminishing his supply; and obstructing the raceway by which the water passes from his mill, thereby occasioning back water upon his wheels, and, by reason thereof, obstructing their operation.

These allegations are denied by the defendant. The principal part of the testimony, introduced at both trials, had reference to the back water upon the plaintiff's wheels.

On the former trial, the defendant offered to prove, that the back water of which the plaintiff complains, so far as any

existed, was occasioned by the construction of the wing dam on the English side, as delineated on Hayden's plan. This testimony was excluded by the presiding Judge.

On that point, the Court remark—"In our view of the case, this testimony might have been both pertinent and important. If the evidence should fail to prove an unlawful obstruction in the raceway by the defendant, and it should appear that the water had been thrown back upon the plaintiff's wheels, to an extent greater than heretofore, it was important to determine whether that increase of back water was occasioned by the obstructions which the defendant had made, in the manner in which the water was discharged from his wheels, or by the wing dams on the English side. For this purpose, the testimony should have been admitted."

The excluded testimony in relation to the wing dams, above referred to, is now before us, together with all the testimony presented to the jury on the former trial; and the Court, by agreement of parties, are authorized to draw inferences as a jury might. From a careful examination and comparison of the new testimony with that of the former trial, we are satisfied that there has been, since the changes of which complaint is made, in the defendant's mill, a large and injurious increase of back water upon the wheels of the plaintiff's mill; that this back water has not been occasioned by the wing dams on the English side, but is the result of an unauthorized change in the sluice of the defendant's mill.

The parties agree that the water power, on the dam from which these mills severally draw water, was originally divided into eight privileges. The records in the case do not show a partition of the entire power among the several original proprietors or their representatives. But the evidence in the case does show that these several privileges have, for a very long period of years, been occupied and improved in severalty. As individual estates, they have been frequently transferred by deed and levy, and have descended to the heirs of deceased parties. The water power, that is, the flow of water in the stream, is of course incapable of practical divis-

ion, like land, by metes and bounds. Each proprietor of a mill site may, however, become the owner of any given proportion of the whole power or flow of water.

The testimony authorized the inference, and we accordingly find, that, at some remote period of time, there has been a partition among the proprietors in severalty of the eight mill sites or privileges, as they have been heretofore used and occupied, and that each of these privileges is entitled to draw from the common head of water one eighth part thereof, except so much thereof as has been parted with by the concurrence of the proprietors, or by operation of law, for sluices for lumber over said dam, or other purposes.

The evidence also shows that, during the whole time of the alleged injury, the plaintiff's mill was under lease, and that the amount of the rent in no way depended upon the result of this suit, consequently the damages he will be entitled to recover can be nominal only.

The defendant's mill, the Franklin, occupying one of the eight privileges on the dam, is entitled to one-eighth of the flow of the water in the stream, with the exception already referred to. Whether this mill has drawn more than its just proportion, or whether its flume is now so constructed as unreasonably to interfere with the passage of water to the flume of the plaintiff's mill Columbus, the evidence does not distinctly show. We therefore make no decision upon that part of the case.

But, from the facts already found in relation to the back water, and the occasion thereof, under the agreement of the parties, a default must be entered and judgment rendered for the plaintiff for one dollar damages.

*Defendant defaulted.*

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

WILLIAM LAWRENCE *versus* MARINER SMALL.

To recover of the master of a vessel the penalty provided by R. S. of 1841, c. 32, § 56, for neglecting to give bonds, "before passengers shall come on shore," who have no residence in the State, it must appear that there had been an *actual landing* of such passengers.

THIS case was presented on EXCEPTIONS to the ruling of RICE, J., directing a nonsuit upon the facts as they were proved by the evidence offered by the plaintiff. The alleged unlawful landing of the passengers was claimed to have been at Eastport.

The exceptions were argued by

*Dyer*, for the plaintiff, and by

*Hayden*, for the defendant.

The facts, material to an understanding of the question of law decided in the case, appear from the opinion of the Court, which was drawn up by

APPLETON, J.—This is an action brought to recover the penalty provided by R. S., 1841, c. 32, § 56.

The section upon which the action is founded is in these words:—"When any ship or vessel having any passengers on board, who have no settlement within this State, shall arrive at any port or harbor within the State, the master of such ship or vessel, *before such passengers come on shore*, shall leave a list of their names, and the places where said passengers first embarked on board such ship or vessel, with the overseers of the poor, where such passengers shall arrive. The master of such ship or vessel *shall not land any such person without the permission of the selectmen*, unless he shall have entered into bond to such town, with sufficient sureties, to the satisfaction of said selectmen, in a sum not exceeding five hundred dollars for each passenger, to save such town and all towns within the State from all manner of charge and expense, which may arise from such passengers as paupers; for and during the term of three years. For any neglect of the provisions of this section, said master shall forfeit

and pay two hundred dollars for each passenger *so coming on shore or landed;* to be recovered by an action of debt, by any person who shall sue for the same, one moiety thereof to the use of the State, and the other moiety to the prosecutor," &c., &c.

It appeared in proof, that the Admiral, a British steamer, of which the defendant was master, arrived at Eastport on June 20th, 1857, having on board as passengers Elizabeth Roach and her children, who were foreigners, having no settlement in this State. They were on their way to Calais. At the arrival of the Admiral, they went on board the steamer for Calais from the Admiral without going on shore at Eastport, or elsewhere, till they arrived at the termination of their journey. The defendant left no list of the passengers with the overseers of the poor, and gave no bond to the town of Eastport.

The presiding Judge, upon proof of these facts, ordered a nonsuit, and we think correctly. The list required by § 56, is to be left "*before such passengers come on shore.*" But the passengers in question did not come on shore. The list is not required unless passengers are to be landed, and before their coming on shore.

Unless the master gives the required bond, he is prohibited from landing his passengers "without the permission of the selectmen." But if the passengers are not landed, the permission to land is unnecessary, and there is no bond to be given. The giving of the bond, or the obtaining permission to land, is preliminary to landing. But when there is no landing in fact, there is no occasion for either.

That an actual landing is contemplated, seems apparent from § 56, as well as from § 58, by which visiting officers are authorized "to prevent the landing of any such passengers," and by § 59, by which a penalty is imposed where passengers are landed at any other place than that to which the ship or vessel is destined, for the purpose of evading the provisions of the statute. *Nonsuit confirmed.*

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

THOMAS A. STAPLES *versus* HARRISON T. SMITH.

Possession, or the right to take immediate possession of goods, entitles one to maintain trespass against a wrongdoer.

Where the owner of a chattel agrees to let it remain in the hands of another "till called for," he may maintain trespass, without proof that he has "called for" the chattel, against one who has wrongfully taken it from the possession of the bailee.

To prove that an alleged sale of a chattel is fraudulent, evidence of a fraudulent sale of another chattel at another time, in another jurisdiction, and to another party, is inadmissible.

ON EXCEPTIONS to the rulings of MAY, J.

TRESPASS for a horse alleged to be the property of the plaintiff and to have been taken by the defendant. The defendant justified the taking by virtue of a writ of attachment against one William N. Knox, whose property he alleged the horse to have been at the time of the attachment. The evidence tended to show that Knox sold the horse to the plaintiff before the attachment, who left him in the possession of Knox under a written agreement, that he should "remain in the hands of Knox *until called for" by the plaintiff.* The plaintiff testified that he had never called on Knox or the defendant for the horse.

The defendant contended that the sale of the horse to Knox was fraudulent and void, and introduced evidence in support of his allegations. He offered to prove that the sale of a schooner by Knox, to one Palmer, of Boston, in the fall of 1857, was fraudulent. This evidence being objected to was excluded by the presiding Judge.

The defendant's counsel requested that the jury be instructed that the plaintiff, never having had more than nominal possession of the horse sued for, and having, by written agreement, left him in the hands of Knox until called for by himself, and never having called for him, this action could not be maintained.

This instruction was not given, and the verdict being for plaintiff, the defendant excepted. There was also a motion

to set aside the verdict, upon which no question of law was made.

*J. A. Lowell*, for defendant, in support of exceptions.

The plaintiff had not the possession or the right to immediate possession, and therefore cannot maintain this action. The horse was left in the hands of Knox "until called for." Under this agreement, Knox had a right to reasonable notice when his possession should terminate. *Wyman* v. *Dorr*, 3 Maine, 183; *Lunt & al.* v. *Brown*, 13 Maine, 236, and cases therein cited.

*G. Walker*, for plaintiff.

The opinion of the Court was drawn up by

APPLETON, J. — On the 7th of December, 1858, one William N. Knox sold and delivered the horse, which is the subject of this suit, to the plaintiff, and, at the same time, gave him a bill of sale containing these words — "said Staples agreeing to let the horse remain in Wm. N. Knox's hands till called for." The defendant justifies as an officer under a writ against Knox, as whose property the horse was attached. It was proved that the horse had not been "called for" by the plaintiff, and it is insisted, in the defence, that, for that cause, this suit, which is trespass, cannot be maintained.

Possession, or the right to take immediate possession of goods, entitles one to maintain trespass against a wrongdoer. *Freeman* v. *Rankins*, 21 Maine, 446. So, the mere right of possession is sufficient. *Codman* v. *Freeman*, 3 Cush., 316. The actual or constructive possession is enough. A mortgagee, having a right to take possession, may maintain trespass against a stranger, who unlawfully interferes before the debt becomes due. *Woodruff* v. *Halsey*, 8 Pick., 333; *Foster* v. *Perkins*, 42 Maine, 168.

One having a right to personal property, loaned to another for an indefinite time, may maintain trespass against a stranger for its tortious taking. *Orson* v. *Storms*, 9 Cow., 687. In *Shloss* v. *Cooper*, 27 Verm., 623, where the plaintiff had left

goods in the hands of a commission merchant, taking from him a receipt to "sell or return on demand," and they were attached as his property, it was held that the owner might maintain trespass. In *Strong* v. *Adams*, 30 Vermont, 223, REDFIELD, J., in cases of bailment, held that, unless the bailee had the absolute right to retain possession for a definite time, the action of trespass might be brought against a wrong-doer in the name of the bailor or the bailee. So, if a bailee, without authority, sell or mortgage the property bailed, the bailor may maintain an action of trespass against such vendee or mortgagee without demand. *Stanley* v. *Gaylord*, 1 Cush., 536. The owner may maintain trespass for taking property out of the hands of a person to whom it was lent. *Root* v. *Chandler*, 10 Wend., 110. "It is established law," remarks HOSMER, C. J., in *Bulkley* v. *Dolbeare*, 7 Conn., 235, "that the person who has the general property in a personal chattel, may maintain trespass for the taking of it by a stranger, although he never had the possession in fact; for a general property in a personal chattel draws to it a possession in law. Bro. Abr. Tit. Trespass, pt. 404, 341, § 214; 2 Bulst., 268; Bacon's Abr., Trespass, c. 2, 3; 3 Stark Ev. 1639."

Nor are the cases relied upon by the counsel for the defendant, when examined, adverse to these views. In *Wyman* v. *Dorr*, 3 Maine, 183, the cattle, for the taking of which trespass was brought, had been leased for a *term of years*, to be taken back by the owner within the term if he should deem them unsafe in the hands of the lessee. As the term had not expired, and as no notice had been given, the action was not maintained. In *Lunt* v. *Brown*, 13 Maine, 237, the mare in controversy had been leased for a *specified time*. It was there held that the general owner could not maintain trespass against a stranger during the continuance of the lease, because he had neither possession nor the right of taking immediate possession.

Whether the sale of a schooner, at another time, in another jurisdiction and to another party, was fraudulent or

not, was entirely immaterial to the inquiry before the jury, and all evidence relating thereto was properly excluded.

The good faith of the sale of Knox to the plaintiff was submitted to the jury with appropriate instructions, and, notwithstanding the able argument of the learned counsel for the defendant, they affirmed its validity. The evidence tending to show the fraudulent character of the transaction, does not so preponderate as to justify or require interference on our part.

*Motion and exceptions overruled.*

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

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JACOB GORDON *versus* WARREN GILMAN.

Under the Revised Statutes of 1841, the notice required by law to terminate a tenancy at will, when the rent was payable yearly, was three months notice in writing to quit at the expiration of that time.

The rights of a tenant at will before such notice, and for the three months thereafter, under those statutes were the same as those acquired under a written lease for a like period.

Such rights are determined by the statutes in force at the time when the question arises.

The rights of a party are not affected by the withholding of requested instructions which are not pertinent to the issue.

The provisions of the Revised Statutes of 1841, requiring notice to terminate a tenancy at will, are not contained in the Revised Statutes of 1858.

Under the existing laws, tenancies at will are determinable at the will of either party, and without notice.

The provisions of sections 1 and 2 of chapter 94, of the Revised Statutes of 1858, relate only to the process of forcible entry and detainer and to the notices required for its maintenance.

ON EXCEPTIONS to the ruling of KENT, J.

TRESPASS *quare clausum.*

The evidence tended to show that the plaintiff was tenant at will of the *locus in quo*, under the defendant, paying rent

yearly; that, in the fall of 1857, the defendant notified the plaintiff verbally that he should not allow him to occupy the premises any longer; and that the alleged trespass was committed in June, 1858.

The counsel for the plaintiff requested the presiding Judge to instruct the jury, (*inter alia:*)—

1. That, in the fall of 1857, the notice required by law, to terminate such a tenancy, was three months notice, in writing, to quit at the expiration of said three months, when the rent was payable yearly.

2. That, since the first of January, 1858, the notice required by law, to terminate such a tenancy, is thirty days notice to quit, in writing, served on the tenant thirty days before the time named for its termination; but, if no rent is due, it shall not be terminated, except at the option of the tenant, until rent shall become due.

These instructions the presiding Judge declined to give, and, the verdict being for the defendant, the plaintiff excepted.

There was also a motion to set aside the verdict as being against the evidence.

*J. Granger*, for plaintiff.

*F. A. Pike*, for defendant.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of trespass *quare clausum fregit.*

It appears that the defendant, in 1853, verbally leased to the plaintiff a tract of land for ten years, from the first of May, of that year, at an annual rent of eight dollars. The plaintiff entered and continued in possession, paying rent up to May 1, 1858, when the trespass complained of was committed.

There was evidence tending to show that, in the fall of 1857, the defendant told the plaintiff that he should not allow him to occupy any longer the premises leased, and to the contrary.

From the exceptions, it is apparent that a tenancy at will existed between the parties.

The counsel for the plaintiff requested the Court to instruct the jury "that, in the fall of 1857, the notice required by law, to terminate a tenancy at will, was three months notice, in writing, to quit at the expiration of three months, when the rent was payable yearly," but the Court declined so to instruct them.

In the fall of 1857, the R. S. of 1841 were in force, and, by c. 95, § 19, all tenancies at will might be determined "by either party, by three months notice, in writing, for that purpose, given to the other party." The possession of a tenant at will, under that statute, before notice, and for three months after, can in no sense be held to be the possession of the landlord. "The tenant," remarks WILDE, J., in *French* v. *Fulton*, 23 Pick., 104, "has not only the possession, but the right of possession, and, in this respect, he stands on the same footing as a tenant for a term certain." In *Dickerson* v. *Godspeed*, 8 Cush., 119, it was held that a tenant at will, whose estate had not been legally determined, might maintain trespass *quare clausum fregit* against his landlord for entering upon the premises leased. So, in *Young* v. *Young*, 36 Maine, 133, SHEPLEY, C. J., says, "an estate at will, existing by the statute of this State, gives to the tenant rights for a period, after a written notice to quit, of equal validity with those acquired under a written lease for a like period."

The requested instruction should, therefore, have been given, if the landlord had wrongfully entered in 1857, without notice. Had the defendant's entry been before the Revised Statutes of 1858 were in force, the inquiry, as to the then existing law, would have been material. But, in point of fact, it was not till May, 1858, that the alleged trespass was committed.

The requested instruction was not therefore pertinent, and whether given or withheld, could not properly affect the rights of the parties.

The entry, which is the subject matter of complaint in this

suit, was made in May, 1858. In reference thereto, the counsel for the plaintiff requested the Court to instruct the jury, "that, since the first of January, 1858, the notice required by law to terminate such a tenancy, is thirty days notice to quit, in writing, served on the tenant thirty days before the time named for its termination, but, if no rent is due, it shall not be terminated except at the option of the tenant, until rent shall become due." This instruction was not given.

By the R. S. of 1858, the provision of c. 95, § 19, of the R. S. of 1841, is repealed, and the section relating to tenancies at will, and requiring notice in writing for their termination is omitted. The existing law therefore is, that tenancies at will are determinable at the will of either party, and without notice, as was the law before the revision of 1841. *Ellis* v. *Paige*, 1 Pick., 43; *Moore* v. *Boyd*, 24 Maine, 243. The request, therefore, was properly denied. The defendant, at the time he did enter, by reason of the change in the law, was under no obligation to give notice, but might determine the estate at his will, and enter upon such determination.

The R. S., 1858, c. 94, §§ 1 and 2, relate only to the process of forcible entry and detainer, and to the notices required for its maintenance.

The other requests of the plaintiff have been so far substantially given, that we do not perceive that he has any just grounds of complaint.

The motion to set aside the verdict must be overruled. There is no such preponderance of proof on the part of the plaintiff, as to the facts in controversy, as indicates either mistake or misconduct on their part. There was conflicting evidence, and it was their province to determine its relative credibility. There is no sufficient ground for disturbing the verdict. *Exceptions and motion overruled.*

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

ALEXANDER STUART *versus* INHABITANTS OF MACHIAS PORT.

In an action for a personal injury, caused by a defect in a highway, a request to instruct the jury, "if they find, that at the time of the accident the plaintiff was intoxicated, this, of itself, would constitute such a want of ordinary care as would preclude him from the right to recover," was properly refused; the question, what constituted ordinary care, being one for the determination of the jury.

EXCEPTIONS from the ruling of MAY, J.

*Walker*, in support of the exceptions.

*J. A. Lowell, contra.*

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiff alleged, in his writ, that he had sustained a personal injury through a defect in a highway in the town of Machias Port, which the inhabitants thereof were bound to keep in repair, according to requirements of the statute. The defendants' liability was denied.

It appears from the case that the defendants introduced evidence tending to show that, at the time of the accident, the plaintiff was more or less intoxicated; and evidence tending to show that he was sober was introduced on the part of the plaintiff.

The presiding Justice was requested to instruct the jury that, if they shall find that, at the time of the accident, the plaintiff was intoxicated, this, of itself, would constitute such a want of ordinary care as would preclude the plaintiff from the right to recover. This instruction was not given.

It is well settled that, to entitle a party to recover damage for an injury through an alleged defect in a public road upon which he is traveling, he must satisfy the jury that he was in the exercise of ordinary care. He may fail in this exercise in many and various particulars, or he may not; and this is a question of fact for a jury to settle. A jury may think a man intoxicated, incapable of using common and ordinary

care in walking, or in driving a horse with or without a carriage upon a public way, or they may suppose that one in that situation may often be free from all negligence in that respect; and that some persons in that state may be exceedingly reckless, while others are very cautious. The law has established no rule such as that requested to be given to the jury in this case. *Exceptions overruled.*

*Judgment on the verdict.*

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

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HUMPHREY DESMOND *versus* INHABITANTS OF MACHIAS PORT.

To render a non-resident liable to be taxed for merchandize in a store, shop or mill, or upon a wharf, (as provided by c. 6, § 11, of R. S.,) his occupancy must be under such circumstances as would constitute him the owner of the premises for the time being.

*Thus*, the occupancy of a portion of a wharf, assigned to a non-resident by metes and bounds, to which he brought, from his mills in another town, his lumber, placed it thereon, and it there remained for several months, awaiting a sale or shipment, — his right thus to use the premises, being (by a written lease) fixed and certain for a long period of time, — *was held* to be an occupancy contemplated by the statute.

THIS was an action of ASSUMPSIT.

The facts material to an understanding of the case, as agreed by the parties, will be found in the opinion of the Court.

The case was argued by

*Walker*, for the plaintiff, and by

*G. F. Talbot*, for the defendants.

The opinion of the Court was drawn up by

MAY, J. — The case finds that the plaintiff, on the first day of April, 1848, had, upon a wharf within the defendant town, a quantity of laths and long lumber, for which the assessors

of said town taxed him for that year, notwithstanding he was then an inhabitant of Whitneyville. The right to make such assessment, under the R. S., c. 6, § 11, depends upon the fact whether the plaintiff then occupied any store, shop, mill or wharf in said defendant town. It is admitted that he occupied no such store, shop or mill, but it is insisted, in defence, that he did occupy the wharf upon which said lumber was piled. Whether he was an occupant of the wharf, within the meaning of the statute, is the only question which has been discussed or raised by the counsel in the case. It is mutually conceded that upon this point the whole case turns.

It appears that the plaintiff had a lease of a mill called the shore mill, situate in Whitneyville, for the term of five years from April 1, 1855, at the annual rent of $950, with the right to have all lumber sawed at said mill landed on the railroad wharves, at Machias Port, so far as practicable for the portion of the wharves to be appropriated for said mill, and the lumber was to be shipped free of wharfage. The plaintiff had a portion of a wharf assigned to him by metes and bounds, as a place to land his lumber, and has used the same for that purpose since the taking of said lease.

In 1857, the plaintiff manufactured large quantities of lumber at said mill, which was carried over the railroad and landed upon that part of the wharf assigned to him, and shipped therefrom. The lumber remained upon the wharf only until vessels could be procured to ship it. That portion of it which was assessed was put upon the wharf in 1857, and shipped the next spring as early as a vessel could be obtained, but not until after the first day of April. Other parts of the wharf seem to have been held and used by other persons under like circumstances.

Do these facts show an occupancy of the wharf within the meaning of the statute? The plaintiff appears to have had the entire control of that part of the wharf assigned to him and to have had the sole use of it, after the assignment under his lease. In the case of *Campbell & al.* v. *Inhabitants of Machias*, 33 Maine, 419, SHEPLEY, C. J., in announc-

ing the opinion of the Court, remarks, that "the design of the statute was to render liable to taxation the property of individuals who *so* occupy a mill or wharf as that they should be entitled to receive, and not liable to pay mill rent for the lumber from time to time sawed in the one, or wharfage for lumber deposited on the other." In this view, the statute contemplates an actual occupancy, implying something more than a mere right to make temporary deposits from time to time, or to pass in common with others, over the wharf, with goods, wares, merchandize or lumber, for the purpose of immediate shipment. It does not, however, make the liability to be taxed depend upon the purpose for which the lumber was piled upon the wharf. Such purpose is only one of the ingredients by which we may determine the character of the occupancy, and whether it was merely occasional and temporary, being subject to the direction and control of another, or fixed, certain and entire without such direction and control.

Under the statute, in order to lay the foundation of the right to tax a non-resident, we think the store, shop, mill or wharf must be occupied under such circumstances as will constitute the occupant, during his occupancy, the owner *pro hac vice*, as against other persons. It must be used by the occupant, as if it were his own for the time being. In the case before us, the fact, that the plaintiff's limits were assigned by metes and bounds; that the right to use the premises was fixed and certain, for a long period of time, without interruption from the owners; and that the premises were in fact so used under a written lease, satisfactorily shows that the plaintiff was an occupant of the wharf within the meaning of the statute. His control of the wharf, as assigned to him, was, for the time provided for by the lease, as entire and absolute as if he had been the owner of the premises; and his occupancy seems to have been such as would, if it had been adverse, constitute a disseizin of so much of the wharf as was occupied by him. Had he been the actual owner, and used the wharf in the same way, the right to tax could not be doubt-

ed. Under such circumstances, the plaintiff, in the judgment of the Court, was legally taxable in the defendant town, for the lumber for which he was assessed. *Plaintiff nonsuit.*

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

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ROBBINS CORDAGE CO. *versus* HENRIETTA B. BREWER, *Adm'x.*

An appeal from the decision of commissioners to examine claims against an insolvent estate, may be made within twenty days after the acceptance of their report by the Judge of Probate.

An action cannot be maintained to recover interest after payment of the principal, unless there had been an express contract to pay interest.

A receipt taken upon the settlement of an account is open to the proof and correction of errors, but the specific errors, distinct and unequivocal, must be shown.

ON REPORT. ASSUMPSIT for money had and received, as provided by statute, upon an account against the estate of John M. M. Brewer, presented to the commissioners of insolvency on said estate, and by them rejected.

The defendant, in her specifications of defence, denied that the appeal from the report of the commissioners had been taken in season, and relied upon a settlement of the account by Brewer in his lifetime, alleging that the plaintiffs' claim was for interest only, and, therefore, this action could not be maintained.

The evidence in relation to the appeal is stated in the opinion.

The only other evidence was the testimony of *F. A. Pike*, which was, that "in May, 1857, I was called upon by Mr. Boynton, of the firm of N. Boynton & Co., who acted for the Robbins Cordage Company, and I went to Robbinston with him to see John M. M. Brewer to get security from him for the debt in favor of the Cordage Company.

"After a good deal of conversation, an agreement was finally made as to the kind of security and Mr. Brewer gave his note for $2248,91, and thereupon Mr. Boynton receipted and settled the account." Before this was done they looked over the account and compared it with Mr. Brewer's books and talked about the interest on the account.

It was arranged between them that "Mr. Boynton was to go home, have an account made and sent down, and if it disagreed with the account settled it was to be rectified. The only difference, so far as I recollect, was about the interest. The account then settled was in gross. Mr. Boynton then went home and the next week sent to me the account annexed to the writ in this case. I showed it to Brewer within a few days, and he said he thought there would not be so much due, but he would make out a statement and give it to me. He made a statement and gave it to me. I told him I would figure it up and see if there was any considerable disagreement. I did figure up this statement, and made it within a few dollars of the account sent me from Boston. I told him the results of my castings. He said he would take the statement and examine it himself, and he took it. After his death it was found among his papers. I have compared the account annexed to the writ with the account upon Mr. Brewer's ledger and they agree, and I think there is no material difference between this and Mr. Brewer's statement. The only objection Mr. Brewer made to this account was, that he thought there would not be so much interest."

*On cross-examination.*—"The receipted bill was given at the time of the interview between Brewer and Boynton. I cannot recollect all the conversation at that time, but, my impression is, that we looked at the books, and that there was apparently some discrepancy between the amounts of the interest charged. Mr Boynton said he knew nothing about the accounts; that he had had nothing to do with the management of the concern until lately, and he would go home and have a full statement made and sent down. I don't recollect any further conversation upon that point. The main part of the

conversation was as to the security. He was anxious to get security. The note given was secured by mortgage.

"Neither time that I talked with Mr. Brewer, did he claim that the account settled was a final settlement of accounts.

"Mr. Brewer was in feeble health at the time. He died about a year afterward. He did not say any thing about whether the account settled was or was not a final settlement. There had been quite large transactions between the parties, extending for several years back."

*Pike*, for plaintiffs.

*Bradbury*, for defendant.

The opinion of the Court was drawn up by

KENT, J.— The first question raised is whether the appeal was taken in season, from the decision of the commissioners appointed by the Judge of Probate. The report was dated April 4, 1859, and was approved by the Judge of Probate, at a Court held May 3d, and this appeal was taken May 6th. The commission, under which the commissioners acted, expired by limitation on April 4th, the day the report bears date. There is some question made as to the exact day that the report was left at the probate office, with the register. There seems to be but little, if any, reason to doubt that it was filed with the register more than twenty days after its date. But this fact is not important, in the view we take of the case.

The defendant contends that the appeal must be taken within twenty days after it is made and signed by the commissioners. The plaintiff contends that the matter is open to an appeal, for twenty days after the action of the Judge of Probate, accepting the report.

The provisions of the statute on this subject are found in c. 66, R. S. By § 11, "a party dissatisfied with a decision of the commissioners, may appeal therefrom within twenty days after their report is made." By § 8 the commissioners are required "to make their report to the Judge," and the Judge

"may recommit it for the correction of any error appearing to him to exist."

It seems very clear that the time of limitation, (twenty days,) does not begin to run until the report is signed and *made to the Judge.* An appeal, before the report is filed in the probate office, would be too soon, and therefore inoperative. *Pattee* v. *Low*, 36 Maine, 141; *Ellsworth* v. *Thayer*, 4 Pick., 122.

The notice of appeal is to be given at the probate office, and not to the commissioners. Does it necessarily begin to run at the time of filing in the office? Without deciding that an appeal entered within twenty days after the report is in the office, and before action on it by the Judge, would be inoperative, as being too soon, if the report was afterwards accepted, we are of opinion that a party is not compelled to enter an appeal until the report has been "made to the Judge," and by him has been accepted. It would be anomalous to compel a party to appeal from any thing but the final action of the Court or tribunal, on the subject matter. There is no statute provision for an appeal from the commissioners, as a court. The appeal is from their decision after it is made to the Court of Probate. The statute evidently contemplates that a party aggrieved, may have a hearing before the Judge of Probate, before an appeal, and may obtain a recommitment of the report to correct the errors he complains of in the disallowance of his claim. This right he might lose, on the construction contended for, if there was no Probate Court held within twenty days after the report was handed in to the register. The Judge might order a recommitment after sundry appeals had been taken.

We think a party may safely wait until the final action of the Probate Court. This is the view taken of a similar statute of Massachusetts, in *Goff* v. *Kellogg*, 18 Pick., 256, where it is held that "the proper evidence of the rejection of the claim, is the return of the report to the probate office and the acceptance thereof by the Probate Court." To the same point is *Hodges* v. *Thacher*, 23 Verm., 455.

2. The case, upon its merits, is referred to the decision of the Court on the report of facts and evidence. It appears that the plaintiffs had dealings for a long time with the intestate; that there had been no settlement until May 20, 1857, when the Cordage company presented a bill, and the balance, as therein stated, was paid by note on six months, and the bill receipted as paid by that note. The plaintiffs now allege that there was an error in the settlement, and seek to have the receipt and discharge set aside on that ground. There is no doubt that a receipt is open to correction and to proof of errors, but when a party makes out his own bill, as from his books, and, after negotiation, takes a note or money in payment, and receipts the bill as paid, the defendant may safely rest on that discharge, until the plaintiffs clearly establish fraud or mutual mistake, or some fact that overcomes the *prima facie* defence.

The defendant insists that the only claim now set up is for interest, which plaintiffs say was not cast or allowed in the settlement. It has been decided that an action cannot be maintained to recover interest after payment of the principal, unless there was an express contract to pay interest. *Howe* v. *Bradley*, 19 Maine, 35; *Johnston* v. *Braman*, 5 Johns., 268; *Fake* v. *Eddy*, 15 Wend., 76.

The amount claimed as due at the time of settlement was paid by the note. Have the plaintiffs shown clearly that the sum then paid did not include all the items of charge, independent of the claim for interest? Assuming that there was no final settlement, and that the negotiation at the time of giving the note, as testified to by Mr. Pike, left the matter open for future correction in case of error, has that error been shown satisfactorily? We think that the settlement ought to stand until some specific error, distinct and unequivocal, is shown. Mr. Pike says that the only difference was about the interest. He also says that the intestate made out a statement from his books, and he compared this statement with the plaintiffs' bill annexed to the writ in this case, and they agree. He speaks of some difference in opinion about interest. If there is any

difference in amount of items of charge in the two accounts, we have no evidence what it is, or whether the error would increase or diminish the amount of the charges and items, or the sum named in the note given on settlement.

The conversation and admissions of Brewer, stated by Mr. Pike, do not amount to a binding acknowledgment of the correctness of any bill. They, at most, leave the matter open for proof of actual errors, in his favor. But the plaintiffs have failed to show to our satisfaction wherein, and in what particulars, there was an error in items of charge or credit, independent of the charges for interest.

It does not appear that there was any agreement or promise to pay interest, or at what time it should commence, or that any demand had been made on the intestate. If the whole of the principal debt had been paid, then, according to the authorities before cited, no action can be maintained for interest as a mere incident of the debt, no express agreement to pay interest being proved. Indeed, there does not seem to be sufficient evidence, as the case stands, before us, to authorize the plaintiffs to claim interest on their account, if there had been no settlement. We have no proof of any agreement to pay it, of any demand for payment, or any usage to charge it, or of the term of credit, if any was given.

*Plaintiffs nonsuit.*

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

THOMAS GARDNER *versus* JAMES H. GOOCH.

In an action of trespass *quare clausum*, the Court cannot restrict the plaintiff in his proof to any less number of lots than he has described in his declaration.

Where the admission of testimony is not objected to at the trial, an objection comes too late, when made at the argument upon exceptions to the *instructions* of the presiding Judge.

Where a grantee is in possession of any part of the granted premises under a recorded deed, he is presumed to be in possession of the whole, unless other possessions or facts show the contrary.

But this presumption is overcome by proof of an adverse possession, though it has not been continued twenty years.

When a deed does not specify the number of acres intended to be conveyed, and the quantity of land depends upon the boundaries of the lot as located, and these boundaries do not depend on any given or proved quantity of land, it cannot affect the construction of the deed.

Exceptions cannot be sustained because the presiding Judge omitted to give a particular instruction, which was not requested.

The provisions of the statute, (R. S., c. 104, § 38,) relating to disseizin, apply to all land alike, though it is competent for the jury to look at the position of the land, the nature of its soil, and its productions, in connection with all the acts done upon it, in determining whether there has been in fact a possession and improvement, open, notorious, exclusive, and comporting with the usual management of a farm by the owner.

ON EXCEPTIONS to the ruling of TENNEY, C. J.

TRESPASS *quare clausum fregit.* The declaration alleged that the defendant broke and entered the plaintiff's close, "situated in East Machias, to wit, the several meadow lots, so called, which are numbered 85, 86 and 87, respectively," &c.

The defendant pleaded the general issue with a brief statement of "soil and freehold."

At the trial, the defendant moved that the plaintiff, before introducing his testimony, should select which of said meadow lots the trespass was committed upon; and that he be confined to testimony applicable to the lot so selected.

But the Court overruled the motion, and allowed the plaintiff to prove acts of trespass committed on all of said meadow lots, and the defendant excepted.

The plaintiff contended that the *locus in quo* was a portion of meadow lots Nos. 85, 86 and 87; and the defendant that it was included in lot No. 50, according to a plan by Waterhouse.

The plaintiff put in a deed of warranty from Samuel Ellis to himself, dated September 28, 1833, acknowledged and recorded December 5, 1833, of three fresh meadow lots, &c., numbered 85, 86 and 87, on the proprietor's plan and records of Machias, and known by name of Scott meadow; and introduced proof tending to show that for fifty years the meadow had been known as the Scott meadow, and as lots 83, 84, 85, 86 and 87, and that he had been in the exclusive, open and adverse possession of the *locus in quo*, as a part of those meadow lots, ever since the date of his deed aforesaid; he admitted that the *locus in quo* lay south of Waterhouse's north line of the township.

The defendant introduced a deed of warranty from Joseph Cutler and wife, to himself and others, of lot No. 50, on Waterhouse's plan, bounded north by Waterhouse's north line of the township, dated June 27, 1844, acknowledged same day, and recorded January 2, 1846. The description in this deed includes the *locus in quo*. He also offered evidence tending to show that he had notified the plaintiff that he claimed all the meadow south of the Waterhouse line, and that he had cut trees on the *locus in quo*, and had also cut the grass growing there.

The whole evidence was reported as a part of the exceptions, but it is not necessary to state it more fully, in order to show what questions of law were raised in the case.

Upon the evidence introduced, the jury were instructed that, if the plaintiff, upon receiving and recording the deed from Samuel Ellis to him, dated September 28, 1833, entered upon the land therein described, and continued to have a visible possession, occupancy, and improvement of only a portion thereof, such occupation and improvement, uncontrolled by other facts, were a disseizin of the true owner as to the

whole of the land described in the deed, though Ellis might not have had title thereto.

Or, if the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated, and though not wholly surrounded by fences, or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner, unaffected by other facts.

But if he cut the grass upon a natural fresh meadow, and carried the hay away and converted it to his own use, annually for any period of time however long, without any other possession of the land, on which it grew, or any claim of title to the land, such acts alone would not constitute an adverse possession against the true owner of the soil.

If the defendant introduced no evidence of title or possession of his grantors, in the premises described in their deed to him of lot No. 50, dated June 27, 1844, and recorded January 2, 1846, it could not control and ride over the recorded deed of Ellis to the plaintiff, or affect the possession of the plaintiff of the premises in dispute, if his possession was such under the instructions aforesaid, as would constitute a disseizin of the true owner; that the delivery and registry of the deed to the defendant of lot No. 50, would not purge the disseizin of the plaintiff, (if the latter had acquired such a possession as constitutes a disseizin according to the foregoing instructions, or, if the disseizin was constituted by the delivery and recording of the deed of Ellis to him,) without an entry into some part of the disputed premises. But, if the defendant had the title to the premises in dispute, under the deed to him from Joseph Cutler and wife, or the right of entry therein, the disseizin might be purged by an entry. And, in regard to an entry, the intent with which it is made, generally determines its character, and consequently, the effect of the act. The mere act of going upon the land and cutting trees upon it, will not always constitute a legal entry sufficient to vest the seizin in him who has the

legal right. In order to constitute a legal entry, the party must go upon the premises with that intent.

The jury were also instructed, that a title in fee was not essential to the maintaining of an action of trespass by one having the actual possession against a stranger to the title, and not in possession; and, at the request of the plaintiff, that no person can purge a disseizin by an entry, who is not the true owner, or who does not make the entry by authority of the true owner.

The defendant requested the presiding Judge to instruct the jury,—

1. That, the defendant, being in possession of lot No. 50, second division, under a recorded warranty deed, *his possession* is *presumed by law* to be *co-extensive* with the *grant* described in his deed, unless they shall find by the evidence, that the plaintiff had the undisputed, open, notorious and exclusive adverse possession of some part of it for more than twenty years.

2. That, such possession in order to be *adverse* as against the true owner of the soil, must not only be open, notorious, and exclusive, but must have been under an *asserted claim* to *own* some part of the *land* by permanent bounds as against the true owner; and, that the fact of having mown the grass annually on the natural fresh meadow, and carrying away the hay and converting it to his own use, could not constitute an *adverse* possession as against the true owner of the soil.

3. That, if the plaintiff having meadows of his own, adjoining lot No. 50, crossed over the line into that lot, and mowed the grass, and converted the hay to his own use *annually, without the knowledge of the owner, or of his agent or attorney,* such occupation, however long continued, would not constitute an *adverse* possession as against the true owner of the land.

4. That, if the plaintiff has his full complement of acres of meadow for the three meadow lots claimed by him north of the Waterhouse line, or northern boundary of the defendant's

lot, he cannot lawfully claim, and hold as part of those meadow lots, any portion of defendant's lot as described in his deed.

5. And also, to instruct the jury, as to what *constitutes* an adverse possession as against the true owner of the defendant's lot.

The first clause of the second requested instruction was given; the remainder of that, and the others were not given any further than they are contained in the instructions already given.

The verdict being against the defendant he excepted to the instructions, and to the refusal to instruct.

The case was argued in writing by

*J. A. Lowell*, for defendant, and

*G. F. Talbot*, for plaintiff.

The opinion of the Court was drawn up by

MAY, J. — TRESPASS *quare clausum*, and, at the trial, before the introduction of any evidence relating to the acts of trespass, the defendant moved that the plaintiff be required to select some one of the three several lots described in his declaration, to which his proof of such acts should apply. This motion was very properly overruled. The Court could not legally have restricted the claim of the plaintiff to any particular lot. He had a right to prove his damages occasioned by the defendant, upon each and all the lots, as his writ alleged.

No objection appears to have been made by either party, at the trial, to any of the evidence offered and admitted. The argument of the counsel in defence, therefore, that some part of such evidence was inadmissible, because there was other and better evidence to be found upon the records of the original proprietors, as to the location and extent of the plaintiff's lots, comes too late. The only questions now open to him are those which are raised upon the face of the exceptions.

There was evidence tending to show that the plaintiff had

acquired title, either by deed or disseizin, to some part of the premises embraced within the deed, under which the defendant claims; and that the alleged acts of trespass were committed upon this part. Which party had the better title to it, in view of all the evidence in the case, was a question for the jury. The presiding Judge was requested by the counsel in defence to instruct the jury in regard to several matters of law. The first request was "that the defendant, being in possession of lot No. 50, 2d division, under a recorded warranty deed, his possession is presumed by law to be coëxtensive with the grant described in his deed, unless they shall find by the evidence, that the plaintiff had the undisputed, open, notorious and exclusive adverse possession of some part of it for more than twenty years." Such a possession, so continued, is equivalent to a title by grant. The legal proposition, therefore, which is contained in the request, is, that a grantee in possession of some part of the granted premises, under a recorded deed, is to be regarded as in possession of the whole, notwithstanding he is actually disseized of some portion of the premises by a third person in actual possession, unless the disseizor has continued his adverse possession long enough to acquire the title. The mere statement of such a proposition shows its absurdity. The rule of law is, that where a grantee is in possession of any part of the granted premises, under a recorded deed, he shall be deemed to be in possession of the whole, unless other possessions or facts show the contrary. *Little* v. *Megquier*, 2 Maine, 176. The presumption that one's possession, under his recorded deed, is commensurate with his grant, is always overborne and repelled by an adverse possession, so long as it exists. The very idea of a disseizin, whatever its duration, is an exclusion of the owner from possession just so far as it extends.

That part of the second requested instruction, which was not given in the precise words of the request, appears to have been so far given in the general instructions as to leave no ground of complaint. And so, in regard to the third request, the general instructions given upon the point to which

it refers, are more favorable to the defendant than the instruction sought. They plainly imply that the acts mentioned in the request, are alone insufficient, under any circumstances, to constitute an adverse possession, as against the true owner; and this, whether he had knowledge of such acts or not. They clearly indicated to the jury that something more than all the acts contained in the request, was necessary to constitute such a possession. The fourth requested instruction was rightly withheld. There was nothing in the plaintiff's deed from Ellis to specify the number of acres intended to be conveyed. The quantity of land depended upon the boundaries of the plaintiff's lots as they were located; and these boundaries did not in any degree depend upon any given or proved quantity of land. The fifth request simply calls upon the Court to define "what constitutes an adverse possession as against the owner of the defendant's lot," and was sufficiently complied with.

In regard to the general instructions, so far as they relate to the law of disseizin, it is now urged in argument, that they were erroneous, because the same rule is applied to meadow lands disconnected from any farm, as would be applied to a farm concerning which a disseizin is alleged. It is contended, that the statute which defines what shall constitute a possession and improvement of land, R. S. of 1841, c. 145, § 42, and of 1857, c. 104, § 38, is applicable only to farms. No such instruction was requested. That it was competent for the jury to look at the position of the land, the nature of the soil and its productions in connection with all the acts done upon it, in determining whether there was in fact a possession and improvement open, notorious, exclusive and comporting with the usual management and improvement of a farm by its owner, is not to be denied; and we doubt not that all these circumstances were urged upon the jury by the learned counsel in defence. The statute, however, applies to all land alike. There was, therefore, no error on the part of the Court in stating its provisions to the jury as law.

It is further said, that although the general instructions

given may be sound law, when taken in the abstract, they become erroneous and delusive, when taken in connection with the facts existing in the case. It is the duty of the Court to give the law as it is, and of the jury, aided by the arguments of counsel, to apply the facts, as they shall find them, to the law. If the facts in this case required the application of any rule of law which had not been given, it was the business of the counsel to ask for the appropriate instruction, and, if refused, exceptions might be sustained.

The instructions which were given are in harmony with the law, and were appropriate to the facts as reported in the exceptions. In view of the authorities cited by the plaintiff, and many more that might be, as well as of those cited in defence, we perceive no error in regard to any instruction given or withheld. The result is, that *the exceptions must be overruled.* *Judgment on the verdict.*

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

# COUNTY OF AROOSTOOK.

HIRAM ESTY *versus* RICHARD L. BAKER.

A lease of lands for twenty years, with the right of perpetual renewal, may be transferred by deed, as well as by assignment on the back of the lease, and in either case the interest of the assignee passes.

Placing a shaft from one building to another, across a passage-way of which another person owns the fee, is a trespass, although the shaft passes under a bridge or platform, and does not interfere with the use of the passage; and an action may be maintained therefor.

A deed conveying a mill, "together with the land and privilege where the same is situated, necessary for and attached to said mill, hereby meaning to convey all the land and mill privilege not heretofore sold by us, *on the dam* connected with said mill and privilege," may be construed to convey not only the land on which the mill stands, but land attached to it, necessary for its existence. But whether it conveys land *above* the dam, previously set apart for a road, by a lease with the right of perpetual renewal, *quære*.

ON REPORT of the evidence by APPLETON, J.

TRESPASS *quare clausum fregit*. Plea, general issue, with brief statement claiming title in the defendant to the *locus in quo*.

The plaintiff adduced in evidence a lease from Jay S. Putnam and Aaron R. Putnam to Samuel Houlton, dated March 15, 1841, for twenty years, with the right of perpetual renewal, and a deed from Houlton to the plaintiff, dated March 10, 1843; also deeds from the Putnams to Rufus Mansur, April 29, 1844; Houlton to Mansur, March 6, 1851; Mansur to plaintiff, Dec. 2, 1851; Putnam to Kelleran, May 20, 1837. All the above deeds and lease were duly recorded.

It appeared that the plaintiff erected, in 1841, on the premises leased to Houlton, a factory building, which was afterwards burned, and another erected on the same spot. Among the rights granted in the lease to Houlton, was the

right to make a road on the south side of the grist mill to the county road. This road the plaintiff had built. In 1857, the defendant erected a shop near said road or passage-way, and placed a shaft from his shop to his grist mill on the other side of the passage-way, running the shaft under a bridge or platform, and so as not to obstruct the passage-way to the factory.

The defendant introduced deeds from the Putnams to Kelleran, Nov. 21, 1834; Putnam to Hussey, May 13, 1843; Hussey to Small, date not given; Small to Trueworthy, Sept. 15, 1846; Trueworthy to Ingersoll, date not given; Ingersoll to May and Vanwart, July 5, 1856; lease, May and Vanwart to the defendant, September 9, 1857. The land described in these deeds included the grist mill, "together with the land and privilege where the same is situated, necessary for and attached to the said grist mill, hereby meaning and intending to convey all of the lands and mill privilege, not heretofore sold by us, on the dam connected with said grist mill and privilege," &c. All the above deeds were duly recorded.

The defendant offered to prove that the land on which the trespass was alleged, was necessary to the grist mill, and that the lease to Houlton, under which the plaintiff, in part, derived his title, had been surrendered; all of which the Court excluded. The Court ruled, that the conveyance of the grist mill covered only the land on which it stood; that the lease to Houlton was assignable, and was duly assigned to the plaintiff; and that the location of the shaft across the passage-way leading to the plaintiff's factory, was a trespass, for which the defendant was liable in nominal damages.

The case was reported for the decision of the full Court, whether the ruling of the presiding Judge was erroneous, or the evidence excluded was material and admissible, in which case the action to stand for trial; otherwise a default to be entered with one cent damages.

*J. Granger*, for the plaintiff, argued that the words "connected with said grist mill and privilege," in the defendant's

deed, were intended to restrict and limit, and not to enlarge the grant.

2. A perfect description in a deed is not to be defeated by a further and false description. 1 U. S. Dig., 538; *Crosby* v. *Bradbury*, 20 Maine, 61; *Vose* v. *Handy*, 2 Maine, 322; 4 Mass., 146. Where doubt arises, the practical construction of the parties to a deed is entitled to great weight. *Stone* v. *Clark*, 1 Met., 378; *Adams* v. *Frothingham*, 3 Mass., 362.

3. Nothing passed by the deed of Putnams to Hussey but the grist mill, the land under it, and the water power to carry two runs of stones. *Leonard* v. *White*, 7 Mass., 6; *Blake* v. *Clark*, 6 Maine, 436; *Grant* v. *Chase*, 17 Mass., 443; *Otis* v. *Smith*, 9 Pick., 293; *Thompson* v. *And. Bridge*, 5 Maine, 62; 6 Cowen, 677; 13 Met., 109.

4. The fee passed by the deeds, Putnams to Mansur, and Mansur to the plaintiff. Conditions in the deed, not consistent with the grant, are void.

5. But possession is sufficient for the plaintiff to maintain this action. If the defendant fails to make out his title, against the plaintiff's prior possession, the defence fails.

6. The plaintiff, if not owner of the fee, is entitled to maintain this action as tenant at will, having received no notice to quit. *Young* v. *Young*, 36 Maine, 133; *Dickerson* v. *Godspeed*, 8 Cush., 119.

*Blake & Garnsey*, for the defendant.

1. Trespass *quare clausum* will not lie for running a shaft under a passage-way, without touching a timber or the ground, but merely passing through the air. *Eames* v. *Prentice*, 8 Cush., 337; 1 Johns., 512; 12 Johns., 184.

2. The lease to Houlton was not assignable, but, if assignable, it conveys only a right of way, with which the shaft does not interfere. *Atkins* v. *Badman*, 2 Met., 474.

3. The deed to Mansur, and from Mansur to the plaintiff, conveys the fee to the factory, but only a right to a passage-way leading to it, forbidding the grantee to use the land south of the grist mill for any other purpose than for a passage-way.

4. The conveyance of the grist mill passed the land necessary to its use as a grist mill, and that had been so used. *Whitney* v. *Olney*, 3 Mason, 380; *Maddox* v. *Goddard*, 15 Maine, 224; *Furbush* v. *Lombard*, 13 Met., 109; *Moore* v. *Fletcher*, 16 Maine, 66.

The opinion of the Court was drawn up by

APPLETON, J.—On the 15th of March, 1841, Jay S. Putnam and Aaron R. Putnam leased for the term of twenty years, with the right of perpetual renewal, to Samuel Houlton, the premises on which the plaintiff's factory is erected, with "the privilege of making a road at the south end of said grist mill to said premises, *not obstructing* the privilege of said grist mill," &c.

On the 10th of March, 1843, Samuel Houlton, by deed of that date, conveyed all his interest in the premises leased, to the plaintiff.

The lease was assignable, and, whether the assignment be by deed, or writing on the back of the lease, is immaterial. The interest of the assignor equally passes, whichever mode of transfer be adopted.

On the 29th of April, 1844, Jay S. Putnam and Aaron R. Putnam deeded to Rufus Mansur the premises which were included in the lease previously given, *together with the land heretofore used as a road to the plaintiff's factory*, specifically describing by metes and bounds the land over which the road had passed; with a restriction upon Mansur, that he should not "occupy that portion of the premises south of the grist mill, and now used as a road to the factory, for any other purpose than a road." These premises, Rufus Mansur, on the 3d of Dec., 1851, conveyed to the plaintiff.

The trespass complained of consists in the defendant's placing a shaft, running from defendant's shop to the grist mill, and across the road leading to the plaintiff's factory. The shaft was underneath the bridge or platform over which was the passage-way, but it in no respect interfered therewith.

If the plaintiff's rights were only such as he derived from

the assignment of the lease to Houlton, he could not maintain this action. He thereby acquired only an easement in the land over which the road passed, and, as he is not injured in his right of way, he would have no cause of complaint.

But the deed of Mansur conveyed the fee of the road, if Mansur had the title thereto. The gist of the action of trespass *quare clausum* is the being disturbed in the possession of the land upon which the wrongful entry has been made. *Anderson* v. *Nesmith*, 7 N. H., 167. If the close is "illegally entered, a cause of action at once accrues. Whatever is done after the breaking and entering is but an aggravation." *Brown* v. *Menter*, 2 Foster, 468. The defendant had no right of entry upon the premises, unless for the purpose of passing over the same. If he did more, he became a trespasser. The entry for the purpose of placing the shaft across the passage-way, though under the platform, and not obstructing the right of passage, was unauthorized, and the defendant, by so doing, became liable in trespass. The mere continuance of a building on another person's land, even after the recovery of damages for its erection, is a trespass for which an action will lie. *Holmes* v. *Wilson*, 10 A. & E., 503.

The action is therefore maintainable, unless the defendant can disprove the title of the plaintiff to the land used as a passage-way, and included in the deed of the Putnams to Mansur of the 29th of April, 1844, and show title in himself, or those under whom he derives his rights. This he attempts to do.

The defendant claims that "the land south of the grist mill, and now used as a road to the factory," was included in the mortgage deed of Jay S. Putnam and Aaron R. Putnam to Bachellor Hussey, dated May 13, 1843, and which was prior to the conveyance under which the plaintiff derives his title. This deed is of "the grist mill in said Houlton, on the Meduxnakeag stream, now owned and occupied by us, with all the appurtenances and machinery thereto belonging, *together* with the land and privilege where the same is situated, necessary for and attached to the said grist mill; hereby meaning

and intending to convey all of the lands and mill privilege (not heretofore sold by us) *on the dam* connected with said grist mill and privilege," &c.

The presiding Judge ruled that the conveyance of the grist mill covered *only* the land upon which it stood. This, we think, regard being had to the language of the conveyance, was too restricted a construction thereof. By the term, "a grist mill," the fee of the land upon which it stood would pass. *Blake* v. *Clark*, 6 Greenl., 436. But there might, from the situation of the mill, be land necessary for its existence, attached to it, and used and occupied with it at the time of conveyance, which, it would seem, would pass with it. *Forbush* v. *Lombard*, 13 Met., 109; *Moore* v. *Fletcher*, 16 Maine, 63.

But it may be considered questionable whether the land south of the grist mill, and above the dam, which had been set apart for a road by a lease, with the right of perpetual renewal, was either land necessary for or attached to the mill, or was *on the dam*, according to the meaning of that expression in the conveyance. But in the present aspect of the case, it is not material to answer this inquiry.

*The case to stand for trial.*

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

## HIRAM STEVENS *versus* OSCO A. ELLIS.

A, the owner of a colt, let B have it for a mare, on condition that if, after trial of the mare, and inquiries as to the title of B, A was satisfied, they would make a permanent exchange; otherwise A was to take the colt where ever he found him. B took the colt and sold him to C, without notice as to the conditions on which he held him. Soon afterwards, A ascertained that B had stolen the mare, and had no right to sell her; and he delivered her up to her right owner. A then notified C of the conditions of his exchange with B, claimed the colt, and took him away. *Held*, that C cannot maintain trover against A, A never having parted with his property in the colt.

TROVER for a colt. This case was tried before CUTTING, J., and the evidence reported for the full Court to render such judgment as the law and evidence required. The facts appear sufficiently in the opinion of the Court.

*Blake & Garnsey*, for the plaintiff, argued that this was not a case of sale on condition, but of sale and delivery of goods effected by fraud and false representations on the part of the vendor. 2 Parsons on Cont., 27, and note; *Sawyer* v. *Shaw*, 9 Greenl., 47; *Leighton* v. *Stevens*, 22 Maine, 252.

The sale being a fraudulent one, and not a conditional one, the defendant's title cannot avail against the plaintiff, a *bona fide* purchaser without notice. The defendant could revoke the bargain as against Violet, but not against an innocent third party. The sale was only voidable, but not void. *Williams* v. *Given*, 6 Gratt., 268; *Coggin* v. *H. & N. H. Railroad*, 3 Gray, 547.

But if this bargain is held to have been a sale on condition, still the purchase by the plaintiff from Violet, being for value, and without notice of the condition, the title of the plaintiff is good against the defendant. *Hussey* v. *Thornton*, 4 Mass., 405; 2 Kent's Com., 498; *Hill* v. *Freeman*, 3 Cush., 259.

If a sale on condition is valid against a *bona fide* purchaser, any neglect on the part of the first vendor to notify such purchaser of his title, is a waiver of the conditions. In the

case at bar, the evidence is that the defendant failed to notify the plaintiff of the conditions of his sale to Violet, as soon as he had opportunity.

As to the general principles affecting the rescission of contracts on the ground of fraud, the counsel cited *Barton* v. *Stewart*, 3 Wend., 236; *Thayer* v. *Turner*, 8 Met., 550; *Coggill* v. *Railroad*, 3 Gray, 549.

*J. Granger*, for the defendant, contended that the colt was not Violet's property, until the conditions of the bargain were fulfilled, and hence the defendant had a right to reclaim him. *Galvin* v. *Bacon*, 11 Maine, 28; *Parsons* v. *Webb*, 8 Maine, 38; *Bradeen* v. *Brooks*, 22 Maine, 463; *Ripley* v. *Dolbier*, 18 Maine, 382; *Means* v. *Williamson*, 37 Maine, 556; *Leighton* v. *Stevens*, 19 Maine, 154; Parsons on Contracts, 499; *Blanchard* v. *Child*, 7 Gray, 155; *Coggill* v. *Hartf. & N. H. Railroad*, 3 Gray, 545; *Sargent* v. *Metcalf*, 5 Gray, 306; *Lucy* v. *Bundy*, 9 N. H., 298.

After the plaintiff had given up the colt to the defendant, and suffered more than six months to elapse without making any claim to him, it was too late for him to commence and maintain this action.

The opinion of the Court was drawn up by

TENNEY, C. J. — The defendant purchased the colt in question of the plaintiff. Afterwards, in the fall of 1858, he permitted one Violet to take him, who, at the same time, left with the defendant a mare, which he asserted to be his own property. Very soon after Violet became possessed of the colt, he sold him to the plaintiff, for a horse and four dollars in money. In a short time subsequent to this supposed sale, one Thibideaux claimed the mare of the defendant, and, immediately after, the defendant informed the plaintiff thereof, and told him, as he testified, that the trade with Violet was conditional; that he had no doubt the mare was stolen, as the man who owned her had come for her, and was then present with the mare; and, thereupon, the defendant told the plain-

tiff he should take the colt, and he had better look after the horse, which he gave Violet in exchange therefor. The defendant sent through to Madawaska, the residence of Thibideaux, and became satisfied that the mare was stolen, and gave her up to Thibideaux, the owner, and demanded the colt of the plaintiff.

After a delay, at the request of the plaintiff, of about a week, upon further conversation between the parties, the defendant took the colt, whether *with*, or *against*, the consent of the plaintiff, the testimony of the parties is conflicting. The colt was kept by the defendant without any further assertion of right by the plaintiff, till the following spring, when he made a demand therefor, and, on refusal of the defendant to deliver the colt, this suit was instituted.

After the colt was taken by the defendant from the plaintiff's possession, as before stated, the plantiff called upon one Johnson, who had in possession the horse which he let Violet take in exchange; and Johnson, instead of surrendering the horse, satisfied him therefor, "*provided such was the law*," by delivering to him another colt, of the same age with the one in question. The colt, so left with the plaintiff, he kept the most of the winter, when Johnson came and insisted upon taking the colt, (which he had delivered,) on the ground, that the horse was his own property, and took him accordingly, without the plaintiff's consent.

It is not necessary, for a proper disposition of this cause, to determine the question of fact between these parties, whether the colt in question was taken by the defendant, after it was ascertained, and known by both, that the mare was stolen, with or without the plaintiff's consent. There was manifestly an uncertainty in the minds of both, touching the legal title of the property, whether it was in one or the other. If it was taken by the defendant with the plaintiff's consent, a consideration for that consent was wanting to make it effectual as a contract. If no permission was given by the plaintiff, expressed or implied, he surrendered none of his existing rights; and the title of the colt is really the question before

us, independently of what transpired at that time. And herein is a question of fact, to be settled by the Court, from evidence not in harmony, which is, did the defendant, in the transaction between him and Violet, in the fall of 1858, dispose of the colt absolutely, as by a sale, in exchange for the mare, which had been stolen? The plaintiff asserts the affirmative, which is denied by the defendant.

In support of the plaintiff's proposition, is his testimony, that when the parties were together in four or five days after the trade between the plaintiff and Violet, he said to the defendant, that he had got the colt back again; and the latter answered, "all right;" the plaintiff then inquired what kind of a trade he made with the Frenchman, and was answered, that he got this horse, (the one he was driving,) for the colt, and made forty dollars in the trade.

That the colt was not sold absolutely to Violet, but remained the property of the defendant, he testified; that Violet came to him with the mare, and proposed an even exchange of her for the colt; that he concluded to exchange, upon the condition, that, if the mare worked well, (she being a little lame,) and Violet owned her, and no claim came against her, he would give the colt for the mare; that he told Violet he would not deliver the colt until he had tried the mare, and had time to inquire and ascertain whether there were claims against her; that he told him he might take the colt, and he would take time to send to Madawaska, where the man lived, of whom Violet said he purchased the mare, and ascertain if his title was all right, and if he found it so, he would make a formal delivery of the colt to him; but he told him, if there was any trouble about the mare or any claim came against her, or any old bills of sale, it was no trade, and that he should take the colt wherever he could find him, and without process of law.

The deposition of Thibideaux is in the case, and, after stating the loss of the mare and the recovery of her from the defendant, and her description, he states that he was present when a conversation took place between the parties, and that

the defendant told the plaintiff he must look out for the horse he let Violet have, as Violet stole the mare which he let defendant have, and that it was a condition of the trade, that if any claim came against the mare, it was no trade. And, in answer to the inquiry by the plaintiff, whether the plaintiff made any answer to this, the deponent said he did not recollect.

It was admitted by the plaintiff, that Violet would testify, that, when he exchanged horses with the defendant, it was agreed that, if any claim came against the mare, they were to give up the trade, and defendant was to take the colt he let Violet have, wherever he could find him.

It is true, that the defendant does not testify that he told the plaintiff, that he had not conveyed the colt in controversy to Violet, when the first conversation took place between them, after the plaintiff had obtained the colt from Violet, and he spoke of the trade as one which was an unconditional sale. But this was a time unsuited to give a particular account of the transaction, the parties being in separate wagons, and traveling over frozen ground in the evening; and was before any information had been received that the mare was stolen, which, according to defendant's testimony, was unexpected; the worst of his apprehension being, that some claim of a third person upon the mare, by way of mortgage or other contract, might be outstanding, which he may have regarded as a contingency somewhat remote, or he would not have parted with the colt. A disclosure at that time of the state of the title, would have had no effect to prevent a trade, to which the plaintiff was a party, as that had been previously completed.

The suspicion that the mare had been stolen, was communicated to the plaintiff immediately on its being awakened; and the facts stated, as to the exchange, substantially, as the defendant has testified in the case. When it is considered that this evidence is somewhat corroborated by the testimony of Thibideaux, and by what it is admitted would be that of Violet, though the latter should be received with some allow-

ance, we are not satisfied that the sale from the defendant to Violet was absolute. The terms of the exchange had been agreed upon, if the defendant should conclude, after such inquiries as he should think proper to make, and as he proposed to make, that no outstanding title to the mare existed. It was a trade on a condition to be performed by the defendant, and waived by him, as the plaintiff's counsel have argued; but very soon, and before a reasonable time for making those inquiries had elapsed, it was ascertained, to the satisfaction of both parties, that Violet had obtained the mare feloniously, consequently the defendant obtained no title to her, under any state of the facts. *Dame* v. *Baldwin*, 8 Mass., 521.

But under the facts, as we find them, the defendant did not part with his property; he has not relinquished the right to take it wherever he could find it. And the case falls within the principle of *Galvin* v. *Bacon*, 2 Fairfield, (Maine,) 28.

According to the agreement of the parties, judgment is to be rendered for the defendant for his costs.

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

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BARTHOLOMEW SMALL *versus* SAMUEL A. GILMAN.

Where, in an action of assumpsit, it is alleged in the writ that the defendant, after giving the plaintiff a permit to cut timber for a specified period on all of a certain tract of land, except a part which he had previously engaged to a third party, and which part the defendant, at the making of the contract, described and defined; but that the defendant, afterwards, granted a permit to the third party covering a much larger territory than he had represented to the plaintiff as engaged, a refusal by the Court to instruct the jury, that the plaintiff may recover damages whether the false representations were made to him by the defendant from misrecollection or mistake, or with a fraudulent intent, was not erroneous, if the writ does not allege a promise on the part of the defendant that a specified portion of the tract in question was the part engaged to the third party.

Neither was it erroneous, in such an action, for the Court to refuse to instruct the jury, that, if the defendant gave the plaintiff a permit which cov-

ered a certain tract, and afterwards gave a third party a permit embracing a part of the same tract, on which said party cut timber included in the plaintiff's permit, the plaintiff is entitled to damages in this form of action. Such acts would be tortious, and, if proved, would not support the promise alleged in the plaintiff's writ.

A letter to the plaintiff from his agent to whom the alleged representations were made by the defendant, though written immediately after the transaction, was no part of the *res gestæ*, and was properly excluded. Such a letter, relating to things past, and about which the agent might be called as a witness, was but hearsay.

Neither the writ, judgment or docket entries in a former action of the holder of the second permit against the holder of the first, are proper evidence in a suit between the latter and the party who granted the permits.

THIS was an action of ASSUMPSIT.

On the 14th October, 1856, the defendant gave the plaintiff a permit "to enter, with two six ox teams or its equivalent, upon that part of No. 4, range 3, west from the east line of the State, which lies west of the east branch of the Mattawamkeag, (excepting that part engaged to Josiah Jellerson,) and north of a line running east and west, and three and a half miles north of the south line of said town, and to cut and remove therefrom spruce and pine timber suitable for board logs," &c.

On the third day of November, 1856, the defendant gave Jellerson a permit "to enter with two or more horse teams upon that part of No 4, range 3, W. E. L. State, belonging to said Gilman, commencing on the south line of said Gilman's land, and west of the east branch of the Mattawamkeag, and carrying a width of one mile, and to extend west a sufficient distance to make out a winter's work for two horse teams," &c.

The declaration in the plaintiff's writ alleges, that the defendant, being the owner of township No. 4, promised and engaged to grant the plaintiff a permit on all of said township west of the east branch of the Mattawamkeag, except what he had promised thereon to Josiah Jellerson, and at the same time represented to Rufus Mansur, agent of the plaintiff, that the portion he had engaged to Jellerson commenced on the south line of the plaintiff's land, west of the east

branch of the Mattawamkeag, of the width of one mile, and extending west to the first point of the lake, and assured Mansur for the plaintiff, that he might operate on all the rest of the land; that, relying on the representations of the defendant, the plaintiff took a permit as proposed, and bound himself to take the ensuing winter not less than one million feet board measure; that the defendant afterwards, unmindful of his engagements to the plaintiff, gave a permit to Jellerson for two or more horse teams on that part of No. 4, commencing on the south line of Gilman's land, and west of the east branch of the Mattawamkeag, carrying a width of one mile, and extending west a sufficient distance to make a winter's work for two horse teams, on which permit Jellerson entered and cut 300,000 feet board measure west of the easterly point of the lake aforesaid, not finding, as he truly alleged, timber sufficient east thereof, and that said Jellerson also cut 50,000 feet north of the north line given him in his permit, and this he did by the license and authority of the defendant, for all which the defendant received stumpage from Jellerson; and the plaintiff avers that he put in the teams prescribed in his permit, and operated during the winter, but did not cut a million feet board measure because the timber was not on the land assigned him, as limited by the permit to Jellerson, in consequence of which limit he cut 3 or 400,000 feet less than he otherwise should have cut with the same teams and in the same time; and that the plaintiff was obliged, by the defendant's violating his agreement as already set forth, to cut inferior timber, and haul it a longer distance, &c., to the damage of the plaintiff, &c.

There was evidence tending to show that the defendant represented to Mansur, that the territory he had engaged to Jellerson extended no further west than the most eastern point of Pleasant lake, and other evidence tending to show that the territory thus engaged was to extend far enough west for a winter's work for two teams.

The plaintiff offered in evidence the writ, judgment and docket entries in a case, *Jellerson* v. *Small & others*, for an al-

leged trespass on territory embraced in Jellerson's permit; but the Court excluded them.

The plaintiff also offered a letter from Mansur, his agent, to him, written immediately after the bargain with Gilman; but it was not admitted.

There was much other testimony, not pertinent to the points on which the case turned.

The plaintiff requested the Court to instruct the jury, that if the defendant, at the time he agreed to give the permit, and did give it to the plaintiff, represented to the plaintiff's agent that the exception extended no further west than the easternmost point of Pleasant lake, when in fact the defendant had promised Jellerson a permit extending far enough west for a winter's work for two teams, and the plaintiff suffered damage by such representation, he was entitled to recover such reasonable and proximate damage as he is shown to have suffered, whether such representation was made from misrecollection or mistake. And that, if the defendant gave to the plaintiff a permit, and afterwards gave one to Jellerson covering part of the same territory, under which the latter cut timber embraced in the plaintiff's permit, whereby the plaintiff suffered damages, he was entitled to recover such damages in this action.

The Court, CUTTING, J., presiding, declined giving these instructions, but instructed the jury, that this action could not be maintained, if the jury found such misrepresentations made by the defendant, as alleged by the plaintiff, unless they also found that such misrepresentations were wilfully false, and were made by the defendant with the intent to deceive and injure the plaintiff.

The jury returned a verdict for the defendant.

The plaintiff filed exceptions to the rulings of the Court.

*J. Granger* and *Blake & Garnsey*, for the plaintiff.

1. The letter of Mansur to the plaintiff was part of the *res gestæ*, and should have been admitted. 1 Greenl. Ev., § 108; *Thorndike* v. *Boston*, 1 Met., 242; *Allen* v. *Duncan*, 2 Pick., 308.

2. The requested instruction should have been given. If the plaintiff was led into a contract by an untrue representation, why should not he be remunerated for the loss he suffered thereby? 2 Parsons on Con., 268, ed. 1845. If a party makes a false representation to promote his own interest, without knowing whether it is true or false, he is liable for the damage arising therefrom. *Stone* v. *Denny*, 4 Met., 151; *Hazard* v. *Irwin*, 18 Pick., 96. The representation that the part engaged to Jellerson was that part east of the easternmost point of the lake, was, in fact, a promise and warranty that the permit given to the plaintiff covered all the territory on the south mile strip west of that point. But the permit given to Jellerson embraced the whole of the south mile strip, to the west line of the defendant's land, if necessary for Jellerson's winter's work. This was a direct breach of the contract, to the great damage of the plaintiff.

3. The instruction given was erroneous. A false representation in many cases furnishes a ground of action, although made with no intent to deceive. It is so in cases of insurance, where there is an implied *warranty* that the representations are true. So with representations of landlords as to the condition of tenements they offer to let. The consequences are often as injurious to the other party, whether the representations are made for the purpose of deceiving, or simply through misinformation.

*Madigan* argued further for the plaintiff, and cited *Taylor* v. *Ashton*, 11 M. & W., 413, and cases cited; *Moers* v. *Heyworth*, 10 M. & W., 156; *Adamson* v. *Jarvis*, 12 Moore, 241; *Lobdell* v. *Baker*, 1 Met., 200, 201.

*Hathaway*, for the defendant, contended that the instructions given to the jury were correct, and that the case furnished no ground for the instructions requested and refused.

The letter of Mansur to the plaintiff was mere conversation between the plaintiff and his agent, in the absence of the defendant, and, as such, inadmissible.

The declaration in the writ was insufficient, and set forth

no cause of action. It does not allege fraud, nor that the representations made were false. 2 Greenl. Ev., 230, *a*, 6th edition; *Hammatt* v. *Emerson*, 37 Maine, 308.

The permit to the plaintiff was effectual, in accordance with the representations made by the defendant at the time, and could not be limited by a subsequent permit to Jellerson.

The promises of the defendant to grant permits, both to the plaintiff and to Jellerson, were void, being verbal only, and both being for the sale of an "interest in and concerning real estate." R. S., c. 111, § 1.

The opinion of the Court was drawn up by

MAY, J. — The plaintiff's declaration, in substance, alleges that the defendant contracted with him for a permit to cut timber in the winter of 1856 and 7, on *all* of a certain tract of land then owned by the defendant, in township No. 4, range 3, west of the east branch of the Mattawamkeag, *excepting so much as he had before engaged to one Josiah Jellerson;* and that the defendant, at the time of making said contract, represented and stated to one Mansur, the plaintiff's agent, with whom said contract was made, what were the limits of that part of said tract which had been engaged to Jellerson, and upon which Jellerson had, or was to have a permit for two horse teams; and further, that the plaintiff, relying upon said representations, and under the expectation that he was to have, for his operations, all the defendant's land in said township, except what had been definitely pointed out as the part engaged to Jellerson, did, on the 14th of October, 1856, take a permit of the defendant, of all his said tract, "excepting that part engaged to Jellerson," supposing that he thereby acquired the right to operate with two six ox teams, or their equivalent, upon all the tract in said township belonging to the defendant, except what had been represented and pointed out to Mansur, his agent, as the part that had been engaged to Jellerson, and did then and there bind himself in said permit to take off the ensuing winter not less than one million feet of timber, board measure. The

plaintiff then alleges that the defendant, being unmindful of his contract, and in violation thereof, did, on the 3d day of November, then next, give a permit to Jellerson for two or more horse teams, which included a much larger part of said tract than the part which had been represented and pointed out by the defendant as the part previously engaged to Jellerson; and that Jellerson thereupon entered upon that part which had not been so pointed out, and which the plaintiff supposed had been and was included in his permit, and cut and carried away large quantities of timber, to the great injury of the plaintiff and his operations, with the knowledge and approval of said defendant. The plaintiff then sets out more specifically what he did and prepared to do, under his permit, and the damages which he sustained by the act of the defendant in granting to Jellerson the subsequent permit as aforesaid, and from the interference of Jellerson with his rights by his acts and proceedings under the same.

To this declaration the defendant pleaded that he never promised, upon which plea issue was joined. Both parties, therefore, notwithstanding all that has been said in argument about the nature of the action, have treated it as an action of assumpsit. The trial proceeded upon this ground, and to this no exception has been taken. The declaration alleges no warranty, and sets forth no allegation of fraud or intentional deceit. The only ground of action set forth, if any, consists in the fact that the defendant misstated the limits of the land which he had before engaged to Jellerson, and afterwards gave Jellerson a permit covering more land than he had represented as the part engaged to him, and that Jellerson afterwards entered thereon with the knowledge and approbation of the defendant, and did acts which were greatly prejudicial to plaintiff.

From the bill of exceptions, as presented, we must presume that the evidence applicable to the various allegations contained in the writ, was submitted to the jury with appropriate instructions, unless the specific instructions which were

requested, ought to have been given, or those which were given instead of them are erroneous.

The first requested instruction relates wholly to the effect of the false representations and statements said to have been made by the plaintiff, at the making of the contract, even though the jury should find that they were made from misrecollection or mistake. The presiding Judge was requested to instruct the jury that such representations, "if false, would entitle the plaintiff in this action to recover such reasonable and proximate damages as he had shown that he suffered by it, whether such representation was made from misrecollection or mistake." The word "whether," in this request, seems to have been used in the sense of "if"—or, perhaps, the words "or not" were accidentally omitted after the word "mistake." The Judge appears to have so understood the request, and thereupon, instead of complying with it, proceeds to instruct the jury that *this action* cannot be maintained, if the jury find such misrepresentations made by the defendant, as contended for by the plaintiff, unless they also find that such misrepresentations were false, and made by the defendant with an intention to deceive and injure the plaintiff.

The writ, as we have seen, contains no promise which such representations, if false, and innocently made, could possibly tend to prove. It is nowhere sufficiently alleged that the defendant promised the plaintiff that any specific portion of the defendant's tract of land in township No. 4, range 3, was the portion which had been previously engaged to Jellerson. Proof, therefore, that false representations were made by the defendant through misrecollection or mistake, could have no tendency to support the plaintiff's declaration in his writ, if it is to be regarded as a declaration in assumpsit. This requested instruction was, therefore, rightly withheld, and the plaintiff has no cause of complaint on account of the instructions which were given, because these gave to the plaintiff the full benefit of the false representations relied on, if made with a design to defraud or deceive, in the same manner, and to the same extent as if his action were an action on the case

in the nature of deceit. They were more favorable to the plaintiff than he had a right to expect, when we look at the promises alleged in the writ, and consider that both parties had framed their pleadings solely with reference to them. The question does not arise in this case, whether an action of assumpsit can be maintained upon a promise, arising out of mutual mistake and misapprehension of facts in regard to the subject matter of a contract, executed in part or in whole, whereby one party has been greatly injured, because no such promise is alleged. The variance between the proof of the facts recited in the request, and the allegations in the writ, assuming that the action is assumpsit, as the parties have treated it, is fatal. There appears to be no ground for the exceptions, on account of the non-compliance of the Judge with this particular request, or by reason of the instructions which were given.

But the presiding Judge was further requested to instruct the jury that, if the defendant gave to the plaintiff a permit which covered a certain territory, and shortly afterwards gave to Jellerson a permit covering a part of the same territory, in express words or by implication, under which Jellerson cut timber embraced in the plaintiff's permit, whereby the plaintiff suffered damage, he is entitled to recover for such damages in this action. This requested instruction was properly withheld, and for the same reasons stated with reference to the other. The writ alleges no promise that the defendant would not permit others to cut upon the same land upon which the plaintiff was to operate. It is true that whatever rights the plaintiff had acquired by his permit, the defendant could not properly interfere with; and if he did so, or permitted others, with his knowledge and approbation, so to interfere, he might be held liable therefor in an appropriate action. Such unlawful interference, however, would not, if proved, tend to support any promise alleged in the plaintiff's writ. Such acts would be tortious, and we see nothing in the writ which made it the duty of the Judge to comply with this request.

Again, it is urged that there was error in excluding a let-

ter written to the plaintiff, by Mansur, while acting as his agent, and immediately after he had concluded the bargain with the defendant, for the plaintiff's permit. It does not appear that the letter contained any thing material, nor for what purpose it was offered. It is said, in the argument for the plaintiff, that it contained an account from Mansur of what he, as his agent, *had* accomplished. It is not perceived upon what ground such a letter could have been admissible. It is a mere declaration of the agent as to what acts he had performed, and about which he was permitted to testify fully. It is not, as now contended, a part of the *res gestæ*. It relates to transactions that were past. Such declarations of an agent, whether in writing, or parol, are but hearsay. If it was offered for the purpose of corroborating Mansur as a witness, it was clearly inadmissible for that purpose.

That the writ, judgment and docket entries in a former case of Jellerson against this plaintiff and others, which was an action for the alleged interference of the present plaintiff with the rights of said Jellerson under his permit, were improperly excluded, is not now contended. That they were properly rejected is beyond question. The result is, that there being no error in the matters excepted to, the defendant is entitled to judgment on the verdict.

*Exceptions overruled and*
*Judgment on the verdict.*

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

## SHEPARD CARY *versus* JEREMIAH WHITNEY.

Although a deed of land from the State is not conclusive against a title from another source clearly traced and legally established, yet it cannot be overthrown by the production of a quitclaim deed of an earlier date from a third party, without evidence of title in the latter.

When the State Legislature has, by resolve, authorized the conveyance of a certain tract of land to a person, he having, it may be presumed, solicited the grant, and having afterwards acted under it, he and those claiming under him are estopped from denying the title of the State.

The power of corporations to pass title to land by vote is anomalous, and limited to the single case of proprietors of common land, and as to them rests entirely upon statute grant, *it seems*.

The State may grant a title to land by a resolve directly, but, in order to do so, there must be in the resolve words of grant, release or confirmation. But where the resolve does not contain any words of grant, but simply authorizes or provides for the giving of a deed, the title does not pass until the deed is executed.

Where a resolve provided for a grant of land to a person who had erected a saw mill, the State, after the passage of the resolve, and before the conveyance by the Land Agent, did not hold the land as trustee for its intended beneficiary. It was a donation, and not a case of a vendor who had received the purchase money under an agreement to sell and convey.

Where a resolve authorized the Land Agent to convey certain lands to A or his assigns, and accordingly he gave a deed thereof to B as the assignee of A, a third party, showing no connection with the title from the Land Agent, cannot object to the title of B, because the fact of assignment, or the legal right of B to take the deed as assignee, has not been proved.

The recital in the deed of the Land Agent, that B is the assignee of A, is *prima facie* sufficient evidence of the fact.

And where a resolve authorized the Land Agent to convey a certain lot to A or his assigns, the determination of the Land Agent that a certain person is the assignee of A, and entitled to the conveyance as such, is binding and conclusive upon other parties claiming under a prior deed of the same land from A himself.

In such a case, the question whether the assignee took the title charged with a trust for the benefit of A, or of A's grantee, is properly for a Court of Equity; and such trust, if any existed, cannot be interposed to prevent the holder of the title from the State recovering his legal estate in a suit at law.

But a deed of quitclaim or release from A, prior to the Land Agent's deed to B, does not create any such trust, either expressly or by implication of law.

Cary *v.* Whitney.

Possession of lands, the title of which is in the State, even if adverse and exclusive in its nature, does not operate to disseize or limit the State; nor can a title be acquired by such adverse possession.

But the possession may be such, in its nature and duration, as to entitle the tenant to betterments.

WRIT OF ENTRY. On report of the evidence by CUTTING, J.

The demandant claimed two acres of land, being a described part of the lot No. 3., letter F, range 2, west from the east line of the State, now called Presque Isle. Plea the general issue, with brief statement and claim for betterments.

The demandant introduced a deed from E. L. Hamlin, Land Agent, to Dennis Fairbanks, jr., assignee of Dennis Fairbanks, of lot No. 3, dated October 22, 1841, and recorded January 21, 1842; deed from Dennis D. D. Fairbanks to T. J. Hobart, Dec. 20, 1845; T. J. Hobart to Shepard Cary and Collins Whitaker, Sept. 27, 1847; C. Whitaker and wife to Shepard Cary, May 11, 1852.

It was admitted that the demanded premises were part of lot No. 3.

It was in evidence that Dennis D. D. Fairbanks was the same person as Dennis Fairbanks, jr., and that, attached to the record, in the office of the Land Agent, of his deed to D. Fairbanks, jr., was a paper purporting to be a letter from Dennis Fairbanks, authorizing and directing the Land Agent to convey lot No. 3, to Dennis Fairbanks, jr. There was some evidence tending to show that the letter was in the handwriting of Dennis Fairbanks, but the original was not produced.

The tenant introduced a resolve of the Legislature, authorizing the Land Agent to convey to Dennis Fairbanks, or his assigns, lot No. 3, township F, range 2, west from the east line of the State, on which he had erected a saw and grist mill, &c., approved March 18, 1840; deed of the demanded premises, Dennis Fairbanks to Mary Reed, dated June 19, 1840, and recorded July 3, 1840; Mary Reed to C. H. Shepard, March 7, 1843; C. H. Shepard to F. S. Whitney, August 16, 1847; F. S. Whitney to S. Whitney, June 12, 1854; S. Whitney to the tenant, May 11, 1857.

It was proved, amongst other things, that Dennis Fairbanks commenced a clearing upon lot No. 3, in 1828 or 1829, which he enlarged from year to year, until he conveyed the two acres to Mrs. Reed; that she and her husband built a house on the two acres about 1840, which still stands there; that a store and large stable were afterwards built on the same lot, and that, subsequently, the tenant erected another house, costing $5000 or 6000; that the demandant and his partner Whitaker knew of the occupation of the demanded premises by the tenant and his grantors from 1840, until the date of the writ in the action.

There was evidence tending to show that Fairbanks, senior, controlled lot No. 3, after the conveyance to his son as well as before; that the sale by the son to Hobart, was for only $600, and that was never paid, while the property was of much more value.

It was agreed that Washington Long and B. L. Staples should assess the value of the improvements made by the tenant, and those under whom he claimed, and, in case of disagreement, that they should select a third person.

The evidence was reported to the full Court, they to draw such inferences as a jury might, and to enter such judgment as the law, and the testimony legally admissible, might require.

*Blake & Garnsey*, for the demandant.

The deed from Fairbanks, senior, to Mary Reed, was a quit-claim, and passed nothing, the grantor having then no title. Any title he acquired afterwards would not enure to her benefit. *Pike* v. *Galvin*, 29 Maine, 183. So, that if the deed to the son, was in trust, it would not avail. But, if there was a trust, there is no evidence that the son's grantees had any notice of it. The demandant was an innocent *bona fide* purchaser, and no trust or prior fraud could affect him. Greenl. Cruise, tit. 12, "Trust," § 88; Fonblanque's Eq., c. 6, § 2, p. 442, and notes. And notice, even, of a conveyance that passed nothing, would be of no consequence. *Helm* v. *Logan*, 4 Bibb, 78.

The resolve of March 18, 1840, did not give a title *per se.* It did not purport to grant or convey, but only to authorize the Land Agent to convey. The authority was to convey to Fairbanks "or his assigns." If the resolve gave the title of itself, to which did it give it, to Fairbanks or his assigns? Nor did Mrs. Reed, by her quitclaim deed, become the assignee of Fairbanks. That deed was of two acres, and the lot contained 168. The son only was the assignee in writing of the whole. Mrs. Reed's deed conveyed at most any improvements that had been made on the two acres, not the title. *Lombard* v. *Ruggles,* 9 Greenl., 62. The record of Mrs. Reed's deed was no notice to the Land Agent. Records are not intended to impair the powers of *grantors,* but to give notice to, and to protect *grantees.* The records of the Land office showed that the State had not parted with its title in lot No. 3; the Land Agent was not to go to Aroostook county to ascertain who owned it. Nor was the record of Mrs. Reed's deed legal notice to the son. The title being in the State, came direct to him, and never was in his father at all. Notice is not brought home to him by evidence *in pais* or by record. *Bates* v. *Norcross,* 14 Pick., 224.

But suppose the son had notice, how does that affect Cary? He had no notice *in pais;* had he any by registry? He took his deed from Hobart. He finds by the record that Hobart had conveyed to no one else; that Fairbanks, the son, had conveyed to no one before his deed to Hobart; and that the State had conveyed to no one before the deed to the son. He thus traces the title direct from the fountain to himself. Conveyances between other parties, having no title to the premises, could not operate as a registry notice to Cary. Fairbanks, senior, had no title, and any other person might as well have deeded to Mrs. Reed as he. *Roberts* v. *Bourne,* 23 Maine, 165; *Veazie* v. *Parker,* 23 Maine, 170; *Pierce* v. *Taylor,* 23 Maine, 246; *Bates* v. *Norcross,* before cited.

Fairbanks, senior, did not acquire title by adverse possession, as twenty years have not elapsed since the State

conveyed to his son; and he did not occupy the premises adversely to the State prior to that conveyance. Angell on Limitations, c. 5, and cases cited.

*Granger, Bradbury & Madigan*, for the tenant.

1. The case finds that Fairbanks, senior, commenced a clearing on the demanded premises in 1828 or 1829, and he and his grantees have occupied ever since. This shows an open, notorious, exclusive, adverse and peaceable possession of more than thirty years. Of this possession the demandant had full knowledge from 1840, down to the time of his taking a deed; nor did he afterwards set up a claim of title to the premises, until this action was brought.

2. It is assumed by the demandant that, at the time of the deed of Fairbanks, senior, to Mrs. Reed, the title to the land was in the State. But how does this appear? The State is not the only source of title. Individuals own much of the land, under various royal or colonial grants, deeds from Massachusetts, and from ancient owners. No principle of law gives the preference to a *junior* title from the State over an *elder* title from another source. The deed of the State, in a judicial tribunal, is to be governed by the same rules of evidence as other deeds. *Crooker* v. *Pendleton*, 23 Maine, 339; *Doe* v. *Prosser*, Cowper, 217; *Hull* v. *Horner*, Cowper, 102; *Clapp* v. *Brenaghan*, 9 Cowen, 530; *Jackson* v. *McCall*, 10 Johns., 377; 2 Wend., 14; 1 Greenl. Ev., 53, § 46, note.

3. The resolve of March 18, 1840, passed the legal estate in No. 3 to Fairbanks, senior. *Mayo* v. *Libby*, 12 Mass., 339; *Pike* v. *Dyke*, 2 Maine, 213; *Dolloff* v. *Hardy*, 26 Maine, 545; *Adams* v. *Frothingham*, 3 Mass., 352; *Springfield* v. *Miller*, 12 Mass., 414; *Codman* v. *Winslow*, 10 Mass., 146; *Folger* v. *Mitchell*, 3 Pick., 396; *Thorndike* v. *Barrett*, 3 Maine, 380.

4. But, if the resolve did not pass the title, the State, after its date, held the land in trust for Fairbanks, senior. In a contract for the purchase of real estate, the vendor, on receiving the purchase money, becomes the trustee of the vendee

until conveyance is made. 1 Cruise's Dig., 370; *Bragg* v. *Paulk*, 42 Maine, 502. And a conveyance by the *cestui que trust* binds the trustee. 3 Kent, 2d ed., 303; 3 Vesey's R., Sumner's ed., 127, 341.

The term "assigns," in the resolve, included any person to whom Fairbanks, senior, should, in any legal mode, transfer his equitable interest in the land or any part of it. 1 Bouv. Law Dict., "Assigns." By his deed to Mary Reed, she became the assignee of the two acres. That deed was recorded July 3, 1840, and Fairbanks, junior, had record notice of it before his deed from the Land Agent.

Dennis Fairbanks, jr., was not the assignee of his father; nothing short of a deed would make him so. Jacob's Law Dict., "Assignee;" *Vose* v. *Handy*, 2 Maine, 322; R. S., c. 73. Assignees must be either by deed or operation of law, as executors, &c. The Land Agent had, therefore, no authority to convey to Fairbanks, junior.

The resolve, as well as a statute then in force, required the conveyance by the Land Agent to be "conditioned for the performance of settling duties." Yet the conveyance was unconditional. Could the Land Agent give a valid deed, not conforming to the statute? All acts of agents, public as well as private, exceeding their authority, are void. *Argyle* v. *Dwinel*, 29 Maine, 29; Story on Agency, 157, ed., 1839; *Cushing* v. *Longfellow*, 26 Maine, 306.

The letter purporting to be from Dennis Fairbanks to the Land Agent, requesting him to convey to his son, is not produced, and there is no competent evidence of its genuineness.

Fairbanks, senior, having assigned his interest in the two acres to Mary Reed, could not authorize the Land Agent to convey to another person. She was his assignee of the two acres, and, as such, entitled to a deed from the State. In equity, the *cestui que trust* is seized of the freehold. 4 Kent, 303, 2d ed.

5. But, if the deed from the State passed all of its interest in the land, what interest did it convey? After the resolve was passed, the State held the land in trust for Fairbanks and

his assigns. Fairbanks, junior, took the conveyance burdened with that trust. The trust fastens itself on the land, and remains, unless the trustee in actual possession conveys to a third party without notice, for a valuable consideration. 1 Greenl. Cruise, 386, 434; *Bragg* v. *Paulk*, 42 Maine, 502. The notice need only be such as is necessary to put a party on inquiry. R. S., c. 73, § 12; *Evans* v. *Chisam*, 18 Maine, 220.

Fairbanks, junior, was not a purchaser for a valuable consideration, and knew that the State was *not* in possession of the two acres, and that Mrs. Reed *was*. He therefore took the conveyance of the two acres in trust for Mrs. Reed. He so regarded it, and never disturbed her.

His deed to Hobart was fraudulent. The property conveyed was worth more than $10,000, and yet he sold it for $600, and even that was never paid.

Besides the house, store and other buildings on the two acres occupied by Mary Reed, there were, upon lot No. 3, the only saw and grist mill in that section, a farm where 70 tons of hay had been cut, the house built by the elder Fairbanks, costing over $3000, and land which soon after sold for $100 and $200 an acre.

All these facts were known to Cary and Whitaker when they purchased lot No. 3. Hobart conveyed to them only his "right, title and interest." Such a deed conveys the actual, not the apparent interest of the grantor. The grantee does not take the estate purged of a fraud in a prior conveyance. *Walker* v. *Lincoln*, 45 Maine, 67; *Coe* v. *persons unknown*, 43 Maine, 432, and cases cited.

If Hobart had any title, it was only a naked legal estate *in trust* for Mrs. Reed, her heirs and assigns. The demandant succeeds to this trust. A trustee cannot maintain a writ of entry against his *cestui que trust*.

A grant or deed may be presumed from lapse of time against the State as well as against an individual. *Crooker* v. *Pendleton*, 23 Maine, 339. No particular length of time is required; it may be all the way from 350 down to 15 years.

No other evidence, except lapse of time, is necessary to raise the presumption. Between 19 and 20 years have elapsed since Mary Reed went into possession under a recorded deed from one who had been in possession 11 years prior to that time. See *Melvin* v. *Prop. Locks and Canal*, 17 Pick., 255; same parties, 16 Pick., 137; *Ricard* v. *Williams*, 7 Wheat., 109; 3 Stark. Ev., 1215, 1228; 2 Black. Com., 198.

The demandant shows no equitable claim; but the equity is all with the tenant.

*Blake & Garnsey*, in reply.

1. The State has exercised acts of ownership within twenty years, surveying lots, deeding land, &c. By his recognition of the resolve, Dennis Fairbanks acknowledged that his possession was not adverse to the title of the State. Angell on Lim., c. 5; *Sparhawk* v. *Ballard*, 1 Met., 95; *Wilbur* v. *Tobey*, 16 Pick., 177. He is estopped to deny the seizin of his own grantor. *White* v. *Patten*, 24 Pick., 324; *Hamlen* v. *Bank*, 19 Maine, 66; 1 Greenl. Ev., §§ 23, 24, note.

2. Under the resolve, as worded, the fee continued in the State until delivery of the Land Agent's deed. *Lambert* v. *Carr*, 9 Mass., 185; *French* v. *Harlow*, id., 192; *Mayo* v. *Libbey*, 12 Mass., 341.

3. The deed of the Land Agent to Fairbanks, jr., passed the title to him. The agent was a public officer empowered to make a certain conveyance, and he made it. The presumption is, that he conveyed the right land to the right person, until the contrary is shown.

Nor was it the duty of the Land Agent to look up Fairbanks' assigns. If Mrs. Reed was assignee of a part of the grant to him, it was her duty to apply to the Land Agent for a deed, and, if she neglected to do so, the risk was hers.

If there were conflicting assignments by Fairbanks, it was for the Land Agent to decide who was the true assignee. His decision to convey to Fairbanks, junior, is conclusive.

4. The deed of Fairbanks, senior, to Mrs. Reed, was one of release and quitclaim, and would not estop him from ac-

quiring subsequently other and adverse title to the same land. *McCracken* v. *Wight*, 14 Johns., 193; *Comstock* v. *Smith*, 13 Pick., 116; *Crocker* v. *Pierce*, 31 Maine, 177. Much less would it estop Fairbanks, junior, from claiming the two acres, under a subsequent title from the State, even though he had notice of Mrs. Reed's quitclaim. Mrs. Reed's deed, then, conveyed to her nothing but whatever personalty or improvements her grantor had on the premises.

The grantee of Fairbanks, junior, stands better than he, holding, as he does, through several mesne conveyances, without any pretence of notice of the conveyance to Mrs. Reed. Since the R. S. of 1841, possession by her grantee is not notice. Her deed not being in the line of the conveyance from the State, the record of it was not notice. *Murray* v. *Bullen*, 1 Johns. Ch., 566; Greenl. Cruise, tit., 32, c. 29.

5. But, conceding that the demandant holds the property charged with a trust in favor of Mrs. Reed's grantors, the trust estate cannot be set up against the holder of the legal estate in a court of law. *Rowe* v. *Reade*, 8 Term, 118, 122; *Jackson* v. *Chase*, 2 Johns., 84; same v. *Pierce*, id., 221; same v. *Van Slyck*, 8 Johns., 487; *Doe* v. *Wroot*, 5 East, 138, note; 1 Greenl. Cruise, tit. 12, "Trust," c. 3, § 62.

The opinion of the Court was drawn up by

KENT, J.—In this case, the demandant claims to recover, upon the strength of his legal title, the premises demanded. He shows a deed from the Land Agent of the State to Dennis Fairbanks, jr., assignee of Dennis Fairbanks, dated October 22, 1841, which includes the premises described in his writ, and traces title to himself by a deed from Dennis D. D. Fairbanks (who is the same person named in the deed from the Land Agent as Dennis Fairbanks, jr.) to T. J. Hobart, and from Hobart to himself and Whitaker, and from Whitaker of his portion to demandant. These deeds, which trace and convey the title directly from the State, make undoubtedly a *prima facie* case for the demandant.

The tenant puts in a resolve of the Legislature, of March

18, 1840, by which the Land Agent was "authorized to convey to Dennis Fairbanks, (senior,) or his assigns, lot number three in township F, Range 2, west of the east line of the State, on which lot he has erected a saw and grist mill." This is the same lot conveyed as above, by the Land Agent, to Dennis Fairbanks, jr., as assignee. The tenant then puts in a quitclaim deed from Dennis Fairbanks to Mary Reed, dated June 19, 1840, recorded July 3, 1840, of two acres, part of said lot No. 3, and the premises described in the writ in this case. He traces title to himself of these two acres by a series of quitclaim deeds.

The question is, whether the plaintiff is entitled to judgment for possession of the two acres thus conveyed.

The tenant contends that, irrespective of the resolve and the right and title under it, he produces the elder deed, and denies that, under our constitution and laws, a junior deed from the State is evidence of a paramount title. He insists that the feudal doctrine, that all lands are held mediately or immediately from the State, or sovereign power, is not and never has been in force here.

It may be granted that the State is not the only source of title, and that a deed from the State is not conclusive against a title from another source, clearly traced and legally established. But we do not think that a title traced directly from the State can be overthrown by the production of a quitclaim deed of an earlier date, from a third party, without any evidence of title, or claim, or right in such person.

If we look at the resolve introduced by the tenant, we find that Dennis Fairbanks, senior, is named as the person to whom the State extends its bounty, by authorizing the Land Agent to deed to him this land. Dennis Fairbanks, as we may well presume, having solicited this grant, and having afterwards acted under it, he, and those claiming under him, may very justly be estopped from denying the title of the State. Indeed, it is apparent that he never did deny or doubt that title; and there is no fact in the case which leads us to question it.

But the tenant claims that the resolve itself, without any

further action, did, by its terms, convey the fee in the whole lot, and that, therefore, Dennis Fairbanks had a perfect title when he conveyed the two acres to Mary Reed.

It is apparent that, from the earliest times, in Massachusetts, and in this State since the separation, it has been held that proprietors of land in common, who acted in a corporate capacity, could alienate their lands and transfer the title by vote without deed. This right, however, was derived from and depended upon the peculiar language of the statute by which such proprietors were "empowered to order, manage, improve, divide and dispose of their common lands in such way and manner as shall be concluded and agreed upon by the major part of those interested, at any legal meeting." As stated by C. J. MELLEN, in *Thorndike* v. *Barrett*, 3 Maine, 386,—"This power, given to proprietors, is a peculiar one, a power of agreeing on the mode of dividing and disposing of their property, a power which persons in their individual capacity do not possess; they must conform to those principles and modes of conveyance which our statutes have expressed. The difference is important." The particular point to be observed is, that the power to pass title by vote is anomalous, and limited to the single case of proprietors of common land, and as to them rests entirely upon a statute grant. *Folger* v. *Mitchell*, 3 Pick., 400, and cases cited by the Court in that case.

The State, however, may grant a title by a resolve. This was decided in *Mayo & al.* v. *Libbey*, 12 Mass., 339, and has been since reäffirmed. But it does not follow, that every resolve which contemplates a conveyance, at some time, necessarily, by its terms, conveys a fee instantly, without any further act. The distinction is well illustrated in the above case, and the cases of *Lambert* v. *Carr* and *French* v. *Harlow*, both in 9th Mass.

The resolve in favor of settlers in Hampden clearly expressed a purpose to grant a release of the Commonwealth's title at once, and by its own terms. The language was,—"Resolved that *there be, and hereby is,* released to each of the inhabitants of Hampden, who settle, &c., all the right and

title of this Commonwealth to one hundred acres of land in severalty," &c.

In the case of settlers in Bangor, (9 Mass., 187,) the resolve declared that all the settlers in that town, before a certain time, should be entitled to deeds of their respective lots, upon paying, &c. In the latter case, there are no words of grant, release or confirmation, but simply a prospective provision for a deed.

The Court accordingly held that the resolve in favor of the settlers in Hampden was a grant of title, and that in favor of Bangor was not; and that a deed was necessary to pass the title to these settlers.

The distinction seems to be, that, where the resolve contains words of grant, or release, or confirmation, or a clearly expressed intent to make a conveyance of the title at the time, the title may pass by force of the resolve alone. This, perhaps, would follow, where the grant of title was clearly expressed, although the resolve contemplated a deed to be given to confirm the title. But, where the resolve does not contain any words of grant, but simply authorizes a public officer to convey a lot to a person named, or his assigns, the title will not pass until such deed is executed. *Thorndike* v. *Richards*, 13 Maine, 430.

In this case, the lot could not have been legally taken on execution as the property of Dennis Fairbanks, until a deed had been made to him. No title passed to him by virtue of the resolve alone.

The resolve, apparently, was passed to give to Fairbanks the rights secured by the statute of 1838, c. 354, § 2, (R. S. of 1841, c. 3, § 28,) to those who might erect a saw and grist mill on townships lotted for settlers. Fairbanks had erected such mills in township F, before the passage of the law. That statute provided that those who erected the mills should "be entitled to a deed of such lot." This resolve provides "that the Land Agent is hereby authorized to convey to Dennis Fairbanks, or his assigns, lot No. three." There are no words of grant, or release, or confirmation, in either law. It was a

donation from the State that was intended. The State received nothing directly to itself. In view of a public interest and benefit by the erection of the mills, it proposed to confer its right in a lot of land. The State, before conveyance by the Land Agent, was not holding the land as trustee for its intended beneficiary. It is not the case where a vendor of real estate has received the purchase money under an agreement to sell and convey.

The tenant insists that, by the deed to Mary Reed, she became the assignee of the two acres, and that the deed to Dennis Fairbanks, jr., from the Land Agent, was void and inoperative, at least, as to the two acres, because he was not the assignee, in fact. He contends that there is no legal evidence that he was ever designated by his father as his assignee, and that the letter of Dennis Fairbanks, senior, to the Land Agent, if admitted, does not make him such assignee, because it is not a deed. The evidence that the father signed the letter or paper introduced, is apparently deficient as proof of that fact, as the witness (Mr. Blake) only says that he "saw a letter from Dennis Fairbanks, in his handwriting, in the land office; that he has seen him write, and that the letter was wafered on to the back of the deed." The original deed and letter were not produced at the trial. This deficiency in proof might, probably, be easily supplied, if necessary. The important question is, how far is the action and deed of the Land Agent conclusive upon this point as to the assignee. The deed is to "Dennis Fairbanks, jr., assignee of said Dennis Fairbanks," and declares that the deed is executed by the Land Agent, by virtue of the authority in the resolve.

The first question is, whether this is not *prima facie* evidence that the person named was the assignee. Is the demandant obliged to prove, by evidence *aliunde*, that he was such assignee? Can third parties, who show no connection with the title from the Land Agent, interpose a valid objection to the title of demandant, until he has proved the fact of assignment, and the legal right of the son to take the deed as assignee? We think not. The Land Agent was authorized

to give a deed to an assignee. He has given such a deed, which is, *prima facie*, sufficient.

But the tenant urges, if we admit the deed to be *prima facie* sufficient, yet, that he has shown, by evidence, that Mary Reed was in fact the legal and rightful assignee of the two acres deeded to her; and that, therefore, the deed of the Land Agent is void. This raises the question whether the decision of the Land Agent, and his conveyance, accordingly, to a person as assignee, is conclusive as to a party situated as this tenant is.

In the cases of *Lambert* v. *Carr* and *Harlow* v. *French*, 9 Mass., before cited, a question very similar to the one before us was raised and determined. By the resolve therein referred to, the agents for the sale of Eastern lands, corresponding in powers and duties to the Land Agent of the State, were empowered and directed to convey by deed to the actual settlers in Bangor, or their legal representatives, their respective lots of one hundred acres each. This committee deeded a lot to Stetson, Lapish and French, describing them as "assignees of James Budge." The tenants offered to prove that Budge was not a settler on that lot; but that their ancestor was in truth and fact the settler entitled to the deed. In the case of *Harlow* v. *French*, the question was, whether the boundaries described in the deeds of the committee were conclusive, notwithstanding the evidence offered of a mistake as to the true line, and the adjudication of referees showing such to be the fact.

The Court, in these cases, decided that the determination of the agents was conclusive on both points, viz. — the persons entitled to, and the limits of the respective lots. The Court very forcibly say, that "any other construction would, in our opinion, render the resolve of the Legislature void and useless, or mischievous in the highest degree for its uncertainty, and by rendering it the source and occasion of endless quarrels and contentions. If a transient possession of land might thus become a title, what committee or judicial court can ever settle the question who was the first settler, or who

are his representatives? Until revoked by the government, (if it has the power, which is questioned,) that grant by the agents continues in full force, and is an exclusive title to the individual to whom it is made, against all other individuals."

It is true that, in this case, the donee was named in the resolve, and, if no other person could have taken the title by the terms of the resolve, a deed to any other person by the agent, as between the donee named and the State, might have been void or inoperative. But this resolve provides that the deed may be given to "an assignee," by the Land Agent.

The Land Agent determines that Dennis Fairbanks, jr., is such assignee, and deeds accordingly; and this determination is binding and conclusive upon the parties now before us. Any other construction would leave land titles from the State, which have been transmitted through many different tenants, uncertain and dependent upon parol or other proof of a mistake in a matter of fact by some public officer many years before.

The legal title to the whole lot passed to Dennis Fairbanks, jr. The deed is unconditional. There is nothing in the resolve which contemplates any condition as to the mill lots. The requirements as to settling duties apply only to the other lots taken up by individuals, and which are to be deeded by the State without price, in consideration of the building of the mills, but such lots to be subject to settling duties. Had there been a requirement that settling duties should be performed on the mill lot, the State only could take advantage of the omission.

The tenant further contends that, if the legal title did pass to Dennis Fairbanks, jr., he took it charged with a trust.

If there was any trust, it does not appear that in this suit at law it could be interposed to prevent the demandant from recovering his legal estate. A court of equity only could properly enforce the trust. But, as the facts are before us, and as we understand that other cases of dispute in reference to the titles of this lot have arisen, we may properly express our views on this point. The State did not hold the land,

after the passage of the resolve, as trustee of Fairbanks, senior, as before stated; and had no actual notice of any interest in Mrs. Reed, when the Land Agent gave his deed. But the tenant contends that Dennis Fairbanks, jr., took and held it, subject to a trust in favor of Mrs. Reed. There is clearly no declaration of trust in writing. The deed to her is a release and quitclaim of grantor's right and interest in two acres. There is no writing in the case which "creates or manifests" a trust. By the statute, "all trusts concerning land" must be thus shown, except such as arise by implication of law. The trust that arises by implication of law is when the money is paid by one party and the deed taken by another. *Buck* v. *Pike*, 11 Maine, 9; *Baker* v. *Vining*, 30 Maine, 121; *Hunt* v. *Roberts*, 40 Maine, 187.

No money was paid to the State by any one. Mrs. Reed had paid nothing and done nothing towards erecting the mill which was the moving cause for the State's bounty. No trust by implication, as to the State, could arise on that ground.

If the deed from the State had been given to Dennis Fairbanks, senior, it might have been necessary to decide at law whether, by the terms of the deed to Mrs. Reed, this after-acquired title would enure to her benefit. But no such question arises.

Dennis Fairbanks, jr., who took the title, has never, in writing or otherwise, created or manifested a trust in favor of Mrs. Reed. She did not aid in obtaining the title, and no implied trust arises. His knowledge of the fact (if it was established that he did know that his father had given a quitclaim deed to Mrs. Reed) would not create or establish a trust. If the resolve alone had given his father a legal title, such actual knowledge might perhaps have prevented him at law from setting up an after acquired title, if her deed had not been recorded; but would not create a trust to be enforced in equity.

There is no sufficient evidence of any express or implied trust in favor of Dennis Fairbanks, senior. If his object was to place the title in his son to prevent his creditors from levy-

ing upon the land, this would be clearly illegal and fraudulent, and no Court could sustain such a trust.

But, if an implied trust, as against Dennis Fairbanks, jr., could be raised, it would be difficult, upon this evidence, to fix that trust upon the demandant. It is sufficient notice, to subsequent purchasers, of a trust which is expressly declared in a deed, to show that the deed was recorded. R. S. of 1857, c. 73, § 12; R. S. of 1841, c. 91, § 32. But, by the same statute, § 12, it is provided, "that the title of a purchaser, for a valuable consideration, cannot be defeated by a trust, however declared or implied by law, unless the purchaser had notice thereof." This is but an affirmation of the well settled doctrine in law and in equity. The evidence in the case would hardly be sufficient to charge such notice as the law requires, upon either Hobart or Cary and Whitaker.

Dennis Fairbanks, senior, took possession of lot No. 3, as early as 1828 or 1829, and continued that possession until he gave his deed to Mary Reed, in 1840, of the two acres; and the possession of the two acres has been continued by Mary Reed, and those claiming under her, to the present time. The possession, whilst the title remained in the State, even if adverse and exclusive in its nature, could not operate to disseize or limit the State. A title cannot be acquired by adverse possession of the land of the State, whilst the title and property is in the State.

The possession in this case has been continued less than twenty years since the deed from the State, and therefore the statute of limitations as to the title does not apply.

But it is equally clear that the possession has been of such a nature, that it entitles the defendant to betterments. This is not denied by the demandant.

The result is, that the demandant has sustained his title to the demanded premises, and is entitled to judgment in his favor according to law. The tenant is entitled to betterments. The value of the improvements by defendant, and those under whom he claims, and the value of the land, without such improvements, at the time of trial, and also at the

time Dennis Fairbanks went into possession of lot No. 3, to be estimated and determined by Washington Long and Benjamin L. Staples, and, if they cannot agree, they may choose a third person as umpire, as agreed by the parties, according to the report of the case.

The case to stand until report of said referees, and judgment thereafter to be rendered as in case of a verdict.

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

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JOHN KNIGHT *versus* NELSON HERRIN.

Where personal property has been attached on a writ and appraised under § 47, c. 81, of R. S., a sale thereof by the officer, before four days from the appraisement, is unauthorized, and he, thereby, becomes a trespasser *ab initio*.

*Before* appraisal, he holds the property by *attachment* on a writ; *after*, it is liable to *seizure* as on execution, and is to be sold in the same manner as if so seized.

The law will not justify the officer in acting as the agent of the attaching creditor, in bidding off the property for him, at a sale by auction.

In an action of trespass against an officer, where he fails to justify the taking and conversion of property attached on a writ, in the absence of proof that judgment has been rendered in that suit, or the property has been applied to the payment of the claim sued, he shows no cause for reduction of damages.

REPORTED by CUTTING, J.

This was an action of TRESPASS for the taking and conversion of a horse. The defendant justified the taking and sale of the horse as sheriff of the county, having attached the same on a writ against the plaintiff.

The action was submitted to the decision of the presiding Judge, with the right to except.

The plaintiff offered evidence tending to prove that the horse was owned by himself and his son in equal proportions;

also the value of the horse, and the defendant's sale of the same by public auction.

*In defence*, the official character of the defendant was proved; and the writ, on which the horse was attached, was introduced, with the officer's return thereon, including the proceedings in the appraisement and sale of the property. It also appeared in evidence, that the officer bid off the horse for the creditor in the action against *Knight*, the creditor having, by letter, requested the officer to bid for him.

Upon the evidence, CUTTING, J., ruled that, it appearing from the officer's return on the writ, that he sold the horse before the expiration of the four days from the time of appraisement, the sale was unauthorized by the statute, and the defendant thereby became a trespasser *ab initio; that* the plaintiff was entitled to recover as damages thirty-five dollars, that sum being the one half of the value of the horse, and for its detention.

The parties thereupon requested the Judge to report the case for the determination of the whole Court.

The case, as reported, was argued by

*Granger*, for the plaintiff, and by

*Blake & Garnsey*, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The plaintiff, having shown that at the time of the attachment he was the owner of the property in controversy, jointly with his son, is entitled to damages for a conversion of his interest, unless the defendant, as an officer, has established a legal justification. This he attempts to do by his official return upon the writ, wherein it appears that thereon he attached the property on December 15, 1858, caused it to be examined and appraised under c. 81, § 47, on the twenty-first day of the same month, and in two days afterwards, having given due notice of the sale, sold the same at public auction; he being the purchaser as the agent of one

of the attaching creditors. The Judge at *Nisi Prius*, to whom the action was referred, ruled that the defence failed.

From the foregoing facts, two questions of law are presented:—*First*, was the sale premature? *Second*, could the officer act as the lawful agent of the creditor in purchasing the property?

The answer to the first depends upon the construction of the following sections of c. 81, before cited.

Section 46. "When personal property is attached, if the creditor and debtor consent, the officer may sell it before judgment, *observing the directions for selling on execution*," &c.

Sect. 47. "When living animals, or goods liable to perish or waste, or be greatly reduced in value by keeping, or which cannot be kept without great expense, are attached, and the parties do not consent to a sale thereof, as before provided, the property so attached, at the request of either of the parties interested therein, may be examined and appraised," &c.

Sec. 50. "And it shall thereupon be sold by the officer, and the proceeds held and disposed of *as before provided, in case of a sale by consent of parties*, unless it is taken by the debtor, as is provided in the following section."

Sect. 51. "The property shall be delivered to the debtor, after it is thus appraised, if he requires it, on his depositing with the attaching officer the appraised value thereof in money, or giving bond to him, with two sufficient sureties, with condition to pay him the appraised value of the property," &c.

In order to ascertain the duties of the officer in "*observing the directions for selling on execution*," see c. 84.

Sect. 3. "Goods and chattels, legally taken on execution, shall be safely kept by the officer at the expense of the debtor, for the space of four days, at least, next after the day on which they were taken, exclusive of Sunday; and they shall be sold within fourteen days next after the day of *seizure*, except as hereinafter provided, unless, before the time of sale, the debtor redeems them by otherwise satisfying the execution."

Sect. 4. "The officer shall post up public notice of the time

and place of sale, at least forty-eight hours before the time of sale, in two or more public places in the town or place of sale."

The foregoing is a collocation of the several sections bearing upon the question now under consideration. The debtor had some time after the appraisal, under § 51, to procure either the money or the bond. He contends that it was at least four days; whereas the defendant sold within two days, or so soon as he had given the forty-eight hours previous notice.

*Now,* what are the duties to be performed by the officer in observing the directions for selling on execution? Or what constitutes the essential elements of a statute sale so as to divest the debtor of his property or damages therefor, as against the officer? We answer, first, *a seizure,*—second, *a detention* of not less than four or more than fourteen days, and third, forty-eight hours *previous notice.* The two first are exclusively for the benefit of the debtor, that he may know when his time of redemption commences, and, consequently, when it will expire; the third, or previous notice of the time and place of sale, is more particularly advantageous to the creditor, in order to procure bidders at the sale and a greater competition, especially, if his only aim be to collect his debt at the least sacrifice to his debtor.

In the present case, it is true, the property was in the custody of the officer for more than four days previous to the sale, but not by virtue of a *seizure,* but by force of an *attachment* on *mesne* process. The officer had no authority to *seize,* as on execution, until after the appraisal, nor even then, unless the appraisers had been of opinion that "the property is liable to perish, wasted or greatly reduced in value by keeping, or kept at a great expense." Consequently, inasmuch as the defendant has not complied with the statute requirement, in keeping the property four days at least after an authorized seizure, he has transcended his power and become a trespasser.

The second point raised is equally fatal to the defence.

The officer, in bidding off the property, could not lawfully act as the agent of the creditor; under such circumstances, the law permits no such relationship; the officer should be disinterested and impartial, whereas an agency for one of the parties implies an interest adverse to the other. *Payson* v. *Hall*, 30 Maine, 319; *Pierce* v. *Benjamin*, 14 Pick., 356.

It not appearing that judgment has been rendered in the original suit on which the property was attached, and *non constat* ever will be, and the proceeds of the sale applied in discharge of the execution, in whole or in part, the defendant is not in a situation to claim a reduction of damages. *Ross* v. *Philbrick*, 39 Maine, 28.

*Judgment for the plaintiff for thirty-five dollars, and additional damages equal to interest from the time of trial, as agreed by the parties.*

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

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WILLIAM EVERETT *versus* NELSON HERRIN.

The moneys remaining in the hands of the officer, arising from the sale of personal property attached on a writ, and appraised and sold according to the provisions of the statutes made for such cases, may be further attached by the officer, as the property of the owner, in like manner, as the property itself might have been, if there had been a sale of it. R. S., 1841, c. 114, § 64.

*Otherwise*, if, in making the appraisement or sale, the officer does not substantially comply with the requirements of the statute, which contemplates, that the proceeds to be attached, are the proceeds of a statutory, and not of an unauthorized, sale.

In an action of trespass, against the sheriff, by the owner of the property thus illegally sold, by his deputy, his attachments and proceedings will afford him no legal justification; for, by reason of his deputy's misfeazance, the law will regard him as a trespasser from the beginning.

THIS was an action of TRESPASS and was presented to the whole Court on report, by CUTTING, J., presiding at *Nisi Prius*.

The report provided for the assessment of damages in case the action is maintainable.

The case is stated in the opinion of the Court.

*Blake & Garnsey*, for plaintiff.

*J. Granger*, for defendant.

The opinion of the Court was drawn up by

APPLETON, J.—On the 7th Feb., 1857, one Paul, a deputy of the defendant, attached two horses, one of which is the subject matter of the present controversy, on a writ in favor of Rufus Mansur against the present plaintiff. On the 5th of March, 1857, a request was made for appraisal of the property attached, under the provisions of R. S., 1841, c. 114, § 53, which was had on the same day, and the horses attached were sold on 7th of March, 1857. It is conceded that the proceedings of the defendant's deputy were illegal, the officer entirely failing to comply with the requirements of the statute of 1846, c. 198. It was determined in *Ross* v. *Philbrick*, 39 Maine, 29, that an officer, who attaches property on mesne process, and sells it thereon, without the consent of the creditor and owner, or otherwise than in accordance with the mode prescribed by the statute, thereby becomes a trespasser *ab initio*. The proceedings of the officer being unauthorized, he must be regarded as a trespasser.

The action, *Mansur & al.* v. *Everett*, was duly entered, and, at the March term, 1858, the plaintiffs became nonsuit. On March 22d, 1858, the same deputy of the defendant, on another writ in favor of *Mansur & al.* v. *Everett*, attached certain moneys in his hands, "the property of the defendant, (now plaintiff,) being the proceeds of the sale of two horses, attached by me on a writ in favor of Rufus Mansur and James A. Drew against said William Everett," &c., "subject to the former attachment." The inquiry arising here is, whether this attachment of the proceeds of a sale, conceded to be illegal, affords any bar to this suit.

By R. S., 1841, c. 114, § 64, it is provided that "when

goods are sold and disposed of * * * after an *appraisal as aforesaid*, the proceeds thereof, whilst remaining in the hands of the officer, shall be liable to be further attached by him as the property of the original defendant, in like manner as the goods themselves would have been liable, if they had remained in the possession of the officer," &c. But this section presupposes a sale in compliance with the statute. The proceeds to be attached are the proceeds of a statutory sale, not of one illegal and unauthorized by law. The officer, by his misfeazance, had become a trespasser from the beginning. He had no proceeds in his hands legally. They were there without authority. The proceeds, which can be attached, are such as are in the officer's hands after, and in pursuance of a legal attachment, appraisal and sale of the property attached. Such proceeds neither the defendant nor his deputy has. The trespass has not been purged. *Defendant defaulted.*

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

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FREEMAN PIKE *versus* JOHN DILLING.

In an action of trespass *vi et armis*, for maiming and disfiguring the plaintiff, the jury are authorized to give exemplary or punitive damages, if they find the defendant wantonly committed the injury. RICE, J., *dissenting.*

The instruction to the jury "that, in such case, they were authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages, both, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like cases," *was held* to be in accordance with the weight of judicial authority in this country, in the courts of the United States and in those of the several States.

EXCEPTIONS from the ruling of CUTTING, J.

THIS was an action of TRESPASS *vi et armis*, for assaulting and maiming the plaintiff by biting off a part of his nose.

The instruction to the jury, to which the defendant except-

ed, was that, if they should find the defendant committed the act wantonly, in that case, they would be authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages, both, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like cases.

The verdict was for one hundred and fifty-one dollars and twenty-five cents.

*Granger & Madagan* argued in support of the exceptions.

The doctrine of the instruction, we contend, has no solid foundation in reason or authority, in cases of assault and battery and similar cases, where the defendant had made, or was liable to make, compensation to the State, on complaint or indictment, for the *public wrong;* although the doctrine has received some countenance from some text writers.

Why should money be given to a private individual, not authorized by any public statute, for a *public wrong?* Why to one person rather than another? The whole public has taken, from the delinquent, the fine and costs which the law authorizes, and the Court, trying him, has imposed upon him; why, then, should the party injured have any thing more than a full compensation and satisfaction for the injury he has sustained? For the same crime, the offender cannot be twice punished by two public prosecutions. But where is the difference, if the same result is attained in a civil suit?

A jury has not been regarded as a safe tribunal in whose breast to lodge the power of determining the penalties to be inflicted for the public wrong in a *criminal* prosecution, as the passions and prejudices of jurors are generally and justly regarded as less under their control than those of the bench.

But it has not been considered safe to confide to the Court, even, an unlimited discretion in fixing the penalties to be imposed upon any delinquent, and the Legislature has generally limited the discretion of the Court by maximum, and sometimes, also, by minimum penalties.

Now, is there not a striking inconsistency and absurdity, in holding, that, while a traverse jury is not permitted in a *criminal prosecution* to determine the penalty to be inflicted on the delinquent for a *public wrong*, and the Court are restricted, by the Legislature, within certain limits, in the punishment it may inflict for such *public wrong;* yet it is prudent, wise and just to confer on the jury, in a *civil prosecution* for the *private injury* connected with the same *public wrong*, the unlimited power of inflicting upon the delinquent, in addition to full compensation for the private injury, such further punishment by way of public example, to deter others from committing similar wrongs, whatever pecuniary mulct the jury, in their uncontrolled caprice, may see fit to give, notwithstanding another tribunal may have imposed the severest penalties on the defendant which the human mind could undertake to justify, by way of *public example* for the same *public wrong?* As though one punishment, however severe, was not enough for one offence. See *Saco* v. *Wentworth*, 37 Maine, 175.

It is no safeguard that the jury, in the civil case, might be permitted to take into consideration the actual fact, or the possibility of a punishment in a criminal prosecution; or that the Court, in the criminal prosecution, might take into consideration the fact of a civil suit, or the possibility that one might be brought. The jury and Court, in the civil action, would not know what the evidence was in the criminal case, if it had taken place; much less what it *would be*, if it had not; or whether any would be instituted. So, in the *criminal* case, the Court could only know and understand how the case was, as presented before him. And each tribunal would be governed by the case as presented to it. Indeed, the defendant might be tried in a *criminal* prosecution in one county, at the same time that his trial was going on in the *civil* suit in another county.

The claim the plaintiff sets forth is the injury he has sustained. For this he claims damages. He does not declare for damages for the *public wrong*, by way of example, to deter others from offending in a like case.

For a definition of "*damages*," in a legal sense, *vide* 1 Greenl. Ev., § 253; Bouv. Law Dict., "Damage"; 2 Black. Com., 438; Hammond's Law of *Nisi Prius*, p. 33. Opposed to the rule, as laid down by Sedgwick on Damages, p. 39, see 2 Greenl. Ev., §§ 253, 256, (5th ed.); 1 Greenl. Ev., p. 256, note; 11 Ad. & El., 356, N. S.; 1 Ruth. Inst. c. 61, § 17; *Gunter* v. *Astor*, 4 J. B. Moore, p. 12; 1 Greenl. Ev., c. 261, note; *Austin* v. *Wilson*, 4 Cush., 273; 3 Am. Quart., 287; Law Reporter, April, 1847; *Worcester* v. *G. F. M. Co.*, 41 Maine, 159; *Longfellow* v. *Quimby*, 29 Maine, 196, and same case, 33 Maine, 437. The rule is well established in this State, with regard to trespass on property. There is no reason for a different rule of exact compensation in cases of trespass on the person.

*Burnham, contra.*

The opinion of the Court was drawn up by

APPLETON, J. — The instructions of the presiding Judge were entirely in accordance with the weight of judicial authority in this country, in the courts of the United States and in those of the several States.

"It is a well established principle of the common law," remarks GRIER, J., in *Day* v. *Woodworth*, 13 How., 371, "that, in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff." This statement of the law was in perfect conformity with the previous decisions which had received the sanction of the Court, when illustrated by the logic of MARSHALL and the learning of STORY. In *Tillotson* v. *Cheetham*, 3 Johns., 56, KENT, C. J., says, "the actual pecuniary damages in actions for defamation, as well as in other actions for *torts*, can rarely be computed, and are never the sole rule of assessment." In *Taylor* v. *Church*, 4 Selden, 452, in delivering the opinion of the Court, JEWETT, J., affirms that "the principle is

well established, as well in the English as in the American courts of justice, that, in actions for injuries to the person, committed under the influence of actual malice, or with the intention to injure the plaintiff, the jury may, in their discretion, give such damages beyond the actual injury, for sake of the example,—damages not only to recompense the sufferer, but to punish the offender." The propriety of awarding exemplary damages "for the sake of the public example, or to punish for some act or default, which has more or less the character of a crime," is sanctioned by PERLEY, C. J., in *Hopkins* v. *Atlantic & St. Lawrence R. R. Co.*, 36 N. H., 10. A similar view of the law is adopted by the Supreme Court of Connecticut, in *Huntly* v. *Bacon*, 15 Conn., 267. Such, too, is the law in Pennsylvania. "In cases of personal injury," remarks GIBSON, J., in *Pastorius* v. *Fisher*, 1 Rawle, 27, "damages are not only to compensate, but to punish." That such is now regarded the law of that State, will be perceived by reference to *Porter* v. *Seeler*, 23 Penn., 424. In New Jersey, the same rule of law is laid down by KINSEY, C. J., in *Stout* v. *Pratt*, Coxe, (N. J.,) 79, and reäffirmed in *Winter* v. *Peterson*, 4 Zab., 524. In *McNamara* v. *King*, 2 Gilman, 432, TREAT, J., says, "in this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant." In the subsequent case of *Deane* v. *Blackwell*, 18 Ill., 336, the Supreme Court of Illinois adhered to the doctrine of *McNamara* v. *King*. Exemplary damages are given in Kentucky, determined in *Fleet* v. *Hollenkemp*, 13 B. Mon., 219, and in *Kountz* v. *Brown*, 16 B. Mon., 577. So, too, is the law in North Carolina. *Lowder* v. *Henson*, 4 Jones, (law,) 369. Indeed, such is declared to be the law in nearly all the States of the Union, unless it be in those of Massachusetts and Indiana. Sedgwick on Damages, 38, and appendix. Such, too, is the law of England. Mayne on Damages, 13.

Nor were the damages in this case unreasonable. Indeed, as was remarked by WILMOT, C. J., in *Tullidge* v. *Wade*, 3

Wilson, 18, "if much greater damages had been given, we should not have been dissatisfied therewith."

The question here presented has never before been determined in this State. In *Worcester* v. *Great Falls Man. Co.*, 41 Maine, 159, the suit was not of a character like the one before us. If the rulings were erroneous as to the rule of damages, the error was favorable to the excepting party, who had, therefore, no cause of complaint. Such, too, was the case in *Wardsworth* v. *Treat*, 43 Maine, 164, and in the other cases cited by the defendant. *Exceptions overruled.*

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

RICE, J., dissenting.—In actions of tort, damages are given as a compensation for injuries received, and should be commensurate with those injuries; no more, no less. Exemplary, vindictive, or punitive damages are something beyond, given by way of punishment. This rule of damages is presented in the ruling in this case distinctly and without any ambiguity. Hitherto it has not been adopted in this State. Deeming it unsound and pernicious in principle, I cannot concur in engrafting it upon our law, nor in adopting it as a rule of practice in our Courts.

Under the rule, as stated in this case, a defendant may be required to make full compensation to the injured party, be punished by fine, *without legal limitation*, by a jury, for private benefit, and then be liable to indictment by a grand jury, for a public wrong, and punished by the Court to the extent of the law, and all for the same transaction.

The soundness of the rule has been much discussed pro and con by courts and jurists. The authorities upon the subject are numerous. To collate or analyze them would give no additional light. A statement of the proposition itself, is, to a legal mind, on principle, a conclusive argument against it. It stands only on contested and doubtful authority. But no number of cases nor weight of authorities, can, in my judgment, relieve the rule of its inconsistency with the universally

recognized principles of natural justice, nor free it from the smack of barbarism. The weight of modern authorities will be found against such rule.

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WILLIAM BLACK *versus* DANIEL HICKEY.

If objections are filed and prosecuted to the acceptance of the report of a referee, and they are overruled at *Nisi Prius*, as being insufficient to prevent the acceptance of the report, even though the allegations should be proved, and exceptions are taken to this ruling, it cannot be urged against sustaining the exceptions, that no evidence was offered to prove the alleged facts.

Where the value of a tenant's betterments was to be determined by a referee, and he considered and deducted therefrom an account which the demandant claimed was due to him from the tenant, such deduction was erroneous, the account not being a matter embraced in the submission.

ON EXCEPTIONS.

WRIT OF ENTRY. The matter controverted in this case was the amount which the tenant was entitled to, for betterments. This question was submitted, by the parties, to a referee, against the acceptance of whose report the tenant filed in writing specific objections. CUTTING, J., ordered the report to be accepted, and ruled that the matter alleged, if proved, was insufficient to authorize its rejection. The tenant excepted.

*J. Granger* argued in support of the exceptions.

*Blake & Garnsey, contra.*

The opinion of the Court was drawn up by

APPLETON, J.—On the 7th day of January, 1856, the Land Agent of this State conveyed to the plaintiff the land described in his writ, "reserving to the person now in possession, the right to compensation for the *present* value of the betterments made by him, if any, over and above a fair rent, for

the use and occupation of the premises and the amount of their depreciation, for strip and waste, during the time which said Black has been out of possession thereof, to be determined by petition in equity, by any Judge of the Supreme Judicial Court, or by referees, to be mutually selected by the parties."

At the March term, 1859, of this Court, the parties appeared and agreed to "refer the appraisement of betterments to the determination of Washington Long," who, after hearing the parties, made a report, to the acceptance of which it is objected, among other causes, that "the said referee deducted from the value of said Hickey's betterments a pretended account in favor of said Black."

The objection, thus urged, the presiding Judge overruled as insufficient, if proved by competent evidence, to prevent the acceptance of the report, and ordered the same to be accepted, to which order the defendant alleges exceptions.

It is insisted that the defendant must fail, because he furnished no proof of the facts upon which he relies. But, it would seem, that the Judge ruled the proof immaterial. It must be understood that the defendant was ready to establish the fact asserted in his motion, and that he would have done it, if, in the opinion of the presiding Justice, it would have been of any avail. The plaintiff, if he denied the existence of the alleged facts, should have contested them, if the Judge would have permitted it, and then, if the defendant failed in his proofs, the report would have been accepted without objection.

In case of a reference, the referee is usually made judge of the law and fact, except when, by the terms of the submission, a special limitation is imposed upon his authority. The parties, by referring to him, make his law the law by which their rights are to be determined, and the facts, as he shall find them to be, the facts to which his law is to be applied. He may err in the law or in the fact, and the parties are bound by his determination, except in case of corruption, gross partiality, or evident excess of power.

In the present case, the defendant offered to show that an account, in favor of the plaintiff, was deducted from the value of the defendant's betterments. The plaintiff's deed, by its terms, was subject to the *then* present value of his betterments, from which certain deductions were to be made. But the accounts between the parties formed no part of the matters referred. The referee had no authority to adjudicate thereupon, and, if he did, it was an excess of authority.

As the referee can only act upon the subject matter referred, his action upon matters not embraced in the submission is erroneous. As to every thing included within its terms, his judgment is final.

*The exceptions, therefore, must be sustained.*

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

# COUNTY OF WALDO.

* LATHLY RICH *versus* SYLVANUS I. ROBERTS.

Where there are two or more joint mortgagers of personal property, residing in different towns, the record of the mortgage required by § 32, of c. 125, of R. S. of 1841, is incomplete until it is recorded in each of the towns in which the mortgagers reside.

Proof that an attaching creditor had notice of such mortgage, before the attachment of the property was made, on being objected to, was rightly excluded.

The revised statute, touching the recording of deeds of real estate, has changed the former law, so that actual notice of an unrecorded deed, to persons making claim to the estate subsequently to its delivery from the same source, alone will postpone the latter to the former.

But in the statutes requiring the record of mortgages of personal property, in order to make them effectual, there is no such qualification; and it cannot be properly inferred that one was intended, against the imperative language used.

REPORTED from *Nisi Prius*, by APPLETON, J., October term, 1856.

This was an action of TRESPASS. The defendant, as an officer, on the 21st day of September, 1855, attached certain horses, oxen and carriages, on two writs in favor of J. A. Cushing,—one against Andrew R. Grant of Frankfort, and the second against said Grant and John Bachelder of Oldtown.

The plaintiff claimed the property under a mortgage bill of sale, from Grant and Bachelder to him, dated September the 18th, 1855, to secure the payment of their note for $800. The mortgage, on the day of its date, was recorded by the town clerk of Frankfort, but was not recorded by the town clerk of Oldtown.

The plaintiff offered evidence to prove that the attaching creditor had actual knowledge of the mortgage, before the

* This case was argued in writing in 1857, and in 1860 was submitted to all the members then constituting the Court.

commencement of his suits;—which the presiding Judge excluded.

The property was sold by Theophilus Cushing to Grant and Bachelder, to be theirs, upon the performance of the condition of sale, relating to the payment for the property.

Before the mortgage to him, the plaintiff paid to Theophilus Cushing the amount due from Grant and Bachelder, and took a conveyance from said T. Cushing to himself.

*N. H. Hubbard,* for plaintiff.

Notice to the attaching creditor, prior to the attachment, of a mortgage of personal property, supersedes, as to such creditor, the necessity of recording the mortgage. *Sawyer* v. *Pennell,* 19 Maine, 167.

The evidence to prove notice in this case should have been admitted.

The property in controversy, both at the time of the mortgage and of the attachment, was at Frankfort, where Grant resided, and was there recorded prior to the attachment. This, under the circumstances of the case, was a sufficient compliance with the provision of the statute.

*N. Abbott,* for the defendant.

The opinion, concurred in by a majority of the Court, was drawn up by

TENNEY, C. J.—The oxen and other property in question were formerly owned by Theophilus Cushing, who entered into a contract with Grant and Bachelder, to sell the same to them at an agreed price, he retaining the title therein till the consideration should be fully paid. On failure of Grant and Bachelder to become the owners of the property, by payment, they were to compensate Cushing for its use.

It appears, from the case, that J. A. Cushing had valid claims against Grant and Bachelder, and that he caused the property to be attached, then in their hands, by the defendant's deputy, on Sept. 21, 1855, on two writs, one against Grant and Bachelder, and the other against Grant alone.

For the security of a note of eight hundred dollars, the plaintiff took a mortgage of the same property from Grant and Bachelder, on Sept. 18, 1855, and the same was recorded on that day by the clerk of the town of Frankfort, in which Grant then lived, but it was never recorded in the town of Oldtown, which was the place of Bachelder's residence at the same time.

If the mortgage became effectual on Sept. 18, 1855, the plaintiff thereby obtained an interest in the property, which could not be legally taken by attachment, excepting upon first tendering or paying to him the amount of the demand, for which it was mortgaged, according to R. S., c. 114, § 70. Whether he had such an interest, must depend upon the construction of the statute, c. 125, § 32, which provides that no mortgage of personal property, when the debt thereby secured amounts to more than the sum of thirty dollars, shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; or unless the mortgage shall be recorded in the town where the mortgager resides.

It is manifest that the design of the Legislature, in the provision referred to, cannot be entirely effectual by recording, in one town only, a mortgage of personal property executed by two or more persons living in different towns. Such an instrument constitutes one mortgage only, though the property described therein is owned by more than one; and it cannot be treated as recorded, in compliance with the statute, till the record is perfected, so far as to conform to section 33 of the chapter last mentioned, in each town, where one of the mortgagers resides. Rule II, of § 3, of c. 1 of the R. S., is applicable to this case, where it is provided, that every word importing the singular number only may extend to and embrace the plural number, &c.

Proof that the attaching creditor had notice of the mortgage, before the attachment of the property was made, on being objected to, was excluded. The exceptions taken to this ruling are attempted to be sustained by the case of *Sawyer*

v. *Pennell*, 19 Maine, 167. This case is not in point, as the decision was not upon any such grounds, notwithstanding there is, perhaps, an intimation that, in a case involving such a question, actual notice of the existence of the entire mortgage, to an attaching creditor, might supersede the necessity of a record, so far, that his attachment could not prevail. But, in that case, there was no such notice proved.

The revised statutes touching the recording of deeds of real estate has changed the former law, so that actual notice of an unrecorded deed, to persons making claim to the estate subsequently to its delivery from the same source, alone will postpone the latter to the former. In the statutes requiring the record of mortgages of personal property, in order to make them effectual, there is no such qualification; and it cannot be properly inferred that one was intended, against the imperative language used. *Plaintiff nonsuit.*

APPLETON, CUTTING, DAVIS and KENT, JJ., concurred.
RICE and GOODENOW, JJ., non-concurred.

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FRANCIS D. KIDDER *versus* INHABITANTS OF KNOX.

By the statutes in force in 1854, towns were authorized to sell spirituous liquors for specific purposes, which, of necessity, implied an authority to purchase them, for otherwise the law would be nugatory.

An agent to sell is not, necessarily, an agent to purchase; and if this specific power was not delegated to the agent appointed to sell the liquors, or to some other particular person, the selectmen were the general agents to act for the town in giving effect to the law.

The sale of liquors to the selectmen, as the agents of the town, was a sale to the town; and the vendor may recover their value, in an action against the town.

For liquors so purchased, the selectmen, signing as such, gave their negotiable promissory note to the vendor: in an action by him against the town, it was *held*, that the giving of the note did not essentially change the nature of the original contract, but made it more susceptible of proof; and it will not be presumed that the vendor thereby intended to extinguish the original liability of the town.

By the earlier decisions of this State, and before it was provided by statute that, when a lawful act is done by an authorized agent, it may be regarded as the act of the principal, such a note might have been held to be the note of the signer, and not of the principal.

ASSUMPSIT. At *Nisi Prius*, GOODENOW, J., presiding, being of the opinion that the action was not maintainable, the plaintiff consented to become nonsuit, to be taken off, if, upon a report of the case, to be made by the presiding Judge, the full Court should be of the opinion that the action was maintainable.

The case was argued by

*Dickerson & White*, for the plaintiff, and by

*N. Abbott*, for the defendants.

The case is stated in the opinion of the Court, which was drawn up by

CUTTING, J.—The case finds that one *Thomas Paine* was duly appointed, under the provisions of law then existing, by the selectmen of Knox, as an agent for the town, to sell spirituous and intoxicating liquors for medicinal and mechanical uses, during the year 1854, and that he was duly qualified.

*James Weed*, a witness called by the plaintiff, testified, without objection, that "he purchased the liquors named in said account annexed, in Boston, in his said capacity as one of the selectmen of Knox, under the direction and by the decree of a majority of said board of selectmen, to be sold by said agent, in virtue of his capacity as agent aforesaid; that the said notes were given for a balance of said account, and signed by witness and said Higgins, in virtue of their said capacity, and indorsed by them to the plaintiff."

This suit is brought on the original account and also on the two notes given for a balance of that account, of the following tenor:—"Boston, Oct. 25, 1854. Six months after date, we promise to pay to our own order, three hundred dollars, for value received.

(Signed) "James Weed, } *Selectmen of*
"John Higgins, } *town of Knox.*"

The second note was similar excepting in date and amount.

The statute of 1851, § 2, authorized the appointment of the agent of the town to sell, as disclosed by the witness, and the statute of 1853, § 8, directs that the casks and vessels containing the liquors, shall be marked with the name of the town and its agent, and that the agent shall have no interest in such liquors or in the profits of the sales thereof.

The cities, towns and plantations being thus authorized, under these two statutes, to sell spirituous and intoxicating liquors for specific purposes, had necessarily an implied authority to purchase, otherwise the law would be nugatory. An agent to sell is not necessarily an agent to purchase, and, in the absence of any specific power, delegated by the town to any particular person, the selectmen are constituted the general agents to act for their towns in furtherance and aid of statute or municipal regulations; and such trust cannot usually be more appropriately conferred.

The sale, then, of the liquors to the selectmen, as the agents of the defendants, was a legal sale to the principals, who are legally bound to the plaintiff to pay to him the stipulated price, if any, or a *quantum meruit*. Have they done it? The defendants' counsel contends that they have, and reasons thus: the original account was paid by the negotiable notes, — the notes, although purporting to have been given by the selectmen, do not bind the town, but the signers, and therefore the town has avoided an original legal liability. Assuming these propositions to be true, how are the defendants finally to be benefitted? They may defeat the plaintiff in this action, who may resort to the signers of the notes, and they, subsequently, to the town in an action for money paid, laid out and expended for its benefit. Circuity of action is always to be avoided, when possible, and the maintenance of the present action, for such cause, may not violate any known rule of law, but we prefer to place the decision on other grounds.

Are the notes those of the town or only those of the signers? By the earlier decisions in this State and Massachusetts, they would be those of the latter; but how far subse-

quent legislation has changed the law on that subject, may be worthy of consideration. See stat. of 1823, c. 220, and re-enactments in 1840 and 1857. Also stat. of 1857, c. 1, § 4, clause 21, a transcript of the stat. of 1840, relating to the same subject, as follows,—"When an act that may be lawfully done by an agent, is done by one authorized to do it, his principal may be regarded as having done it." It will not be denied that the selectmen were the agents of the town, and it has heretofore been shown that they were, as such, legally authorized to purchase the liquors, and the testimony is that the liquors were so purchased. The giving of the notes did not essentially change the nature of the contract, but made it more susceptible of proof. They could have drawn an order on their treasurer, instead of making the notes, and the difference would be merely in form. The only agency disclosed in town orders is similar to that contained in the notes, the names of the selectmen in their official capacity, and, under the old decisions, it may be questionable whether selectmen do not render themselves liable, instead of their towns, on all such orders. A distinction is attempted to be drawn between the tenor of orders and the notes in suit, because the latter contains the words "we promise;" but the question may be asked—who are we? Look at the signatures; there it is found that "*we*" are the selectmen of the town of Knox, or, in other words, agents of the town, in which capacity we promise. And the evidence produced at the trial discloses an authority as agents to act. Now apply the citation from the statute and judge whether the legal promisors in the notes are not the inhabitants of the town of Knox. But, for the maintenance of the action, it is unnecessary to rely upon this point.

If the notes were negotiable in the hands of the plaintiff, of which, as the case is presented, there may be doubt, still, is the plaintiff debarred from maintaining this suit on his original cause of action? We think, from the evidence and the authorities, that he is not. The plaintiff's original claim was against all the inhabitants of Knox, and, from the evi-

dence, is there any "pretence for supposing that he ever intended to extinguish that liability,"—that he would release all the defendants excepting two of them? The inference from the whole evidence, including the official capacity of the signers of the notes, is otherwise; if any such inference could be drawn, it was for the jury and not for the Court. But, if for the latter, they should consider that, "whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon his note." See *Wilkins* v. *Reed*, 6 Maine, 220, 2d ed., and note by editor, citing *Butts* v. *Dean*, 2 Met., 76; *Curtis* v. *Hubberd*, 9 Met., 328, and *Perrin* v. *Keene*, 19 Maine, 355.

*Nonsuit taken off, and*
*Case to stand for trial.*

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

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WILLIAM A. MONROE *versus* JAMES MATTHEWS.

A contract of guaranty, by which a debtor was, within a specified time, to pay a certain execution, "or cancel it in some other satisfactory way," or deliver to the officer certain property, will be construed to mean, that the cancellation shall be in a manner satisfactory to the creditor.

There being no ambiguity in the language employed, parol testimony cannot be admitted to prove that, at the time of making the contract, the officer having the execution consented to offset against it an execution in favor of the debtor and against the creditor, if one should be obtained and put in his hands within the time fixed for the performance of the contract.

It is no good ground of defence, to an action on the contract, that the officer refused to offset the executions. If his refusal was unjustifiable, the remedy, for the party injured, is against him.

REPORTED from *Nisi Prius*, by APPLETON, J., presiding.

This was an action on a contract of guaranty, dated March 27, 1851. The writ is dated the 3d day of September, 1852.

At the October term, 1856, the parties agreed that the case should be reported to the full Court, exercising jury powers, to be determined upon so much of the evidence as was legally admissible.

From the report, it appears that *H. W. Cunningham,* a deputy sheriff, had in his hands, on the 27th day of March, 1851, for collection, an execution in favor of the plaintiff, against one William R. Matthews, who pointed out to the officer two wagons, as his property; that, instead of seizing the wagons to satisfy the execution, he took from the debtor in the execution a writing, and the defendant's guaranty of performance thereof, which are as follows:—

"Know all men by these presents, that I, William R. Matthews of Lincolnville, do this day mortgage, sell and deliver to William A. Monroe, two horse wagons, for the security of the payment of an execution in his favor, [execution described,] and the officer's fees taxed at one dollar, to be paid in thirty days, or cancelled in some other way.

"And I, the said William R. Matthews, do represent to said Monroe that I am the lawful owner and possessor of the said wagons, and that they are free from all incumbrances, and that I will pay said sums as above stated, or cancel the same in some other satisfactory way, or deliver said wagons at the office of H. W. Cunningham, in Belfast, within said thirty days.

"Now if the said William R. Matthews shall pay said mentioned sums, or cancel the same in any satisfactory way within said thirty days, or deliver the same to H. W. Cunningham's office within that time, then this obligation shall be void, otherwise shall remain in full force.

(Signed) "Wm. R. Matthews.

"Lincolnville, March 27, 1851."

"Waldo, ss. March 27, 1851. I, James Matthews, agree to be responsible if the obligation is not fulfilled as above stated, and that of the delivery of the same property free and clear of any incumbrances.

(Signed) "James Matthews."

The officer further testified that, on the 14th day of November following, he demanded of the defendant the wagons.

There was evidence that, within thirty days from the date of the contract, an execution in favor of said William R. Matthews, against the plaintiff, was put into the hands of the officer, with directions to offset it against the execution in his hands against said W. R. Matthews; which the officer declined to do, in consequence of a communication received by him, from the justice of the peace who issued the execution.

There was also testimony reported, tending to prove that, when the contract was made, it was understood that the said W. R. Matthews had recovered a judgment against the plaintiff; and that the officer engaged to offset the execution, that should be issued thereon and delivered to him within thirty days, against the execution then in his hands.

Testimony was introduced, subject to objection, tending to show that the judgment was wrongfully rendered, the magistrate being absent on the day to which the case was adjourned for further hearing; no other justice having, for that cause, continued the case,—if, under the provision of the statute in such case, another justice had authority to act.

At the law term in 1860, this cause was continued to be argued in writing. Briefs were afterwards furnished by

*Crosby*, for the plaintiff, and by

*Dickerson & Lewis*, for the defendant.

The opinion of the Court was drawn up by

RICE, J.—The defendant became responsible that one William R. Matthews should perform a certain contract, which he entered into with the plaintiff on the 27th day of March, 1851. The terms of the contract were, that the said William R. should pay within thirty days the amount of a certain execution with costs, or cancel said execution in some other satisfactory manner, or deliver certain wagons, referred to in the contract. He did neither, but put into the hands of the officer, who held the plaintiff's execution, referred to, an

execution which the defendant (W. R. Matthews) had obtained against the plaintiff, with orders for him to offset the executions. This the officer refused to do. Whether he was justified in that refusal we cannot now determine. If he was not, he will be responsible to William R. Matthews for neglect of duty. The cancellation, referred to, must be construed to be in a way satisfactory to the plaintiff. There is no ambiguity in the contract, and, it being in writing, cannot be varied or controlled by parol testimony.

According to the stipulations in the report, the defendant is to be defaulted for the amount of the plaintiff's execution, including costs and legal charges, with interest thereon.

*Defendant defaulted.*

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

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JOSEPH HERRICK *versus* THE UNION MUTUAL FIRE INS. CO.

In his application for insurance, to the question, *who occupies the building?* the owner answered, "will be occupied by a tenant: *held*, in a suit on the policy to recover for loss, that the answer was not a stipulation that the building should be so occupied, but was rather the representation of his expectation that it should be occupied by a tenant, and not by himself.

Even if it was a warranty, the defence that the house was unoccupied at the time of the fire would fail, unless it appear the risk was increased by want of a tenant.

REPORTED by CUTTING, J., from *Nisi Prius.*

This was an action on a policy of insurance for a loss insured against. The case was presented on written arguments by

*W. G. Crosby*, for plaintiff, and by

*Dickerson*, for the defendants.

The opinion of the Court was drawn up by

RICE, J.—In the argument before this Court, reliance is only had upon the third specification of defence, which is in the following words:—"The assured, in his application, which is made a part of the contract, stipulated that the house should be occupied; whereas the house was not occupied."

The stipulation referred to, if it exist, is found in the application of the plaintiff for insurance. To the question, "who owns and occupies the buildings?" the plaintiff answered, "owned by the applicant, will be occupied by a tenant."

The application contains the following stipulation:—"and I hereby covenant and agree to and with said company, that the foregoing is a correct description of the buildings and property requested to be insured, so far as regards the risk on the same." Does this constitute a warranty that the premises insured was, and should continue to be occupied by a tenant? And if so, was the occupation material to the risk?

There is a distinction between a representation of an expectation, and the representation of an existing fact. The latter is in the nature of a warranty; the former does not amount to a warranty. *Rice* v. *N. E. M. Ins. Co.*, 4 Pick., 439.

In *Catlin* v. *Springfield F. Ins. Co.*, 1 Sum., 434, the words in the policy described the house insured, as "at present occupied as a dwellinghouse, but to be hereafter occupied as a tavern." It was held that this was not a warranty that the house should, during the continuation of the risk, be constantly occupied as a tavern; but that it is, at farthest, a mere representation of an intention to occupy it as such. STORY, J., in his opinion in that case, says, "suppose a policy against fire, underwritten on the house of A, in Boston, described as a dwellinghouse, or as occupied as a dwellinghouse, would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never, to my knowledge, been asserted; nor should I deem it maintainable."

The answer to the interrogatory manifestly shows that the house, at the time of the application, was without a tenant; and that it was the expectation or representation of the applicant that it should be occupied by a tenant and not by the owner. Nor can it fairly be construed to mean that it should be occupied by a tenant during the whole period of the risk.

But, even if it were a warranty that it should be occupied by a tenant continuously, it could not avail the defendants, because it does not appear that the risk has been in any degree increased by want of a tenant, and the applicant only covenants that his representation shall contain a correct description of the building to be insured, so far as regards the risk on the same.

As the case is presented, the defence fails, and a default must be entered. *Defendants defaulted.*

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

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STEPHEN BOOTHBY *versus* INHABITANTS OF TROY.

An action brought against a town, by a non-resident physician, for professional services rendered to a destitute person, who had a legal settlement therein, cannot be maintained by proof that one of the overseers of the poor consented that such services might be rendered and charged to the town, unless it be further proved that this was assented to by a majority of the board, or that the town has, in some way, ratified the act of the individual overseer.

EXCEPTIONS from the ruling of DAVIS, J.

The plaintiff, an inhabitant of the town of Unity, brought an action to recover of the defendants, for services rendered as a physician, to a sick and destitute person, who was then living, and had a legal settlement, in the defendant town.

At *Nisi Prius*, the presiding Judge ruled that, upon the testimony introduced for plaintiff, on the trial, his action was not maintained; and directed a nonsuit. To this, the plaintiff excepted.

The exceptions were argued by

*Dickerson,* for the plaintiff, and by

*N. Abbott,* for the defendants.

The material testimony is stated in the opinion of the Court, which was drawn up by

TENNEY, C. J. — The plaintiff, not being an inhabitant of the town of Troy, cannot recover in this action, under the provisions of R. S. of 1841, c. 32, § 48, after notice and request made to the overseers of the poor.

The action is sought to be maintained by virtue of the contract between the plaintiff and the defendants. He testified that he visited the pauper, Harriet Davis, on April 26, 1856, as a physician, and that he prescribed for her; that, on May 19, 1856, he called upon E. W. Bennett, one of the overseers of the poor of the town of Troy, and informed him that he was doctoring the Davis girl, and, if he doctored her any more, he should expect the town to pay him; to which Bennett replied, "if she needs it, tend to her, and they will."

Robert Woodhouse, another of the board of overseers for that year, testified that, after the board had let out the standing poor of the town, at that time, the overseers agreed among themselves that each one should look out for the poor in his own part of the town, and furnish any temporary supplies for small amounts, that might be necessary, in all such cases as they should be willing to take the responsibility for; that Bennett lived in the section of the town nearest to Harriet Davis, the pauper; that, in accordance with this arrangement, orders had been drawn and signed by the board, for small sums, in two instances, for supplies to other paupers, furnished by direction of one of the overseers alone. But, by the arrangement stated by the witness, the overseers did not surrender the right to act in all cases; and, in all instances, where one did not wish to take the responsibility, it was expected that he would consult the others; that he had no knowledge that the plaintiff was visiting the Davis family, and

that he gave Bennett no authority to employ the plaintiff, unless it resulted from the arrangement spoken of. No evidence was adduced to show that the third overseer had any knowledge of the employment of the plaintiff by Bennett. The plaintiff's charges, annexed to the writ, for services and medicine for Harriet Davis, commence on April 21, 1856, and continue, with short intervals between them, to July 25, 1857, inclusive, amounting to the sum of $57,60. The employment of the plaintiff by Bennett, if it was done, was in no way ratified by either of the other overseers afterwards, or by the town.

By R. S. of 1841, c. 1, § 4, rule III, "words giving authority to three or more persons, authorize a majority to act." This clearly implies that less than a majority can do no binding act; consequently, the doings of the minority can have no effect to make responsible those for whom it professes to act.

The defendants cannot be treated, in this case, as having made any contract with the plaintiff which creates any liability. *Exceptions overruled.*

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

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HUGH COLEMAN *versus* DAVID P. ANDREWS.

Under a complaint for flowage, where commissioners have been appointed to appraise the damage and limit the extent of future flowage, (as provided by § 9 of c. 92 of R. S. of 1857,) it will be a valid objection to the acceptance of their report, that it does not thereby appear that the parties were heard, or notified to appear.

If, in fact, the parties were notified, the report should be recommitted for correction; if not notified, that they may be, and have an opportunity to be heard.

Objections to the acceptance of the report, for that the complaint is defective, cannot avail, as that should have been taken advantage of before the respondent submitted to a default.

EXCEPTIONS from the ruling of GOODENOW, J.

COMPLAINT FOR FLOWAGE. The respondent having been defaulted, commissioners were appointed. At a subsequent term, the complainant's counsel offered the report of the commissioners and moved that it be accepted. To its acceptance the respondent filed objections:—(1.) Because the report does not show that he was notified to attend at the hearing; and, (2.) That the complaint does not set forth that the respondent erected or maintained a water mill and dam, to raise water for working the mill, on his own land or the land of another, by his consent, upon or across any stream not navigable, and for other defects in the complaint.

These objections were overruled by the presiding Judge, who ordered that the report of the commissioners be accepted. The respondent excepted.

*N. Abbott*, in support of the exceptions.

*Williamson, contra.*

The opinion of the Court was drawn up by

APPLETON, J.—This is a complaint for flowage. After the defendant was defaulted, commissioners were appointed, to whose report, when presented, the objection was taken that it did not appear that the respondent was present, or was notified to be present, at the time and place of hearing.

By R. S., 1857, c. 92, § 9, it is provided, after default of the respondent, that "the Court shall appoint three or more disinterested commissioners of the same county, who shall go upon and examine the premises, and make a true and faithful appraisement, under oath, of the yearly damages, if any, done to the complainant by the flowing of his lands or the diversion of the water described in the complaint, and determine how far the same is necessary, and ascertain and make report what portion of the year such lands ought not to be flowed or water diverted, or what quantity of water shall be diverted."

To enable the commissioners to do this, the mere inspection of the land flowed or the dam by which the flowage is caused,

is not enough. It may be necessary that witnesses should be called to state the condition of the land and its yearly value before the dam complained of was erected. There will be proofs and counter proofs of the several questions and facts in dispute.

It is obvious, therefore, that the presence of the parties is indispensably necessary to a just understanding of the cause. But, unless notified, they could not know of the time and place of hearing. The proceedings of the commissioners were judicial in their character, and, if affirmed, form the basis of a judgment of this Court. The rights of the defendant were the subject matter of their adjudication, and it is an elementary principle of justice, that those who are to be bound by a judgment should have notice of the time and place of hearing, that they may be enabled to appear and protect their rights. *Harris* v. *Sturtevant*, 29 Maine, 366; *Abbott* v. *Wood*, 22 Maine, 541; *Ware* v. *Hunnewell*, 20 Maine, 291.

The report of the commissioners does not disclose the fact of notice to the defendant. If, in fact, there was no notice, the report should be recommitted. If there was notice, the report of the commissioners may be amended by showing that fact.

It is objected that the complaint is defective. That is true, but the defendant has, notwithstanding, submitted to a default. The defects should have been taken advantage of before default and the appointment of commissioners. The same principles would seem to be applicable as if a verdict had been rendered, in which case the verdict would not be arrested nor the proceedings be quashed on certiorari. *Bryant* v. *Glidden*, 36 Maine, 36. Even before default, the objections taken might have been cured by amendment.

*Exceptions sustained.*

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

INHAB'TS OF FRANKFORT *versus* INHAB'TS OF NEW VINEYARD.

A child, who has a derivative settlement in the town of N. V., from that of his father, who was a pauper, will not gain a new settlement in S., from the fact, that he was bound out, until he should become of age, to an inhabitant of S., with whom he lived for the term of ten years. He was not thereby emancipated.

REPORTED from *Nisi Prius* by RICE, J.

This was an ACTION OF THE CASE to recover the value of certain supplies furnished to one *William Welch*, an alleged pauper. The legal settlement of the pauper was the only question controverted.

The depositions of sundry persons are referred to in the report as making a part of the case, none of which are found with the papers. The case was submitted to the full Court, exercising jury powers, to render judgment on nonsuit or default, as the legal rights of the parties may require.

The case was argued by

*N. H. Hubbard*, for plaintiffs, and by

*N. Abbott*, for defendants.

The opinion of the Court was drawn up by

APPLETON, J.—This action is brought to recover for certain supplies furnished one William Welch, whose settlement is claimed to be in the defendant town.

It appears, that Obed Welch, the father of the pauper, had his settlement in that part of Strong which was set off to New Vineyard, by c. 503 of the special laws of 1856. By virtue of that Act, the settlement of the pauper's father was transferred to the latter town. *Wilton* v. *New Vineyard*, 43 Maine, 315.

The pauper has a derivative settlement from that of his father, which will remain until a new one is gained.

It appears in evidence that the pauper, when about ten years of age, was bound out to one Luther Sweatland of

Strong, with whom he resided, with the exception of a temporary absence, when he ran away, till he was nearly twenty-one years old. It is insisted that by such residence a settlement was acquired in Strong.

A minor child, of parents who are paupers, bound to service by written indenture, until twenty-one years of age, is not thereby emancipated. *Oldtown* v. *Falmouth*, 40 Maine, 106. The evidence fails to establish the pauper's emancipation. The residence of the pauper, while thus living in Strong, was not of a character to change this settlement. He was not emancipated. The settlement of the father was his settlement, and he has not acquired one since. By the Act of 1856, c. 503, as his settlement was gained in that part of Strong which was set off to New Vineyard, it passed with that transfer, notwithstanding the absence of the pauper, to the defendant town. *Wilton* v. *New Vineyard*, 43 Maine, 315.

By the agreement of parties a default must be entered.

*Defendants defaulted.*

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

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JOSEPH T. NEALLY *versus* SAMUEL JUDKINS.

Where one of the counts in the writ is for money had and received, for a sum different from that in the other counts, and there was no specification of any particular claim to be proved under it, the attachment of real estate on such writ is void against persons subsequently attaching or purchasing.

WRIT OF ENTRY. Both parties claimed under one *Ezekiel D. Williams*. The demandant, by virtue of an attachment of the demanded premises, made on December 16th, 1850, on his writ against said Williams, and a levy thereon of an execution on the 16th day of November, 1857.

The defendant claimed under Williams' deed of mortgage to him of the date of the 19th of August, 1856.

One of the grounds set forth in the defendant's specifications of defence, duly filed, was this:—"also, because the writ contained a general money count and no specification or statement of matters to be proved under it," therefore "the attachment on the original writ was invalid."

The action of the plaintiff against said Williams was entered February term, 1851, and was tried at the next February term, and a verdict was rendered for the plaintiff for the sum of sixty-two dollars, as damages.

There were several questions raised by the exceptions, which were fully argued, only one of which is considered in the opinion of the Court.

*J. S. Abbott*, in support of the exceptions.

*J. W. Hathaway* and *C. P. Brown, contra.*

The opinion of the Court was drawn up by

KENT, J.—The writ in this case, on which judgment was rendered, contains three counts. The first, on an account annexed, for $63,60. The second, for money had and received, for $99,60. The third, on a special count, for a sum different from either of the foregoing. There was no specification of any particular claim under the general money count. The attachment was made Dec. 14, 1850, the levy Nov. 16, 1857. On the 19th of August, 1856, the debtor conveyed the premises, by deed of mortgage, to the defendant.

The defendant requested the Judge to instruct the jury that, as there were no specifications of claims to be proved under the money count, the attachment was not valid against the title of the defendant. This instruction was not given, as there were other points which it was deemed expedient to have settled.

This objection is set forth in the defendant's specifications of defence. It has been decided in the case of *Osgood* v. *Holyoke, ante p.* 410, and in several other cases, that an attachment on a writ like this is void against subsequent attaching

creditors or purchasers. This case comes within the principle of those cases.

It is unnecessary to consider the other objections to the validity of the attachment and levy.

*Exceptions sustained—verdict set aside, and new trial granted.*

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

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INHABITANTS OF SCHOOL DISTRICT NO. 1 IN JACKSON *versus* SILAS STEARNS *& als.*

The vote of a town to divide a school district, is unauthorized and void, where there had been no written statement of the facts submitted by the selectmen, as the statute requires.

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

TRESPASS *quare clausum*, and an asportation of a school-house alleged to belong to the plaintiffs.

It appears from the report, and from the records of the town and the school district, which were made a part of the case, *that* a school district had existed in the town of Jackson for nearly fifty years; *that* the town voted to divide the district, without a written statement of facts, required by the statute; *that*, afterwards, the northern part of the district organized by the election of officers, while the southerly part of the district treated the action of the town as unauthorized and void, voted to remove the school-house to a location beyond the limits of the district, attempted to be formed by the town, and authorized the defendants, as a committee, to remove it. The defendants removed it accordingly. *That* the north district, thereupon, voted to commence an action against the other district. This action was then brought against the defendants, who acted under the authority of the vote already stated, in the removal of the house.

The case was withdrawn from the jury, upon the request of the parties that it should be reported by the presiding Judge, for the decision of the full Court, who were authorized to draw inferences as a jury might, and render judgment on nonsuit or default, as the legal rights of the parties should be determined.

The case was argued upon the report, and such of the papers, which made part of the case, as were produced at the hearing, by

*Dickerson*, for the plaintiffs, and by

*N. Abbott*, for the defendants.

The opinion of the Court was drawn up by

CUTTING, J. — There can be no question that the attempt on the part of the town to divide the district proved abortive. It is now so conceded by the counsel of both parties, and the old district still remains an integer, and was such when the north half attempted to authorize their agent to prosecute the south half for removing the school-house; instead of which, he has commenced this action against certain individuals, alleging in one count a trespass *quare clausum fregit*, and an asportation of the house, in aggravation. The writ, pleadings and specifications were made a part of the case; of which only the copy of the writ now appears. Consequently, what was admitted or denied is uncertain. By the report we are authorized to decide from what does, and not from what does not appear, except by legal inferences.

There is no proof that the plaintiffs ever owned a foot of land, or that the defendants ever invaded their soil; and we might as well infer that the house was located on the defendants' as the plaintiffs' close, in the highway, or on land of a non-resident proprietor. All we can infer is, that the house was, and still is within the limits of the district; that all the records are imperfect and the district disorganized.

*Plaintiffs nonsuit.*

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

# COUNTY OF PENOBSCOT.

M. P. C. WITHERS *& al., Petitioners for Review, versus* SAMUEL LARRABEE.

A verbal lease of real estate at an annual rent, by the statutes of this State, creates a tenancy at will.

Under the Revised Statutes of 1841, the notice required by law to terminate a tenancy at will, when the rent was payable annually, was three months' notice in writing, to quit at the expiration of that time.

When such a tenancy is terminated by notice by the tenant, he is liable for rent until the expiration of the time fixed for the termination of the tenancy, whether he occupies the premises or not.

The provisions of R. S. of 1841, requiring notice to terminate a tenancy at will, are not contained in the revision of 1857, so that, under the latter, tenancies at will are determinable as at common law, at the will of either party and without notice. [But see c. 199 of laws of 1863.]

The provisions of c. 64, §§ 1 and 2, of R. S. of 1858, relate only to the process of forcible entry and detainer, and the notices required to maintain that process.

The rights of parties to a lease, which accrued before the R. S. of 1858 took effect, are not affected by those statutes.

Where a tenant at will, before the expiration of his tenancy, quits the premises and offers to surrender the key to the landlord, and upon his refusing to receive it, throws it down, and after the tenant has left, the landlord takes it up and retains it, but the premises remain unoccupied during the remainder of the term, the landlord thereby waives no rights, and the tenancy is not determined.

REPORTED from *Nisi Prius.*

PETITION FOR REVIEW of an action, in which the defendant in review recovered of the plaintiffs rent of a store for two quarters.

The original writ was dated Sept. 23, 1856, on account annexed, for balance of rent of a store from Sept. 15, 1855, to Sept. 15, 1856, being $125.

It was proved that Larrabee verbally leased the store, the

rent of which is in controversy, to the plaintiffs in review, for $250 per annum, payable quarterly; that they entered into possession Sept. 15, 1855, and paid the first quarter's rent when due; that, some days *before* the end of the second quarter and *after* they had left the premises, they notified Larrabee they should no longer occupy, and before the expiration of the quarter they paid rent for the second quarter; that, on the 14th of March, 1856, before which the rent for the second quarter had been paid, they offered the key to Larrabee, who refused to take it; that Chase, one of the defendants, threw down the key on the floor, and left; that after he had left, Larrabee took the key and retained it; that plaintiffs in review did not afterwards occupy the premises, and that they remained unoccupied during the year.

Upon this evidence the Court were authorized to render such judgment as the law requires.

*A. Sanborn*, for plaintiffs in review.

*F. A. Wilson*, for defendant in review.

The opinion of the Court was drawn up by

APPLETON, J. — According to the facts, as reported, the petitioners were tenants at will of the defendant. R. S., 1841, c. 95, § 19.

It was held in *Ellis* v. *Paige*, 1 Pick., 43, that a tenant at will is not entitled to notice to quit, and that the tenancy is determinable at the will of either party. The Supreme Court of Massachusetts were divided in opinion in that case, as appears in *Coffin* v. *Lunt*, 2 Pick., 70, but the principles of that decision were fully affirmed in this State, in *Davis* v. *Thompson*, 13 Maine, 209, in which WESTON, C. J., uses the following language: — "It results, as incident to a tenancy at will, that it may be determined at the will of either party; and that neither is to give notice of a future day when the estate shall determine." That either party might at pleasure terminate a tenancy at will, is again recognized as unquestioned law, by SHEPLEY, J., in *Moore* v. *Boyd*, 24 Maine, 243. In a strict

tenancy at will, the right of the landlord to rent is necessarily coëxtensive with the occupation of the tenant. If the latter may, of right, leave at any moment, he cannot be holden for rent after he has left the premises previously occupied.

In the revision of our statutes, in 1841, a new provision was inserted. By c. 95, § 19, it was enacted "that all tenancies at will may be determined by either party, by three months notice, in writing, for that purpose, given to the other party; and, when the rent, due upon such lease, is payable at periods of less than three months, the time of such notice shall be sufficient, if it be equal to the interval between the days of payment; and, in all cases of neglect, a refusal to pay the rent, due on a lease at will, thirty days notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease."

By § 20 the limitations in the preceding section were declared inapplicable to cases of forcible entry and detainer.

In construing the provisions of this Act, it was held, in *Smith* v. *Rowe*, 31 Maine, 212, that the tenancy continued till the expiration of the time specified in the notice, and that the tenant's occupation is lawful till it has elapsed. In *Dutton* v. *Colby*, 35 Maine, 505, it was decided that the notice to quit, upon which the process of forcible entry and detainer by R. S., 1841, c. 125, § 5, is founded, cannot be given before the estate at will has been first determined.

It would seem to follow, from these decisions, that the tenant would be liable for rent during the time of the notice given for the determination of his estate, whether he occupied it or not. "The statute," remarks WILDE, J., in *Creech* v. *Crocket*, 5 Cush., 133, "was intended to prevent the sudden termination of a tenancy at will, by one of the parties, against the will of the other, in cases where there was no valid agreement for its termination otherwise." The Revised Statutes of Massachusetts, enacted in 1836, c. 60, § 26, contain provisions almost identical with those of our revision of 1841, c. 95, § 19, to which Mr. Justice WILDE referred. It was decided in *Whitney* v. *Gordon*, 1 Cush., 266, that if a

tenant at will, whose rent is payable quarterly, quit the premises on a quarter day, without giving the three months previous notice of his intention, he will be liable *prima facie* for another quarter's rent. So in *Walker* v. *Furbish*, 11 Cush., 366, it was again held that an action for use and occupation would lie against a tenant at will who had left the premises without giving due notice of his intention to terminate his tenancy. These decisions are based upon R. S., c. 60, § 20, of Massachusetts, which corresponds, as has been before remarked, to c. 95, § 19, of our revision of 1841.

It follows, from this examination, that Larrabee, under the R. S. of 1841, is entitled to recover for a quarter's rent.

It is insisted that Larrabee, by taking the key to the store, has taken possession of the store and waived all right to notice from his tenant.

It is in proof that the tenants offered the key to Larrabee, who refused to take it; that one of them then threw it on the floor, and left; that after this, and in the absence of both of the tenants, he took it and retained it, but that the premises remained unoccupied during the residue of the term.

As the tenancy was the result of the express or implied agreement of the contracting parties, so must be its termination, unless when the notice required by statute is given. The key was offered and refused. The tenant threw down the key and left. The landlord, by merely taking up and preserving from loss the key left by his tenants, cannot be regarded as having assented to the termination of the tenancy. It was a mere matter of prudence, by which no rights were forfeited. The receipt of rent is no waiver of a continuing breach of covenant. *Doe* v. *Jones*, 5 Exch., 498. In *Barlow* v. *Wheelwright*, 22 Verm., 88, the tenant quit possession of the premises leased, and offered to give up the key, which the landlord refused to receive; but, as the tenant left without notice and before the determination of his tenancy, he was held liable for rent. In *Cannan* v. *Hartley*, 9 Man., Gran. & Scott, 635, (67 E. C. L., 634,) the tenant, upon the bankruptcy of his landlord, sent the key to the office of his

official assignee, where it was left with his clerk, and immediately left possession of the premises, and no further communication took place. This was held not to amount to a surrender by act of law. "I am of opinion," says WILDE, C. J., in the case just referred to, "that there was no evidence of a surrender and acceptance, which could have been properly left to the jury." "But it is said," remarks MAULE, J., "that conduct of the official assignee in not returning the key amounted to an acceptance of it. I do not think the official assignee was bound to seek out the tenant for the purpose of rendering back the key." The taking up of the key, when thrown down, was no more a waiver of notice in this case, than was the entering and shutting the door of the premises which the tenant had abandoned, in *Walker* v. *Furbish*, 11 Cush., 366. So, in *Townsend* v. *Alvers*, 3 E. D. Smith, (N. Y.,) 147, it was held that, if a tenant quits the premises during the term, and the landlord accepts the key, stating that he receives the key, but not the premises, it will not be held as an acceptance of the surrender.

But it is urged that the law has been changed, in the revision of our statutes in 1857, and that it now is as it was prior to the revision of 1841 and the new provisions of R. S., c. 95, §§ 19, 20, relating to the determination of tenancies at will, and that, under the existent legislation, tenancies at will are determinable without notice, and at the will of either party. Such we regard the law, as established by the revision of 1857.

Chapter 95 of R. S., 1841, is entitled "of estates in dower and by curtesy *and at will*." Chapter 103, in the revision of 1857, is headed—"estates in dower and by curtesy and actions of dower." No reference is made therein to estates at will, and no section corresponding to R. S., 1841, c. 95, § 19, is to be found.

The provisions on the subject of forcible entry and detainer are found in R. S., 1857, c. 94. The second section is a reënactment of the statute of 1849, c. 98, which provided for the maintenance of the process of forcible entry and detainer,

although the relation of landlord and tenant did not subsist between the parties; and of the statute of 1853, c. 39, § 1, which relates to the termination of a tenancy at will, on the part of the landlord. These Acts, embodied by the revision in R. S., 1857, c. 94, § 2, have relation to the process of forcible entry and detainer alone, and have nothing to do with the determination of tenancies at will *by either party*, upon notice in writing.

Though R. S., 1857, c. 94, is headed—"Forcible Entry and Detainer—Tenancies"—yet no provisions are found therein for the determining tenancies at will, by notice in writing, by either party, as was the case by R. S., 1841, c. 95, § 19. It merely gives the landlord rights, and provides what he may do preparatory to bringing the process of forcible entry and detainer. Though reference in the margin is made to R. S., 1841, c. 95, § 19, yet c. 94 of R. S., 1857, contains none of its provisions, nor does it provide in any way for the determination of estates at will. Nor are any provisions corresponding to those of R. S., 1841, c. 95, § 19, to be found in the last revision. Consequently, tenancies at will are now as they were before the revision of 1841.*

The claim of Larrabee for rent, therefore, if it were to be determined by the existing law on the subject, cannot be maintained. But his right of action accrued in 1855, and the original action, now sought to be reviewed, was commenced Sept. 22, 1856, and before the revision of 1857 became the law of the State. It is therefore saved from the operation of the change of the law, by the express terms of the repealing Act of 1857, by § 2 of which, the Acts declared to be repealed "remain in force * * for the preservation of all rights and their remedies existing by virtue of them; and, so far as they apply to any office, trust, judicial proceeding, right, contract, limitation or event, already affected by them."

The original action was brought to recover the rent for half a year. The plaintiff in that suit had a legal claim for a quarter's rent only. He took judgment on default for

* Vide c. 199 of laws of 1863. — *Reporter.*

double the amount to which he was entitled, and thus necessitated a review on the part of these petitioners, for the protection of their rights. As they were entitled to their review, so they are equally entitled to recover the costs incidental to its prosecution.

The writ of review is to issue, unless the defendant in review indorse on the execution by him obtained, the sum of sixty-two dollars and fifty cents, and interest from the date of the original action, and pay the costs of this petition.

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

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STATE *versus* EDWARD MILLER *& al.*

The provisions of the Act of 1858, authorizing search for, and seizure of, intoxicating liquors, are not in conflict with the constitution of this State.

When an officer seizes intoxicating liquors upon a warrant, and arrests their alleged keeper, he must have both before the magistrate who issued the warrant.

From that time, the proceedings against the person and those against the liquors are separate and distinct. There are then, for all purposes, two distinct cases. The person accused is tried upon the complaint; upon the libel is tried the question whether the liquors were intended for unlawful sale by *any one*. The judgment in one case does not, in any manner, affect the judgment in the other.

If the cases are appealed, they should be entered and tried in the appellate court as *two* cases.

When a magistrate adjourns a criminal case within his jurisdiction more than ten days at one time, *at the request of the respondent, he* cannot afterwards object to it.

A complaint, alleging that intoxicating liquors were in the possession of the accused, and were intended for unlawful sale in this State, is insufficient. It must allege that the liquors were intended for unlawful sale *by the accused.*

Where a person files a claim to intoxicating liquors which have been libelled, he cannot object to defects in the monition and notice.

ON EXCEPTIONS to the rulings of APPLETON, J.,

COMPLAINT to search for and seize intoxicating liquors,

alleged to have been kept by the respondents at their store in Bangor, and "intended for sale within this State, in violation of law."

The complaint was made to the Judge of the Police Court of Bangor, who issued a warrant, upon which the officer seized certain liquors found in the respondents' store, and arrested them.

The officer made return of his warrant on the ninth day of November, before said Judge, when, upon the motion of the respondents and at their request, he continued the case to the twenty-third day of the same November.

On the day he returned the warrant, the officer libelled the liquors, and the Judge issued his monition returnable the twenty-third day of November.

The notices were posted and the return made on the monition by the libellant.

On the return day of the monition, Edward Miller, one of the respondents, filed his claim for the liquors, in the manner required by the statute.

Thereupon the cases proceeded to trial, and were tried together, and the magistrate convicted the respondents upon the complaint, and declared the liquors forfeited upon the libel. The record of the magistrate shows a joint judgment against the respondents and the liquors, and a separate judgment against the liquors, from both which judgments the record shows that Edward Miller appealed, and recognized to prosecute his appeals in accordance with the provisions of the statute. The magistrate sent up but one recognizance, which was the one taken upon the *joint* judgment.

The appellant entered but one case in the Supreme Court, and it stood upon the docket as, *State* v. *Edward Miller*, and *William K. Miller and certain intoxicating liquors, appellants.*

Before verdict, the counsel for Miller moved "that the complaint and warrant be quashed and the case dismissed," because:—

1. The magistrate continued the case from the ninth day of November to the twenty-third.

2. Because the record did not show that the notice required by law had been given on the libel.

This motion was overruled by the presiding Judge.

The case was thereupon tried; the jury returned a verdict of guilty against the respondents, and found that the liquors were intended for sale in this State in violation of law.

The respondents requested the presiding Judge to instruct the jury that the statute under which the proceedings had taken place was unconstitutional; which instruction was refused.

The respondents also filed a motion in arrest of judgment, which was overruled, and, thereupon, they excepted to the refusal of the presiding Judge to dismiss the case, to give the requested instruction and to arrest the judgment.

The reasons for arrest of judgment were set out in the motion as follows:—

1. [The same as in the motion to dismiss.]

2. That the libel and monition contained no certain, specific and sufficient description of the articles seized, such as the law contemplates; in consequence whereof, said Court could have no jurisdiction of said liquors.

3. That a copy of the said libel and monition were not posted or caused to be posted up by said magistrate in two public and conspicuous places in said Bangor.

4. That said Court, appealed from, gave no separate and distinct judgment as to the liquors seized, as the law requires.

5. Because said complaint does not allege that said liquors "were, and still are, unlawfully kept" by said respondents.

6. Nor that said liquors were intended for unlawful sale; as by the statute, and the form of complaint and warrant therefor prescribed, is required.

7. Because said complaint and warrant no where allege that said liquors were kept or deposited for unlawful sale, by said Miller, nor any phraseology equivalent thereto.

*Blake & Garnsey*, for respondents.

I. A magistrate cannot adjourn a criminal case more than ten days at one time. R. S., c. 137, § 8.

The Court, therefore, lost jurisdiction in this case, unless the Act of 1858 repeals the statute cited above, or the consent of parties gave it to him.

1. The Act of 1858 does not profess to repeal the provision relied upon, and has nothing inconsistent with it. The provision for at least ten days notice on the libel does not affect the question, because proceedings on the libel have nothing to do with the complaint.

2. Consent of parties cannot give a magistrate jurisdiction. Gould's Plead., 231; 1 Chitty's Plead., 478; 3 Chitty's Prac. 524.

3. Nor does the fact, that the Court may have had jurisdiction over the liquors, give him jurisdiction to render a joint judgment against the liquors and the person.

II. No legal notice was given on the libel. The copies posted were attested by the *libellant*. The statute requires them to be attested by the *magistrate*. The *magistrate* shall cite parties to appear "by causing a *true* and *attested* copy, &c. to be posted." Sec. 15.

III. That portion of the "Act for the suppression of drinking houses and tippling shops," approved March 25, 1858, on which the proceedings on this complaint are founded, is unconstitutional, because —

1st. The authority of the officer to seize, is not limited by his warrant to liquors described by quality, quantity, marks or any other description whatever, in direct violation of § 5th of the declaration of rights, providing against unreasonable searches and seizures. *Fisher* v. *McGirr*, 1 Gray, 29.

2d. The execution of the law is left wholly at the discretion, and dependent upon the judgment, of the officer having the precept; i. e., he is to determine whether the liquors are unlawfully kept, before he seizes them, and then it is discretionary to what extent he will seize. Ibid.

3d. Such judgment is a prerequisite to the jurisdiction of the magistrate issuing the warrant, both as to the person and the property seized. Ibid., p. 30.

4th. It confers on justices of the peace unusual power and jurisdiction over an unlimited amount of property. Ibid., 33.

5th. On the *ex parte* statement of three persons, under oath, the legal presumption of innocence is taken away, and, without further proof or trial, the accused may be punished by a forfeiture of their property.

6th. An excessive restriction is imposed upon the right of appeal, by requiring the oath of the defendant, if claimant for liquors, before an appeal can be taken.

7th. By section 14, a defendant, who claims property in the liquors seized, is exposed to a second prosecution for the same offence. Laws of 1858, c. 33, § 19.

8th. Because it is in violation of the spirit of § 19, art. 1, of the constitution of Maine, and against public policy.

IV. Every word in the complaint may be true, and yet the respondents be innocent of any crime.

It is not alleged that they intended to sell these liquors, in violation of law.

It is true, the form prescribed admits this allegation. But the Legislature cannot thus override art. 1, § 6, of bill of rights, and declare that a man may be tried for an offence and not know the nature of it; be tried on a charge, *the whole truth of which is admitted*, and which is no offence, and *be punished for a crime!*

*N. D. Appleton, Attorney General*, for the State.

The opinion of the Court was drawn up by

DAVIS, J. — This case comes before us upon exceptions, and a motion in arrest of judgment. The defendants were arrested upon a warrant, issued on a complaint charging them with having in their possession intoxicating liquors, intended for sale in this State, in violation of law. A quantity of intoxicating liquors, found in their possession, was seized upon the same warrant.

The constitutionality of the statute, authorizing the search for and seizure of liquors, has been elaborately argued by

counsel; and the case of *Fisher* v. *McGirr*, 1 Gray, 29, is relied upon in the defence. Without commenting upon that case, or expressing any opinion in regard to former statutes in this State, in which there was no provision for libelling liquors after seizure, it is sufficient for us to say, that we believe the provisions of the existing statute, authorizing the seizure of intoxicating liquors, upon warrants duly issued therefor, are not in conflict with the constitution of this State. Such processes have so frequently been before us, on appeal, and have been sustained, unless defective, that it is unnecessary for us to state at length the reasons for this opinion.

When an officer seizes intoxicating liquors, upon a warrant issued therefor, he is required also to arrest the person in whose custody they are alleged in the complaint to be, and to have both the person and the liquors before the magistrate who issued the warrant. At this point the proceedings are divided, and constitute, thenceforth, two distinct cases. *The person* is put on trial for having had such liquors in his possession, with intent to sell the same in this State, in violation of law. Laws of 1858, c. 33, § 12. And *the liquors* are libelled, as intended for illegal sale, whether by one person or another, it is immaterial. So that the acquittal of the *person* does not entitle him to a restoration of the *liquors;* nor does a condemnation of the *liquors* necessarily result in a conviction of the *person*. The two cases are entirely separate.

A stranger to the original process may claim the liquors under the libel. But, if it is otherwise, and the person arrested becomes the claimant under the libel, the matter is entirely distinct from the hearing upon the complaint. The hearing may be at the same time, for convenience; but there must be a separate decree and judgment in each. And either one may be appealed without the other.

If the person arrested claims the liquors under the libel, and the magistrate decides against him upon the complaint, and also upon the libel, and he appeals from both decisions, they constitute two independent cases in this Court, in which different verdicts would be rendered. *Upon the complaint,*

the jury would find the personal guilt or innocence of the appellant, upon the plea of "not guilty." *Upon the libel*, they would find whether the *liquors* were intended *by any person* for unlawful sale, and if not, whether the claimant had the right to the custody of any part of them.

In the case at bar, the proceedings before the magistrate appear to have been in conformity with the provisions of the statute. The hearing upon the complaint was continued more than ten days at one time; but it was done at the request of the defendants. And though jurisdiction cannot be conferred upon an inferior court by consent,—where such Court has jurisdiction of the case and of the parties, if they request a continuance beyond the time authorized by the statute, it is not for them afterwards to object to it.

The hearing before the magistrate upon the complaint, and upon the libel, was on the same day. The liquors were claimed by Edward Miller, one of the defendants; and the decision being adverse to him, he appealed. And both of the defendants being convicted upon the complaint, they appealed from that judgment also. They entered into but one recognizance for both cases; but the validity of that is not material to the question now presented. In this Court there was but one trial, which we must regard as having been upon the *complaint alone*. This is shown by the report, and by the verdict. And the first question presented, is, whether the judgment against the defendants should be arrested, on account of defects in the complaint.

It is alleged in the complaint that the liquors were in the possession of the defendants, and were intended for unlawful sale. But it is not alleged that the liquors were intended *by them* for sale in violation of law. The complaint charges nothing against *the defendants* except *the possession* of the liquors. The allegations may all be true, therefore, and the defendants be entirely innocent. For this reason the judgment must be arrested. See opinion by KENT, J., in *State* v. *Learned*, 47 Maine, 426.

In regard to the libel, some objections are taken to the

monition and notice. We are not satisfied that the objections are valid; but if they are, it is immaterial, for Edward Miller appeared, and filed his claim for the liquors. This claim cannot be aided by a defective notice. The decision was against him, and he appealed. Did he enter his appeal in this Court? We have some doubt whether it was entered. But his counsel seem to understand that one entry was sufficient for both cases. We would not sanction or encourage such a practice. But, as both parties have assumed that the case was properly in Court, we will so consider it. So far as the libel is concerned, it has not been tried, and must, therefore, still be considered as on the docket at *Nisi Prius*.

*Judgment upon complaint arrested.*

*Case to stand for trial upon the libel.*

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

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## MIDDLE DISTRICT.

## 1859.

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## COUNTY OF KENNEBEC.

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* PARKER SHELDON, *Adm'r, versus* WILLIAM CONNER.

Whether one, having, from the owner of a tract of land, a license to cut and haul timber therefrom, can make a mortgage of it, before it is cut, that will be valid against a third party, claiming a right to the timber, acquired after it has been cut, *quære.*

The statute requiring a mortgage of personal property to be recorded, to render it valid, makes no exception; and one subsequently purchasing or attaching the property will not be affected by an unrecorded mortgage, notwithstanding he had actual notice of it.

EXCEPTIONS from the rulings of RICE, J.

This case was argued on the exceptions, in 1857, and was, by consent of the parties, submitted to all the members of the Court in 1859.

The facts bearing upon the questions of law considered by the Court, will be found in the opinion of the Court, and the dissenting opinion by RICE, J.

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* The papers in this case accidentally failed to reach the Reporter, until the case of *Rich* v. *Roberts*, *ante*, p. 548, was sent to press.

*H. W. Paine* and *Whitmore,* for the plaintiff.

*J. S. Abbott,* for the defendant.

The opinion, concurred in by a majority of the Court, was drawn up by

TENNEY, C. J. — This action is trover for the value of certain timber alleged to have been converted by the defendant. The plaintiff's title is derived from one Larry, who contracted with Heald & Co., in writing, on Nov. 24, 1849, to cut and haul the timber from a tract of land in the contract described; the said Larry to retain a lien upon the timber cut and hauled for certain charges thereon. The said Heald & Co. cut and hauled a large quantity of timber under this contract, *before* and *after* the 16th day of February, 1850. Larry gave a bill of sale of this timber to Parker Sheldon, on Oct. 10, 1850; and Parker Sheldon gave a bill of sale of the same to Parker C. Sheldon, on June 6, 1851. Parker C. Sheldon died, and his estate is now represented by the plaintiff. The logs in controversy are a part of those cut under the contract between Larry and Heald & Co., which is dated Nov. 24, 1849.

The defendant claims title from White and Norris, who took from Larry a mortgage dated April 6, 1850, but not recorded; and Heald & Co. gave a mortgage to White and Norris, without date, but recorded Feb. 16, 1850.

1. A question in the case was, whether White and Norris acquired any rights under the mortgage from Heald & Co., to logs cut subsequent to the record thereof. The Judge instructed the jury that an interest did pass under that mortgage, to that part of the logs in question.

On this question, the Court was so divided in opinion, that a majority of its members were not in favor of sustaining or overruling the exceptions, consequently, this instruction of the presiding Justice cannot be treated as erroneous; and the exceptions are not sustained thereon.

2. There was evidence tending to show that Parker Shel-

don had actual knowledge of the mortgage from Larry to White and Norris, of April 6, 1850, before the sale to him of Oct. 10, 1850. Upon this point the jury were instructed that, though White and Norris abandoned possession of the logs, or never took delivery thereof, yet the mortgage was valid as to Parker Sheldon, if they should be satisfied that he had actual knowledge of the mortgage. This, we think, was erroneous. It is true, that the law touching the recording of mortgages of personal property is substantially the same as that which required that deeds of real estate, to be effectual, except in certain specified cases, should be recorded. And it was held that actual or implied knowledge of a subsequent purchaser, whose deed was recorded earlier than that of a former purchaser from the same grantor, should not prevent the operation of the deed first given; and this, upon the ground, that the second purchaser was guilty of a fraud upon the first. The statute upon the subject of conveyances of real estate was revised in 1840, and, in the matter referred to, an essential change was introduced, that actual knowledge only could defeat the effect of a deed given of real estate, and recorded prior to another deed of the same, from the same grantor, given anterior to the one under which he claimed.

In the R. S. of 1841, c. 125, § 32, it is provided that no mortgage of personal property, made since April 24, 1839, or that shall be hereafter made, &c., shall be valid against any others than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee; or, unless the mortgage has been, or shall be recorded by the clerk of the town where the mortgager resides. This provision is imperative in its terms, and, if it was really designed that it should have a construction, even more enlarged than that in reference to the recording of deeds of real estate, it is very remarkable that such unequivocal language should be employed touching the record of one and not of the other.

The requirement contained in the statute referred to had its origin in this State April 24, 1839, and we are not aware

that the Court had been called upon to give, and did give a construction in the particular now under consideration, to the statute of that year, before the revised statutes of 1841 went into operation. And, inasmuch as the statutes were generally revised at that time, and that in relation to the recording of deeds of real estate underwent the alteration just mentioned, no construction of this Court has been adopted in any respect by the Legislature.

The instruction, that no title passed from Larry to Sheldon, if the transaction was fraudulent, would have been correct if the title of the fraudulent vendor is contested by an attaching creditor, or a subsequent purchaser of the vendor. If the mortgage of Larry to White and Norris was effectual in any mode, before the sale to Sheldon, it superseded the latter. If otherwise, the sale to Sheldon was the only operative transfer. As between the parties to a sale mutually designed to defraud creditors who attach, or subsequent purchasers, it is valid. *Dagget* v. *Adams*, 1 Greenl., 198, overruled by *Andrews* v. *Marshall*, 43 Maine, 272.

It is made a question, whether Larry had not abandoned his title to the logs, reserved by the contract of Nov. 24, 1849, and the Judge instructed the jury, that his taking the bill of sale of March 10, 1850, might tend to prove that fact. In this remark, no rule of law was given, but it was simply left to the jury from the evidence of that fact, which does not seem to have been objected to, to draw their own inferences. It was for them to determine, whether or not he wished to fortify his title, then existing, or whether it was from a wish to claim entirely by a different one. We think this instruction not erroneous.

The instruction given to the jury, in relation to the evidence in another trial, as compared with that in this case, was given under a misapprehension of the mode in which the former case was disposed of, and was withdrawn. The plaintiff was not aggrieved in this. *Exceptions sustained.*

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

RICE, MAY and GOODENOW, JJ., non-concurred.

RICE, J., dissenting.—On the 24th day of November, 1849, Abel W. Heald and others entered into a contract with J. W. Larry, by the terms of which they were authorized to cut and haul pine timber, in which the latter had an interest, either as absolute owner, or by virtue of a license, from "Spider valley" and "Arnold's river," in Lower Canada. This contract, as a specimen of obscurity and illiteracy can hardly be excelled. But by careful examination and analysis an interpretation may be had, from which the intention of the parties may, with reasonable certainty, be discerned. Among other stipulations of less distinctness, the contract contains the following provision:—"The said J. W. Larry does sell and convey and bargain the timber to the said Heald, Brown & Co., and gives them the right to go on and cut and haul timber from the above named places in the province of Lower Canada."

The title to the timber, when cut and hauled, was to remain in Larry, as security for the performance of the contract on the part of Heald & Co.

Under this contract, Heald and his associates went upon the territory described with several teams, and commenced cutting and hauling timber into the north branch of the Dead river.

White and Norris were merchants doing business at Skowhegan, and furnished Heald & Co. supplies with which to carry on their lumbering operations, under their contract with Larry, above referred to.

During the winter of 1849–50, White and Norris took from Heald and his associates, as security for supplies, past and future, an instrument or mortgage, of which the following is the material part, so far as this case is concerned:—

"Whereas White and Norris have furnished, the present winter, certain logging supplies to A. W. Heald, &c., and have agreed to furnish, during the balance of the logging season, the necessary supplies to enable the said Heald, &c. to continue their logging operations: now, therefore, be it known that the undersigned, A. W. Heald, &c., assign, transfer and

make over, as per mortgage, to them, the said White and Norris, all the logs that have been cut by us, or for us, the present winter, and landed on said north branch of Dead river, and also all logs that may hereafter be cut by us or for us, the present winter, and landed as aforesaid, to secure the full payment for all supplies heretofore furnished, or that may be hereafter furnished us by said White and Norris."

It is not controverted that the logs cut and to be cut, referred to in this mortgage, are the same logs cut under the contract from Larry.

The mortgage to White and Norris is without date, but appears to have been recorded by the town clerk of the town of Bingham, Feb. 16, 1850.

At the trial the plaintiff contended that, if the defendant would hold the logs under the mortgage from Heald and others to White and Norris, it was incumbent on him to prove that the logs in controversy were cut prior to February 16, 1850, and that no interest in the logs cut after that date passed to White and Norris, by the mortgage on that day recorded, but the Judge instructed the jury that this interest did pass by the mortgage.

It is now contended that this instruction was erroneous, inasmuch as it sustains, as a legal and binding transaction, an attempt on the part of Heald and his associates to transfer, by mortgage, property to which they had no title, and, in which they had at the time no interest, but to which they might have expected to acquire title at a future time.

It was held by this Court, in *Abbott* v. *Goodwin*, 20 Maine, 408, that if a mortgager sell goods by him mortgaged, and, with the proceeds thereof, purchase other goods, these last represent the first, and are substituted for them, and equally subject to the lien of the mortgagee thereon. Thus, it was decided, in that case, that a quantity of lime, purchased by the sale of goods which had been mortgaged, was held by the mortgagee, in place of the goods which had been mortgaged to him.

The soundness of this decision has been questioned, and

the case may be deemed to have been overruled by *Head* v. *Goodwin*, 37 Maine, 181, and *Chapin* v. *Cram*, 40 Maine, 561.

The general rule, undoubtedly is, that a person cannot grant or mortgage property of which he is not possessed, and to which he has no title. Com. Dig., Grant, D; *Jones* v. *Richardson*, 10 Met., 481.

This principle is not, however, applicable to the case now under consideration. For, though it be true that a person may not grant that which he hath not, yet it is now well settled, that a possibility coupled with an interest, is assignable; that a man may grant that which he hath *potentially* though not *actually*. Hill. on Sales, 12. "It is true," says WILDE, J., in *Jones* v. *Richardson*, cited above, "that a person may grant personal property of which he is potentially though not actually possessed. A man may, therefore, grant all the wool that shall grow on the sheep which he owns at the time of the grant, but not the wool which shall grow on sheep not his, but which he afterwards may buy. So a parson of a church may grant his tithes for years, although they are not actually in him at the time, yet they are potentially; and the same exception to the general rule extends to grants of crops growing on lands of the grantors at the time of the grants." *Bigelow* v. *Wilson*, 1 Pick., 485; *Lunn* v. *Thornton*, 1 M., G. & Scott, 383; Shep. Touchstone, 239; Com. Dig., Grant, C.

If rights are vested, or possibilities are distinctly connected with an interest or property, they may be sold. 1 Parsons on Cont., 438.

There was, clearly, a possibility coupled with an interest in Heald and his associates. Though the timber, at the date of the mortgage, had not, all of it, been severed from the soil, the right to cut was in them, and potentially the possession was in them. The right to cut all the timber in the "Spider valley" and on "Arnold's river," had been granted by the contract of Larry, subject only to a lien to secure the payment of stumpage, &c. They had entered under this grant or license, and had cut a large quantity of the timber, at the date of the mortgage, and were proceeding day by day to

cut and haul the remainder. Their condition was not unlike that of the parson who is actually collecting his tithes, or the husbandman whose crops are being garnered up, or the grantor of the fleece which is being taken from the sheep by the hand of the shearer, at the time of the grant. It was simply the ordinary transaction of a lumberman, who holds a permit to cut timber on the lands of another, and who, to procure the supplies necessary to enable him to carry on his lumbering operations, gives the merchant a lien on the timber, to be cut, under his permit, as security for his supplies. Though he has not, at the time the lien is created, cut a single log under his permit, yet, having the *right to cut,* by virtue of the permit, the possession of the timber is potentially in him, and he may lawfully mortgage that contingent interest, as security for his supplies. The ruling of the Court, therefore, on this part of the case, was not erroneous.

The Judge instructed the jury to ascertain whether White and Norris took delivery, and, if they did, whether they abandoned their possession; and further, though their mortgage was not recorded, and though they should be satisfied that White and Norris abandoned the possession or never took delivery, yet this mortgage would be valid as to Parker Sheldon, if they should be satisfied that he had actual knowledge of its existence when he purchased.

The question here raised is the effect of actual knowledge of the existence of an unrecorded mortgage of personal property, upon the rights of a subsequent purchaser, who purchases with such knowledge.

Section 32 of c. 125, R. S., 1841, provides that no mortgage of personal property, made since the 24th day of April, 1839, or that shall be made hereafter, when the debt thereby secured amounts to more than the sum of thirty dollars, shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; or unless the mortgage has been or shall be recorded by the clerk of the town where the mortgager resides.

The Supreme Court of Massachusetts, under a statute similar in substance to the section above cited, have decided that when personal property is mortgaged, without delivery thereof to the mortgagee, and the mortgage is not recorded, a party who buys the property of the mortgager, and takes possession of it, though he has knowledge of the mortgage, will hold the property against the mortgagee. *Travis* v. *Bishop*, 13 Met., 304.

But, in New York, under a similar statute, it has been decided that knowledge in a creditor of the existence of a mortgage on personal property, which has not been duly filed, will not preclude him from availing himself of the objection. The statute makes no exception. The mortgage is absolutely void as against the creditors of the mortgager. It is different as to subsequent purchasers and mortgagees. They must, in order to be protected, take their conveyances in good faith, and that cannot be if they have actual knowledge of the existence of an antecedent mortgage, and are conscious that their conduct, if it should be available, would have the tendency to reduce the security of an innocent but careless creditor. *Farmers' Trust and Loan Co.* v. *Hendrickson*, 25 Barb. N. Y. R., 484.

At common law, as a general rule, to make a transfer of personal chattels valid against subsequent purchasers, *bona fide*, there must be a delivery, actual or symbolical, and in general, also, the possession of the goods must be retained by the vendee. *Lanfear* v. *Sumner*, 17 Mass., 110; *Goodenow* v. *Dunn*, 21 Mass., 86; 2 Kent's Com., 581. But against a person having no right, such delivery is not necessary. *Parsons* v. *Dickinson*, 11 Pick., 352.

Recording a mortgage of personal property is equivalent to, and a substitute for delivery and possession. *Bullock* v. *Williams*, 16 Pick., 33; *Smith* v. *Smith*, 24 Maine, 555.

Statutes providing for the registry of mortgages of personal property are of comparatively recent origin, and were undoubtedly adopted by the Legislature, from considerations similar to those which occasioned the registry Acts for real

estate. All registry laws are designed to give notice of the condition of the title to property, and thereby to prevent deception and fraud.

The statute now under consideration, providing for recording mortgages of personal property, is the same in substance, and, in fact, in almost the same words, as c. 36, § 1, statutes of 1821, for recording deeds and other conveyances. This statute provision may be traced back through the statutes of Massachusetts to the Colony law, c. 28, § 1; Anc. Chart., 85; and is also found in stat. 1783, c. 37, § 4.

The decisions of the courts in Massachusetts and in this State, under these statutes, have been numerous and entirely uniform, that actual notice proved is to the person affected by it, as useful, and ought to be attended with the same consequences, as public notice by registry. These decisions rest upon the ground that a party having knowledge of the existence of an unrecorded deed, is estopped to set up want of registry; and that an attempt to defeat such prior conveyance, under such circumstances, would be in violation of good conscience, and fraudulent. This principle is too well established to require the citation of authorities in its support. The obvious equity of the rule must also commend it to the approval of every honest, right thinking mind. It is equally sound in morals and in law.

Such being the rule of law in relation to real estate, deduced from great fundamental principles of equity and natural justice, independent of specific statutory provisions, and in apparent opposition to the literal reading of the statute, it is not easy to perceive on what ground a directly opposite result can be reached, under statutes of precisely the same import, and, in many instances, in the same words, where title to personal estate is involved. It is believed that no sound reason can be given for such distinction. Nor, indeed, do the authorities support it.

It seems, that a mortgage of personal property, where the mortgager retains the possession, is not valid against a subsequent *bona fide* purchaser or attaching creditor, if there be

neither record of the mortgage *nor actual knowledge of it* on the part of the purchaser or creditor. 1 Parsons on Cont., 453.

In *Smith* v. *Moore*, 11 N. H., 55, the Court say that, "to protect property against creditors, when the mortgager resides out of the State, (their registry Act for mortgages of personal property, Act of 1832, not providing for recording in such case,) the mortgagee must take and retain the possession; *unless, perhaps, in case of actual notice.*"

In *Stowe* v. *Meserve*, 13 N. H., 46, the same question arose, and the Court say that, "although the exception to the statutory provision has long been settled, the proof necessary to bring the parties within it, seems to have been very little considered."

In *Gregory* v. *Meserve*, 20 Wend., 17, which was a claim of a second mortgagee against the first, in a case where the first mortgage was not filed according to the provisions of the statute, the Court, in their opinion, by COWEN, J., say:—"The offer to prove that the plaintiff below took his mortgage with actual notice of the defendant's prior mortgage, destroyed the character on which alone he could be protected. To say that a man takes *in good faith* when he acts with notice, and, of course, under conscious hostility to another, who has before taken a similar title, would be a legal solecism. The object of the statute here, is that of all the other registry Acts, to prevent imposition upon subsequent purchasers and mortgagees, who must, many times, govern themselves by appearances. When every thing is actually explained to them, they have the best kind of knowledge."

In *Sanger* v. *Eastwood*, 19 Wend., 514, it was held that actual notice was equivalent to recording, and, that a party having such notice, acquired no rights against a prior mortgagee. In this case, NELSON, C. J., says, in the opinion of the Court, that "clear notice of a prior claim is considered, *per se*, evidence of *mala fides.*"

The cases of *Witherell* v. *Spencer*, 3 Mich., 123, and *Hill* v. *Beebe*, 3 Kernan, sustain the same doctrine.

An argument has been deduced in favor of the position

that actual notice is of no avail under this statute, from the fact, that, when the general statutes of the State were revised, in 1841, a qualification, as to the effect of actual notice, was introduced into the statute with reference to conveyances of real estate, while that having reference to mortgages of personal property was permitted to stand as it was originally enacted. The history of legislative and judicial action upon this subject will show that no such deduction can legitimately be made. The statute in this State, providing for the recording of mortgages of personal property, is, as we have before remarked, of recent date, originating in 1839. From that time until the statutes were revised, in 1841, it was, as has been seen, substantially the same as the statute providing for the registry of conveyances of real estate, neither containing provisions declaring the effect of notice to third parties.

Under this statute with regard to real estate, while it stood thus unqualified as to notice, grew up the series of decisions to which allusion has already been made. These decisions not only held persons bound, who had *actual notice* of prior unrecorded deeds, but those who had *constructive notice* of such unrecorded deeds, and open and notorious possession of the first purchaser, under his deed, was held sufficient to raise a presumption of such notice. *McMechan* v. *Griffing*, 3 Pick., 149; *Colby* v. *Kenniston*, 4 N. H., 262; *Norcross* v. *Widgery*, 2 Mass., 506.

It has long been the settled construction of the statutes requiring the registry of conveyances, that the visible possession of an improved estate by the grantee, under his deed, is implied notice of the sale to subsequent purchasers, although his deed has not been recorded. *Mathews* v. *Demerritt*, 22 Maine, 312; *McKennie* v. *Hoskins*, 23 Maine, 230.

Such was the settled rule of law in this State when the R. S. of 1841, c. 91, § 26, with reference to actual notice of unrecorded deeds, was passed. That provision was one of limitation, not of enlargement. It restrained the subsequent purchaser, only when he had actual notice; whereas, before, the Courts had held him equally restrained by constructive notice. It charges him with fraud only when he has actual

knowledge of the prior conveyance; whereas the Courts had held him responsible as for a fraudulent act, when that knowledge was only implied from circumstances. I think the Legislative the better and more equitable rule.

As to personal property, the rule of implied or constructive notice has never been adopted. The Legislature, therefore, had no occasion to interfere, as in the case of real estate, when the statutes were revised in 1841. They may therefore well have permitted the statute to stand as it before existed, if their attention was called to the subject. But if we are to suppose that this distinction received the attention of the Legislature, the legitimate inference is that they deemed it necessary to limit the rule adopted by the Court, in relation to constructive notice of conveyances of real estate, but desired to have the old judicial rule applied to mortgages of personal property; otherwise, they would have applied the limitation in this case also, the provisions of the two statutes being in substance the same. But the ruling of the Court, in the case at bar, does not go to this extent.

The object of all registry Acts is the same; it is to give notice of the condition of the title to property, and thereby to prevent fraud and deception, and to insure honesty and fair dealing among men. . Courts are, therefore, not to construe those Acts so literally as to work injustice, but so liberally as to prevent the mischief and advance the remedy. *Jackson* v. *West*, 10 Johns., 466.

The Legislature could not have intended that such an interpretation should be put upon this statute, as would enable a dishonest and designing purchaser, with full knowledge, to conspire with a corrupt or imbecile mortgager, and thus stealthily to defraud a prior *bona fide* mortgagee. Nor do I believe that the Courts will, on consideration, adopt so literal a construction of the statute, in clear violation of the general, equitable and well established rules of construction, which have obtained in analogous cases.

The defendant contended that the purchase by Sheldon was a sham, and that Larry never delivered the logs to him, and the Court instructed the jury that, if that purchase was fraud-

ulent, or the logs were not delivered under it, the title to the logs would not pass. It is contended that this instruction is erroneous. As a rule for general application, it may not be technically correct. But in determining the correctness or incorrectness of a particular instruction, reference must be had to the circumstances of the case then before the Court.

There is no intimation in the case, no suggestion from any quarter, that the mortgage from Heald and his associates to White and Norris was not made in good faith and for a valuable consideration. The objections to its validity are of a character purely technical. These objections, as we have already seen, are untenable, so far as want of interest in Heald and others was concerned, and also against a person having knowledge, on the ground that Heald's mortgage to Norris was not properly recorded.

The defendant holds under the title of White and Norris. The plaintiff claims title under a conveyance which the defendant declared to be a mere sham, and that no delivery was had under that conveyance. The contest was for precedence of right under these titles. No other question was involved, or then before the Court. We have already seen that the plaintiff should prevail against the unrecorded mortgage of White and Norris, if he had knowledge of its existence at the time of his purchase, because it would be fraud in him so to do. He is estopped from setting up, against them or their grantees, a title obtained under such circumstances. If this is sound law, then, *a fortiori*, is he estopped from setting up a title which, against them, is actually fraudulent,—a mere sham. Such was, in substance, the ruling of the Court. This is not a case under the statutes of Elizabeth, in which subsequent purchasers or creditors are assailing Sheldon's title as fraudulent as to them, but a case in which the question is whether he shall be permitted to set up a subsequent title, in fraud of the equitable rights of prior mortgagees in good faith, but against whose title there are supposed to exist certain technical, statutory defects.

In *Daggett* v. *Adams*, 1 Greenl., 198, this Court held that a fraudulent purchaser of goods has no right to contest the

regularity of the doings of an officer, who has seized them as the goods of the debtor, (vendor,) by virtue of an execution against him. But this case has been revised, and in the case of *Andrews* v. *Marshall*, 43 Maine, 272, it has been held that such fraudulent purchaser may maintain his right to goods thus purchased, against a naked trespasser, or person having *no* rights. Neither of these cases, however, is analogous to the case at bar.

Those cases involved questions of fraud as to creditors, under the statute of Elizabeth, in which the effect of the fraud is pointed out by the statute. The case at bar involves a question of fraud at common law; that kind of fraud which taints and contaminates whatever it touches. There is no suggestion in the case, that the sale from Larry to Sheldon was for the purpose of delaying or defrauding the creditors of Larry. But the question was whether the circumstances of the case were such as to render it a fraud upon White and Norris, or whether there was, in the transaction, such want of *good faith* as would preclude Sheldon from setting up that title against them. It was, evidently, in view of this state of things, at the trial, that the instruction was given, and under such circumstances it was not erroneous, nor could it tend to mislead the jury, to the prejudice of the plaintiff.

There were objections to other instructions and directions of the Court, but, on examination, those objections are not sustained. In my opinion, the exceptions should be overruled.

MAY and GOODENOW, JJ., concurred.

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NOTE BY DAVIS, J. — I concur with Judge RICE, in the opinion that the right to cut timber under a permit may be sufficient to uphold a mortgage of it before it is cut.

But I am not satisfied with his reasoning on the effect of notice of an unrecorded mortgage. The considerations presented were proper for the *Legislature*. But in the face of the absolute statute provision, that no unrecorded mortgage "*shall be valid*," I cannot see how the mortgagee can have any rights under such a mortgage, against any one but the mortgager. On this point, I am constrained, though reluctantly, to concur with Chief Justice TENNEY. "The statute having made no exception, we can make none." 9 How. U. S., 522.

# APPENDIX.

## PROCEEDINGS OF THE BAR ON OCCASION OF THE DEATH OF HON. JUDGE HATHAWAY.

At a meeting of the members of the Penobscot Bar, holden June 7th, 1862, the following resolutions were adopted, as reported by a committee previously appointed, consisting of E. L. Hamlin, S. H. Blake and A. Sanborn:—

*Resolved*,—That the sudden and unexpected death of the Hon. Joshua W. Hathaway, late one of the Justices of the Supreme Judicial Court, and, at the time of his decease, in active practice as a member of this Bar, has not failed to remind us of our uncertain and feeble tenure of life, of the instability of all earthly hopes, and to present to us a solemn warning to be prepared soon to follow his footsteps through "the valley of the shadow of death."

*Resolved*,—That, in the removal of our brother from this life, we derive great consolation from our remembrance of his public services, so satisfactorily performed, and his exemplary character as an honest and upright man, and as a good and useful citizen.

*Resolved*,—That, in the discharge of his official duties, as Justice of the District Court, and as Justice of the Supreme Judicial Court, it is a source of much gratification to us to have witnessed his constant and faithful devotion to the impartial discharge of his responsible duties, and to know that he has had a reward from the confidence which the public has ever placed in his honesty, fidelity and legal acquirements.

*Resolved*,—That, in token of our regard for the deceased, we will attend his funeral.

*Resolved*,—That a copy of these resolutions be furnished to the family of the deceased, and that they be entered upon the records of the Bar.

The resolutions were presented to the Court by Mr. Blake, with the following remarks:—

MAY IT PLEASE THE COURT:—The members of the Bar, at their meeting this morning, have been pleased to assign to me the duty of announcing to you, the melancholy intelligence of the death of our brother Hathaway. He died at his residence, in this city, yesterday morning, at two o'clock. His illness was only of a few days, for, but last week, you will remember, he stood up upon this floor and argued a cause before you with his accustomed power, and to-day his body reposes in its coffin—dust to be committed to dust.

I was not prepared for the death of our brother, and this sad lesson may well remind us all, I think, of what the world so often forgets, that death is always certain and may be sudden. Let it admonish us of the frail tenure of our lives, and let it teach us the duty of being always ready to surrender them to Him who gave them, "for in the midst of life we are in death."

Few men have performed better their part in life, or fulfilled better the duties of a good citizen, than Judge Hathaway. He was born Nov. 10, 1797. He entered Dartmouth in 1816, and graduated at Bowdoin in 1820. In college he was distinguished for his scholarship, and particularly as a writer of English composition.—He read law, and commenced its practice at Bluehill, in 1824, where he remained until the spring of 1825, when he moved to Ellsworth.—He had a large practice in the county of Hancock, and early took the lead there in his profession. He one year represented the county in the State Senate with distinguished ability. In 1847, he moved to Bangor. He brought here a fine reputation and great fondness for his profession, and acquired high rank and a large practice. In 1848, he was appointed to the bench of the District Court, and, when that Court was abolished, he was appointed, in 1852, one of the Justices of the Supreme Court.

As a Judge, he presided always with dignity and urbanity, and his published opinions attest his learning and ability. They are remarkably well written, and are distinguished for their clearness, directness and conciseness. Indeed, his mind seemed naturally to reject ornament or illustration in writing or speaking, but to delight in plain statement, with enough only of foliage to relieve without concealing the size and strength of the trunk and limbs. His habits were plain, his tastes were plain, but he had fine culture, and his faculties harmoniously blended in the honest man, the able lawyer and upright Judge.

Judge Hathaway was true always to his clients. He was kind and courteous to his brethren of the Bar. He was genial in society, companionable at his office, hospitable at his house, and, in all the relations of life, he was cheerful, ingenuous and upright.

Our brother has gone—he has gone to that country

"From whose bourne no traveler returns,"

and to which we are all fast hastening. He leaves behind him only his name, his character, and the memory of the virtues that adorned him in life. The autumnal leaf has silently fallen to the ground—for a while we shall at times recall its beauties and then forget it—such is life—but the good deeds of our departed brother will have become a part of our lives, and will live forever.

I may only add, that we give to the memory of our lamented brother the tribute of our sincerest respect, and we all ask to join in tendering to his afflicted family our kindest offices and our tenderest sympathies in this hour of their bereavement. May the widowed wife, the most estimable of women, and our brother, who is absent, the idolized son, both be long spared to sustain each other, and to remember the fondest of husbands and the kindest of fathers, whom they both so loved and venerated.

### Remarks of Judge Appleton.

I can well express my cordial concurrence in the truth of the resolutions so feelingly and eloquently announced—resolutions, not the unmeaning expressions of indifferent regard, but the appropriate utterance of respect for departed worth—resolutions, not merely indicating the sentiments of the profession of which our departed brother was so long an honored member, but of the whole community in which he resided, and of the bench in whose deliberations he so ably participated.

I can well bear witness to the justice of the merited tribute you have paid to his memory, for I have known him long and well. Our acquaintance is of no recent origin. Our friendship has not been the growth of an hour. It goes back to the days of youth and the pleasant recollections of college life. It embraces the contests of the bar—never for a moment interrupted in the ardor and excitement of forensic debate. It is associated alike with the delights of social intercourse and our common judicial labors in the service of the public. It includes the whole range of active life, from the time we were together laying the foundations upon which the superstructure of our future was to be erected, till the hour when, in the fullness of his appointed time, he was so suddenly taken from our midst.

I well remember Judge Hathaway in college—a close student, of quick apprehension, he there held a high rank in a class of eminent ability. After leaving he commenced the study of the law; and, with his acknowledged talents and his devotion to professional pursuits, he made himself a thorough master of the great principles upon which it must ever be administered.

Almost immediately on his admission to the bar, he commanded a large and extensive practice. A sound and accurate lawyer—of good judgment—of an honest intellect—quick to perceive the necessities and ready to meet the emergencies of a cause, he soon took rank among the leaders of

the bar of the State. In a long and laborious career, I do not remember a harsh and unkind word spoken—an ungentlemanly expression or a discourteous remark. He was satisfied with the full discharge of his duty, without scattering abroad imputations of fraud or allegations of dishonesty upon parties and upon opposing counsel. His arguments were forcible, though generally brief—for the jury rather than the public—for the cause rather than for display. He condensed rather than expanded the material out of which they were constructed. In the terse language of professional obligation, he conducted his cause, according to the best of his knowledge and discretion, and with all good fidelity, as well to the courts as to his clients. What more could he do? What more should he do?

After the preparation afforded by a full practice at the bar, he received an appointment upon the bench—an appointment due to his ability, his learning and his high professional standing. The duties of judicial life were not irksome to him. Patient in the trial of a cause, he gave ample time to elicit all its facts, and the attention necessary to their just appreciation. Perceiving clearly the rights of a cause, he endeavored that those rights should be strictly enforced. Evenly and impartially he held the scales of justice. Firmly, with courtesy, and with dignity, he presided over its administration. The public confided in the honesty of his purpose and the uprightness of his judgments. But his judicial reputation must hereafter rest upon his recorded opinions, as embodied in the Reports of the State. Without any ambitious show of learning, or any unnecessary citation of authority, he presented, in a style eminently lucid, and with great clearness and strength of argument, the conclusions to which he arrived, and the reasoning upon which those conclusions were based.

A man of strict integrity, he passed through life without the taint of suspicion or the word of reproach, commanding the respect and confidence of the public, while his kindly nature, his warm affections, his cheerful temper and his courteous manners, endeared him to his friends. Enemies he had none.

We are ever reminded of the feeble tenure by which life

is held. But a few days ago, during the present term, our friend paid with us the last offices of respect to a departed brother,* venerable for length of days and an honorable life, little aware how almost immediately he too was to be followed by us to the common resting place of all. The friends of youth, the associates of mature life, are passing away. The ground upon which we tread is gliding from beneath our feet. Death, night and day, and day and night, is inexorably pursuing his fated victims,

"Nam nox nulla diem, neque noctem aurora secuta est,
Quæ non audierit mistos vagitibus ægris,
Ploratus, mortis comites, et funeris atri."

Though called thus suddenly, our brother was not unprepared. Perceiving the hand of death upon him, without a murmur or complaint, trusting in the mercy of God, calmly, quietly he met the approach of the victorious conqueror of humanity; fearing "not the sentence of death," but remembering that "this is the sentence of the Lord over all flesh," acceptable "unto the needy and unto him whose strength faileth."

The loving husband, the kind father, the affectionate brother, the warm friend, the pleasant companion, the good citizen, the just man, the learned counsellor, has gone to meet his reward. Vain and idle are words of consolation. Time, with lenient hand and the dear memories of the past, can only assuage the bitterness of grief. While our sincerest sympathies are with those who are thus suddenly called upon to mourn an irreparable loss, we should grieve not for the departed, for he is at rest.

"Weep not for him who dieth—
For he sleeps, and is at rest.
And the couch, whereon he lieth,
Is the green earth's quiet breast."

Let the resolutions of the bar be entered upon the records of the Court, and, in token of respect to the memory of the deceased, let the Court be adjourned.

* John Godfrey, Esq.

# ADDITIONAL RULE OF COURT.

In case of a disagreement of the members of the Court in a cause argued orally or otherwise, the papers in the case, with the briefs of counsel, shall be submitted to the members of the Court not present at the term; and the decision shall be made by all the members of the Court, unless the counsel, or either of them, at the term when the case is entered, shall enter their dissent thereto upon the docket.

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The case of *Coffin* v. *Rich*, 45 Maine, 507, examined and approved.
*Thompson* v. *McIntire*, 34.

## CONTRACT.

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## CORPORATION.

1. It is the duty of every employer to use all reasonable precautions for the safety of those in his employment, by providing them with suitable machinery, and keeping it in a condition not to endanger the safety of the employed; and, by the same reasoning, bridges, passageways or ladders necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer. *Buzzell* v. *Laconia Manufacturing Co.*, 113.
2. The master is responsible to the servant for an injury caused by the negligence and want of ordinary care of the former, the defect occasioning the injury being known to the master, and not to the servant. *Ib.*
3. But, if the defect was known to the servant, or to both servant and master, and the servant continued in the service, he assumed the risk himself. *Ib.*
4. Neither can the servant recover, if his own neglect contributed to the injury. In order to maintain his suit, he must show ordinary care on his part. *Ib.*
5. In a suit for damages to an employee, arising from the neglect of the employer, in the use of defective machinery or tools, the declaration is bad, if it does not allege, that the defect was unknown to the plaintiff, as well as known to the defendant, and that it arose from the want of proper care and diligence on the part of the defendant. *Ib.*
6. In an action brought by an employee of a corporation to recover damages for a personal injury received while in their service, the burden of proof is on the plaintiff to show negligence on the part of the corporation.
*Beaulieu* v. *Portland Co.*, 291.

## DECLARATION.



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## EXECUTORS AND ADMINISTRATORS.

An action does not lie against the husband, as an executor *de son tort*, for acts of his wife, done without his knowledge. Otherwise, where he advises or aids her in the commission of the wrongful acts; for every one, thus participating, becomes a principal. *Hinds* v. *Jones*, 348.

See EQUITY, 5. TRESPASS, 3. TRUSTEE PROCESS, 1.

## FENCE.

1. In an action of trespass *quare clausum* for breaking and entering the plaintiff's close, by the defendant's cattle, in order to sustain the defence that the cattle were lawfully on the adjoining close, and escaped therefrom in consequence of the neglect of the plaintiff to maintain his part of the partition fence, it must appear that there has been a division of the fence, either by fence-viewers, by a valid agreement between adjoining owners, or by prescription. *Knox* v. *Tucker*, 373.
2. The division must be such as to impose on the plaintiff the obligation to build and maintain a legal fence, upon a certain, well defined portion of the line. *Ib.*
3. If there has been no such division of the fence, each party is bound, at his peril, to keep his cattle upon his own land *Ib.*
4. An agreement for the division of the line fence, by adjoining owners, in order to be binding on them and their privies, must be in writing. *Ib.*
5. In a case in which a line fence was built in separate portions by the adjoining owners, and maintained by them in the same manner for more than twenty-five years, some agreement or grant, by which a legal division of the fence was established, may well be presumed. *Ib.*

## FLATS.

See DEED, 5.

## FLOWAGE.

1. The process, under our statute, to obtain damages for flowing land by a mill-dam, is a personal action, and, when the damages demanded do not exceed one hundred dollars, may be served by a constable. *Hall* v. *Decker*, 255.
2. Under a complaint for flowage, where commissioners have been appointed to appraise the damage and limit the extent of future flowage, (as provided by § 9 of c. 92 of R. S. of 1857,) it will be a valid objection to the acceptance of their report, that it does not thereby appear that the parties were heard, or notified to appear. *Coleman* v. *Andrews*, 562.
3. If, in fact, the parties were notified, the report should be recommitted for correction; if not notified, that they may be, and have an opportunity to be heard. *Ib.*

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## NONSUIT.

A judgment on *nonsuit* in a former case between the same parties, for the same cause of action, is no bar to a second suit, when it appears that the former case was not tried on the merits. *Jay* v. *Carthage*, 353.

## NOTARY PUBLIC.

1. The protest of a promissory note, under the hand and seal of a notary public, is made by our statutes sufficient evidence of the facts stated in such protest, in any court of law. *Williams* v. *Smith*, 135.
2. A notarial protest which states that the notary "made notices to all the indorsers," which he "caused to be left at their dwellinghouses," is not sufficient evidence of notice to charge the indorsers of a promissory note. *Union Bank* v. *Humphreys*, 172.

## NOTICE AND DEMAND.

See BILLS AND NOTES.

## OFFER TO BE DEFAULTED.

1. If a defendant causes to be entered upon the docket an offer to be defaulted for a specified sum, but has no time fixed for its acceptance, the plaintiff may accept it at any time before it is revoked. *Hartshorn* v. *Phinney*, 300.
2. If the plaintiff subsequently accepts the offer, he is not entitled to costs from the time it was made, but the defendant is. *Ib.*

## OFFICER.

1. An officer *de facto* is one, who executes the duties of an office under some color of right, some pretence of title, either by election or appointment. *Hooper* v. *Goodwin*, 79.
2. The acts of an officer *de facto* are valid when they concern the public or the rights of third persons, and cannot be indirectly called in question, in a suit to which such officer is not a party. It is only in a suit against him that his right can be questioned. *Ib.*
3. *Thus*, in a suit upon a poor debtor's bond, where the defence was, that the debtor had performed one of its alternative conditions, by taking the oath required, evidence that the justice, who issued the notification to the creditor, was, at the time he was commissioned, a minor and not eligible to the office, was rightfully excluded. *Ib.*

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## SUPREME JUDICIAL COURT.

1. The Supreme Judicial Court of Maine has general common law jurisdiction in all cases unless its powers are restricted by the constitution or by statute. *Badger* v. *Towle*, 20.
2. Cases enumerated, in which it has jurisdiction, if either or both of the parties reside without the State, and there has been personal service upon the defendant, or his property has been attached. *Ib.*

See PRACTICE.

## TAX.

1. The term "highest bidder," used in the statute authorizing collectors to sell real estate for unpaid taxes, means the one who will pay the tax, &c., for the least quantity of land. *Lovejoy* v. *Lunt*, 377.
2. A sale of real estate, by a collector to pay the taxes assessed thereon, is invalid if the whole tract is sold, and the collector does not certify, in his return to the town clerk, *that it was necessary to sell the whole to pay the taxes, &c.* *Ib.*
3. Such sale of the real estate of a resident is invalid, unless the collector's return shows that he gave the owner or occupant ten days' notice of the *time* and *place* of sale. *Ib.*
4. A collector of taxes, legally qualified, acting within the scope of his powers under a warrant from competent authority, is protected against all illegalities but his own. *Judkins* v. *Reed*, 386.
5. His return is *prima facie* evidence of the facts stated therein. *Ib.*
6. A man cannot have a residence for purposes of taxation in two towns at the same time. *Ib.*
7. When a town line passes through the house of a person, his residence will be held to be in that town in which the most necessary and indispensable part of his house is situated, especially if the out buildings and other conveniences are in that town. *Ib.*
8. Where a person was taxed for personal estate, by the assessors of a town, of which he was not an inhabitant, and was compelled to pay the tax, which he paid under protest, or where it was paid by seizure and sale of his property, and the money paid into the town treasury, he may recover the same, in a suit against the town for money had and received, without proof that the acting officers of the town, who assessed, collected and received the money, were legally elected and qualified. *Hathaway* v. *Addison*, 440.

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