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 XLIX.

HALLOWELL:
MASTERS, SMITH & CO.
1864.

ENTERED according to Act of Congress in the year 1864,
BY MASTERS, SMITH & Co.,
in the Clerk's office of the District Court of Maine.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

HON. RICHARD D. RICE,
HON. JOHN APPLETON,
HON. JONAS CUTTING, LL. D.,
HON. SETH MAY,
HON. DANIEL GOODENOW, LL. D.,
HON. WOODBURY DAVIS,
HON. EDWARD KENT, LL. D.,

} ASSOCIATE JUSTICES.

HON. CHARLES W. WALTON, was appointed Associate Justice, on the 14th day of May, A. D. 1862, in place of MAY, J., who had retired from the Bench.

ATTORNEY GENERAL.

HON. JOSIAH H. DRUMMOND.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT.

1860.

COUNTY OF PENOBSCOT.

BANGOR, OLDTOWN & MILFORD R. R. CO. *versus* THOMAS SMITH.

The prevention of the doing an unauthorized and unlawful act does not constitute a good cause of action, on the part of the incipient wrongdoer, who is interfered with in the commission of his intended offence.

The plaintiffs, a railroad corporation, brought a special action on the case against the defendant, for preventing their constructing a branch track across a public highway, where they were not legally authorized so to construct it: — *Held*, that the action was not maintainable; that, if the defendant wrongfully entered upon the land of another to prevent the construction of such branch railway, he would be liable to the owner in an action of trespass therefor; and that he was not liable in case to the railroad corporation for merely preventing their violating the law.

If plaintiffs fail to establish their right as set forth in their writ, they will not be allowed to amend, by making a different description of their cause of action, so that they may recover nominal damages.

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

THIS was an action on the case, which this Court has before had under consideration: — *vide* 47 Maine, p. 34.

The plaintiffs introduced evidence to prove, and the witnesses testified, that, at the time alleged in the writ, the plaintiffs' employees were proceeding under the direction of

their President, to build or construct a branch track of their road over the land of Samuel Veazie, in Oldtown, with his consent, he being at the time President; that while so engaged on the land of said Veazie, this defendant, with a large number of other men, resisted their further proceedings, and continued their opposition so long that they finally abandoned their work, and never afterward resumed it.

It also appeared from plaintiffs' testimony, that their intention, at the time, was to construct a track across the public highway on a curved line, such as this Court, in this case, have decided, (47 Maine, 34,) they had no right to construct; that the only purpose of the persons so engaged was to extend the track across the road, and the only object of the defendant, and other citizens of Oldtown, was to resist the laying across the road; that no question was made at the time, whether they were on Veazie's land or not, and that plaintiffs' object was not to build merely on Veazie's land to the street, unless the track could be carried across said street—which the defendant, as a citizen of Oldtown, resisted.

Notwithstanding the decision, the plaintiffs now claim damages for being prevented from building said road or constructing the track upon the said Veazie's land, although they had no right to continue it across the road, the track in such case being capable of being used as a side track.

The presiding Judge being of opinion that the action could not be sustained to recover such damages, the case was taken from the jury and continued, on report, with the agreement, that if the action cannot be sustained, a nonsuit is to be entered, otherwise, the action should stand for trial.

The plaintiffs moved for leave to amend their writ, if, under the foregoing facts, any action can be sustained, so as to make it conform to their rights.

The case was argued by

A. W. Paine, for the plaintiffs, and by

J. A. Peters, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiffs, a corporation established by the law of this State, undertook to construct a branch track of their railroad across the public highway in Oldtown. The defendant, with others, denying the right of the plaintiffs to construct the branch track as claimed by them, interfered and prevented the laying down of the same. For this interference, the plaintiffs have brought a special action on the case, setting forth their right to construct such branch track, and the doings of the defendant, by which they were prevented from constructing it.

When this case was before under consideration, the Court held that the plaintiffs, not having brought themselves within the provisions of the law, could not legally construct the branch track in the way and manner proposed by them.

The branch track described in the plaintiffs' writ, and to which all the evidence relates, crosses the public highway. The branch is an unit. The plaintiffs were desirous of and had commenced the building the track as a whole—the writ alleges no intention of building a part of the same. They were undertaking to build *the branch track*. They had no right so to do. Undertaking what by law they were not authorized to do, and what, if done, would have been the proper subject of an indictment, they were prevented by the defendant from executing their unlawful purpose.

The action, then, is one in which the plaintiffs claim damages because they were prevented from doing an illegal act, and for which, if done, those engaged in its commission would have been criminally punishable. It is difficult to perceive how the prevention of an offence constitutes a valid cause of action on the part of the would be offender, who is interfered with in the commission of his intended offence. It is still more difficult to understand how any damages can have been sustained by reason of such interference.

But it is insisted that the defendant's interference took place before the plaintiffs reached the highway over which they were about laying their track. But this does not alter

the case. The branch track would be utterly useless if not laid its whole length. The plaintiffs had no intention of laying it a part of the way. The grievance complained of is the not being permitted to lay *the branch track*, not an useless portion of the same. The defendant had no objection to the laying of part of the track so long as it did not interfere with the public highway; and the case shows that the building the track across the highway was the sole matter in dispute.

The plaintiffs' writ, coupled with the facts admitted in the case, negatives the plaintiffs' right to recover. It alleges that the track in question was "legally and properly located and established by consent of the owner of the land over which it was so established and laid out, and fully confirmed and approved by the County Commissioners of said county of Penobscot, in a proper and legal manner." But it has been determined that the track in controversy has not been legally located and established, and that the plaintiffs had no legal right to construct the same as they proposed to do.

The claim for damages as set forth in the second count is, that "by reason of such unlawful proceeding of the defendant as aforesaid, the plaintiffs have wholly lost all right and power to hold said road, and are therefore without right and power to finish said road and to enjoy the benefits thereof; but, on the contrary, are daily ever since, and ever must be hereafter, subjected to great additional expense and trouble, as well as danger, to pass their cars and trains from the mills on their track, and thus to Bangor," &c. In the first count, the damages are set forth as having arisen from the defendant's "having prevented the plaintiffs resuming and finishing said track until the full time had expired within which the plaintiff company had right or authority to complete or construct said road," &c. The damages are alleged to follow from an interference by the defendant with the plaintiffs, in the enjoyment of certain rights, particularly that of building the branch track. But as the plaintiffs had no legal right to construct and complete the branch track, as

they claimed to do, they cannot have sustained any loss from that special cause, and having lost nothing, they have set forth no ground for having damages awarded them.

The plaintiffs having failed to establish their right, as set forth, now ask for leave to amend their writ by making a different description of their cause of action, so that thereby they may recover nominal damages. This they should not be permitted to do. A new trial will not be granted to enable a party to recover nominal damages. *Jenney* v. *Delesdernier*, 20 Maine, 183. Neither should an amendment be allowed for any such purpose. The right to lay the branch track was asserted by the plaintiffs and denied by the defendant. It was the only question at issue between these parties. The plaintiffs attempted what they were not authorized to do and the defendant resisted, and the Court affirmed the propriety of that resistance.

If the defendant entered wrongfully on the land of Gen. Veazie and there prevented the further prosecution of the plaintiffs' undertakings, it may be a trespass for which he would be liable to the owner of the soil, but such is not the subject of this suit, nor is this an action of trespass.

If the defendant violently interfered with the laborers in the plaintiffs' employ, before the branch track they were laying had reached the public highway, he may be liable to them, severally, for any assault he may have committed, but the declaration in this case discloses no such cause of action.

The prevention of the doing an unlawful and unauthorized act does not, *per se*, constitute a good cause of action on the part of the would be and incipient wrongdoer,—and that is the whole of the plaintiffs' case. *Plaintiffs nonsuit.*

TENNEY, C. J., CUTTING, MAY and KENT, JJ., concurred.
RICE, J., did not concur.

GEORGE FORBES & *al. versus* GEORGE E. WOODERSON.

Where one was constituted an agent for the purchase and sale of goods in the name of the principal, a recital, in the power of attorney, that the principal "is about to leave upon a voyage to sea," does not limit the duration of the agency to the time when the voyage was completed.

ON REPORT. ASSUMPSIT for goods purchased by John Wooderson as the agent and attorney of the defendant, who denys that the said John was authorized so to purchase.

The plaintiffs offered in evidence, a writing dated October 22, 1855, signed by the defendant, which is as follows:—

"Know all men by these presents, that I, George E. Wooderson, am about leaving Bangor upon a voyage at sea, and do hereby make John Wooderson, of said Bangor, my agent and attorney, with power to substitute any other agents and attorneys, in my name and stead, to transact for me any and all business of every name and nature as fully as I could do myself, including the transfer of any property, the prosecution of any suits, and the settlement of any claims or demands whatever, and the purchase and sale of any personal property whatever."

The plaintiffs offered evidence, tending to prove, that, before October 22, 1855, John Wooderson had become insolvent; held no property, nor traded in his own name, but did so, more or less, in the name of the defendant; that some arrangement was made between him and the defendant, that he should carry on the hardware business in Bangor, buying and selling in the name of the defendant. That defendant was a shipmaster, and when about to go on a voyage, procured the paper to be prepared, for his signature, that said John might have it as evidence of his authority to use his name.

That the defendant had recently said, on different occasions, that he had no defence to the suit.

That the bills for goods sold at the store were made out in the name of the defendant; and that he personally left them with an attorney for collection.

Hilliard & Flagg, for the plaintiffs.

Blake & Garnsey, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—John Wooderson, as the agent of the defendant, purchased the goods, to recover payment for which this action is brought.

The questions presented are, whether the agent had authority to bind his principal in the purchases thus made by him, and, if not, whether his purchases, though unauthorized, have been affirmed and ratified.

The agent was authorized by his principal "to transact any and all business of every name and nature, including the transfer of any property, the prosecution of any suits, and the settlement of any claims or demands whatever, and *the purchase and sale of any personal property whatever.*" The authority thereby conferred in express terms authorized the purchase of the goods in suit.

But it is urged that the recital in the power of attorney, that the defendant is "about leaving Bangor upon a voyage at sea," limits the duration of the agency, and that, as the defendant had returned from that voyage before the purchases were made, he ceased to be liable for the acts of his agent. But we do not so regard it. The voyage may have been an inducement leading to the appointment of an agent, but it is no limitation upon the duration of the authority conferred. The time during which the agency was to continue is unlimited, and the authority granted has not been revoked. The purchases made were within the unquestioned powers of the agent.

But, if it were otherwise, the evidence adduced clearly shows that the defendant, in repeated instances, ratified the acts of his agent, with a full knowledge of what he had done, and consequently is bound thereby.

Defendant defaulted.

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

HENRY C. GARLAND *versus* JAMES W. WILLIAMS.

The plaintiff was arrested on an execution and gave the bond provided by statute. The last day of the six months was Sunday. He commenced his disclosure on Saturday, but the proceedings not being completed the justices adjourned to meet at the jail on Monday. Before the expiration of the six months, the debtor, to save a breach of the bond, voluntarily surrendered himself and went into jail. He was allowed to take the poor debtor oath on the Monday following by the justices, who gave him a certificate thereof, by force of which he demanded his release of the keeper of the jail; which being refused, he brought an action of personal replevin against the jailer: *Held*, that the action could not be maintained; and that the defendant have judgment for a redelivery of the body of the plaintiff, to be disposed of as the law provides.

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

THIS was an action of PERSONAL REPLEVIN, against the defendant, who was the keeper of the jail in Bangor, under the sheriff of the county of Penobscot,—to replevy the person of the plaintiff from his custody.

The plaintiff having been arrested on an execution, on the 26th day of June, A. D. 1858, gave the bond provided by statute, to be released from arrest. He caused the creditors in the execution to be cited to attend on the 25th day of December, to hear his disclosure, when he would claim to take the oath provided for poor debtors. The parties met at the place and time designated by the notice. The limitation of six months expired on the next day, Sunday. The examination of the debtor was continued on Saturday, by the attorney of the creditors, until a few minutes before twelve o'clock of that night. The debtor then signed the disclosure he had made. The justices adjourned the further proceeding upon the disclosure to the office of the jail in Bangor, to Monday the 27th of said December; and, before that day, the plaintiff had surrendered himself to the jailer.

On the 27th of December, the justices met according to adjournment, when the attorney of the creditors, protesting that further proceeding of the justices was unauthorized, objected thereto; and objected further that the justices

could not adjourn to a place other than that named in the citation.

But the justices overruled the objections, and administered to the debtor the oath provided by statute, and delivered to him a certificate of discharge, by force of which he demanded of the defendant to be released from imprisonment; but the jailer declined to release him. He was subsequently enlarged by this process of replevin.

Upon the trial, the plaintiff offered to prove, that the examination of the debtor was intentionally and unnecessarily protracted by the creditors, to consume the time to twelve o'clock, and thus prevent the debtor from obtaining a discharge. And that, after the debtor had signed the disclosure, the counsel of the creditors objected to the administration of the oath to the debtor, on the ground that he wished to produce testimony and have an opportunity to be heard in the argument of the case; that it was in consequence of this request by the creditors that the justices adjourned for further proceeding.

The plaintiff claimed to introduce this testimony, as these facts are not stated in the record of the magistrates, and do not contradict it.

The presiding Judge excluded the testimony. The parties thereupon agreed that the case should be reported for the decision of the full Court.

The debtor was arrested on an alias execution of the date of June 15th, A. D. 1858. The certificate of discharge of the justices describe the execution on which the debtor was arrested, as having been issued on the 10th day of February, A. D. 1858, and that the debtor, "on the 26th day of June, A. D. 1858, was enlarged on giving bond to the creditors.

The case was argued by

Knowles, for the plaintiff, and by

H. M. Plaisted, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action of personal replevin against the defendant as keeper of the jail in Bangor.

The plaintiff having, on 26th June, 1858, been arrested on execution, gave a bond with the conditions prescribed by law. After duly notifying the creditor in the execution on which he had been arrested to hear his disclosure, on 25th December, 1858, he commenced the same. Before it was finished or the oath taken, he, on the same day, voluntarily surrendered himself to jail, and, after his commitment, and on 27th December, took the poor debtor's oath.

By voluntarily surrendering himself, the plaintiff performed one of the conditions of his bond and the sureties thereon were discharged.

The writ *de homine replegiando* lies in favor of a person unlawfully imprisoned. The plaintiff was not unlawfully imprisoned, for he was in jail by a voluntary self surrender. He was then "in jail on an execution in a civil suit."

The form of a certificate in case of the imprisonment of the poor debtor is given in R. S., 1857, c. 113, § 31, which, by § 32, is to be filed in the office of the jailer, whereupon he is to be set at liberty.

The plaintiff could not file such a certificate for no such had been signed by the magistrates. The one given was applicable to the case of a poor debtor arrested on execution and "enlarged on giving bond to the creditor." It was for one at liberty and not for one then in prison. It gave no authority to the prison keeper to set at liberty the debtor then in his custody, for it was not applicable to one imprisoned.

The plaintiff, then, was a poor debtor, who voluntarily surrendered himself to discharge his sureties. He cannot, when imprisoned, take advantage of an incomplete disclosure, commenced before his surrender. He must, it would seem, commence his proceedings *de novo* for a discharge.

As the plaintiff surrendered himself before completing his disclosure, what took place at that time becomes immaterial.

The certificate of the justices describes a different execu-

tion from that on which the bond was given, and no motion to amend has been made.

According to the agreement of parties, a nonsuit must be entered, and the defendant have judgment for a redelivery of the body of the plaintiff, to be disposed of agreeably to law. *Hutchins* v. *Van Bokelen*, 34 Maine, 126.

Plaintiff nonsuit.

RICE and DAVIS, JJ., concurred.

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

KENT, J., concurred in the result, on the ground, that the discharge, or certificate of the justices, does not properly describe the case,—and the execution therein named is of a date different from that on which the plaintiff was imprisoned; and non-concurred in the opinion as to the giving new notice.

MAY, J., dissenting.—The facts in this case show that the plaintiff, having been arrested upon execution, gave a poor debtor's bond in the usual form; and, to save himself and sureties against a forfeiture thereof, surrendered himself into the custody of the defendant, who was the keeper of the jail in Penobscot county, to which he was liable to be committed under said execution. It further appears, that prior to such surrender he had cited the creditors before two justices of the peace and of the quorum; submitted himself to examination at the time and place appointed therefor; and, under the direction of the magistrates, actually completed and signed his disclosure. So far all the proceedings are in conformity with the provisions of the statute. It being Saturday, and near midnight, and the creditors desiring to offer other evidence and to be heard by their counsel in the matter, the magistrates, without request from either party, adjourned to Monday morning at nine o'clock to meet at the office of the jail in Bangor, within which the plaintiff, having surrendered himself, as before stated, would then, of necessity, be confined. The time within which one of the alternatives contained in the condition of the bond must be performed to prevent forfeiture, expired on Sunday, the day

next after the plaintiff's disclosure and surrender. His voluntary surrender was therefore a performance of the bond; but he could not be discharged from the custody of the jailer without taking the oath required by the statute. The magistrates met at the time and place of their adjournment, being other than that which was originally appointed, and, against the protestation of the creditors, proceeded to hear such evidence as they offered, and, after a full hearing of the parties, adjudged that the plaintiff was entitled to take the oath, and thereupon administered the same and gave him a certificate of the fact, though not strictly, yet substantially in the form required by the R. S., c. 113, § 31. The plaintiff presented this certificate to the defendant, to whom it was directed, and demanded to be released from his imprisonment. This the defendant refused.

Upon the foregoing facts, the question is, was the plaintiff entitled to his discharge? The fact that he voluntarily surrendered himself to imprisonment did not justify its continuance, after he became entitled to his discharge. If he was so confined, then his further imprisonment was unjust and unlawful, and this action of replevin for his person well lies. The writ, *de homine replegiando*, is expressly designed for such a case. See R. S., 1857, c. 101, § 1, and *Hutchins* v. *Van Bokelen*, 34 Maine, 126. Whether the plaintiff was entitled to his discharge upon the facts stated, depends upon the true construction of the statute for the "relief of poor debtors." R. S., 1857, c. 113.

The design of this statute, as stated in its own words, is, that a debtor, in an execution running against his body, "may be arrested and imprisoned thereon for *the purpose* of obtaining a discovery of his property wherewith to satisfy it." Section 21. No part of the statute contemplates the punishment of an honest debtor for his failure to pay his debts; nor should it receive a construction, unless its language necessarily requires it, that will produce any such effect. While it should be so construed as rigidly to secure to creditors legal notice of the time and place appointed for the debtor's examination, and a full and fair disclosure as to his goods and

estate, no such construction should be adopted, or regarded as admissible, as will make it needlessly oppressive to the debtor, by subjecting him to any more imprisonment or expense than is necessary to effectuate the general purpose of the statute. If the creditor gets everything which the statute and the imprisonment of the debtor was designed to give, of which the tribunal which the statute provides, when duly organized, is the judge, then his rights under the statute are at an end, and he has no legal ground of complaint. That the creditors, in the execution against the plaintiff, have obtained, in the judgment of the magistrates, a full and fair disclosure of the actual state of the debtor's affairs and property, is not to be denied. Nor can it be denied that they have had the same notice, the same tribunal, the same examination, and the same oath administered, which the statute contemplates. It is true, the plaintiff was not actually in prison when his citation issued. He had been discharged from his arrest by giving a statute bond, which was substituted for imprisonment until the time limited for the performance of its condition should expire; and no reason is perceived, why a citation issued during this period, especially when it is precisely the same in kind, may not be as effectual as one issued after the debtor had surrendered himself into the custody of the jailer. The right of the plaintiff to a certificate of discharge was in no way dependent upon his bond. He was equally entitled, by a compliance with the provisions of the statute, to an exemption from imprisonment, after the performance of the condition of his bond as before. He might have cited and disclosed immediately upon his arrest, without giving any bond; and, after citing, he might, for the safety of the officer, have gone into prison and remained there until the time appointed for his disclosure should arrive, without affecting the legality of the citation he had given, and, for the same reasons, he may avail himself of a citation issued while under bond, after he has voluntarily surrrendered to imprisonment to save its condition. A construction of the statute which

would require the debtor to cite anew, at additional expense, and to remain in prison at least fifteen days *after* his surrender, when he had given the legal notice of his intention to take the poor debtor's oath fifteen days before, of the time and place appointed for his disclosure, would not only be useless, but barbarous, and, therefore, a reproach upon the law. It would make the statute an engine of oppression instead of *relief*. Such a construction is wholly inadmissible.

But, it is said that the citation, though legal in its character, may be waived by the debtor. This is undoubtedly so. But a waiver is always a question of intention, express or implied, and is usually resorted to, to prevent injustice. *Simonds* v. *Parker*, 1 Met., 511. It ought not to be raised by implication, except in clear cases, when its effect is to prevent the end at which it aims. Under the circumstances of his surrender, is it not too much to infer from it, that the defendant intended a waiver of any of his rights, existing by virtue of his previous citation? Why should an intention to give a new notice be presumed, when a legal one, sufficient for his purpose, already existed, especially when such new notice would imply a voluntary incarceration in prison, which might be avoided under the old one. Such a presumption is not only repelled by the subsequent conduct of the plaintiff, but is against the usual tendencies and motives of human action. This case is widely different from the case of *Williams* v. *McDonald*, 18 Maine, 121. There the debtor, after having once cited his creditor, gave a poor debtor's bond to relieve himself from imprisonment, in which one of the conditions was, to cite the creditor, and take the oath required by the statute. The very language of this condition imposed a new notice, and was, therefore, an express waiver of the notice which had been given, so far as the fulfilment of the bond was concerned. The case simply decides that what was stipulated in the bond *to be done in the future*, could not be regarded as performed, by showing that the obligor had done the same thing before the

bond was made. It has no tendency to show a waiver under the circumstances of the present case.

But, it is further urged, that the certificate of the justices was insufficient in form to authorize the plaintiff's discharge. That it was sufficient to carry notice to the defendant, that the plaintiff had taken the oath required by law to entitle him to his release from imprisonment, cannot well be denied. It was the *oath* and not the certificate that conferred such right. The certificate is only evidence that the oath had been taken. After the oath has been administered, it is made the duty of the justices to give a certificate, and such certificate is conclusive evidence of the fact. But it is no where in the statute made the only evidence upon which the jailer can act. Might he not, if personally present when the oath was administered, act upon his own knowledge of the fact and discharge the debtor, without subjecting himself to an action therefor? The certificate, although the best evidence, is not necessarily a condition precedent to the debtor's discharge; and, to require that such certificate, after the oath has been duly taken, shall be made in the *exact form* which the statute prescribes, would often make the statute a trap instead of a relief. It surely is sufficient if it substantially state the facts which entitle the debtor to his discharge.

Again, it is contended that the magistrates had no power to adjourn from the office of Mr. Knowles to that of the jail. There is no express prohibition in the statute to prevent their adjourning to a place other than that appointed in the citation, when necessity requires it, as there is in relation to the time beyond which they shall not adjourn. There being no restriction, no reason is apparent why the magistrates should not have the power usually incident to such tribunals, of consulting their own convenience as well as the wishes or necessities of the parties, by adjourning to any reasonable place. Circumstances beyond the control of the magistrates may exist to render such adjournment absolutely necessary. The jurisdiction of the magistrates was not

therefore lost by their adjournment, and their certificate of discharge was effectual and entitled the plaintiff to his release from imprisonment. The result is, that the defendant, in my judgment, should be defaulted, but, as the evidence shows no design to oppress or intentional violation of his official duty, the damages should be only nominal.

JOHN W. VEAZIE *versus* GORHAM L. BOYNTON *& al.*

An action cannot be maintained under the provisions of the statute, for knowingly aiding a debtor in the fraudulent concealment and transfer of his property, where the transfer, alleged to be fraudulent, is of the right of redeeming property mortgaged to secure debts vastly exceeding its value, and the equity of redemption, therefore, is utterly worthless.

ON REPORT.

Rowe & Bartlett, for the plaintiff.

J. A. Peters, for the defendants.

The case is sufficiently stated in the opinion of the Court, which was drawn up by

APPLETON, J.—This is an action of the case, brought against the defendants under the provisions of R. S., 1841, c. 148, § 49, for knowingly aiding and assisting Paulk & Co., a firm composed of Ephraim Paulk and Thomas Rice, in the fraudulent concealment and transfer of their property.

It appears in evidence that John Winn had become liable for Paulk & Co., as indorser and otherwise, for a large amount, and that, to secure and save him harmless from liabilities incurred on their account, they, on the 9th November, 1854, mortgaged to him the personal property set forth in the plaintiff's writ. It appears from the testimony of Winn, introduced by the plaintiff, that, upon his settlement with Paulk & Co., they were indebted to him in the sum of two hundred and forty-five thousand dollars. The security

thus afforded was utterly inadequate for the protection of Winn. It was proper that Paulk & Co., considering the immense indebtedness Winn had incurred for them, should secure or attempt to secure him. There were ample reasons why Winn should receive any security that might be offered without the imputation of fraud. Indeed, the charge of fraud, as between Winn and Paulk & Co., is simply preposterous.

On the 27th Nov., 1854, Paulk & Co., having only the equity of redeeming, gave a subsequent mortgage of the same property to the defendants, in which Winn joined. There were such numerous and heavy charges upon the lumber, by way of liens and previous mortgages, that, according to the disclosure of the defendants, under oath, as trustees, on Dec. 16, 1856, they had expended about $80,000, in and about the manufacturing the lumber, and in discharging mortgages and liens thereon, over and above the sums received from its sales, and there was slight prospect of the balance in the lumber account ever becoming more favorable. The result, as far as shown, most clearly shows that various claims upon and charges against the lumber, irrespective of the mortgage to Winn, much exceeded its value. All that Paulk & Co. conveyed to the defendants was the right of redemption from the Winn mortgage. That mortgage far exceeded the value of the lumber, had it at that time been free from liens and charges. The equity of redeeming, as the evidence discloses, was not merely utterly valueless, but it did not approximate by tens of thousands of dollars to possessing any value. It is difficult to perceive how any fraud could have been committed under such circumstances, even if the parties were ever so desirous of committing one. The equity of redemption conveyed by Paulk & Co., to the defendants was worthless. The right the defendants thereby acquired was worthless. *Ex nihilo, nihil fit*, and, according to the agreement of the parties, the plaintiff must become nonsuit. *Plaintiff nonsuit.*

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

Orono Bank *versus* John M. Wood.

Where a draft, which was drawn on a firm in Philadelphia, was protested for non-acceptance, the certificate of the notary that he had "duly notified the drawer and indorser," (who were citizens of this State,) is, by the law of the State of Pennsylvania, where the draft was payable, evidence of the facts certified by the notary, — and, in the absence of contradictory proof, sufficient to charge the indorser.

In this State, likewise, the notary's certificate is, *prima facie*, sufficient; but not so conclusive, as to exclude explanatory or contradictory evidence.

In an action against the indorser of the draft, the holder will be entitled to damages at the rate of six per cent. additional to the contents of the bill and interest; for the statutes of 1841 and 1857 are not materially variant; the difference in phraseology was only for the purpose of condensation.

Reported from *Nisi Prius*, by Appleton, J.

This was an action of assumpsit against the defendant, as indorser of a draft drawn by James Black, on F. A. Van Dyke, jr., & Co., of Philadelphia, payable to the order of said Wood, and by him indorsed. It was dated, Bangor, September 12th, 1856, and was protested for non-acceptance.

The defendant objected to the protest, as insufficient evidence to charge the indorser; but the presiding Judge ruled that it was sufficient, in the absence of other evidence. The specific objection thereto is stated in the opinion of the Court.

A question arose as to damages payable for dishonor; the plaintiffs claiming, that Pennsylvania was not one of the States designated in the statute as an "Atlantic State," and, being "southerly of New York," they were entitled to nine per cent. The defendant contended that it was not designed by the statute of 1858 to alter the statute of 1841, and that, if the plaintiffs were entitled to recover on the draft, only six per cent. could be assessed as damages for dishonor.

The defendant was defaulted, the parties agreeing that the case should be reported for the decision of the full Court. If the ruling as to the sufficiency of the protest was

erroneous, the case should stand for trial; otherwise, the default was to stand, and the Court should determine the question of damages for dishonor.

W. C. Crosby, for the plaintiffs.

J. A. Peters, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—The defendant contends that he is not liable as indorser of the draft, because the notary, in his protest, certified generally, that he had "duly notified the drawer and indorser," without stating *what* notice was given, *how* given, and, particularly, *where* such notice was addressed.

In *Bradley* v. *Davis*, 26 Maine, 45, this Court had under consideration the protest of a similar tenor, and WHITMAN, C. J., in the opinion, remarks, that "the statute of this State, c. 44, § 12, has provided, that such notarial certificate shall be legal evidence of the facts stated in it, as to the notice given to the drawer or indorser, in any court of law. It is not said in the statute, that such certificate shall be conclusive evidence of those facts; and, it would seem, if it should be taken to be conclusive, that it ought to be specific, as to the mode in which the notices were given, by stating whether they were verbal or in writing, and, if in writing, whether the writing was delivered to the person or persons notified, or despatched by some other mode of conveyance; and, if so, by what mode, and when sent, and to what place addressed. But, if it be considered that the certificate is defective, the necessary facts may be supplied *aliunde*." In that case, the plaintiff unnecessarily produced the deposition of the notary, who testified, on his direct examination, that he had examined the protest, found it to be in his handwriting, and that the statements in it were true; and the whole defence was subsequently elicited from answers to cross interrogatories. Hence, it is inferable from that decision, that the protest is sufficient *prima facie*, but not so conclusive as to exclude evidence either explanatory or contradictory.

In *Ticonic Bank* v. *Stackpole*, 41 Maine, 321, a construction was given to a notarial protest, similar in its character, so far as the question now under consideration becomes material. In defence, it appeared that the indorser resided in the same town where the note was payable and protested. Hence, it was contended that the kind of notice should have been certified, for if not verbal, but by a written communication through the post office, it would have been insufficient; but the Court held, that, under the circumstances, it was legally inferable that the notice was verbal; but, had the indorser proved that he resided at the time in another town, no reason is perceived, why it would not have been equally inferable, by parity of reasoning, that the notice was in writing, and addressed, through the post office, to the party to be charged. So that the protest in the latter, like that in the former case cited, was, *prima facie*, sufficient to charge the indorser. But, the rule of law as to notice in this State is not material in this case, as the draft was payable in Philadelphia, and must, therefore, be governed by the law of Pennsylvania. By the Act of Assembly, of that State, passed June 2d, 1815, the certificate is evidence of the facts therein certified, and, in the absence of contradictory proof, it is sufficient. *Sherer* v. *Easton Bank*, 9 Casey, 134. Consequently, according to the agreement of the parties, the *default is to stand*, and damages are to be assessed by any Judge before whom the defendant may show any partial payments. In assessing which, he will allow, in addition to the contents of the bill and interest, damages at the rate of six per cent., for we consider the statute of 1841 and that of 1857 not to be materially variant, although the phraseology is somewhat different, but only for the purpose of condensation, latitude being substituted in the latter for enumerated States, *eo nomine*, in the former.

Tenney, C. J., Rice, Appleton, May and Kent, JJ., concurred.

BETSEY LYONS *versus* ANTHONY WOODWARD.

By the common law, no cause of action accrues to the wife, for the injury she sustains, by the death of her husband, against the person, through whose neglect or fault the accident, which caused his death, occurred.

Nor was the provision of the Revised Statutes, c. 17, § 8, relating to public and private nuisances, that any person thereby injured "in his *comfort* or property may maintain against the guilty party an action to recover his damages," intended to embrace such a case.

ON EXCEPTIONS.

THIS was a special action on the CASE, founded on the provisions of c. 17, § 8, of R. S. The plaintiff alleges in substance, that she is the widow of Jeremiah Lyons, now deceased, on whom she and their children were solely dependent for support; that her said husband was employed by the defendant and was in his service in the steam mill, in Bangor; that a steam boiler was used by the defendant, having no fusible safety plug, contrary to the form of the statute in such case provided; that, in consequence of which, the boiler exploded and caused the death of her husband, thereby depriving her of his society, and of all means of support and of supporting her children through him, and causing her great grief and pain of mind, and great injury in her comfort, property and enjoyment of her estate; whereby and by force of the statute this action hath accrued to her, &c.

At *Nisi Prius*, the defendant, for the purpose of having the ruling of the Court, admitted the truth of the allegations of the writ; whereupon APPLETON, J., presiding, being of opinion that the action could not be maintained, directed a *nonsuit*. The plaintiff excepted.

H. P. Haines, for the plaintiff.

J. A. Peters, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—At common law, no cause of action ac-

crues to the plaintiff to recover damages for the injury set forth in her declaration. On this point, the decisions in *Carey* v. *Berkshire Railroad Company*, 1 Cush., 475, and *Nickerson* v. *Harriman*, 38 Maine, 277, and authorities there cited, are conclusive.

But the plaintiff's counsel contends, that the action is maintainable under R. S., c. 17, § 8, which provides that "any person injured in his *comfort*, property, or the enjoyment of his estate by a common and public, or a private nuisance, may maintain against the guilty party an action to recover his damages," &c. And that, by the death of the husband, the wife is "injured in her comfort."

On an examination of that statute, its origin and its history, we are satisfied that § 8 was intended to apply to injuries arising from a violation of § 1 of the same statute, prohibiting offensive trades, "which, by occasioning noxious exhalations, offensive smells, or other annoyances, become injurious and dangerous to the health, *comfort*, or property of individuals," &c. And, that offensive smells and comfort, may be considered as correlative terms, the one affecting the other only through an atmospheric medium, and not the domestic relations.

Exceptions overruled.—Nonsuit confirmed.

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

DAVID J. PERLEY *versus* INHABITANTS OF OLDTOWN.

Towns are, by the statute, bound to furnish *actual* relief, after notice, to persons in need thereof; and, when a town fails to do this, an inhabitant thereof, (who is not liable for the pauper's support,) may provide the necessary relief, and recover for the expense thereof against the town, notwithstanding the overseers had contracted to have the relief afforded with one who failed to do it.

ON EXCEPTIONS from *Nisi Prius*, APPLETON, J., presiding.

THIS was an action of ASSUMPSIT, on an account annexed, for medicine and attendance on the wife of one *Raucho*, whose family had become chargeable to the defendant town as paupers. There was also a count founded on c. 24, § 32, of the R. S.

The plaintiff testified that he was called by Raucho to visit his wife, who had previously been visited by Doct. Fortier; that, after his third visit, having been informed that Raucho and his family had become chargeable to the town, he notified Mr. Hoskins, one of the overseers, of the condition of Raucho's wife, that she needed medical aid, and that, for payment for all future attendance and services, he should look to the town. Hoskins replied, "that Raucho belonged to Bucksport and he would get his pay; that he would put his bill into the Bucksport bill." That he continued to attend her, as charged in his account; and, while visiting her, neither Fortier nor any other physician, to his knowledge, came there or notified him, or tendered his services, nor did either of the overseers go to Raucho's. At that time the small pox was in that part of the town and Fortier was employed to take care of the cases—but none of the Raucho family had it.

That the case of Raucho's wife was one of necessity—she was confined to her bed, and required medical aid. Her sickness was a chronic trouble, of some years' standing, and Fortier had previously attended her for it.

In defence. S. W. Hoskins testified that Raucho resided in the small pox district, and, being shut up, fell on the town; that Doct. Fortier was employed by the town in the cases of small pox. The plaintiff informed witness that Raucho wanted him to doctor for his wife's sickness; that he told plaintiff he must not go there, that Fortier was to take care of that neighborhood—has no doubt he told plaintiff he would assist him in getting his pay of Bucksport. There was no physician employed by the town generally.

The Judge was requested by the plaintiff to instruct the jury, if they find that the overseers of the poor, at the time the plaintiff rendered services to Raucho's wife, as charged in his account, were employing Doct. Fortier, generally, to take care of the district or neighborhood where Raucho lived; unless they further find that Fortier, or some other physician, employed by the overseers, actually attended on the Raucho family, or offered to do so, after plaintiff's application to Hoskins, the overseer, the plaintiff is entitled to recover for such services rendered after such application. Which instruction the Judge declined to give, but instructed the jury that, if the Raucho family was on the town at the time, and this was known to the plaintiff, and, also, that Fortier was employed to take care of that district generally, and plaintiff knew it, and plaintiff was forbidden to attend on them, he cannot recover.

The plaintiff excepted, the verdict being against him.

J. H. Hilliard, in support of the exceptions.

Sewall, contra.

The opinion of the Court was drawn up by

May, J.—It is made the duty of overseers of the poor, in their respective towns, to provide for the immediate comfort and relief of all persons, residing, or found therein, falling into distress, and standing in need of such relief; but, until such relief is furnished, towns are held liable to pay any expense necessarily incurred therefor, by any in-

habitant not liable by law for the support of such person, after notice and request to the overseers whose duty it is to make the provision. R. S. of 1841, c. 32, § 48, which were in force when the services, now sued for, were performed. Under this statute, and we are not aware of any difference in the present R. S., c. 24, § 32, it is clearly the duty of overseers of the poor to see that suitable provision is *actually made* for the suffering poor within their towns, whenever they have notice that any such have fallen into distress and stand in need of immediate relief. It is not enough that they contract with other persons to provide it. Such persons may violate their contracts, and the necessary provision for relief may not be made. There is quite a difference between *actual relief furnished* and a *contract for it;* and any construction of the statute, that makes the latter a substitute for the former, in such a sense as to exonerate the overseers of the poor from further duty, and deprive the humane inhabitant of the right to recover for supplies actually furnished, after notice and request, in cases of *actual necessity, still existing, notwithstanding the making of any such contract*, would be in derogation of the manifest purpose of the statute, and an outrage upon that public humanity which not only originated, but was the basis of our pauper laws.

When the necessary relief has in fact been furnished by the overseers of the poor, then the right of the inhabitant to recover for such as he may afterward provide ceases, because the necessity for individual action no longer exists. But, so long as the necessity for immediate relief exists, and it is actually unprovided, and not offered, the law contemplates that the individual inhabitant who furnishes it shall be remunerated by the town. *Underwood* v. *Inhabitants of Scituate*, 7 Met., 214. Nor will the mere fact that he had knowledge that the overseers of the poor had employed some other person to furnish the necessary supplies, take away his right to recover therefor, unless it further appears that he had, at the time of furnishing the supplies, reasona-

ble ground to believe that they would be seasonably furnished by the overseers of the poor; and it ought, perhaps, also to appear that they would in fact have been so furnished.

In the case before us, Doct. Fortier having neglected to render the needed services, notwithstanding his employment therefor, of which there is evidence, and of which the plaintiff had knowledge, the plaintiff, notwithstanding he was forbidden to do so, might, after notice to the overseers and their neglect to make further provision, very properly render, at the expense of the town, the services which the immediate necessity of the pauper's case required. Any other rule, in a case like the present, would permit the ravages of disease to outrun the benevolence of the statute, and the death of the pauper might be the result. Whether such a state of facts existed in this case, as to justify the plaintiff in charging his services to the defendant town, was a question for the jury under suitable instructions. Those which were given, not being in harmony with the principles which we have indicated, and those which were requested having been withheld, the exceptions must be sustained.

Exceptions sustained.

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

JAMES TREAT & *al. versus* CHARLES D. GILMORE.

A promissory note given by A to B, and by B indorsed to a third party, constitutes a contingent indebtedness from A to B, so long as B's liability continues thereon.

A question of fact submitted to the Court, and decided by the Judge, acting in place of a jury, is not open to revision or exceptions.

The grantee, in a second mortgage of chattels, may maintain an action of *trover* against an officer, who, before the title of the first mortgagee becomes absolute, attaches and sells the goods mortgaged, such grantee being, by the act of the officer, deprived of his right of redemption.

Treat *v.* Gilmore.

The right of the grantee, in the second mortgage, to redeem the goods, continues until the foreclosure of the first mortgage, unless defeated by the goods being taken and sold by a third party.

An appraisal of goods of a mortgager, attached by his creditors, made under the authority of the attaching officer, is not binding on the mortgagee as a rule of damages, in an action against the officer.

TROVER. This case was tried by the presiding Judge, APPLETON, J., by agreement, reserving the right to except.

Samuel B. Field, on Jan. 15, 1857, mortgaged the goods in his store, in Bangor, to the plaintiffs and others, and, also, his goods in the custom house and on board schooner Jenny Lind, subject to a mortgage of the same date, to John Benson and David Fuller, of the same goods, with covenants of seizin, ownership, and warranty against all persons, excepting Benson and Fuller, on condition, that if the said Field, his heirs, executors, or administrators, should pay to the said grantees, their executors, administrators, or assignees, all his indebtedness to either of them, by note, account, or otherwise, within six months from date, the said Field to retain the goods during the said six months, and pay the proceeds to the said grantees, after first paying said Benson and Fuller mortgage, then the deed to be void, otherwise to be in force.

This mortgage was recorded by the city clerk of Bangor, Jan. 16th, 1857, and was accepted by the plaintiffs Jan. 18th. At the date of the mortgage, there were in the Kenduskeag Bank, Bangor, two notes of Field, indorsed by the plaintiffs, one dated Sept. 16th, 1856, for $314,33, payable in four months, and the other, Nov. 14th, for $229,96, in four months. These notes were paid at maturity, by the plaintiffs.

The goods of Field were attached by the defendant, as sheriff of the county, April 3d, 1857, in an action, *Barnard & al.* v. *Field*, appraised at $2931,93, and afterwards sold for $2954,10; expenses of sale, $225,49; balance, $2728,61, to be applied on the judgment in the suit.

The writ and record in a suit, John Benson and David Fuller against the defendant, were put into the case. Ver-

dict for the plaintiffs, $2554,81, at April term, 1858; remitted by the plaintiffs, $175; judgment rendered for $2326,42.

Field, called by the plaintiffs, testified that the goods in the store were the same when attached as at the date of the mortgage, except a quantity of seed put in after the mortgage. He further testified, that, up to December, 1856, he was boarding in Bangor, but at the latter part of that month, he went to board in Brewer, with his wife's mother, his wife expecting to be confined soon; left his effects at his boarding house in Bangor, until after his store was closed by the attachment.

The defendant requested the Court to rule, 1st, that the two notes, being the property of the Kenduskeag Bank, did not constitute an "indebtedness" secured by the mortgage; 2d, that, upon the evidence, the residence of Field, at the date of the mortgage, was in Brewer, and the mortgage should have been recorded there; 3d, that, at the time of the attachment and sale, the legal title to the goods was in Benson and Fuller, the first mortgagees, and that the plaintiffs took, by their mortgage, only the right of redemption, which, not having exercised within the time named in the statute, they had lost; and, 4th, that in law, the judgment in favor of the first mortgagees in their suit against the defendant, operated to transfer the whole property in the goods and their proceeds, to the defendant.

The Judge refused to rule as requested, but ruled that the measure of damages should be the appraised value of the goods, less the value of the articles not embraced in the mortgage, and that the amount of the judgment for damages in the case of *Benson & al.* v. *Gilmore*, and not the amount of the verdict, was to be deducted.

The defendant excepted.

W. C. Crosby, in support of the exceptions, argued that the "indebtedness" of Field, on the two notes, at the date of the mortgage, was not to the plaintiffs, but to the bank, and the terms of the mortgage did not include it.

The apparent residence of Field was in Brewer, at the

date of the mortgage. Creditors could only know what they could see. His private, undeclared intention to return to Bangor, was unknown to them. The statute must refer to his apparent residence, otherwise it was at his option afterwards to declare his intentions, so as to fix his residence in either place.

Field, after his mortgage to Benson and Fuller, had no other interest in the goods than the right to redeem, and could convey no more. This right ceased in sixty days after the time of payment to Benson and Fuller expired. *Clapp* v. *Glidden*, 39 Maine, 448. The presumption is, that that mortgage has never been redeemed. As the plaintiffs did not redeem from Benson and Fuller, they have lost all right to the goods, and cannot complain of acts of the defendant, by which they have been injured.

The plaintiffs cannot recover in this suit, because, at the time it was commenced, they had no right to the possession of the goods. 22 Pick., 53; 9 Pick., 156. The right of possession was then in Benson and Fuller, and could not be in the plaintiffs. The judgment in favor of Benson and Fuller for damages transferred the title to the goods to the defendant, and, as the plaintiffs have never redeemed the first mortgage, they have no ground of complaint.

Rowe & Bartlett, for the plaintiffs.

The opinion of the Court was drawn up by

Rice, J.—Trover for a stock of goods taken by the defendant, as sheriff of the county of Penobscot, on a writ dated April 3, 1857, in favor of John M. Barnard & al. *v.* Samuel B. Field. On the 13th of the same April, the defendant caused the goods, thus attached, to be appraised under the provisions of c. 114, §§ 53 to 56, of the R. S. of 1841, and, on the 17th of the same month, said goods were sold by the defendant.

The plaintiffs claim title by virtue of a mortgage from Samuel B. Field, to themselves and others, dated January

15, 1857, and recorded January 16, 1857, duly accepted by the plaintiffs, which mortgage contains this condition:—

"Provided nevertheless, that if the said Samuel B. Field, his heirs, executors or administrators, shall well and truly pay to the said grantees, their heirs, executors, administrators or assignees, all his *indebtedness to each of them by note, account or otherwise*," then, &c.

This mortgage was made subject to a mortgage to Benson and Fuller, dated January 14, 1857, and recorded the same day, to secure to them all the mortgager's "indebtedness, or where they, or either of them, have indorsed notes for me," &c.

Both mortgages were recorded in the office of the city clerk of the city of Bangor.

The case was referred to the presiding Judge with the right to except by either party.

As the foundation of their mortgage, the plaintiffs introduced in evidence two notes given by Samuel B. Field, and payable to his own order at either bank in Bangor, which were indorsed by said Field. The first note was dated Sept. 16, 1856, for $314,33, on 4 months; the second was dated Nov. 14, 1856, for $229,96, on 4 months. These notes had both been indorsed by the plaintiffs.

James Treat, one of the plaintiffs, testified that, at the date of plaintiffs' mortgage, both the above notes were held by the Kenduskeag Bank of Bangor, having been discounted for the plaintiff in the regular course of banking business, and that he took up the first the day after it became due at said bank, and subsequently took up the other; and that nothing has been paid on them.

On behalf of the defendant, several legal propositions were presented to the Court, to be decided as matters of law, which were overruled. Of these rulings, as matters of law, the defendant now complains. The propositions referred to appear in the report of the case.

The first proposition was rightly overruled. The notes having been originally given to the plaintiffs, and having

been indorsed by them, and discounted for their benefit and accommodation, constituted a continued contingent indebtedness from Field to them, so long as their liability continued thereon. *Mace* v. *Wells*, 7 How., 272; *Fulwood* v. *Bushfield*, 2 Harris, 90; *French* v. *Morse*, 2 Gray, 111; *Dole* v. *Warren*, 24 Maine, 94; *Sargeant* v. *Salmond*, 27 Maine, 539; *Thompson* v. *Thompson*, 19 Maine, 244; *Howe* v. *Ward*, 4 Maine, 195.

The second proposition has reference solely to matter of fact, which was submitted to and decided by the Judge acting in the place of a jury. His decision upon such matter of fact is not open to revision or exceptions.

The third proposition presents the consideration whether the defendant, in the attachment and sale of the mortgaged stock of goods, interfered with, or trespassed upon the then existing legal rights of the plaintiffs, without authority, and to their prejudice.

At that time the plaintiffs had an existing right to redeem from the first mortgage. Had the goods been sold under that mortgage there would have been a surplus which the second mortgagees could legally have appropriated in payment of their debt. Of this right the defendant, by his interference, deprived them. The case is unlike that of *Clapp* v. *Glidden*, 39 Maine, 448. In that case the title under the first mortgage had become absolute, before the act of conversion occurred. The title of the second mortgagees had, therefore, become extinct when the act was performed of which complaint was made. Not so here.

The rights of the first mortgagees, as presented by the fourth proposition, were to hold the goods as security to the extent of their claim under their mortgage. Until they had foreclosed their mortgage, there was an equity of redemption existing, available in the first instance, to the second mortgagees, and, then, to the mortgager. This equitable right was destroyed by the defendant. He is, therefore, liable in damages to the plaintiffs for that destruction, so far as they have thereby been injured.

But the Judge erred in the rule of damages. The appraisal was a transaction between Field and his creditors, under whose authority the goods were attached and sold by the defendant. To that transaction, the plaintiffs in this suit were strangers, and were, therefore, not bound by it, as matter of law. For this reason, the exceptions must be sustained and a new trial granted.

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

BYRON MERRILL, *Complainant, versus* JOHN C. HINCKLEY, *Appellant.*

In a case of forcible entry and detainer, where the magistrate adjudges the defendant guilty, and he enters an appeal, it is not necessary that the recognizance shall require payment of such "reasonable rent of the premises as the magistrates shall adjudge," if no rent is adjudged by the magistrates to be payable.

But where a recognizance contains requirements which are not sanctioned by the existing statute, it is defective, and the appeal will be dismissed.

Under R. S. of 1857, c. 94, § 8, a recognizance requiring the appellant to "appear" at the appellate court, prosecute his appeal "with effect," "recover back possession of the premises," and pay all intervening "damages" and costs, in case he does not recover possession, is unauthorized and illegal.

THIS was an action of forcible entry and detainer, commenced before a Justice of the Peace. The defendant pleaded title to the premises, in a brief statement; but the magistrate adjudged his plea to be frivolous, and intended only for delay, proceeded to hear the parties, adjudged the defendant guilty, and that a writ of possession should issue to put the plaintiff in possession. The defendant appealed, and recognized as required by the magistrate. The case turned upon the sufficiency of the recognizance under c. 94 of R. S. of 1857.

G. P. Sewall, for the plaintiff.

Blake & Garnsey, and Mace, for the defendant.

The opinion of the Court was drawn up by

KENT, J.—The first question presented is, whether this Court has jurisdiction of the case. It appears by the papers before us, that this process of forcible entry and detainer was commenced before a justice of the peace on the 18th of May, 1858, and tried before such justice on the 28th of May, 1858. The R. S. of 1857 were then in force. The defendant pleaded the general issue, and also filed a brief statement, alleging that he was then, and for a long time had been in peaceable and lawful possession of the premises, and that he claims title to the same premises. The complainant replied to the brief statement by alleging that the same was frivolous and intended for delay. The magistrate proceeded to examine the case, so far as to ascertain the truth respecting it, and determined that the replication to the brief statement was true, and, thereupon, the case was tried on the plea of not guilty, and it was adjudged by the magistrate that the defendant was guilty, as alleged, and that a writ of possession should issue at once, and such writ was issued, and the complainant put in possession. The defendant appealed. These proceedings were all according to the provisions of c. 94, R. S. of 1857.

The action was duly entered in this Court. The complainant moved the Court to dismiss the case, because no such recognizance, as the law requires, was given.

The conditions, required by § 8 of c. 94, in the recognizance to be given by a defendant when he appeals, are, that "he shall enter the suit, pay all intervening costs, and such reasonable rent of the premises as the magistrate shall adjudge, if the judgment is not reversed."

The conditions in the recognizance actually taken in this case, are, that "the defendant shall appear at the court aforesaid, and shall prosecute his appeal with effect, and recover back the possession of the premises aforesaid, and

shall pay all intervening *damages* and costs, in case he does not (recover) back possession aforesaid."

In this recognizance, there is no provision in relation to the payment of rent. But it is manifest, that that requirement is based upon the ground that the defendant is to retain possession after the appeal, until final judgment. When, as in this case, under the recent enactment, which is somewhat anomalous, a writ of possession issues to remove the defendant, although he is allowed to appeal from the judgment on the general issue, it would be absurd to require a recognizance conditioned that the defendant should pay rent, after his removal under the writ. The statute requires it only for such reasonable rent as the magistrates shall adjudge. In a case like this, the magistrate cannot reasonably adjudge that any rent should be secured. The defendant is not bound to give such security, unless the magistrate fixes the sum and requires that it shall be secured by the recognizance. The magistrate, in this case, very properly did not fix any sum as rent, and, therefore, it was not necessary that this condition as to rent should be inserted in the recognizance.

It has been decided by this Court, that where there is no recognizance, when one is required, the appeal cannot be sustained. *Hilton* v. *Longley*, 30 Maine, 220; *Dolloff* v. *Hartwell*, 38 Maine, 54. Where the recognizance taken is not in its terms in conformity with the statute, but contains requirements not specified therein, although it does include all the statute conditions, it is void and the appeal is not perfected, and the appellate court has no jurisdiction. *French* v. *Snell*, 37 Maine, 100; *Dennison* v. *Mason*, 36 Maine, 431.

The recognizance to give jurisdiction, must be one that an action can be sustained upon by the party to whom it was given. *Ibid.*

The recognizance required by the statute, in a case like this, provides for only two liabilities—1, that the suit shall be entered—2, to pay all intervening costs. The recogniz-

ance actually taken, provides—1, that the appellant shall appear at the court aforesaid. This requirement is illegal. *French* v. *Snell*, above; 2, that "he shall prosecute his appeal with effect." The statute requires only that he shall *enter* the suit. There is a marked distinction here. "The legal effect of a recognizance to prosecute an appeal *with effect* is different from one to prosecute an appeal." *Owen* v. *Daniels*, 21 Maine, 182. 3. That "he shall recover back the possession of the premises." He may fail to do this, and yet, under the plea of the general issue, he may defeat the suit, and the "court may, or not issue a writ to restore to him the possession of the premises." § 9, c. 94. 4. That he shall pay all intervening *damages* and costs in case he does not recover back possession. The statute provides only for *costs*. It is silent as to *damages*. And the appellant is not responsible for costs, if the final judgment is in his favor, although he may fail to obtain a writ of restitution. *Harrington* v. *Brown*, 7 Pick. 231.

If the question were entirely a new one, it might deserve consideration whether a more practicable and reasonable rule would not be, to hold all recognizances sufficient which contain all the statute requirements, although they may also contain conditions not specified in the statute, the latter being rejected as immaterial and not binding on the parties. Under the decisions, a different rule must be applied until the Legislature sees fit to interpose.

We dismiss the case for want of jurisdiction. In examining the papers we perceive that there are serious questions touching the title to the whole or a part of the premises. We do not intend to affect the rights of either party on the merits of the case. The entry must be—

Dismissed for want of jurisdiction in this Court, on account of the defect in the recognizance of the appellant, without prejudice.

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

JULIA A. FOSTER *versus* RUFUS DWINEL.

A mortgagee, who had taken possession for the purpose of foreclosure, but, before the foreclosure was perfected, quitclaimed his right, had not such a seizin as will entitle his widow to dower in the mortgaged estate, notwithstanding the latter became absolute in his grantee, by the failure of the mortgager to redeem.

Although the tenant claims title under the deed of the mortgagee, in an action by his widow for dower, he will not be estopped from showing that her husband's seizin was only that of a mortgagee.

ON STATEMENT OF THE CASE BY THE PARTIES.

THIS was an action for DOWER in a parcel of real estate, in Bangor, called the Coombs wharf. The plaintiff is the widow of Samuel J. Foster, and claims that her husband was seized of one-third of one-fourth of the estate, and that she is entitled to dower therein.

It is agreed that in 1835 Royal Clark conveyed the premises, in mortgage, to Ephraim Lincoln, Samuel J. Foster and Benjamin Brown. The mortgagees commenced a foreclosure and took possession of the premises under a writ of *habere facias*, on the 24th day of February, 1838, and held and occupied the same, until the 23d of February, 1841, when the said Lincoln, Foster & Brown, by their deed of warranty,* of that date, conveyed the premises to Benjamin Lincoln, under whom Dwinel, the tenant, through sundry mesne conveyances, now claims.

The case is submitted to the full Court to determine, (1,) whether the defendant is not estopped from denying such seizin in the demandant's husband as will entitle her to dower; and, (2,) if not so estopped, whether the demandant's husband was not possessed of such a seizin, as in law would entitle her to dower.

The Court to enter judgment on default, or nonsuit, as the legal rights of the parties shall require.

J. Granger, for the plaintiff.

* On being produced it was found to be a quitclaim.

1. The tenant, deriving title to the premises of which dower is claimed through demandant's husband, is estopped to deny his seizin. *Smith* v. *Ingalls*, 13 Maine, 284; *Bancroft* v. *White*, 1 Caines, 185; *Hitchcock* v. *Carpenter*, 9 Johns., 344; *Nason* v. *Allen*, 6 Maine, 214; *Hains* v. *Gardner*, 1 Fairf., 383; *Thorndike* v. *Spear*, 31 Maine, 91. See, also, *Lincoln* v. *White*, 30 Maine, 291.

2. Demandant's husband was, in fact, seized of an estate in fee simple. *Hunt* v. *Hunt*, 14 Pick., 374.

An indefeasible estate in the husband is not essential to his right of dower of the widow. If the estate was not defeated, but became absolute in the grantee of demandant's husband, she was entitled to dower.

J. A. Peters, for the defendant.

On examination, the deed from Foster and others will be found to be merely a quitclaim, not a warranty, as the case states.

Foster claimed only under a mortgage, and, at the time of his conveyance, his foreclosure had not been perfected. The conveyance, whether by deed of quitclaim or warranty, was operative only as an assignment of the mortgage. *Hunt* v. *Hunt*, 14 Pick., 382; *Ruggles* v. *Barton*, 13 Gray, 506; *Crooker* v. *Jewell*, 31 Maine, 306; *Lincoln* v. *White*, 30 Maine, 291.

Until a mortgage is foreclosed, there can be no dower in the mortgagee's estate. 4 Kent's Com., 43; Washburn on Real Property, 163; *Smith* v. *People's Bank*, 24 Maine, 185.

The statute provides, that the widow shall be entitled to dower "in the *lands* of her husband." R. S. c. 103, § 1. But a mortgage, not perfected, is not an interest in land, but a *chattel*. 24 Maine, before cited; *Gore* v. *Jenness*, 19 Maine, 53.

The defendant is not estopped to show, that demandant's husband was seized only *in mortgage*. He was seized, but not of an estate which entitled the wife to dower.

It has been decided in New York, and other States, that the grantee is not estopped from showing that the husband was not seized of such an estate as to entitle the wife to dower. *Sparrow* v. *Kingman*, 1 Comst. R., 242; *Finn* v. *Sleight*, 8 Barb., 401.

Kent, in his 9th edition of Commentaries, 4th vol., starred page 38, in note, corrects or explains his text in accordance with the doctrine of these cases, and states that *Bowne* v. *Potter*, 17 Wendell, 164, is, so far as inconsistent therewith, overruled. See Washburn on Real Property, under the chapter upon dower, for a general summary of the cases upon this point.

But it has been decided in this State directly. *Gammon* v. *Freeman*, 31 Maine, 243.

But no estoppel works from a quitclaim. *Ham* v. *Ham*, 14 Maine, 351; *Partridge* v. *Patten*, 33 Maine, 483; *Pike* v. *Galvin*, 29 Maine, 183.

The opinion of the Court was drawn up by

KENT, J.—The issue joined in this case, is upon the seizin of the husband during coverture. The defendant denies that the husband was so seized of a dowable estate.

Two questions arise,—1st, is the defendant estopped from denying such seizin, and from establishing by proof, that the husband's seizin was such that no right of dower ever existed?—2d, if not, was the seizin of the husband, on the facts agreed, such as to give a right to dower in the premises?

In relation to the first point, we find that the tenant has derived his title from the husband through mesne conveyances, the deed from the husband and two others having been given to Benjamin Lincoln, from whom the title has passed to defendant. It is insisted, in the first place, that the tenant is estopped to deny that the wife is entitled to dower, because the tenant has and claims title derived from the husband; and this, without reference to the nature of the conveyance from the husband, whether by deed of war-

ranty, or a mere release or quitclaim. It is contended, that, when the tenant holds under a conveyance from the husband, whatever its form, he is estopped from controverting the seizin of the husband, and, from showing that it was not such as to entitle his wife to dower. The doctrine asserted goes beyond the rule, that the production of a deed of conveyance from the husband, and evidence that the tenant claims and holds under that deed, is, *prima facie*, sufficient to establish the claim of the widow to dower, if uncontrolled, but it claims that it is not to be controlled by any evidence, and that the doctrine of estoppel comes in and excludes absolutely every other fact.

It is, undoubtedly, true, that this principle is to be found, more or less directly asserted, in many cases in this State, and in New York and other States. *Kimball* v. *Kimball*, 2 Greenl., 226; *Nason* v. *Allen*, 6 Greenl., 243; *Smith* v. *Ingalls*, 13 Maine, 284; *Hains* v. *Gardner*, 10 Maine, 383; and other cases. *Bancroft* v. *White*, 1 Caines, 185; *Hitchcock* v. *Harrington*, 6 Johns., 290; *Bowne* v. *Potter*, 17 Wen., 164; and several other cases in New York.

It is equally true, that, in New York, this doctrine, which had been deemed settled there for forty years, has been overruled, and the contrary doctrine fully established. *Sparrow* v. *Kingman*, 1 Comstock, 242; *Finn* v. *Sleight*, 8 Barbour, 401.

In our own State, in the case *Gammon* v. *Freeman*, 31 Maine, 243, the point was made, and thus disposed of by SHEPLEY, C. J.: "It is insisted that the tenant is estopped to deny the seizin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny that the husband was seized, he may be permitted to show the character of that seizin, and that it was not such that his widow would be entitled to dower." This principle is indicated in *Campbell* v. *Knights*, 24 Maine, 232. The same doctrine is found in *Moore* v. *Esty*, 5 New Hamp., 479.

In the last edition of Kent's Commentaries, vol. 4, p. 38,

(in a note,) it is stated, that the law in New York is now established as declared in the recent cases. In the able and instructive work by Prof. Washburn, on real property, the author evidently doubts the soundness of the early decisions, and inclines to consider the recent decisions to be in accordance with the doctrines of the common law, and the principles on which they are based. See, also, *Gardner* v. *Greene*, 5 R. I., 104, hereafter more fully stated.

In this state of the authorities, we may be at liberty to consider the questions raised in this case as in doubt, and the former decisions as shaken, if not overruled. We may the more properly do so, when we find that such able jurists as Judge COWEN and Judge BRONSON, of New York, whilst yielding to the apparent force of the earlier authorities, both admit that the doctrine of estoppel, in their judgment, was improperly applied to cases of dower, and cannot be sustained upon principle. 2 Hill, 308; 1 Comstock, 242.

If the tenant is estopped, it must be because his grantors *accepted* a deed from plaintiff's husband. Why should that fact estop the defendant from showing that the husband was not seized in such a manner as to give a right of dower? It is unnecessary to go over all the learning and all the nice distinctions to be found in the books and in adjudged cases. The definition given by Lord COKE of an estoppel, is not calculated to recommend it to one in search of truth and the right of the case. "An estoppel is where a man is concluded by his own act or acceptance to say the truth."

It is, nevertheless, a doctrine, when strictly guarded and applied, of essential importance, and perfectly just and reasonable. It is based on the great principle of right, that a man shall not be permitted to contradict what he has solemnly affirmed under his hand and seal; nor shall he deny any act done or statement made, when he cannot do so without a fraud on his part and injury to others. When a person gives a deed he is not allowed to deny or contradict any thing distinctly stated as a fact. There must be certainty of allegation, and a particular and not a general recital.

Roll. Abr. Estoppel, pl. 1—7; 1 Show., 59; *Doe* v. *Bucknell*, 2 Barn. & A., 278.

But this is a case of *accepting* not *giving* a deed. There has been some obscurity introduced into the cases by not distinguishing between a deed indented and a deed poll. An indented deed is considered as the deed of both and of each party, and the statements and recitals therein, the words of each, and therefore both are bound and estopped thereby. 1 Shep. Touch., 53. But a deed poll is of one part, and is the deed and language of the *grantor* only. Co. Litt., 47, b. 363, b.

But there may be an estoppel *in pais*, "by acceptance of an estate." Co. Litt., § 666–7. This rule applies to cases where, by denying the title, the rights of the landlord, or some party, would be injuriously affected thereby. As when a deed accepted creates the relation which imposes on the grantee a duty or obligation, express or implied, at some time, or in some manner, to surrender the premises to the grantor or his heirs or assigns, as landlord and tenant, trustee, mortgager and mortgagee. There must be remaining some right in grantor and some duty towards him in grantee, in relation to the surrender of the estate. *Williston* v. *Watson*, 3 Pet., 47; *Watkins* v. *Holman*, 16 Pet., 53; *Doe* v. *Barton*, 11 Ad. & El., 307. A grantee in fee is under no such obligation. *Fox* v. *Widgery*, 4 Greenl., 218; *Small* v. *Proctor*, 15 Mass., 499; *Sparrow* v. *Kingman*, 1 Comst., 248.

A man who takes a warranty deed in fee, is not estopped from denying the seizin of his grantor, or from alleging his want of title, or the existence of incumbrances. If he were, no action could be maintained on the covenant of seizin, or on any covenant in the deed. *Small* v. *Proctor*, above.

It is now settled in this State, (overruling the case of *Fairbanks* v. *Williamson*, 7 Greenl.,) that where a party has given a quitclaim deed, he is not estopped from setting up his title subsequently acquired, unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance. *Pike* v. *Galvin*, 29 Maine, 185. It follows,

a fortiori, that a grantee who merely *takes* a deed cannot be estopped to deny the title, or to acquire a new and independent one, unless by so doing his acts work a fraud and injury upon the legal rights of some other person, *Right* v. *Bucknell*, 2 Barn. & Ad., 278.

It is a well settled rule, that estoppels must be *mutual*, i. e., both parties must be bound. In the case of *Grant* v. *Wainman*, 3 Bingham, N. Cases, 69, it appeared that the tenant took land from the assignees of the demandant's husband, by a deed which described them as *freehold*, and it was held that he was not estopped by taking that deed, as against the demandant *in dower*, from proving that the estate was in fact *leasehold*, in which the widow was not entitled to dower. The reason given is, that every estoppel must be reciprocal, that it must bind both parties, (Co. Litt., 352, A,)—that, in this case, if the defendants had taken a deed of the premises as *leasehold* only, when in fact they were *freehold*, the widow would not be estopped from proving the fact, notwithstanding the recital in the deed. The ground of this decision seems to be, that the wife or widow is not a party or privy to the conveyance. Her claim is by a title paramount and distinct, and therefore she is not estopped, and, on the doctrine of mutuality, the tenant cannot be estopped.

If the husband, in our mode of conveyance, should describe, in his deed, his estate as one for life or a term of years, when in fact he had a fee, his widow might claim dower, and sustain her claim by proof of the facts. *Campbell* v. *Knights*, 24 Maine, before referred to.

In this last named case it appeared that the demandants were mortgagees and the husband only mortgager; that, after the death of the husband, his administrator sold his right in equity under license; that, prior to such sale, the widow's dower in these premises had been set out to her. The mortgagees purchased the equity at the sale by the administrator, and took a deed from him, in which were these words, "reserving from the conveyance the widow's dower, which has

been assigned and set out heretofore." It was contended that the demandants, by accepting a deed with this reservation, were estopped to deny that the dower had been properly assigned, and that the widow was entitled to dower as against them. The Court held, that the admission could not be extended beyond its exact terms; that estoppels are mutual; that, in this case, the clause did not admit, as respected themselves as mortgagees, that her husband died seized, or that she was entitled to dower in the premises, and that they were not precluded from establishing a title which may be good and not inconsistent with their admissions; that, if their title under the mortgage was still outstanding, they would be entitled to recover, even as to the part set off as dower, and the widow must redeem to be entitled to dower. The case of *Gardner* v. *Greene*, 5 R. Isl., 104, is directly in point. It is there held, that the acceptance of a deed poll, conveying, with covenants of warranty, lands purchased, and taking and holding possession under it, do not estop the grantee from disputing the grantor's title to such lands, prior to and at the time of the conveyance, upon a subsequent claim of *dower* in the lands by the widow of the grantor.

The reasoning of the Court in this case fully sustains the ground taken by the tenant in the case before us.

If we depart from technical rules, and inquire what there is in the nature of an estate in dower that should give it this right of *creation* out of the mere fact that the tenant, or those under whom he holds, took a title from the husband, we may be at a loss to discover any substantial reason. We have seen that a widow cannot be defeated of her dower by any declarations or recitals of her husband. Why should she be allowed, as against the truth, to create this right when it never existed, by the mere fact that a title of some kind has been taken from the husband. If it were true, that every seizin of the husband, which gave him a right to *convey* an estate or interest in it, was necessarily a *dowable* seizin, there would be more force in the argument. But

this is not true. A man may have only the estate and right of a mortgagee, which will not give dower, and yet he may properly give a deed of the premises. *Hutchins* v. *Carlton*, 19 N. H., 487; 15 N. H., 55. There are many other cases where the title in the husband may give him a seizin and a right to convey his interest, and yet not in law give the wife a right of dower.

The right of dower is an *inchoate* right. It lies dormant during the life of the husband. It may never become operative. It is not, properly speaking, any part of the husband's estate during his life. It is an independent inchoate right in his estate, if his seizin is such as to give the right of dower after his death. *Barbour* v. *Barbour*, 46 Maine, 1.

It would seem to be a great stretch of the doctrine of estoppel to say, that by *accepting* a deed from the husband, which in no way alludes to the matter of dower, or to the existence of a wife of grantor, the tenant is not only estopped from denying an actual seizin of the husband, sufficient to enable him to give the deed, but is also estopped from denying that the seizin was such as to give a third person an independent right in the estate, although in truth no such seizin ever existed; thus creating an estate by a rule of law, where none ever before existed.

But, looking at the case before us, on the ground that the defendant *is* estopped from denying any thing expressly and particularly set forth as statement, in the deed which he received, the question arises, what *is* thus stated in the deed from the husband? Is there any admission of a seizin in the husband which will give the wife dower?

No man is estopped where the truth appears in the same deed. Co. Litt., 352, b.; Com. Dig., Estoppel, E, 2. The language of the deed is this, "meaning hereby to convey the same premises which was conveyed to us by Ransom Clark, by his mortgage deed, dated July 11th, 1835, and recorded in Penobscot Registry, vol. 71, page 142."

If the tenant is estopped by the recital, what is that re-

cital? Is it any thing more than that the title of the husband was that of mortgagee?

There is no averment that the mortgage had been foreclosed, and the admission cannot be carried beyond what is affirmed "with certainty and particularity." The title and seizin named is not such as gives a right of dower, being only the title of a mortgagee.

The tenant's grantor *accepted* only such an estate as is described in terms, in the deed, and, in any event, an estoppel cannot arise by the assumption of the existence of any fact not clearly and distinctly stated in the deed. On the deed itself, therefore, no estoppel arises in this case.

If the tenant may be allowed to prove the nature and extent of the seizin of the husband, and to show that it was not a dowable seizin, (as we think he may,) the facts agreed upon show that the husband never had any other title or interest in the premises than that of a mortgagee, who had entered for foreclosure but had not perfected it. The deed from the husband was delivered before the expiration of the three years after entry to foreclose. This deed upon inspection appears to be a quitclaim, and not a warranty deed, as stated in the report of the case.

It is well established law that the wife of a mortgagee cannot claim dower in an estate, until the same is foreclosed by the husband. 4 Kent's Com., 43; 4 Dane's Abr., 671; Washburn on R. Actions, c. 7, § 15.

The husband in this case was never so seized as to give his wife a right to dower in the premises.

Plaintiff nonsuit.

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

JULIA A. FOSTER *versus* SYLVESTER GORDON.

If an execution creditor quitclaim to a third person, lands which have been levied on, before the time for the redemption from the levy has expired, the widow of the creditor will not be entitled to dower therein.

ON REPORT from *Nisi Prius*, by APPLETON, J.

THE plaintiff demands DOWER, as the widow of Samuel J. Foster, in certain premises in Hampden. The tenant denies that her husband was ever so seized of the estate as to entitle her to dower therein.

It was admitted that the fee of the premises was in one *John Brown*, on the third day of November, A. D. 1838, on which day, an execution against him, in favor of said Samuel J. Foster, and Ephraim Lincoln, and Benjamin Brown, was levied upon the premises, and the same were set off to the said creditors, who, on the 16th day of the same month conveyed the estate, by quitclaim deed, with special warranty, to Barker & Weeks, under whom, through sundry mesne conveyances, the tenant now holds the premises.

In the deed from Foster and others, to Barker & Weeks, after giving the boundaries of the premises, they add, "being the same set off to us on execution against John Brown, on the third day of the present month, as will appear by the return on the execution."

J. Granger for the plaintiff.

The tenant claiming and holding the estate through the demandant's husband, is estopped to deny his seizin. *Kimball* v. *Kimball*, 2 Greenl., 226; *Bancroft* v. *White*, 1 Caines, 185; *Hitchcock* v. *Carpenter*, 9 Johns., 344; *Smith* v. *Ingalls*, 13 Maine, 284; *Nason* v. *Allen*, 6 Greenl., 214; *Hains* v *Gardner*, 1 Fairf., 383, and would have been estopped even if there were an outstanding paramount title unless tenant had been evicted. 17 Wend., 164. When the widow's husband had nothing but a tenancy at will or

for years, it was held the tenant was estopped, as he held under the title conveyed by the widow's husband. *Ib.*

If one enters by wrong and occupies five years, and conveys and dies, if the tenant holds under that title, he is estopped to deny demandant's seizin.

The title became absolute and indefeasible in the grantees of Foster after his conveyance, if not before in Foster.

A. H. Briggs for the tenant.

The title of a mortgagee is made void by payment of the mortgage debt; 18 Maine, 170; 6 N. H., 12; 8 Ver., 164. So, where the title is by a levy of execution, if the debtor pay the debt, &c., before the time of redemption has expired. Nothing passed by the deed of the execution creditors to Barker & Weeks, but the right to have title in one year, if the debt was not paid. Undoubtedly, if the time for redemption had elapsed before Foster and others conveyed to Barker & Weeks, and the tenant claimed under that title, he would be estopped from denying the title, and the plaintiff would be entitled to recover dower. But to the case at bar, the rule of estoppel is not applicable. It is clearly distinguishable from the case of *Kimball* v. *Kimball*, 2 Greenl., 226, in which the title of the husband was absolute; the tenant derived title from him, with covenants of warranty—not a mere release of a right to have title, which depended on a contingency. See 43 Maine, 489, also 34 Maine, 135; 29 Maine, 266; 36 Maine, 86.

The opinion of the Court was drawn up by

KENT, J.—This case, in many of its features resembles that of same *plaintiff* v. *Dwinel*, (*ante*, p. 44,) decided at this term. The only question presented, is upon the seizin of the husband. The facts are agreed upon. As in the other case above named, the tenants hold by mesne conveyances, under quitclaim deed from the husband. They, however, contend that the husband never had a dowable seizin. The question we consider open to proof, for the reasons stated

in *Foster* v. *Dwinel*. The only right or title that the husband ever had, was derived from a levy of an execution in his favor on the premises, on the third day of November, 1838. The quitclaim deed from the husband was dated the sixteenth day of the same month, but not acknowledged until the eighteenth of March, 1839. In this deed, as in the one in the former case, the nature and extent of the husband's seizin, and the nature and origin of his title are set forth. The language is—"and is the same set off to us on an execution against the said John Brown, on the third day of the present month, as will appear by the return on said execution." The question thus open for decision, therefore, is, whether the seizin of the husband, by virtue of a levy of an execution on the land, before the expiration of the year of redemption, is such as to entitle his wife to dower. It appears, that, within the year allowed for redemption, the husband parted with all his right and title by deed; and, of course, he never had any of the rights which would accrue from a perfected title by the expiration of the year of redemption.

What is the nature of the seizin which the husband had? He acquired it by a levy, under a statute, on an execution for a debt due to him. All the right and title he acquired, was subject to the right of the debtor to redeem and re-invest himself of his former estate, by paying the appraisement and interest and cost within the year. The real estate was thus taken and held as a pledge or security, or as a mortgage for the debt.

By the strict principles of the common law of England, following out the feudal doctrine of inalienability, real estate could not be levied upon, or sold for payment of debts. The first attempt to obtain some rights in land by creditors in England, was by a writ of execution, wherein the sheriff was commanded to seize and receive all the rents and profits, but not to take actual possession. Then followed the writ of *elegit*, given by statute, Westm., 2, 13; Edw., 1; by which one-half of the debtor's freehold lands are to be de-

livered to the creditor on the execution, to be held by him, until the debt is paid out of rents and profits. Recently this right has been extended to the whole of debtor's land, instead of a half; and a registration of judgment liens is provided for. 1 & 2 Vict. It is evident that the land is held only to secure payment of the debt.

It has been decided "that, although the estates acquired by a tenant by statute merchant, statute staple or *elegit*, are uncertain as to their duration, and, although persons holding such estates shall have the same remedy by assize as *freeholders*, yet they *are but chattels*, which vest in executors and administrators." Cruise's Digest, (Greenleaf,) Title xiv. § 65.

The provisions in our statute in relation to levies on real estate to satisfy executions, partake, to some extent, of the nature of the writ of *elegit*, in those provisions which authorize a levy on rents and profits. R. S., c. 76, §§ 8, 9, 10. But, in ordinary cases, where the estate can be described by metes and bounds, the estate of the debtor is taken by appraisement, and the creditor has seizin and right of possession from the day of the levy completed. *Pope* v. *Cutler*, 22 Maine, 105. This is subject to the right in the debtor to redeem by paying the appraisement and cost, and interest, within a year.

The question arises as to the nature of the creditor's seizin during the year of redemption, or until redemption within the year. The whole proceedings are instituted to obtain payment of a debt. As, in the case of a mortgage, the debt is the principal thing. Whatever discharges the debt, discharges the mortgage, and whoever holds the mortgage holds it in trust for all interested in the debt or debts thereby secured. The creditor takes the land by levy, and holds it, like a pledge, for the year. His title is not absolute and forever, but liable to be entirely defeated by payment. The levy creates a kind of statute mortgage, the time of redemption being limited to one year.

If the creditor dies within the year, and before redemp-

tion, and the land is redeemed, the money received goes to the administrator and not to the heirs of the real estate. And, even if not redeemed, the land is to be distributed among those entitled to the personal estate. R. S., c. 65, §§ 23, 24. Our law treats the land, even after the title becomes perfect by failure to redeem, as still representing the debt, and decrees its distribution as, in effect, still personal estate.

It has been decided in numerous cases, that a mortgagee, before foreclosure absolute, has no such estate as can be attached or levied on. *Smith* v. *People's Bank*, 24 Maine, 185. He has not an estate that his widow can have dower in. *Foster* v. *Dwinel*, *supra*.

It has been decided, also, that payment after the time of redemption, accepted by mortgagee, operates as an extinguishment of the title. And this doctrine has been applied to the case of a title under a levy of execution. *Randall* v. *Farnham*, 36 Maine, 86.

If the seizin of a creditor, who has levied, is sufficient to give his wife a right of dower in the land levied on, this right attaches at the time of the perfected levy, and any seizin, however short, if it be of a nature to give dower, is sufficient. It can, in this view, make no difference whether the land is redeemed or not. If the land is redeemed in a week after the levy, still the seizin is the same as if redeemed just before the expiration of the year. The widow of every creditor who has ever levied on the land will be entitled to dower, although the debtor has redeemed his land after each levy. It is evident that neither the common law nor the statute, ever contemplated such a right of dower. The statute makes no provision for a release of dower, when the land is redeemed, and it is not probable that any debtor, thus redeeming and taking a release, has in practice obtained such release of dower. The law does not contemplate or require that the debtor shall not only pay the appraisement, interest and cost, in order to re-possess himself of his land, but shall also pay whatever the wife of his creditor

may require for her inchoate right, or leave a newly created right of dower in his land as a perpetual incumbrance. We have known instances, where an energetic but unfortunate debtor has had the same land taken from him several times, by different creditors, and yet, in each case, has been enabled, before the expiration of the year, to redeem it, and finally was so fortunate in his affairs, as to hold it without fear of creditors. He would, however, have but little cause to rejoice, if all the widows of the several creditors could each in turn have a third part set off to them as dower. It would be as when "seven women lay hold of one man."

We are satisfied that the seizin of the husband was not such as to give his wife a right of dower in the premises demanded, and, according to the agreement of the parties, the *Plaintiff must be nonsuit.*

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

DANIEL B. HINCKLEY *& al. versus* CHARLES D. GILMORE.

The provisions of the statutes authorizing, in certain cases, an officer to sell, on mesne process, personal property attached, do not apply where logs are seized on a writ brought to secure the statute lien thereon, in favor of one who has rendered services in cutting and hauling them, if the owner of the logs is not a party defendant in the writ; and such proceeding and sale afford no justification to the officer in a suit against him, for their value, by the owner of the logs.

REPORTED from *Nisi Prius*, by APPLETON, J.

TROVER for 397 logs. The plaintiffs had title to the township from which the logs were cut, by mortgage from Rufus Dwinel. The plaintiffs permitted Dwinel to cut logs, they retaining a lien on them. The logs in controversy were cut under a contract made by Hewes & Eastman with Dwinel.

On August 9th, 1860, the defendant, as sheriff of the county of Penobscot, sold the logs to Samuel Pratt, they being then in the possession of the defendant, he having before that time seized them.

In defence, were introduced six writs against said logs and Hewes & Eastman, brought by persons for their claims for services in cutting and hauling the logs, each claiming a lien on the logs under the provisions of the statute. On these writs, the defendant seized and held the logs, until they were sold by him.

These writs were returnable to and entered at the October term, A. D. 1860, for the county of Waldo, when the Court ordered notice, as provided by statute, to be given to said Dwinel and the plaintiffs, as owners of the logs. The notice was given, and, at the term of Court in January, 1861, a default as to the logs was entered, and also against the said Hewes & Eastman; but judgment in none of the cases had been entered up and rendered.

This case was argued by

J. A. Peters, for the plaintiffs, and by

C. P. Stetson, for the defendant.

The opinion of the Court was drawn up by

KENT, J. — This is an action against a sheriff for taking certain logs, which the plaintiffs claim as their property. The defendant undertakes to justify the taking, by showing that he attached these logs by direction of a writ, in which he was specially directed to attach them. The plaintiffs do not, in this action, deny that this would be a justification to the defendant, so far as the attaching and holding the logs is in question; but they say that he has so conducted since the attachment, that he is to be charged as a trespasser *ab initio*. They say that, instead of holding them until final judgment, he has unlawfully sold them to one Samuel Pratt. The fact of such sale is admitted, and the officer attempts to sustain the legality of his acts, on the ground that he was

authorized to sell them under the statute, he having complied with all the essential requirements.

The plaintiffs reply to this defence, that, admitting all the facts stated in the defendant's return, he had no right to sell these logs at the time he did. This raises the question whether an officer can proceed to sell logs attached as these were, on a writ in favor of a plaintiff who claimed a lien thereon for labor done on them—the suit being against a third party, not the owner, who had not been summoned in, and these logs being attached by a special mandate in the writ, the case being still pending?

There is no question, since the decision of the case of *Redington* v. *Frye*, 43 Maine, that the writ and declaration referred to are sufficient in form to authorize the attachment, nor that the proceedings are duplex in their character. The suit, as against the contractors, who are named as the debtors, is the ordinary action of assumpsit for work and labor; as against the logs it is not originally against any persons; but is in the nature of a proceeding *in rem*, to enforce a lien. Any property of the debtors named, not exempt from attachment, might be attached and held as in common cases, or sold on the writ. But the logs are not attached as the property of the debtors. They are attached under the provisions of c. 91, § 19, to enforce a lien claimed for labor. In ordinary cases, no questions can be tried in the suit, on which an attachment is made, to test the ownership or rights of any parties in the goods attached. But the only question as to these logs, which can be tried in a case like this under consideration, is, not whether the defendants named owe the debt sued for, but whether the goods seized are liable to be held to pay that debt, by reason of a lien. The attachment of the logs, therefore, resembles very nearly a process in Admiralty, where the article is seized and held in the custody of the law until a decision is had as to the title or right in the thing itself. There is no doubt that in Admiralty a sale of the thing may be made *pendente lite*, but it must be by special order of the Court, and for special

reasons. The marshal cannot sell it without such order, however clearly it may appear that such sale was best for the interests of all parties.

Did our Legislature intend, when they gave the new right to enforce a lien by attachment, to place such seizure on the same ground, in every respect, as an ordinary attachment of the debtor's property, before the claimants had been summoned in? In ordinary cases, the sale on a writ, as it is termed, simply changes the security from specific articles into money, and the money, to all intents, stands in the place of the goods. But it would be far in advance of this to authorize a sale of an article, confessedly not the debtor's, and which could not be levied on until after notice to the claimant, and a judgment of the Court that it was subject to the lien claimed. Until such judgment the attaching creditor acquires no right to intermeddle with the property, except to have it taken into the custody of the law to await a trial and decision *in rem*, as to the lien; and the owners cannot take it by replevin, as in other cases, it being in the custody of the law as legally attached. There are inseparable difficulties in applying the provisions of the statute authorizing a sale on a writ, to a case like this. The section (47 of c. 81) which gives the right to commence proceedings preliminary to a sale, contemplates that there has been a prior refusal by one of the parties to have the goods sold by mutual consent. The statute did not intend to give the right to the creditor to subject the debtor and his goods to the expense of an appraisement and notices, &c., until he had refused an application to have the property sold as by consent of all parties, under § 46. It would be manifestly unjust to incur these expenses until such refusal on the part of the debtor. But, in the case under consideration, there was no debtor representing these logs, to give assent or refusal. It is contended, in the ingenious argument of the counsel for the defence, that the logs may be considered "the party." The difficulty of this view, in reference to the various provisions of the sections of c. 81, authorizing a sale on a writ, is,

that those sections contemplate a party who can, and will, determine and act from intelligence and according to a formed judgment, and not a mere "King Log." The owners of the logs are not properly parties or defendants until they have been summoned into Court, to assert there their rights, if they see fit. In this case, the action had not been entered in Court, when the appraisement and sale were made. The property attached was not the defendants in the suit, and therefore they could not assent to or refuse a proposition to sell by consent. The logs were dumb. A question may be asked, to test whether these provisions apply to a case like this, viz.:—Could the debtors sued consent to a sale under § 46, and, by that consent justify the officer in selling another man's logs?

Another difficulty is in § 49. "The debtor" has the right to appoint one of the appraisers. The owners of the logs are not "debtors," and, we have seen, were not then parties. It could not have been the intention to give this right to choose an appraiser to the "debtors" named in the writ, who were not owners, and who had no interest in the goods. After the appraisement "the debtor" may take the property, by giving a bond to pay the appraised value, or to satisfy all judgments that may be recovered in the suits on which it is attached. If this right should be claimed by the debtors in such a case as this, the property must be delivered to them, and they would only be held to pay their own debt, and the owners of the logs must look to them only, if on a final decision it should be adjudged that no lien existed. The owners of the logs are not "debtors," and, in this case, were not parties at the time, and had no opportunity to give the bond. The condition required in the bond is not one applicable to a case of lien. It is, that the obligor shall pay the appraised value of the property, or satisfy all judgments in the suits in which the property is attached. The appraised value may be more than the lien claims, or the judgments may be more than the appraised value. The proper condition would seem to be, to pay all liens on the

goods. There might be a conflict if the "debtors" should insist upon giving the bond when the owners also claimed the right to give it. To which party should the goods be delivered? It is evident, from a comparison of the statutes, that the provisions in relation to a sale on a writ, were made without reference to the peculiar attachment to enforce a lien. Indeed the original statutes in reference to a sale before judgment, was passed many years before the one giving a right to enforce a lien by attachment, and the R. S. of 1857 make no change in the provisions. The framers of the original statutes could not have had in view an attachment to preserve a lien, as no such right then existed. This fact is an answer to the argument drawn from the language of the 48th section of c. 81, which requires the officer, in his posted notice, to name "the supposed owner of the property." That language was first used in the statute of 1846, c. 198. The first statute giving a lien to laborers on logs and lumber, and a right to attach, to enforce it, was passed in 1848. (c. 72.) It is, however, true that those words may be sufficient to show that the provision as to posting notices may be adapted to a case of owners not the debtors sued. The provision was, undoubtedly, designed originally to meet the case where there were several defendants, and the property of one, or a part only of them, was attached. But there are insuperable difficulties in other parts of the proceedings.

The officer must be held as a trespasser *ab initio*, according to the case of *Ross* v. *Philbrick*, 39 Maine, 29.

Defendant defaulted—Damages to be assessed by the Judge, at Nisi Prius, as agreed.

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

WILLIAM H. MILLS *versus* O. P. MERRYMAN *& ux.*

Money due for rent, which accrued prior to a testator's death, goes to his executor as part of the estate; but rent afterwards accruing, if the estate be solvent, belongs to the heirs or devizee.

And the executor has no claim to after accruing rent, so that he may collect it, to reimburse himself for payments made to a co-tenant of the rented premises, for his share of the rent collected by the testator; the co-tenant's claim creating no lien on this particular portion of the testator's estate.

ON STATEMENT OF FACTS.

ASSUMPSIT. The facts, as they are stated by the parties, are these: —

The plaintiff is executor of the will of John Bennock. The female defendant is the daughter of the said testator, and was a minor at her father's death, which occurred in 1855. Josiah Bennock was her guardian. In 1856, she married the defendant and became of age before the date of the writ. At the time of the decease of said testator, he was seized of 35-100th parts of lot 25, in Oldtown. Daniel White was seized of 5-100ths of the same lot. The testator had collected White's part of the rent, and, at the time of his decease, was indebted to White, on that account, $22,50. One Davis, too, had a claim against the estate for $21,70, which sum he paid during the lifetime of the testator for taxes on his portion of the lot. These two bills were paid by plaintiff on January 2d, 1856. On April 24th, 1856, the plaintiff received $40, and, on June 19th, 1856, $30, for rent of said testator's, and said White's share of said lot. From May 1st, 1856, to May 1st, 1857, and, on January 29, 1857, he paid to Josiah Bennock, guardian as aforesaid, the full amount so received. Said guardian paid 35-40ths of said $70 to his ward, then sole, and a minor, and charged the same in his guardian account, which was afterwards, in March, 1857, duly settled. If he overpaid Bennock, it is admitted that it was by mistake.

Before this suit was brought, the defendants were requested to refund said $44,20, and refused.

By the provisions of John Bennock's will, his real estate was devised to Mrs. Merryman, and some others of his children, to be equally divided between them. At the May term, 1856, of the Probate Court, a commission was issued to divide the real estate—and such division was made and completed, and she went into possession of said 35-100ths of lot 25, which was assigned to Mrs. Merryman as her share, on June 23d, 1856.

Judgment to be rendered on nonsuit or default, as the Court shall order.

The case was argued by

Sewall for the plaintiff, and by

Rowe & Bartlett for the defendant.

The opinion of the Court was drawn up by

KENT, J.—This action is based upon a count for money paid by mistake. The plaintiff, as executor of John Bennock, received certain moneys for rent of the real estate of the testator, which *accrued after his death*. The estate is not represented as insolvent. The real estate, for the use of which the rent was paid to the executor, was, in the division, assigned to the defendant, Mrs. Merryman. The executor paid over the rent received to her guardian, who paid it to defendant. The plaintiff now claims to recover back at least forty-four dollars and twenty cents, the amount paid by him to Daniel White and one Davis, who had claims against the estate, arising from receipts and payments in relation to this land. The claim of White was for rent of a part of this lot, which he owned in common with testator, and which testator had collected. The claim of Davis was for testator's portion of taxes, which he, Davis, being also interested in the land, had paid. Both these claims were existing against the testator and his estate at and after his death. They were simply debts due from the

estate, and created no lien on the land, and no right to the rents afterwards received. It was the duty of the executor to pay them out of the general fund and assets, in the same manner as he paid other simple contract debts. He could not properly apply the rents received for occupancy, after the death of the testator, to this purpose.

The rents of real estate accruing before the death go to the executor, as part of the estate. But all rents accruing after the death are incident to the reversion, and go to the heirs, who take the land by devise or descent. If collected by the executor, he is bound to pay them to the heirs as part of the inheritance. These principles are fully stated in the case of *Stinson* v. *Stinson*, 38 Maine, 593. In the case before us, the rent received was paid to the heir to whom this land was assigned in the division.

This action is in the name of the plaintiff as an individual, and not in his capacity as executor. He claims, apparently, to recover back the amounts he paid to White and Davis, on the ground that he paid them to defendant by mistake, having the right, as against the heirs, to retain those sums for the purpose of paying them. We have seen that he had no such right.

If there is any question whether the defendant had a right to receive and retain it all, it can only arise between the heirs, and could, at most, involve the small portion of the yearly rent between May 1st and June 23d, 1856.

Plaintiff nonsuit.

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

JAMES CUNNINGHAM *versus* WALTER K. FOSTER.

The defendant pleaded in bar a judgment, between the parties, in a former suit — which judgment was rendered on the award of referees appointed by a rule of Court: — *Held*, that the judgment was not, necessarily, a bar to this action, although, under one of the counts in the writ, in the former action, the claim now in suit might have been proved; and the question, whether the claim was embraced in the award, was properly submitted to the jury.

EXCEPTIONS by defendant, to the ruling of APPLETON, J., at *Nisi Prius*.

THIS was an action of ASSUMPSIT for "85 days' labor in tempering blades for pencil sharpeners."

The defendant pleaded the general issue, and, by way of brief statement, alleged that the subject matter of the present suit was embraced in, and determined by, an award made by referees, appointed by a rule of the Court, in a former action, between the same parties.

The declaration in the plaintiff's former writ is given, substantially, in the opinion of the Court.

The plaintiff introduced evidence to show that the contract he made with defendant, was for cutting, champering, and facing; that tempering was not included in the original bargain, but was a matter of subsequent agreement, and that the compensation for tempering was not claimed in the reference and was not presented to the referees.

The defendant introduced evidence that his bargain with the plaintiff, was, that the plaintiff was to take the blades from the grindstone and prepare them for the mould which would include tempering, and that the whole matter of the tempering was before the referees. The tempering was all done before the first suit was commenced.

The presiding Judge ruled upon the trial of the cause, that although the subject matter of this suit might properly have come before the referees in the former suit, inasmuch as the second count in plaintiff's former writ would embrace

the items in the account now in suit, yet, said award was not necessarily a bar to this suit, and the question, whether the claim now in suit was embraced in said award, was submitted to the jury.

To which ruling the defendant excepted, the verdict being in favor of the plaintiff.

The case on the exceptions was argued by

F. A. Wilson, for the defendant.

T. W. Porter, contra.

The opinion of the court was drawn up by

RICE, J. — Assumpsit on account annexed. May 26, 1858, the plaintiff sued out a writ against the defendant containing three counts; one on an account annexed, one for work and labor performed, and one upon a special contract "to cut, champer and face one million of pencil sharpener blades." This action was referred to referees by rule of Court, by whom an award was rendered in favor of the plaintiff, and, on that award, judgment of Court was duly entered.

July 12, 1860, the present action was commenced, in which the plaintiff claims to recover the sum of $191,25, for "tempering sharpener blades," as per his account annexed to his writ. It is admitted that the work, for which this action is brought, was performed before the former action was commenced, and the defendant contends that it was included in that case under the head, of "cutting, champering and facing" said blades. He has, therefore, pleaded the former judgment in bar of this action. The plaintiff, however, contended that the claim now sued for, is different and distinct from the one in litigation in the former action before the referees, and was not presented to nor considered by them.

The presiding Judge ruled that although the subject matter of this suit might properly have come before the referees in the former suit, inasmuch as the second count in the plaintiff's former writ would embrace the items in the

account now in suit, yet said award was not necessarily a bar to this suit, and the question, whether the claim now in suit was embraced in said award, was submitted to the jury. To this the defendant excepted.

It is a well settled rule of law, that if a verdict, award, or judgment of a Court of competent jurisdiction, has apparently, but not necessarily, covered the very ground on which a second action is brought, though this would be, perhaps, *prima facie* evidence that the matter had passed *in rem judicatum*, yet it may still be averred, and proved by parol testimony, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided in the former case. *Snider* v. *Croy*, 2 Johns., 227; *Phillips* v. *Berick*, 16 Johns., 136; *Webster* v. *Lee*, 5 Mass., 334; *Whittimore* v. *Whittimore*, 2 N. H., 26; *Squires* v. *Whipple*, 2 Vt., 111; *Eastman* v. *Cooper*, 15 Pick., 276; *Dutton* v. *Woodman*, 9 Cush., 255; *Sedden* v. *Tutpot*, 6 T. R., 607.

It appears from the authorities, that where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action, to show that they are not the same. Per ABBOTT, C. J., in *Bugot* v. *Williams*, 3 B. & C., 235.

The ruling of the Judge was in strict conformity to authorities. *Exceptions overruled.*

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

CYRUS HEWES *versus* JABEZ B. BICKFORD.

Trespass *quare clausum* cannot be maintained by a mortgagee of a farm, before entry for condition broken, against one who holds under the mortgager, and cuts and takes off the grass growing thereon; for thereby, neither the estate nor the mortgagee's security is impaired.

And if the defendant did nothing recognizing the relation of landlord and tenant, between the mortgagee and himself, the fact that the mortgagee notified him to quit the premises, which he held as his tenant at will, gives no right to maintain such action.

REPORTED from *Nisi Prius* by APPLETON, J.

TRESPASS for breaking and entering the plaintiff's close, on August 15th, 1859, and on divers days between that day and the first day of October following, (the date of plaintiff's writ) and cutting down and carrying away the grass and appropriating the same.

At the time of the alleged trespass, the plaintiff held a mortgage of the *locos in quo* made by one Rich to one Mason, and by Mason assigned to plaintiff; the condition of which was broken; but no entry had ever been made by the plaintiff or his assignor, nor any proceedings taken to foreclose. Rich had been left in possession. In April, 1859, Rich leased by parol the mortgaged premises to the defendant for the season, and he immediately entered upon them, occupied the house by his sub-tenant, and improved, planted and sowed the tillage himself, and put up the fences and repaired the same all over the farm, including the mowing land as well as other parts of the land, and pastured the pasture land during the whole season, until the season closed in November following; all which was in the usual and ordinary mode of managing a farm—but he did not personally live on the premises himself.

While engaged about the tillage, and fencing, the plaintiff frequently passed by and knew the defendant had possession as before stated, but he said nothing until on July 8th, 1859, when the plaintiff gave the defendant a written notice

to quit the premises which he occupied as his tenant at will, and that his tenancy at will would terminate on the 10th day of August, 1859. The defendant still continued in possession of the premises, and, in the same month of July, he mowed and gathered the grass, and afterwards gathered his other crops and pastured the land—both pasture and field where he cut the hay—entering upon the same for that purpose from day to day as aforesaid, until the close of the season.

Sanborn, for the plaintiff.

A. W. Paine, for the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiff is the assignee of the mortgage of the farm, which is the *locus in quo*, from Rich to Mason, the mortgagee, never having taken possession, or steps to foreclose the mortgage, notwithstanding the condition therein had been broken. In April, before the trespass alleged, the mortgager leased, by parol, the premises to the defendant, who occupied through the season, in such manner as farms are usually occupied.

The plaintiff frequently passed by the farm, and knew that the defendant had possession, but said nothing to him on the subject. On July 8, 1859, he gave notice in writing to the defendant, that he regarded him as his tenant at will, of the farm, and directed him to quit on August 10, 1859. The defendant continued his possession, mowed the grass, harvested the hay and other crops, and also pastured the land, which had been mowed by him, and that which had been used as pasturage, till the close of the season. On Oct. 1, 1860, this suit was instituted.

Nothing in the case shows, that the defendant ever recognized the relation of landlord and tenant, as existing between the plaintiff and himself. The rights of the former were exclusively those of a mortgagee, not having taken possession. The possession of the defendant was that of

the mortgager, whose possession had never ceased, by himself or his lessee, and the action cannot be maintained better against one than the other.

The notice of the plaintiff to the defendant, to leave the farm, as therein directed, and the expiration of the time within which it was to be done, did not change the possession, and gave no right to maintain this action.

The land, according to the case, was used for the ordinary purposes of husbandry, and, in the case of *Fernald* v. *Linscott & als.*, 6 Greenl., 234, this Court recognize the doctrine as well settled, that, until entry, the mortgager is not accountable to the mortgagee for rents and profits; for he is not a trespasser in taking them, though he cannot lawfully do any thing to impair the estate, or the security of the mortgage, and such was not done in this case, according to the statement. *Plaintiff nonsuit.*

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

JOHN H. WILSON *versus* GEORGE W. LADD.

Where logs were attached to secure the lien thereon, provided by c. 91 of R. S., and the general owner of them receipted to the officer therefor, reserving his right to claim them as his own property, he will not be estopped in an action brought by the officer, upon the receipt, to assert his right to the logs and to defend the suit.

The receipter may refuse, in such case, to deliver the logs when demanded of him by an officer having the execution issued in that suit, if there is no mandate in the precept, authorizing him to satisfy the judgment by seizure and sale of them, his precept running only against the property and body of the *debtor* therein, who was never the owner of the logs.

Actual notice to the owner of the logs, of a suit in which they have been attached, is not required, as the statute provides that the notice shall be "such as the Court shall order;" and a notice will be sufficient if ordered and given by publication in a newspaper.

On statement of facts.

This was an action upon the defendant's receipt, given to the plaintiff for certain logs attached by him as an officer, on a writ in favor of one Lunt, against Webster & Grant. That action was brought to enforce the statute lien of said Lunt on the logs, for his personal services, having been one of the men who cut and hauled them.

Ladd, the defendant in this action, was the general owner of the logs. In his receipt to the officer is the following:— "Not hereby admitting the right of said Lunt to attach said logs, and reserving the right to claim said logs as my own property."

The writ upon which the logs were attached, contained a command to the officer "to attach certain pine and spruce logs marked W. G. X., now in Penobscot river, in and near Penobscot boom, and being the same which were cut and hauled by Mark Webster of, &c., and Andrew R. Grant of, &c., from township No. 3, &c., in the winter of the years 1857 and 1858, on which said logs the plaintiff labored in cutting and hauling, and upon which he claims a lien for his personal services in cutting and hauling, by virtue of § 19 of c. 91 of the R. S. of this State, to the value of one hundred and fifty dollars; and summons the said Webster & Grant to appear, &c., &c., to answer unto William Lunt, &c., in a plea of the case," [on account annexed, which specified the plaintiff's claim,] "then and there, in consideration thereof, promised the plaintiff to pay him that sum on demand, by reason and in consideration thereof; and, by virtue of the statute, [before named,] the plaintiff claims a lien on said logs for his personal services in cutting and hauling the same. Yet, though often requested, the defendants have not paid the same, but neglect and refuse so to do."

The record of the judgment, after reciting the plaintiff's claim as contained in his writ, sets forth, that this action was entered at the October term, A. D., 1858, when notice was ordered to the general owners of said lumber, by publication, in a newspaper, of the writ, with the order thereon,

three weeks successively in, &c., the last publication to be thirty days before the term of the Court to be holden on the first Tuesday of January next, that all persons interested may then and there appear, and take upon themselves the defence of this action.

At the said January term, it was proved to the Court that the order had been complied with, and the defendants did not appear, but made default. "It is therefore considered by the Court that the plaintiff recover against *the defendants* the sum of," &c.

The execution that issued was of the following purport:— Whereas the said Lunt recovered judgment, &c., against the said Webster & Grant, and certain pine and spruce logs,— (which were described, as was also the lien of said Lunt thereon) for the sum of, &c., the officer was commanded to take the property of the debtors, and for want thereof, their bodies, according to the form of a common writ of execution.

The officer having the execution seasonably demanded of defendant, Ladd, the logs attached upon the original writ.

N. H. Hubbard, who was of counsel for the plaintiff in this action, argued—

1. That the notice given was sufficient, being "such as the Court ordered." R. S., c. 91, § 20.

2. The record shows that judgment was recovered against the *defendants* in the suit, and defendants are the logs, and also Webster & Grant. The suit was against Webster & Grant and certain logs.

3. The execution recites in direct terms that judgment was recovered against the logs, and Webster & Grant, and the mandate to the officer was sufficient to authorize him to take the logs.

J. A. Peters, for the defendant.

It being admitted that Ladd was the general owner of the logs attached, both at the time of the attachment and of the

demand, he is not now estopped to deny the plaintiff's claim upon the receipt, for, by its terms, that right was reserved. *Sawyer* v. *Mason*, 19 Maine, 49.

The plaintiff has no valid claim. The judgment, execution and proceeding, are fatally wrong.

The statute contemplates *actual* notice to the owner of the logs; not a *constructive* notice, by publication.

The judgment is against the *personal defendants* only. There was no default of the logs; no judgment against them. But, even if the judgment was correct, the execution is not. In the descriptive clause of "whereas," &c., the logs are covered, but in the mandatory clause to the officer, it runs merely against the men. The present plaintiff has no mandate to proceed against the logs, as logs. He cannot proceed against them as property of the defendants, because they were not their property. *Cunningham* v. *Buck*, 43 Maine, 455; *Redington* v. *Frye*, 43 Maine, 578; *Perkins* v. *Pike*, 42 Maine, 141; *Stedman* v. *Perkins*, 42 Maine, 130.

The opinion of the Court was drawn up by

TENNEY, C. J.—It is agreed in this case, that the general ownership of the logs, described in the defendant's receipt, was in him, both at the time of the attachment, and the demand thereof. And the terms of the receipt sufficiently guard his right to claim the property, and defend this suit upon the receipt.

The defendant insists, that the record shows that he has had no such notice as the statute requires in c. 91, § 20, which should be actual notice. Such construction cannot be admitted. If the statute had prescribed the "notice" to be given, such as was actually given by the order of Court, it could not be insisted, with propriety, that it was insufficient. And when it is left to the Court to order such notice as it thinks is proper, and it is given accordingly, can it have any less validity than it would have if given in pursuance of the statute provision? The meaning of the term "notice" is not so restricted as the defendant contends.

Whether there is a judgment against the logs, is a question, which may be material to the correct decision of some cases, like the present in some of its features, but not so here, from the view we take upon another point presented in argument. It cannot, however, be denied, as the record of the judgment, which makes a part of this case, stands, that a want of that precision, which should always be exhibited in a record, designed to have a conclusive effect upon the property, against the consent of the owner, is quite manifest. It is insisted in behalf of the plaintiff, that the record, showing that the "defendants, though solemnly called to come into Court, do not appear, but make default," and, "it is therefore considered by the Court, that the plaintiff recover against the said defendants, the sum," &c., the term "defendants" is sufficiently broad to embrace the logs referred to. But the same record, immediately following the recital of the count in the writ of *indebitatus assumpsit*, proceeds—"Yet, though often requested, the said *defendants* the same have not paid but neglect it." This language can hardly be said to apply to the logs in question, but to the alleged debtors. We think such looseness should be avoided in judicial proceedings, especially in the record of judgments.

But the defendant relies upon the points that the mandate in the execution is insufficient to authorize the plaintiff, as an officer, to seize and dispose of the logs, and hence the delivery to him would be a useless ceremony, inasmuch as he could do nothing with them in this case, as the general owner thereof was the receipter and the defendant.

The case of *Cunningham* v. *Buck*, 43 Maine, 455, was where the officer, who attached property, (not that of the debtor,) on mesne process, where a lien was claimed in favor of the plaintiff therein, was called upon by another officer, who had the execution, within thirty days of the judgment, and made demand upon him for the property attached, the mandate of the execution authorizing the seizure of the property of the debtor only, and it was held that the officer who

made the attachment was not liable. HATHAWAY, J., in delivering the opinion of the Court, says:—"The demand made by Wilson, (the officer who had the execution,) must have been for property attached, which he could lawfully dispose of and appropriate the proceeds thereof, in payment of the execution in his hands, and which the defendant was under legal obligations to deliver to him for that purpose." This case is in point, and decisive against the maintenance of the action. *Plaintiff nonsuit.*

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

BENJAMIN SHREVE & *al. versus* JEREMIAH FENNO & *al.*, and GEORGE K. JEWETT, *Trustee.*

A trustee having disclosed that the principal defendants conveyed to him certain real estate by deed absolute in form, and assigned to him the cause of action in a pending suit, in which judgment was afterwards recovered, and had given him an unconditional bill of sale of their stock of goods in their store which he took possession of — all which transfers were intended to secure him against liabilities he had assumed and for moneys paid for them, it was *held* that where there had been no fault or neglect on his part, he could not be charged with the real estate, or with the amount of the judgment, and required to credit the value thereof in part of their indebtedness to him; but that he would be liable under the provisions of the R. S., c. 86, § 50, to deliver the goods to the plaintiffs upon the payment of his claims by them.

Held, that although the condition of the sale of the goods was not expressed in the transfer, the sale was not void, as having been made in fraud of the statute, which requires that mortgages of personal property shall be recorded, the trustee having taken possession of the property at the time of the sale.

EXCEPTIONS from *Nisi Prius* to the rulings, *pro forma*, of CUTTING, J., discharging the trustee.

From the disclosure of the trustee, it appears that, prior to and on the 28th day of December, 1859, he had become liable, by indorsing for and advancing to the principal defendants, the sum of $8367,03. Prior to that date he had

received from them a deed of all their right to redeem the store they then occupied, from a mortgage of about $3000; and, on that day, he received from them, a conveyance of their stock of goods then in the store; that the conveyance of their interest in the store, and of the goods, was intended to secure him for his liabilities and advances; that he there took possession of said goods, by an agent, and had sold a portion of the same prior to the service of the plaintiff's writ on him; that, on the 31st day of December, 1859, and at different times between that date, and the service of the writ on him, on September 4th, 1860, he had advanced and became liable for the further sum of $2500, and had received from the proceeds of the goods sold the sum of $2955; that, when the writ was served on him, there was a balance of $7912,03 and interest due to him.

That the principal defendants assigned to him, as collateral security for his liabilities, a demand against Rufus Dwinel, in suit; and, since the service of the writ on him, the said trustee, judgment has been rendered in said action against the said Dwinel for the sum of $1670,89, damages, and $87,52, costs of suit; that execution has been issued, which is in no part paid. The execution the trustee regards as worth cent per cent.

The said trustee was also liable for the principal defendants on a bond to relieve them from arrest on an execution in favor of one Hazeltine, for about $300; but, he has been informed, that the debtors have disclosed thereon and performed one of the conditions of the bond.

The trustee estimates the store to be of the value of $5000 or $5500; the goods remaining in the store unsold, at the time the writ was served on him, of the value of $3000.

The trustee made and filed his disclosure at the first term; whereupon the plaintiffs moved the Court to order that, within some time, to be assigned by the Court, on payment or tender of such amount as may be due said trustee, and while the right of redemption exists, said trustee shall deliver over the property disclosed to the officer serving the process, to

be held and disposed of as if it had been attached on mesne process; and that, in default thereof, he shall be charged as the trustee of the principal debtors or defendants; and, if not to deliver over all said property, then the personal property and said Dwinel judgment; and, if not said real estate or said judgment, then said personal property.

That said sum to be paid or tendered, be the sum claimed by said trustee, with interest, less the disclosed value of said equity of redemption, and of said judgment; and, if not less said equity of redemption, then less said judgment, or its value, as disclosed; and, if not less said judgment, as aforesaid, then the whole sum.

But that such sum may be reduced by the amount which said trustee may in fact realize in cash from any of said property, in the meanwhile, and, especially, less by so much of said judgment as may be paid within the time to be assigned; and, if not as above, that the sum fixed may be the sum disclosed as due; and said plaintiffs offer to pay therefor, such sum, and within such time as said Court may order, as prayed for.

All of which motions and propositions the Judge presiding refused, and overruled, *pro forma*, and ordered the trustee to be discharged. To which orders, rulings, directions and refusals, the plaintiffs excepted.

Peters, for the plaintiffs.

The trustee's claims were for his liability on the defendants' paper. These cannot be secured by *absolute* sales or conveyances. 2 Greenl., 87; 28 Maine, 471; 20 Pick., 404.

The trustee must give credit, as in payment, for the real estate, judgment, &c. *Fales* v. *Reynolds*, 14 Maine, 89; *Howland* v. *Wilson*, 9 Pick., 18; *Lane* v. *Nowell*, 15 Maine, 86.

A sale as security is void, if there be no bond or writing given back. 8 Pick., 386; 6 N. H., 67; 9 N. H., 31; 10 N. H., 150; 5 Maine, 79.

The trustee is chargeable for the personal property, if the sale is a fraud, as against the plaintiffs. And we submit whether an absolute sale of chattels, as security merely, is not a fraud upon the mortgage law, which requires a record. All the decisions in this State that have tolerated security in the form of absolute sales of personal property, were made prior to the statute requiring the record of mortgages. But, in any view, the plaintiffs in the case are entitled to redeem upon some basis, and the questions here arise —

1. Shall not plaintiffs hold the personal property because sold in a form in fraud of the mortgage law?

2. If not, shall not said trustee give credit for said securities, and turn out the goods, or turn out the securities, or goods and securities. See § 50, R. S., c. 86.

C. S. Crosby, for the trustee.

The opinion of the Court was drawn up by

MAY, J. — Service of the writ was made upon the trustee September 4th, 1860, at which time the principal defendants were indebted to him, as appears from his disclosure, and the exhibit thereto annexed, marked A, in the sum of $7912,03, for moneys advanced prior to December 28th, 1859. The trustee was also surety for them on a poor debtor's bond, given to relieve them from arrest upon an execution, wherein the debt was about $300. The condition of the bond appears to have been performed by the subsequent, but seasonable taking of the poor debtor's oath, and the trustee's liability thereon was discharged. It further appears from the disclosure, that, prior to the service of the writ upon him, the trustee had received from said defendants a deed of all their right to redeem the store occupied by them, then under mortgage for about $3000; and also a conveyance of all the stock of goods therein, belonging to said defendants, of which he took actual possession at the time of the conveyance. The precise date of these conveyances does not appear, but the trustee states that they were

taken prior to December 28th, 1859, and that they were intended to secure him for his liabilities and advances on account of said defendants. They are not in the case, but are treated in argument by the counsel upon both sides as if they were, in form, absolute upon their face. The trustee also held, at the time of the service, as collateral security for his liabilities, a demand then in suit against Rufus Dwinel, upon which he has since obtained judgment for $1670,89, damages, and $87,52, costs; which judgment, though supposed to be good, had not been paid at the time of said disclosure. From the foregoing statements, which are to be taken as true, it appears that the whole property conveyed, including the judgment against Dwinel, was not sufficient in value to pay the actual claims of the trustee. Taking the property at the highest estimate of the trustee, and adding thereto the amount of the judgment, so far as it was a judgment for damages, the whole value at the time of the service of the writ did not exceed $7170,89, while the amount then due to the trustee for money advanced, or loaned directly to the defendants, between August 27, 1859, and December 29, 1860, exclusive of interest, was $7912,03, as before stated.

Upon these facts, the presiding Justice ordered the trustee to be discharged, and the question now presented upon exceptions, is, whether such order was erroneous. The counsel for the plaintiff contends that it was, and that the trustee ought to have been charged either absolutely, or conditionally, in accordance with some one of his motions made at *Nisi Prius*.

No question is made in regard to the right of the trustee to state in his disclosure the purposes for which the conveyances were made. Without such statement, both conveyances would appear to be absolute on their face, and neither of them could be impeached, except upon the ground of fraud. Upon the authority of *Stevens* v. *Hinkley & Tr.*, 43 Maine, 440, it is not perceived how any such ground, in view of all the facts, could be sustained.

In determining the question submitted to us, we will look at the conveyances separately. And, first, as to the deed of the equity of redemption, nothing is better settled, than that a trustee cannot be directly charged for the value of real estate which has been conveyed to him. Even if the conveyance is fraudulent as to creditors, he cannot be charged, unless he has received something by way of rents and profits. If fraudulent, the proper remedy is by attachment and levy on execution. That a trustee cannot be charged for real estate in his hands, whether the conveyance was fraudulent or not, I cite, as directly in point, *Plummer* v. *Rundlett & Tr.*, 42 Maine, 365; *Bissell* v. *Strong & Tr.*, 9 Pick., 562. In the case last cited, WILDE, J., remarks, that "in no case has a trustee been charged on account of lands held in trust for the principal, or as security for a debt." The deed before him, like the one in the present case, was absolute upon its face, but was in fact intended as security; and the trustee was discharged without any reference to the difference between the value of the estate conveyed, and the amount of the trustee's claim secured by the deed.

It is said that the real estate conveyed by the defendants to the trustee at its value, as well as the judgment against Dwinel, ought to have been treated as a payment of his claims *pro tanto*, and ordered the conditional judgment required by the R. S. of 1857, c. 86, § 50, in relation to that part of the stock of goods which remained unsold. That such an order, if it had been moved for, might properly have been made with reference to the goods, is not denied. They were in his possession at the time the process was served on him; they were not exempted by law from attachment; they were mortgaged, pledged or delivered to him by the principal defendants to secure the payment of a sum of money due to him; and the defendants had an existing right to redeem them by making such payment. The goods, therefore, came directly within the provisions of the statute. But, unless such an appropriation of the real estate, and the judgment against Dwinel can be made as will con-

stitute a part payment of the trustee's claims, such an order as the statute provides would be worthless to the plaintiffs; and, if such appropriation should be made, it is not perceived, in view of the estimated value of the property, and the larger amount of the trustee's claims, how the plaintiffs could be advantaged by it.

But, aside from this, we are not satisfied that this Court has the power, under the circumstances of this case, to apply either the real estate, or the judgment against Dwinel, towards the payment of the trustee's claims. The judgment, especially in the absence of proof of any want of diligence in collecting it, cannot be so applied before it is paid. The understanding of the parties must have been, that the money due upon it should be appropriated to the payment of the defendants' indebtedness, when paid, and not before. No other agreement can be inferred. So, too, it must have been understood, that the avails of the real estate should be appropriated in the same manner when received. Any earlier or different appropriation cannot be made as against a party who is not in fault, in violation of the mutual understanding of the parties. If there was evidence in the case that the trustee had refused to fulfil his contract with the defendants, or to use due diligence to appropriate the premises conveyed to him for the payment of his claims, then he might well be regarded as electing to retain the premises at their value in payment of his debt.

This case differs widely from the case of *Fales & al.* v. *Reynolds*, 14 Maine, 89, which is relied upon mainly by the plaintiffs to maintain the principle for which they contend. In that case, the action was against the grantor, or equitable mortgager, if he may be so called, who had refused, upon request, to fulfil or perform the contract which the absolute deed was given to secure; and it was held that the real estate conveyed might be treated by the grantee as a payment at its true value, for so much, and the grantee was permitted to recover for any balance that might be due to him under the contract or demands intended to be secured. A similar principle has been established in other cases for the protec-

tion of a party who is without fault. In the case of *Richards* v. *Allen*, 17 Maine, 296, the principle is recognized that a party who has made a verbal contract for the sale of real estate, and received money in part payment therefor, is not liable in an action brought to recover back the money until it is shown that he has placed himself in a position where he cannot make the conveyance, or that he has refused, upon request, and tender of performance by the other party to make it. Such a contract, though void by the statute of frauds, may be shown in defence of the action. *A fortiori*, therefore, an agreement between parties which is to be regarded as valid at law; and the conveyance of the real estate to the trustee, in this case, for the purpose of security, in the absence of fraud, in view of the authorities already cited, is to be treated as such, cannot be disregarded by the Court, in any of its parts, as against a party who is not in fault. The trustee, in this case, is such a party, and, therefore, is entitled to the full benefit of his contract with the defendants as he made it. To deprive him of it would be manifestly unjust.

The objection, that such a view of the law will enable a debtor to cover up his property, or portions of it, so as to prevent its attachment for his just debts, may indicate the necessity of some legislation to remedy the evil, similar to that which now exists in relation to personal property, mortgaged or pledged, but will not justify the Court in any action unauthorized by law.

In regard to the stock of goods, if the conveyance cannot be treated as a mortgage because it has no condition or defeasance, still, inasmuch as the possession was delivered to the trustee, it may properly be deemed a pledge, putting it upon the same footing as if no bill of sale had been executed. Where no fraud exists, justice requires that such a construction should be adopted. *Whittaker* v. *Sumner*, 20 Pick., 399. It secures to the creditor his lien upon the property in his possession, and, at the same time, gives to other creditors the benefit of the provisions of the R. S., c. 86, § 50, before cited. Such a construction is not a fraud upon

our registry laws, as is contended, because, in such a case, no registry of the bailment or pledge is required.

It is contended that such a conveyance of personal property, absolute on its face, if in truth it was made for collateral security only, is inoperative, as against creditors, by reason of the fraud which is to be presumed from such circumstances. Such a bill of sale, given for such a purpose, is not fraudulent, *per se*, in this State. Whatever may be the law of some other States, it has often been held by this Court, that it is only a circumstance for the jury in determining the question of fraud, and when unaccompanied by any other circumstances, has often been deemed, not only by juries, but by the Court, as insufficient to show it. *Reed* v. *Jewett*, 5 Maine, 96; *Stevens* v. *Hinkley*, before cited. We think, in this case, the proof is not sufficient to show any fraudulent intention on the part of the trustee. The amount of the defendant's indebtedness to him, exceeding, as it does, the value of all the property conveyed, both real and personal, including the judgment against Dwinel, repels any design on his part to defraud or delay other creditors.

If, however, the conveyance of the goods was fraudulent and void as to creditors, it seems that the trustee would be entitled to hold the property to secure his *bona fide* claims; *Ripley* v. *Otis*, 6 Pick., 475; *Stedman* v. *Vickery & Tr.*, 42 Maine, 132; and most certainly so, if he held it as a pledge, as above determined.

Whatever view, therefore, we take of this case, none of the motions of the plaintiffs which appear in the bill of exceptions, except that relating to the personal property, other than the judgment, could properly have been sustained. On this point they are sustained, and the plaintiffs will have the right to redeem according to the provisions of the statute and the principles stated in the opinion, and the presiding Judge, at *Nisi Prius*, may enter judgment accordingly.

Exceptions sustained.

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

SETH R. BATES *versus* ALTHEA WARD, *Adm'x.*

If, pending an action in Court, the defendant dies, and commissioners of insolvency on his estate are appointed by the Judge of Probate, and the claim in suit is, by the creditor, presented to them and their adjudication upon it had, from which he appeals, he cannot prosecute his appeal by amending his writ in the action pending, but must commence a new suit, declaring for money had and received, as the statute provides.

Nor is the case altered, by the fact that the estate proves to be solvent.

The adjudication and report of the commissioners having been accepted by the Probate Court, will bar the plaintiff from recovering in such pending suit; and the administrator will have costs from the time of his appearance to defend.

REPORTED from *Nisi Prius*, by APPLETON, J.

ASSUMPSIT on a contract for building a barn, for $125. All the material facts are stated in the opinion of the Court.

The case was argued by

A. W. Paine, for the plaintiff, and by

F. E. Shaw, for the defendant.

The opinion of the Court was drawn up by

KENT, J.—This suit, by the plaintiff against Ariel Ward, the intestate, was pending in Court at the time of his death. His estate was represented as insolvent, and commissioners were appointed. The plaintiff presented his claim to them. It was adjudged by the commissioners that a small part only of the claim was due. The plaintiff, after the acceptance of the report, appealed, by giving the notice required by the statute, but did not commence any new action, but the original action having remained on the docket of this Court, he resorted to it, and afterwards summoned in the administratrix, who appeared, and, at the first term thereafter, pleaded the above facts in bar of the further prosecution of this action.

The principal question is, what was the effect of the action by plaintiff, and the proceedings before the commissioners, on this suit.

It is provided, in c. 66, § 17, R. S., that "actions pending, when a representation of insolvency is made, may be discontinued without costs; *or* continued, tried, and judgment rendered, with the effect, and satisfied in manner provided in case of appeal."

It is provided in the previous sections of this chapter, that a party dissatisfied with the decision of the commissioners, may appeal within twenty days after the report is made, and that, when an appeal is taken, the claim is to be determined in an action for money had and received, commenced in three months, or at next term. The plaintiff is to file with the clerk of this Court, or annex to his writ, a schedule of his claims, and the administrator is to file an abstract of all demands of the deceased against the claimant, and judgment is to be rendered for either party, for the balance ascertained at the trial. No execution for the debt is to be issued against the administrators, but the sum found due to claimant, is to be entered by the Judge of Probate on the list of contingent debts, entitled to dividends.

Where a creditor has a suit pending at the time of the death of the intestate, he can have his claim ascertained and determined in either of the two ways, as he may prefer. He may at once discontinue his suit without cost, and present his claim, without reference to the suit, before the commissioners, where he will have a right to appeal. Or he may retain his suit in Court and have the amount there determined by the jury, in which case no execution can issue; but the amount is to be certified to the Judge of Probate, to be entered on the list of contingent claims entitled to a dividend. In other words, "it is to be tried and judgment rendered with like effect and satisfied in the manner provided in case of appeal."

But he cannot have both remedies. If the case has been contested or has been pending a long time in Court and the costs are large, it might be unreasonable to require the plaintiff to discontinue without cost. The law, therefore, permits him to stand in Court on his original action, as he

would stand in case of an appeal entered. If he prefers to have the adjudication of another tribunal, he may discontinue his suit in Court and resort to the new tribunal, and, if not satisfied with the determination, may appeal and bring a new suit for money had and received, and, in that new suit, have all demands between the parties adjusted.

We think, that, by the presentation of his claim to the commissioners, he elects that tribunal, and that this proceeding necessarily discontinues his suit. It is like the case of a reference of the claim in suit to arbitrators at common law, or to referees under the statute. It has been decided that such submission operates as a discontinuance of the pending suit. *Crooker* v. *Buck*, 41 Maine, 355; *Mooers* v. *Allen*, 35 Maine, 276. The commissioners of insolvency are substituted for the Court, as referees or arbitrators are in the cases submitted to them. They constitute a special tribunal to receive and examine claims against the estate and to adjudicate upon them, with power to administer oaths and examine witnesses, as Courts of record do. An appeal is allowed from their decision. An adjudication by the commissioners is final and binding on both parties, unless appealed from and unless the appeal is prosecuted according to the requirements of the statute.

The common law remedy is taken away, except in the case of an action pending, and, to the extent before stated. This result follows, although the estate should prove to be solvent. *Paine* v. *Nichols*, 15 Mass., 264; *Todd* v. *Darling*, 11 Maine, 34; *Johnson* v. *Ames*, 6 Pick., 330; *Hodges* v. *Thacher*, 23 Vt., 455; *Burlingame* v. *Brown*, 5 R. I., 410.

The plaintiff insists that all claims *must be* submitted to the commissioners, and that a party cannot avail himself of his right to have a pending action continued and tried, unless he also presents his claim to the commissioners, and that, if they decide against him, he can give notice of his appeal and fall back on the original suit, which is to be tried as in effect the new action for money had and received required by the statute.

It is, undoubtedly, true, that in all cases where insolvency is pleaded or suggested, the claim named in the pending action must be brought within the knowledge and action of the Probate Court, and must be entered by the Judge on the list of contingent claims. But this may be done where the action is continued and tried in Court, under the 17th section, by a proper certificate from this Court, (as in case of appeal,) without any action of the commissioners. It is clear that the Legislature did not intend, by the general language of the first section of this chapter, giving authority to the commissioners to receive and decide upon all claims against the estate, to include the cases where a different tribunal is clothed with that power. The subsequent language controls and limits the generality of that first used.

At first view, in one aspect of the matter, it may seem that justice may be done and the rights of the parties secured, by allowing this resort to the pending action. But there are difficulties in thus attempting to adapt such a case to the requirements of the statute, in relation to appeals. This contemplates a new action—in a particular form of declaration—money had and received. The plaintiff is to annex or file a schedule of claims. The administrator is to file, in set-off, all claims of the estate, of whatever nature, and the judgment is to be for the balance. Costs are to be allowed to the prevailing party. The plaintiff, although he might recover, yet his damages might be no more than the decision of the commissioners gave him, and, in that case, the administrator would be the prevailing party in the new suit. If the statute had not so clearly required the prosecution of the appeal, by a new suit, it still would have required very special changes, and amendments, and restrictions, to fit the pending action to stand as an appeal from the Probate Court. We are satisfied that the appeal can only be perfected by a new suit. *Action dismissed;—*

Cost for defendant, the Administratrix, since entry of her appearance.

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

AXEL H. BICKNELL *versus* AARON L. LEWIS *& al.*

Where a receipt is given for goods attached, to which an aggregate value is affixed, the receipters are bound, on demand, to return *all* the articles attached.

If, in an officer's receipt for goods attached, the specific value of each article is affixed, and the receipter sells a part of them, he may, *it seems*, on demand made by the officer for the property attached, deliver the articles unsold, and, in lieu of those sold, the amount in money, at which they were valued in the receipt.

Where the sheriff having the execution, received and indorsed thereon, the the proceeds of certain articles included in the receipt, at their agreed value, and took possession of the remainder, the receipters were held to be discharged.

ON EXCEPTIONS to the ruling of APPLETON, J.

THIS was an action of ASSUMPSIT on an officer's receipt for goods attached on a writ, *E. P. Baldwin* v. *A. L. Lewis*. Execution was duly issued in said action, and the property demanded of the receipters.

This action was prosecuted by the said Baldwin, and referred to the Court, at *Nisi Prius*, APPLETON, J., presiding, with leave to except.

In the receipt, the property attached is thus described:— "One shop, valued at $250; one cutting machine, one rolling machine, one splitting machine, and one turning machine, all of said machines valued at $80; two rolls of leather, valued at $30; 30 lbs. sole leather, $10; 8 pairs of boots and 10 pairs of shoes, $30; all of the value of four hundred dollars."

An approval of the ability of the receipters, signed by said Baldwin, was indorsed upon the receipt.

On the hearing of the case, the Judge found that, *after* the receipt was given, the plaintiff, Bicknell, authorized the defendant, Lewis, to sell portions of the receipted property, to wit, the leather, boots and shoes, for the sums named in the receipt, agreeing that if their value was paid for in money, it should be received in lieu of the goods receipted for, and that the defendant, Lewis, so sold the leather, boots

and shoes, which were in the receipt of the agreed value of $70, for that sum. Plaintiff's attorney objected to the admission of evidence to this point, and also to its effect, for the reason that he had no authority to make such agreement. He further found C. D. Gilmore, as sheriff, on 15th July, 1857, had the execution and receipt in his hands; that, on that day, he made a demand of Tilton, (one of the defendants,) of the property attached, who thereupon paid him $70, in lieu of the leather, boots and shoes, which was, by Gilmore, indorsed upon the execution; that, at the same time, he offered to turn out, and did turn out; all the other property included in the receipt, to Gilmore, who discharged the receipt by indorsement thereon, which was subsequently erased without the knowledge or consent of defendants. The creditor's attorney directed the officer, Gilmore, not to take the goods unless all were delivered to him which were mentioned in the receipt. The $70, before mentioned as paid to Gilmore, was by him paid to the judgment creditor, less his fees. On these facts, the presiding Judge rendered judgment for the defendants.

Paine & Brown, for the plaintiff.

Sanborn, for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—Where a receipt is given for goods attached, to which an aggregate value is affixed, the receipters are bound, on demand, to return the identical articles attached. A failure as to one would obviously constitute a breach of the contract. *Gilmore* v. *McNeil*, 46 Maine, 533.

Where a specific value is affixed to each article attached, the receipter is not liable beyond the stipulated valuation. All the officer can accomplish by a suit is to obtain judgment for such value. If, therefore, the receipter tender the money agreed on as the value, in lieu of the thing valued, he will have done all that can be required of him. Nor, it seems, would it make any difference, if he tender a portion

of the articles specifically attached and the money price of the remainder, as agreed upon by the parties. *Drown* v. *Smith*, 3 N. H., 299.

The officer attaching, *after* the receipt was given, agreed with the receipters, that they might sell any portions of the property receipted for, at the sums named as their value in the receipt, and that he would receive the price in lieu of the articles attached and sold. There is no reason why the officer, if he chose, should not make such agreement, nor why, if made, he should not keep it.

This action is brought for the benefit of E. P. Baldwin, the creditor in the suit, *Baldwin* v. *Lewis*, in which the attachment was made. It seems he approved the receipt so far as relates to the pecuniary ability of the receipters, but, for aught that appears, it was *after* the contract between the officer and the receipters and subordinate thereto.

The officer having the execution and the receipt, received the proceeds of the leather and the boots and shoes, at their agreed value. The other articles attached, were duly tendered to and accepted by him, and were in his possession. That those goods were not sold, and that the plaintiff in interest has derived no benefit from them, is because he preferred trusting to what he might have considered to be the uncertain chances of litigation upon a nice point of technical law, to selling the goods on execution and receiving the proceeds of their sale. If he erred in his calculations as to the chances in his favor, or as to the law applicable to existing facts, he must abide the result.

Exceptions overruled.—Judgment for defendants.

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

GEORGE WESTON *versus* JOHN B. ALLEY *& als.*

The owners of a certain tannery appointed an agent to act for them in "all matters and business relating to the tannery;"—*held*, that he was not thereby authorized to bind his principals, as receipters to an officer, for horses, &c., used in the tannery which had been attached as the property of a third person.

REPORTED from *Nisi Prius*, by APPLETON, J.

ASSUMPSIT on two receipts given the plaintiff, which were signed thus:—"A. Webb, agent for Alley, Choate & Cummings."

Defendants denied Webb's authority to bind them by his signature as aforesaid. The evidence upon this point of authority, was as follows:—

Daniel Lord.—I know Webb, also defendants. Defendants carry on a tannery at Lowell, Maine, but reside in Massachusetts. Webb acts as their agent—buys bark—hires and discharges men, and does all the business pertaining to manufacturing—contracts for bark by the cord to be hauled—contracts to buy—has teams under his direction. Defendants have frequently been there since Webb was in charge.

The bark, when attached, was in No. 2, then Hancock county, 75 rods from Lowell. The team, horses and shingles, when attached, were at the tannery in Lowell. The horses were in defendants' stable when attached; shingles were near the tannery. After the horses were receipted for, they were used in defendants' teams. The bark was taken, after the receipt, to the tannery and used there.

A. Webb.—I was the authorized agent of defendants. Had a written, and no other, authority, as follows:—

"Lowell, Dec. 12, 1857.

"We hereby authorize Alexander Webb to act for us as our agent in all matters pertaining to the tannery in this place, and all business pertaining thereto.

"Alley, Choate & Cummings."

The horses, when attached, were in my possession. I claimed them to be defendants' property, and supposed they were.

It appeared that said articles were attached on 18th February, 1858, as property of Harrington & Russell, and the receipts were given on same day in the usual form.

Upon this evidence, the presiding Judge ordered a nonsuit, which was to be taken off, if the full Court should hold the ruling to be erroneous.

Peters, for the plaintiff.

Rowe & Bartlett, (with whom was G. Kent,) for the defendants.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action upon a receipt given the plaintiff, a deputy sheriff, for horses and bark attached by him on a writ in favor of *Hinckley & Egery* v. *Harrington & Russell*, and signed A. Webb, agent for Alley, Choate & Cummings. The defendants deny the agency of Webb to sign receipts for them, and the question is, whether they are bound by his act.

The defendants are merchants, residing in Massachusetts, and owning a tannery in Lowell, in this county. The only authority under which Webb acted, or claimed to act, is in these words:—

"Lowell, Dec. 12, 1857.

"We hereby authorize Alexander Webb to act for us as our agent in all matters pertaining to the tannery in this place, and all business pertaining thereto.

"Alley, Choate & Cummings."

The property receipted for consists of horses and bark. It does not appear to whom the horses belonged. They had been used in the tannery, and the agent supposed they belonged to his principals. Whether they did so or not, is uncertain. They were attached as the property of Russell & Harrington. The agent of the defendant was clothed

with limited powers. His agency was restricted to "all matters relating to the tannery in this place and to all business relating thereto." Now, receipting for goods attached is not a matter relating to the tannery nor to the tanning business. If the agent could make the defendants, residents of another State, bailees in this instance, he might in all, and the defendants would soon find they had ample business to attend to beside the tannery and business thereto pertaining.

If the horses belonged to Harrington & Russell, Webb was not agent to receipt for them, and thus bind his principals in another jurisdiction. That they had been used before this, or were then needed, does not alter the principle. The tannery business would require laborers for its various operations, but if one of them had been arrested, Webb was not authorized to bind them as bail by signing their names to a bail bond. If the horses were Harrington & Russell's, the agent had no more right to receipt in the name of his principals for their goods, though used in the tannery, than to become bail for their laborers in the same business. The defendants had conferred on their agent no authority to become bail for all who might be arrested, whether their servants or not, nor bailees of the officer for whatever might be attached, no matter to whom it might belong, nor where it had been used.

If the horses attached belonged to these defendants, of which there is no proof, the agent had no authority to jeopard their rights by receipting for them as attached, in a suit between other parties. *Drew* v. *Livermore*, 40 Maine, 266. The attachment, in such case, would be a violation of their rights, to which the agent should give no sanction. He was agent for no such purpose.

The bark was in Hancock county when attached. There is no evidence that the defendants ever had any interest in the bark, nor that the defendants were ever aware of the doings of their agent in the premises. There is no pretence of subsequent ratification. The case rests entirely in pre-

cedent authority. The authority conferred gave no authority to the agent to become general bailees for the sheriffs and deputy sheriffs of the counties of Hancock and Penobscot.

Exceptions overruled.

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

KENT, J., did not sit in this case, having been of counsel.

E. FRANKLIN CRANE *versus* URIAH T. PEARSON.

As security for the payment of a debt, P. gave W. a written agreement, acknowledging that he had received of W. a horse, as his property, which he would return to him, at a time therein specified, *or* pay the debt. The horse, at the time, was, in fact, the property of P. and no delivery of it was made to W.; afterwards P. sold the horse: — *Held*, that the property passed to the vendee; that the writing held by W., was not a bill of sale, nor was it a mortgage, and, by it, no interest in the property was conveyed to W.

THIS was an action of REPLEVIN, submitted to the full Court, upon a report of the evidence offered at *Nisi Prius*, APPLETON, J., presiding.

From the report, it appears, that one Pollard, on November 13th, 1852, was at *Cartland Station*, with his team of four horses, two of which he exchanged with one Webber for two of his horses, and agreed to pay Webber for the exchange, sixty-five dollars. After Pollard's team had left, Webber, as security for the payment of the sixty-five dollars, requested a writing, which Pollard signed, of the effect following: — that he had received of said Webber, as Webber's property, the sorrel horse used by him, (Pollard), which he agreed to keep, free of expense to Webber, and return the same to him in April following, *or* pay him twenty-two dollars, also, the same amount in July, and twenty-one dollars in October (then) next, with interest.

The sorrel horse, the property in controversy in this action, was not one of the horses exchanged; and Webber

never had any title to him, except by that writing. There was no delivery of the horse to Webber; nor had he ever any possession of him. Pollard paid the first installment, but the remainder of the debt remains unpaid. The horse remained in the possession of Pollard, and about two years afterwards, he sold him to one Jones, who had no knowledge of Webber's claim. The plaintiff obtained the title of Jones by purchase.

Webber assigned the agreement to the defendant, who took the horse from the plaintiff about a year after he had purchased him of Jones.

Crosby, for the plaintiff.

Knowles, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—The plaintiff derives his title to the sorrel horse from Pollard, whose ownership was unquestioned prior to Nov. 13, 1852. The defendant claims to hold under the agreement of that date, given by Pollard to Webber, he having Webber's rights.

The evidence shows that Pollard never sold nor delivered the horse to Webber, nor exchanged it with him.

Webber's right is by virtue of the agreement with Pollard, of Nov. 13. But that is not a bill of sale. Neither is it a mortgage. If it were, it is not recorded. It is a contract in the alternative—to return the property or to pay the sums mentioned therein. It would bind the person signing, but would convey no interest in the property to which it refers. *Buswell* v. *Bicknell*, 17 Maine, 344. *Perkins* v. *Douglas*, 20 Maine, 317. *Dearborn* v. *Turner*, 16 Maine, 17. The defendant shows no title to the horse in controversy. *Defendant defaulted.*

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

MERCHANTS' BANK *versus* DANIEL LORD *& al.*

If a bond, for the release of a debtor from arrest on execution, is not taken for the exact amount required by the statute, in the absence of evidence that this happened through "mistake, accident, or misapprehension," it is invalid as a statute bond.

A forfeiture of such a bond will be saved, if the principal has taken the poor debtor's oath, according to the terms of the condition of the bond, notwithstanding the proceedings before the justices do not conform to the requirements of the statute.

REPORTED from *Nisi Prius* by APPLETON, J.

DEBT on a bond given to release Lord, the principal, from his arrest on execution.

Blake & Garnsey, for the plaintiffs.

J. A. Peters, for the defendants.

The opinion adopted by a majority of the Court was drawn up by

CUTTING, J.—In the language of C. J. TENNEY, in *Flowers* v. *Flowers*, 45 Maine, 459, "the bond declared upon in this action, was not for just double the sum for which the debtor, the principal obligor, was arrested on execution, and, therefore, not conformable to the R. S. of 1841, c. 148, § 20, (since reënacted). The case discloses nothing which shows that this departure was by reason of any mistake, accident or misapprehension, and, consequently, is not brought within the provision of § 43 of the same chapter. The bond, therefore, cannot be treated as a statute bond."

Again, of the same Judge in *Clark* v. *Metcalf*, 38 Maine, 127, "the bond having no validity as a statute bond, created no obligation in the debtor to comply with statutory provisions, further than the terms used in the condition provided." "It was the election of the debtor, which of the three alternatives, mentioned in the three conditions of the bond, he would perform; and, if he performed the one attempted, no breach has occurred. And the case finds that

the condition was performed of the alternative first named." The case at bar is similar in every respect to the cases cited. That is, the debtor did, in six months from the date of the bond, cite the creditors before two justices of the peace and of the *quorum*, and did submit himself to examination, and take the oath prescribed in § 28 of c. 113, which was the common law compliance.

Plaintiff nonsuit.

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

ALBION K. P. LEIGHTON *& al. versus* U. T. PEARSON *& als.*

A debtor, who had given bond on execution, disclosed notes, which were secured by a mortgage of real estate, which he neither indorsed nor delivered to the creditor, but deposited with the justices an assignment of them and of the mortgage, which was neither sealed nor acknowledged: — *Held*, that the property was not "duly secured" to the creditor, as the statute requires, and the justices were not authorized to issue their certificate of discharge.

In such case, the creditor can recover only "the real and actual damage" he has sustained.

REPORTED from *Nisi Prius*, by APPLETON, J.

THIS was an action of DEBT on a bond given by Pearson to be released from arrest on execution. He duly cited the creditors, made a disclosure of his property in writing, and was allowed the oath by the justices who gave him a certificate of discharge.

The justices made a record of the debtor's assignment of certain notes secured by mortgage, their appraisal of them, and the fact that they were not produced at the disclosure.

The case was argued by

A. L. Simpson & T. W. Porter, for the plaintiffs, and by

Waterhouse, for the defendants.

The opinion of the Court was drawn up by

CUTTING, J.—This action is brought on a bond, dated May 12, 1859, the conditions of which were, that the said Uriah T. Pearson should, within six months, cite the creditors before two justices of the peace and of the *quorum*, and submit himself to examination, and take the oath prescribed in § 28th of c. 113, or pay the debt, &c.

The defence is, that the first condition has been complied with, and, as evidence of that fact, the certificate of two justices of the peace and *quorum*, in the form prescribed by c. 113, § 31, was introduced as conclusive evidence of the facts therein recited. But the plaintiffs deny the conclusive character of the certificate and contend that it is invalid for various reasons.

Since so many decisions have been given, and the Reports are so full of learning upon most of the points raised, we will pass by them with respectful recognition, and acquiescence, and come directly to the position which establishes the plaintiffs' right to maintain their action.

By c. 113, § 29, "when, from the disclosure of a debtor, arrested or imprisoned on execution, it appears that he possesses or has under his control any bank bills, notes, accounts, bonds, or other contracts, or property, not exempted by statute from attachment, which cannot be come at to be attached, and the creditor and debtor cannot agree to apply the same towards the debt, the justices hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, costs and charges. If the creditor accepts it, it may be assigned and delivered by the debtor to him, and applied towards the satisfaction of his demand." And, by § 31, "after the oath is administered and the property disclosed is duly secured, the justices shall make out and deliver to the debtor a certificate under their hands and seals in the form following."

Now, it appears from the debtor's disclosure, that, at that time, he held two notes signed by one *Asa B. Edgerly*, on which were due $200, secured by a mortgage on the Ken-

duskeag House, in the town of Kenduskeag and county of Penobscot, which the record of the justices show the creditors elected to take, and which the justices appraised to be worth one dollar. Was that property "duly secured" before the justices issued their certificate? If otherwise, they had no authority to issue it, and, being void for want of authority, it could not be set up in defence.

The property disclosed comes within the provision of § 29, as has been decided in *Smith* v. *People's Bank*, 24 Maine, 184, and in *Lincoln* v. *White*, 30 Maine, 291. The notes were neither delivered or indorsed, and, from the copy of the assignment of the mortgage, as appears from the justices' record, it was not under seal or acknowledged, and consequently was not "*duly secured.*" *Smith* v. *Kelley*, 27 Maine, 237. According to the agreement of the parties, the defendants are to be defaulted and heard in damages by the Court, which will be the real and actual damages as provided by § 48.

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

SAMUEL H. BLAKE *versus* PETER DENNETT.

By the rules of pleading, in a real action the defendant admits himself to be in possession of all the land demanded, if he files no disclaimer of the whole or of any part of it.

The statute of 1849, c. 105, provides that the certificate of the register of deeds shall be *prima facie* evidence of a public notice, by a mortgagee, of his claim to foreclose a mortgage, published "in a public *newspaper* printed *in* the county where the premises are situated;" but a certificate of the register, that a (recorded) notice "was copied from the Bangor Journal, vol. 1," &c., does not inform the Court, judicially, that the Journal "was a *newspaper* printed in the county," &c., and, without other evidence, there is no sufficient proof of notice.

REPORTED from *Nisi Prius*, by CUTTING, J.

WRIT OF ENTRY.

Blake & Garnsey, for the demandant.

Rowe & N. Wilson, for the tenant.

The facts necessary to an understanding of the case, are contained in the opinion of the Court, which was drawn up by

CUTTING, J.—This is a real action to recover possession of certain premises, described in the demandant's declaration, situated in Bangor, in the county of Penobscot. Plea, the general issue, with certain specifications of defence, but with no disclaimer of the demanded premises, or of any part thereof; consequently, by the rules of pleading, the tenant admits himself to be in possession of all the land embraced in the declaration, and the first question presented is, which of the parties has the superior and better title. The demandant introduced a deed to himself from one Levi Dennett, of May 7th, 1853, and recorded the same day, conveying the demanded premises to secure a note of the same date, for four hundred and forty-eight dollars, payable in one year. And the tenant, a deed from the same grantor to himself, dated Nov. 29th, 1853, but, whether of the same premises, it might have been questionable, had the pleadings been so framed as to have presented such an issue. The demandant's therefore, being the elder, should be considered the better title, and he should have judgment for his possession.

But the next and more important inquiry is, whether the judgment should be absolute or conditional, and this depends upon the legality of his foreclosure. The demandant attempted to foreclose under R. S. of 1841, c. 125, § 5, which provides that "he may give public notice in the newspaper, printed in the county where the premises are situated," &c. And, by statute of 1849, c. 105, the certificate of the register of deeds shall be *prima facie* evidence of such notice. The certificate of the register, which is referred to

as a part of the case, is as follows, viz.:—"The foregoing notice is copied from the Bangor Journal, vol. 1, No. 26, dated February 22d, 1855, which notice was also published in the two preceding papers, being Numbers 24 and 25, vol. 1, and dated February 8th and 15th, 1855. Received February 24th, 1855. Entered and compared by Jefferson Chamberlain, Register."

At the argument, in addition to the point raised as to "describing the premises intelligibly" in the notice, concerning which we express no opinion, it was argued by the tenant's counsel, that there was no evidence that the Bangor Journal was "*a newspaper printed in the county where the premises are situated.*" The burden was on the demandant to show a strict compliance with the provisions of the statute, and, although, after the point was raised, he could have introduced to the Court, at the hearing, "newspapers containing notices," as the report shows, if he had wished; yet none such were introduced, and consequently are not now before us.

The question then returns, the solution of which depends solely upon the certificates of the register, who does not say, as he was authorized to do, if such was the fact, that the Bangor Journal was a newspaper printed in the county, and, are the Court from such certificate, judicially informed that such was the fact? By reference to lexicography, we find the first and most prominent definition of the word journal to be, "a record or an account of daily transactions; a daily register; a diary." The Bangor Journal might then be the diary of the proceedings of the city government, and if published weekly, it could not be said to be a newspaper conveying information to the remotest parts of the State, or Union, but would be local in character and intended only for such persons as would be interested in municipal affairs. And, *again*, assume that the Bangor Journal be a newspaper, what evidence have the Court that it was "*printed* in the county where the premises were situated?" It may have been published as a newspaper, and still *printed in another*

county. The demandant having failed to show a statute foreclosure, his judgment must be conditional.

Conditional judgment for the demandant.

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

INHABITANTS OF VEAZIE *versus* INHABITANTS OF MACHIAS.

Under the statute of March 21, 1821, an emancipated minor, by five consecutive years' residence in a town, could not there fix his settlement; for, by that statute, no person under the age of twenty-one years could thus acquire a settlement.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action to recover for supplies furnished to a pauper, whose legal settlement the plaintiffs allege to be in Machias.

Mace, for the plaintiffs.

G. F. Talbot, for the defendants.

The ruling, to which the plaintiffs excepted, appears from the opinion of the Court, which was drawn up by

CUTTING, J.—The report of the evidence, in substance, discloses, *that* the pauper was born in 1810, in that part of Machias which, in 1826, was incorporated as Machias Port, where his father resided, and died the same year; *that* the pauper, being thus emancipated, subsequently resided five consecutive years, viz.: from 1826 to 1830, both inclusive, in Machias, two of which, on the territory now Marshfield, which was taken from Machias and incorporated by a special Act of 1846, the third section of which provides that—"The said town of Marshfield shall be liable for the support of all persons, who are now paupers in said town of Machias,

who were born within the limits of Marshfield, or, who, having gained a settlement in said Machias, have usually resided within the limits of Marshfield; and all persons, who may, or hereafter shall become chargeable as paupers, shall be considered as belonging to that town, on the territory of which they may have gained a legal settlement, and shall be supported by the same."

And it appears that, at the trial, "the plaintiffs' counsel contended under that section, if said pauper was emancipated and then lived said two years in said Marshfield part of Machias, and then the next three years in Machias proper, and thereby gained a settlement by means of such five years' residence; that he would now be chargeable to Machias, if he had not gained a new settlement since; which the Court overruled."

The point raised by the plaintiffs' counsel, is neither legal nor logical. It assumes that five consecutive years' residence, by an emancipated minor, were sufficient to fix his settlement in Machias, in 1830, which was sixteen years prior to the incorporation of Marshfield. Such was their proposition, from which they draw the conclusion, that "*thereby*" the pauper gained such settlement.

First, It is not legal, because, under the statute of March 21st, 1821, then in force, no person under the age of twenty-one years could gain a settlement by five consecutive years' residence. It is true that, under another mode in that Act, "*any person* resident in any town at the date of its passage, shall be deemed to have a settlement in the town where he then dwells and has his home," under which provision this Court have invariably held, that an emancipated minor was such "*person*." And thus, in the incorporation and division of towns.

Second. It is not logical, for the premises being false the conclusion is equally so, and the presiding Judge was justified in withholding his assent.

The pauper having gained no settlement either in Machias or Marshfield, the third section of the special Act of

1846, incorporating the latter town, cannot aid the plaintiffs. The last point as to the admission of certain testimony, was waived at the argument.

Exceptions overruled.—Judgment on the verdict.

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

WADE LITCHFIELD *versus* VINSON LITCHFIELD.

If, by the terms of a bond, it is to be void, upon the failure of the obligee to pay two notes at their maturity, and a strict compliance should be regarded as waived by receiving payment of the first note, the other being also overdue, such waiver would only prolong the payment for a reasonable time.

ON EXCEPTIONS.

THIS was an action of DEBT, on a bond, dated May 1, 1856, given by the defendant for the maintenance of the plaintiff. The obligation contained a provision, that it should be void, if the said Wade Litchfield shall fail to pay his two notes for one hundred dollars each, the first payable in one year, the other in two years, with interest.

This action was commenced on February 16, 1860. The defendant prayed *oyer* of the bond, alleging performance of its conditions on his part, and that the plaintiff had first broken the conditions, on his part to be performed.

The plaintiff offered evidence, which tended to show a breach of the bond, on the part of the defendant, also, that, by a verbal agreement, the defendant, subsequently to the execution of the bond, waived a strict compliance on the part of the plaintiff, as to the time of payment of the two notes named in the bond. That the plaintiff paid the first note to the defendant personally, a part of it, long after the second note had become due, but no part of the second note has been paid.

Upon this evidence, KENT, J., ordered a nonsuit, and the plaintiff excepted.

Barker, for the plaintiff.

Waterhouse & Whitney, for the defendant.

Per Curiam.—The bond in question is to be void, if the plaintiff neglects to pay his notes. One of them he has failed to pay. If the time in which to do it was prolonged, still a reasonable time has long since elapsed and the note has not been paid. The nonsuit was properly ordered.

Exceptions overruled.

CHARLES BUFFUM, *in Equity*, *versus* ADELINE BUFFUM, *Administratrix*, *& al.*

A partnership with all its incidents may be created without articles in writing.

Real estate purchased by partners, with partnership funds, for partnership purposes, though conveyed to them by such a deed, as, in case of other parties, would make them tenants in common, is considered, in equity, as part of the partnership stock, to be applied, if necessary, to the payment of partnership debts, including the balance due any partner on final settlement.

BILL IN EQUITY, by the complainant, as surviving partner, against the administratrix of the deceased partner, and his only heir. The case was heard on demurrer to the bill, answers and proofs. The facts proved and the questions of law argued are fully stated in the opinion.

W. C. Crosby, for the plaintiff.

H. P. Haynes, for the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—It is not denied that the complainant and Albert C. Buffum were in partnership for a long time preceding the death of the latter, and that, in the various

business and enterprises of the firm, they had acquired an interest in real estate to a considerable amount, which was used, to some extent at least, in connection with these enterprises. They contracted debts for various purposes of the partnership. The real estate so purchased remained undisposed of, and many of the debts of the firm were outstanding and unpaid at the time of the death of Albert C. Buffum.

It is alleged that the copartnership was really entered into as early as the month of May, 1844, under the name of A. C. Buffum, and so continued till the spring of 1845, when the name of A. C. & C. Buffum was taken as that of the firm, without any change of the relations before existing between the partners. The complainant seeks relief by a decree, that the real estate be treated as personalty, and he be allowed to dispose of the same, as surviving partner, for the purpose of paying, as far as it will extend, the debts of the firm.

The defendants file demurrers to the bill, and answers, denying that the partnership was formed so early as is alleged in the bill, and they claim that the real estate conveyed to the two partners was held by them as tenants in common, and that, on the death of Albert, an undivided moiety thereof descended to his heir, subject to the right of dower therein of his widow.

The deeds are in the form usual when conveyance is made to two or more individuals as tenants in common; excepting one from Timothy Mayo, dated Aug. 26, 1844, which is made to Albert C. Buffum, his heirs and assigns. But, on Sept. 30, 1850, the grantee therein gave a deed to the complainant of one undivided half of all the real estate conveyed to him by Mayo.

It does not appear that articles of co-partnership were made in writing between A. C. & C. Buffum, and it was not necessary that it should be so, to constitute it a partnership in all its incidents. Story on Part., § 86.

So far as partners and their creditors are concerned, real estate belonging to the partnership, is, in equity, treated as

mere personalty, and governed by the general doctrines belonging to the latter. And so it will be deemed, in equity, to all other intents and purposes, if the partners have by themselves, by their agreement or otherwise, purposely impressed upon it the character of personalty. But a question has been made, whether, in the absence of any such agreement or other act affecting its general character, real estate held as a part of the partnership funds or stock, ought to devolve upon or descend as real estate, to the heir or devisee, or ought to belong, as personalty, to the executor or administrator, upon the death of the partner. Upon this point there has been a diversity of judicial opinion, as well as of judicial decision; some Judges holding that, in such a case, it retained its original character of real estate, and passed to the heirs or devisees accordingly; and others holding that it was to be treated throughout as partnership property, and therefore as personalty. Story on Part., § 93.

Lord THURLOW, in *Thornton* v. *Dixon*, 3 Bro. C. R., 199, at the hearing, was inclined to hold the latter doctrine; but the case was permitted to stand over, for the partners to agree among themselves, and gave liberty to argue the nature of the property, if the proposition on that point could not be maintained. Upon the cause coming on again, the Lord Chancellor thought that, had the agreement been that the property should be valued and sold, it would have converted it into personalty of the partnership, but that the agreement in this case was not sufficient to vary the nature of the property. Therefore, after the dissolution, the property would result according to its respective nature, the real, as real, the personal, as personal estate. This doctrine was affirmed by Sir WILLIAM GRANT, Master of the Rolls, in *Bell* v. *Phyn*, 7 Vesey, 453, and in *Balmain* v. *Shore*, 9 Vesey, 501. *Coles* v. *Shaw*, 15 Johns., 159, is in accordance with the same doctrine. And the case of *Goodwin* v. *Richardson*, 11 Mass., 469, has been considered as nearly to the same effect. Vice Chancellor Sir L. SHADWELL affirmed the same principle in *Cookson* v. *Cookson*, 8 Sim., 529.

On the other hand, Lord ELDON holds the opinion, that all property in a partnership concern should be treated as personal. *Selkrigg* v. *Davies*, 2 Daw. Parl. Rep., 231, 242; *Townsend* v. *Devaques*, reported in Montague on Partnership, 97; 3 Bro. C. R., 199, Belt's note (1). Lord ELDON is followed in opinion by Sir JOHN LEACH, in *Fereday* v. *Wightman*, 1 Rus. & Mylne, 45; *Phillips* v. *Phillips*, 1 Mylne & Keen, 649; *Broom* v. *Broom*, 3 Mylne & Keen, 443, and Baron ALDERSON, in *Morris* v. *Kearnley*, 2 Younge & Call, 139.

Chancellor KENT expresses the unqualified opinion that the weight of authority is, that equity will treat the person in whom the real estate is vested, as trustee for the whole concern, and the property will be distributed as real estate. 3 Kent's Com., Lecture 43. The later cases in Massachusetts are strongly in favor of the same doctrine. Indeed, the decisions are in harmony with each other in that Commonwealth, with perhaps the exception of *Goodwin* v. *Richardson*, already referred to. In that case, there was a mortgage to two parties, for partnership debt, and a foreclosure, and then one of the partners died, and the question was, whether the real estate after the foreclosure remained partnership property. It was decided that it did not. Judge STORY, referring to this case, in *Hoxie* v. *Carr & al.*, 1 Sumner, 173, remarks, "this was a mere question of law, upon a mere legal title. But, in a Court of Equity, it is impossible, (I think,) that the property should not have been deemed partnership property, and distributable accordingly, among creditors." And he adds, "the cases already cited are full to the point, and they have the unhesitating approbation of Mr. Chancellor KENT."

In *Dyer* v. *Clark, adm'r, & als.*, 5 Met., 562, the doctrine is, when real estate is purchased by partners with the partnership funds, for partnership use and convenience, notwithstanding the conveyance to them is such as to constitute them tenants in common, it will be considered and treated in equity as vesting in them, in their partnership ca-

pacity, clothed with an implied trust, that they shall hold it, until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts, unless there is an express agreement, or circumstances exhibiting an intent, that such an estate shall be held for their separate use; and, upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate, for his indemnity against the debts of the firm, and for receiving the balance which may be due to him from the deceased partner, on the settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom, after his death, until the surviving partner is so indemnified.

SHAW, C. J., in the opinion of the Court last cited, remarks, "it has been supposed that the case of *Goodwin* v. *Richardson*, [before noticed] stands opposed to the decision now made; I do not think it does,"—"it was in terms a question as to the vesting of the real estate; and the Court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners on foreclosure, as tenants in common."

The case of *Burnside* v. *Merrick*, 4 Met., 537, was before the Court, at the same time with that of *Dyer* v. *Clark*, and the results to which they came are similar, on the question which is presented before this Court. The Chief Justice, in the opinion, says:—"though there has been much diversity of judicial opinion, upon the subject, we think the prevailing opinion now is, that real estate acquired, is to be considered, at law, as the several property of the partners, as tenants in common; yet, that it is so held, subject to a trust, arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, as far as it is necessary to pay the debts of the firm, and to pay any balance which may be due to the other partners on a final settlement, and cannot be held by the separate own-

er, except to the extent of his interest in such final balance." "And it follows, as a necessary consequence, that neither the widow, nor the heir at law can claim any beneficial interest in such estate, till the claims of creditors are first fully satisfied." See also *Peck* v. *Fisher*, 7 Cush., 386.

With the reasonableness of these views we fully concur. A different conclusion would be a sacrifice of substance to form, and a disregard of the settled principles of enlightened equity jurisprudence, and a substitution therefor of the rigid principles of the common law, in cases where chancery was designed to afford relief.

The application of the foregoing remarks and authorities will make the case before us of easy solution.

The evidence of Samuel Buffum, the father of A. C. and C. Buffum, is full, and that with other proof, sufficient, in a case in equity like the present, that these men formed a copartnership in the month of May, 1844, by the father's advice, and in the name of A. C. Buffum, they did business as partners, till they assumed the name of A. C. & C. Buffum, which last was retained till the dissolution by the death of one of the partners.

Much of the real estate conveyed by Timothy Mayo to Albert C. Buffum, on Aug. 26th, 1844, was appropriated directly to the use and convenience of the firm, and in furtherance of the business in which it was engaged. As appears from the books and other proofs, payments were made for this real estate from partnership means, with no expectation on the part of the complainant, that he was to be reimbursed for the funds so employed, which belonged to him. No charge for use and occupation is found in favor of Albert, against the other partner, for this real estate, which stood in the name of the former for more than six years, but continued all this time to be in intimate connection with the enterprises of the firm. This view is confirmed by the conveyance by Albert of an undivided half of this property to the complainant, without any indication of payment beyond the expression of a consideration in the deed. If it were a sale

independent of the partnership, it would be reasonable to expect a severance of the estate. When the whole evidence is examined, it is apparent that the brothers considered it proper that this conveyance should be made, as indicating more clearly and directly, that it was to be held like their other real estate.

The other real estate purchased by the partners was conveyed to both, and stood in their names at the time of the dissolution of partnership. Upon this property, as well as that originally purchased of Mayo, but afterwards held by them, as appears by the deed of Mayo, and that of Albert to the complainant, the partners themselves "purposely impressed the character of personalty."

We think there is no propriety in the appointment of a third person to take the real estate belonging to the late partnership, unless by consent of parties. The survivor is interested to make the most out of it, and it is his privilege to attend to the business personally. There is no suggestion that he is wanting in capacity or fidelity to attend to the discharge of his trust, thus imposed upon him by well settled principles.

In view of the whole evidence of the case, the Court is of the opinion, that the real estate should be disposed of by the complainant, as surviving partner, and the proceeds brought into the partnership funds, so far as is necessary to discharge the debts of the firm, and to discharge any balance due to the complainant, on a final settlement. The residue will remain in his hands, to be distributed according to law.

Rice, Appleton, May, Goodenow and Davis, JJ., concurred.

SAMUEL BRALEY *versus* JOHN GODDARD.

Where two parties entered into a written contract to cut certain timber, one to furnish money, teams and supplies, and the other his own services, and the latter to have one-fourth of the profits, and the former three-fourths, besides stumpage and interest on his advances, this did not constitute a co-partnership, if one of the parties had not, by the terms of the contract, an unqualified right to dispose of his own share of the lumber, nor any right to dispose of the remainder on any terms whatever. APPLETON, J., *dissenting.*

ASSUMPSIT. On the twenty-fifth day of October, 1855, the plaintiff and defendant entered into a written contract, stipulating that the defendant should furnish money, supplies and teams for a lumbering operation for the then ensuing logging season, with twelve teams, on townships No. 10, range 9, and No. 10, range 10, on the Moostick waters, and the plaintiff should give his whole personal attention, and have the entire charge of the cutting, hauling and driving of the lumber until it arrived at the city of St. John, N. B.; the defendant to have six per cent. on his advances, and six dollars per thousand stumpage, and the profits to be divided, one quarter to the plaintiff, and three quarters to the defendant.

The contract further provided, that, if Braley wished to saw his quarter part, Goddard should furnish mills without delay, at four dollars per thousand, or saw them at cost, charging a reasonable price for the use of the mill; or, if Braley preferred to sell his quarter, and could do so for cash or satisfactory paper, Goddard should take them at the price they could be sold for, or let the entire lot of logs go at the same price; or, if the party wishing to purchase should not want the entire lot, Braley might sell him his interest, if Goddard declined to take them, provided the party wanting the logs, as well as the pay he offered, should be satisfactory to Goddard, and not otherwise; "Goddard holding the lumber under this contract till the supplies, money and stumpage as above, at all events."

The plaintiff, called as a witness, testified that, pursuant to the contract, he cut, hauled and drove to the market a large quantity of logs, which arrived at St. John in the spring of 1856; that he afterwards made a demand upon Goddard for a settlement, but he declined settling; that there was a difference of opinion between him and Goddard as to whether Goddard should account for the doors, sashes and blinds made from the slabs; and that he had received from Goddard some hundreds of dollars.

The plaintiff offered to introduce other testimony in support of the action; when the counsel for the defendant raised the point that the written contract produced constituted a co-partnership, and that this action could not be sustained.

The presiding Judge, APPLETON, being of opinion that the agreement constituted a partnership between the parties, rejected the testimony offered as immaterial, and ordered a nonsuit.

The plaintiff excepted.

J. A. Peters, for the plaintiff, cited *Dwinel* v. *Stone*, 30 Maine, 384, and commented upon the opinion of the Court in that case, to show that the contract in the case at bar did not create a partnership. The title to the logs and lumber was in Goddard, and was never parted with by him. Braley had no title in them until the operation was finished and the bills paid; Braley's rights rested *in contract* merely. *Denny* v. *Cabot*, 6 Met., 82.

There was no community of *loss*. Braley was to have nothing, if there were no profits; but if Goddard made a heavy loss on the operation, Braley could lose no more than his labor. *Gilman* v. *Cunningham*, 42 Maine, 78. In the case of *Bearce* v. *Washburn*, 43 Maine, 564, there was a community of profit and loss. Not so in this case.

Rowe & Bartlett, for the defendant, argued that every element necessary to constitute a partnership existed in this case. The plaintiff being interested in the profits, was liable for the losses to the extent of the value of his labor.

Story on Partnership, § 23; *Dob* v. *Halsey*, 16 Johns., 34. The plaintiff was liable to lose his whole labor, even though the defendant lost nothing, as the latter was to be first repaid for his advances.

The plaintiff had a lien on one quarter of the lumber, after the expenses paid, so that a creditor of Goddard could have attached only the remaining three-fourths. This is not so when the contract is merely to pay a share of the profits as wages. The plaintiff was to have an interest in the property, after payment of stumpage and advances; an interest which he might sell, or compel the defendant to purchase, or he might force the defendant to join with him in the sale of the whole. Even if there was no partnership in the property itself, there might be in the profits. Story on Partnership, § 27. In either case, the plaintiff, being a partner, cannot recover in this action. Chitty's Pleadings, 39.

He cannot recover on his general count on the contract, unless he proves complete fulfilment of the stipulations on his part, and also, a demand upon the defendant, and a refusal to fulfil. This, he has not shown. Nor can he recover on his second count, because he has not alleged nor proved any profits received by the defendant.

If the plaintiff desires to recover his share of the timber, under the contract, or if there are unadjusted matters and claims between the parties, this is not the form of action for an adjustment.

The opinion of the Court was drawn up by

TENNEY, C. J.—It appears that the parties entered into a written contract, by which certain timber, standing upon the land described therein, was to be cut and taken to market by means of the services of the plaintiff. The defendant alone had acquired the right to cut the timber, and he only was accountable to the owner of the same. He was, also, to furnish the teams, money and supplies, to carry through the operation, and to receive six per cent. a year,

return on every dollar furnished, in addition to its cost, which, with six dollars for every thousand feet stumpage, was agreed to be deducted from the first proceeds which he should receive from the sales of the lumber.

The plaintiff was to give his whole personal attention to the cutting, hauling and driving the lumber, having the entire charge of the same, till its arrival at the city of St. John.

The profits of the operation were to be shared between the parties, one quarter to the plaintiff and three quarters to the defendant.

If the plaintiff should wish to saw his fourth part of the lumber, the defendant was to furnish mills for that purpose, on certain specified terms. But, if he should prefer to sell his portion of the lumber, he was entitled to do so, on the condition, that if he could sell it for cash or satisfactory paper, the defendant was entitled to take it at the same price, or permit the entire lot to be disposed of at that price; or, if the party, who might wish to purchase, did not desire to take the entire lot, the plaintiff could sell his interest if the defendant declined taking it, provided the party wishing to purchase, and the pay offered, should be satisfactory to the defendant, and not otherwise; the defendant holding the lumber under his control till the supplies, money and stumpage should be paid, at all events.

The plaintiff had not the unqualified right to dispose of the portion of lumber belonging to him, by the contract, after all the prior claims should be discharged; and no authority existed in him to dispose of any further portion on any terms whatever. This is entirely inconsistent with the rights of a member of a co-partnership, having the power "to make contracts, incur liabilities, manage the whole business and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power as all the partners could when acting together." *Dwinel* v. *Stone*, 30 Maine, 384.

The nonsuit was directed on the ground that the contract

made the parties thereto a legal partnership, and it was erroneous. *Exceptions sustained—*
Nonsuit removed—and
New trial granted.

RICE, CUTTING, MAY and KENT, JJ., concurred.
APPLETON, J., non-concurred.

INHABITANTS OF VEAZIE *versus* THE PENOBSCOT RAILROAD COMPANY.

The Penobscot Railroad Company, under their charter and the general laws of the State, had a right to construct their railroad over or under a highway, and, for that purpose, to raise or lower the highway.

But they were bound to exercise this right in such a manner as not to obstruct the highway unnecessarily, and to use reasonable care to protect those passing thereon from injury.

The company are liable for any injuries happening to any one passing on the highway, on account of their neglect to use such care.

Nor are the company exempt from this liability, although the change in the grade of the highway is made by contractors, grading the railroad under an agreement to do the work "according to the plans and directions of the chief engineer of the company," who is employed and paid by the company.

But a railroad company cannot, by *any* stipulations with contractors, relieve themselves from their obligation to protect the public from danger, when they interfere with, or obstruct a public highway.

When a person, passing upon a highway, receives an injury, wholly by reason of an illegal defect in the same, caused by the alteration thereof by a railroad company, the town in which it is situated is liable for such injury.

The railroad company is liable to indemnify the town for all the damage it has been compelled to pay, and for the costs and expenses reasonably and fairly incurred, in a suit against them by the person injured.

When the railroad company has been notified of the pendency of such a suit, and requested by the town to assume the defence of it, they are bound by the judgment, and it is conclusive against them as to the cause of the injury and the extent of the damage, whether they appear in the case or not.

The railroad company cannot avoid the effect of such a judgment, on the ground that they did not receive the notice until the day before the trial, it appearing that one of their directors was present at the trial and took notes, and that they made no request for a continuance or postponement of the trial.

Veazie *v.* Penobscot Railroad Company.

An action, by a town against a railroad company, for expenditures to put in good condition a highway obstructed by the company's railroad, can be brought only within one year from the time when such obstruction was caused or created.

But, when a town has been compelled to pay damages on account of a defect in a highway, caused by the construction of a railroad thereon, it may maintain an action therefor commenced within a year from the time when its liability is ascertained and fixed.

On Report.

Case to recover damages of the defendants for constructing their railroad across a highway, which the plaintiffs are bound to keep in repair, in such a manner as to render such way unsafe and dangerous for travellers thereon.

The case and the evidence, (so far as it relates to the questions of law raised,) are sufficiently stated in the opinion.

Wakefield, for plaintiffs.

Rowe & Bartlett and *N. Wilson*, for defendants.

1. The judgment, *Phillips* v. *plaintiffs*, was admissible only to show the fact of its rendition. For any other purpose, it is evidence only against parties or privies. *Sargent* v. *Salmond*, 27 Maine, 539; *Trustees of P. F. School* v. *Fisher*, 34 Maine, 172.

The notice of the suit was given too late. It cannot change the effect of the judgment.

2. The defendants, by their charter and the laws, had a right to construct their railroad across the highway. And they are not liable for damages consequent upon their contractors' doing, in an illegal way, a legal act, which the defendants rightfully hired them to do. Redfield on Railways, c. 22, and cases there cited.

3. The statute of 1853 does not apply to this case; and the action is not founded upon it.

4. The cut was an "obstruction" within the meaning of c. 81, § 11, of R. S. of 1841, and this action is barred by the limitation contained in that section.

5. If the Phillips judgment is admissible, it is a bar to this suit. The jury find, and the Court adjudge, that he

sustained his injury *through the negligence of the town* in not guarding the cut after notice of the existence of it. *Loker* v. *Damon*, 17 Pick., 284; *Thompson* v. *Shattuck*, 2 Met., 615.

The opinion of the Court was drawn up by

KENT, J.—The plaintiffs claim to recover of the defendants damages which they allege they have sustained by reason of the acts of the defendants, in causing a deep cut to be made in a highway in the town of Veazie. The first ground of damage is, the amount which the town has been compelled to pay to one Phillips, and the cost and expenses of defending a suit instituted by him against the plaintiffs, as primarily liable for the injuries caused by the defect. The second ground of damage is, the injury sustained by the town by the digging down, and the cost of repairs of the highway.

The defendants insist, in the first place, that whatever was done was done in pursuance of their legal right by their charter, § 8, and by c. 81, § 8, of R. S. of 1841.

By the provisions of those Acts, the railroad corporation had an unquestioned right to have their road pass over or under the highway; and, for that purpose, to raise or lower any part of it. But, both by those statutes and by the principles of the common law, the defendants were bound to exercise that right so as not unnecessarily to injure others. Corporations, as well as individuals, are bound to observe that excellent and compact rule, which has for centuries stood as the guardian and protector of individuals, against the reckless, tyrannical, or careless exercise of admitted rights. When applied to a case like this, it requires that the act permitted should be done in such a manner that the use of the road should not be unnecessarily obstructed, and that reasonable care should be used, by the erection of barriers, and otherwise, to warn and protect the citizens from danger and injury. The right to make the cut did not give the right to do it without due regard to the public safety;

and that required that all proper guards should be erected and continued, whenever there was danger of injury to any person by reason of the cut. The charge in this case is, that the corporation made a deep cut, partly across the road, which was not well guarded, by sufficient railing, against accident; and that one Phillips, travelling on the road in the evening, using due care, walked or fell into the hole or cut so made, and was injured. These allegations, if legally established, bring the case within the rule before stated, and it is not necessary to decide whether the provisions of the Act of 1853, (R. S. of 1857, c. 51, § 15,) are applicable to this case. Under that Act, if the crossing had been made without the consent and action of the County Commissioners, or city authorities, as therein set forth, it would have been a nuisance, and, of course, an illegal and unjustifiable act. We have considered this point on the assumption that the act of cutting was legal. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick., 24; *Drew* v. *New River Co.*, 6 Carr. & P., 754.

It is further objected that this company is not liable for damages consequent upon the acts or neglects of the persons who had contracted with the corporation to do the work. It is contended that the contract was a legal one, and only authorized a legal act; and that, if the contractors performed this legal act in an illegal manner, the company is not responsible.

This point, it would seem, must have been raised and determined when this case was before the Court, at a former term, on a statement of evidence offered. The fact that this work was done by contractors, was distinctly stated in that report; and the Court, by ordering the case to stand for trial, notwithstanding that fact, necessarily determined that it did not debar the plaintiffs from maintaining this suit.

We are not disposed to discuss at length the questions which have arisen in different Courts in England and in this country, in relation to the limits of the liability of individ-

uals who have contracted with others to do certain work, and by the negligence or fault of such contractors, during the progress of the work, injuries have arisen to others. The cases on this subject are collected and commented upon very ably, by Mr. Justice THOMAS, in the case of *Hilliard* v. *Richardson*, 3 Gray, 349. When applied to cases between individuals, not involving any question of public right, the rule, that if the injury occurred in the ordinary course of doing the work, and as part of it, the employer may be liable, but if, from some irregularity of the contractor, outside of his contract, he alone is responsible, may perhaps be the true and just one, where the relation is simply that of a contractor who is to perform his work without any interference, or control, or direction by the party employing him. Where such right to direct or control exists, or where the relation is that of master and servant, a different and opposite rule may be enforced.

In the case before us, the company stipulate that the work is to be done "according to the plans and *directions* of the chief engineer of said company," who is "to be employed and paid by the company." See *Wyman* v. *Pen. & Ken. Railroad Co.*, 46 Maine, 162.

But we place the decision on this point on the well settled doctrine, that, where the Legislature, as guardian of the rights of the public in a highway, permits a corporation or individual to use or interfere with the way, and to obstruct its use, on condition, express or implied, that all requisite care is to be taken to protect others from injury, the right thus granted must be exercised by the party to whom it is granted, and cannot be assigned, so as to relieve the party from the faithful execution of the power. The company may doubtless make contracts for the performance of the work; but cannot avoid their obligation to protect the public against danger, by the stipulations they may make. The grant of the Legislature is to a known and responsible company, as it is to be presumed, over which the Legislature has more or less control. Important rights are to be affect-

ed, and it would be a dangerous, as well as an unsound doctrine, to allow such a body to transfer their liabilities and obligations to the public and the individual citizens, to irresponsible or transient contractors. In the execution of such a trust, or power, the company must be responsible, whatever contracts they may make. *Hilliard* v. *Richardson*, 3 Gray, 349; *Bailey* v. *Mayor, &c., New York*, 3 Hill, 531.

It is settled by various decisions, that, where railroads have the power by law to cut through and alter highways, and, in so doing, travellers sustain an injury, without fault on their part, by reason of an illegal defect, the towns in which the highways are situated are primarily liable for such injuries. *State* v. *Gorham*, 37 Maine, 451; *Willard* v. *Newbury*, 22 Vt., 458; *Currier* v. *Lowell*, 16 Pick., 170.

A town thus made liable may sustain an action for indemnity against the railway company, if that company was first and principally in fault and the wrongful cause of the defect or neglect. The town is compelled by law and public policy to stand as guarantors, or in a position like that of surety for the company, that it shall not be guilty of neglect. When the wrong or neglect is altogether on the part of the company, the town may nevertheless be held to make good the injury to the individual. The liability of the railroad company is to indemnify the town fully for all the damages it has been compelled to pay, and for the costs and expenses reasonably and fairly incurred. *Lowell* v. *B. & L. R. R. Co.*, 23 Pick., before cited; *Duxbury* v. *Vermont Central Railroad*, 26 Vt., 751; *Hayden* v. *Cabot*, 17 Mass., 169.

The Judge in this case ruled that the evidence put in was sufficient to authorize a verdict for plaintiffs, and was conclusive upon the defendants as to the cause of the injury to said Phillips, and as to the extent of the damage. The principal point thus raised, is, whether the judgment recovered by Phillips, against the town, with the parol evidence, is conclusive upon defendants as to the cause and extent of the damage. The rule seems to be established,

that, when a person is responsible over to another, either by operation of law or by express contract, and he is notified of the pendency of the suit, and requested to take upon himself the defence, he is not afterwards to be regarded as a stranger to the judgment that may be recovered; because he has a right to appear, and make as full defence, as if he were a party to the record. *Coates* v. *Roberts*, 4 Rawle, 100. A judgment, after such notice, will be conclusive against him, whether he appeared or not; *Jackson* v. *Marsh*, 5 Wend., 44; *Thrasher* v. *Haines*, 2 N. H., 433.

It must be made to appear that the action is for a cause for which the defendant is liable. We think it does sufficiently appear, in this case, that the injury sustained by Phillips, for which he sued, was occasioned by the acts or neglects of the railroad company. The declaration in the writ, *Phillips* v. *Veazie*, sets out, substantially, the same defect in the same place in the highway as the writ in this case, viz.:—a cut partly across or into the highway, which was not well guarded by sufficient railing. The plaintiffs also introduced parol proof that the *locus* of the injury to Phillips was where the railroad, as located, crossed the highway, and that the cut was there made by the corporation or its agents.

The two declarations are identical. There is no cause for the injury set out in the first declaration which is not found in the one before us. With the connecting parol evidence, the identity of the cause of action, upon which the recovery was had, with that in this case, is sufficiently established.

The defendants contend that they did not have sufficient notice of the pendency of the former suit, and therefore are not concluded by it. The notice was given to the President, and to Mr. Wilson, a counsellor of this Court and a director of the company, on the day before the trial commenced, and Mr. Wilson was present at the trial, and took notes, but no part in the trial. The notice certainly gave but little time for preparation. But the town, so far as it appears, had made all necessary preparations, and the cause

was fully and fairly tried. If the company had desired further time for preparation, they should have moved the Court for a continuance, or have notified the town that they desired more time, or in some manner signified a wish for postponement. The fact that a director attended and took notes is important, and shows that that officer of the company had an opportunity to know how the trial was conducted.

The notice requested the company to assume the defence. If they had desired to do so, there was time sufficient to notify the town of that fact, before, or during the trial. No such notice was given, or desire expressed. We think they cannot now avoid their liability on this ground.

The defendants interpose the objection that both the claims sued for are barred by the limitation contained in § 11, of c. 81, R. S. of 1841.

That limitation of actions, to "one year after the causing of such obstruction," obviously refers to the right of action given in the preceding section, and is restricted to such actions as are brought by the town to recover damages done to the road itself, or for the amount expended by the town in putting the way in good repair, after neglect of the corporation so to do. This construction covers the claim in this case, "for the repairs of the cut and road." The action not having been commenced within one year after the obstruction and these expenditures, the limitation applies, and the plaintiffs cannot recover for this item.

The other claim is not for an injury to, or expenditures upon the road, but to recover damages from this railroad corporation, for which the town was held liable, primarily, by a judgment of the Court. The town could not legally commence the action until the damages to the individual had been ascertained and fixed in some mode, and the plaintiffs held liable therefor. In the 11th section, before referred to, the limitation is to one year after the obstruction is caused or created. But, if an injury to an individual should happen by reason of such obstruction, more than a year after its first creation, the right of action for such injury, against

the town or corporation, would not be barred by this limitation of the statute. In this case, the action was commenced within a year after the liability of the town was ascertained and fixed. The right of action then first accrued, and the plaintiffs may recover for this item.

Judgment for plaintiffs for the amount paid to Phillips on his judgment against plaintiffs, with interest thereon, to time of final judgment in this case; also, for reasonable charges for counsel fees, witnesses, and expenses in defending said suit of Phillips, and interest thereon, as above.

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

HENRY E. PRENTISS *versus* AMOS M. ROBERTS.

In an action involving the conditions of a permit to cut logs on land of the plaintiff, where the testimony of the parties to the permit is conflicting, it is not competent to introduce evidence of the previous course of business between the same parties, or of the conditions contained in former permits. CUTTING, J., *dissenting.*

In an action to recover for stumpage for logs cut under a verbal license from one tenant in common to his co-tenant, brought against the assignee of the latter, the question at issue being whether a lien on the lumber was reserved, accounts stated and rendered to each other by the co-tenants are properly excluded, unless the plaintiff will consent to open the whole question of the state of the accounts between the parties.

Where the plaintiff has introduced evidence to prove declarations of the defendant unfavorable to the character of one of the witnesses for the defence, as to truth and veracity, this is, in effect, an impeachment of the witness's character, and the defendant may be admitted to testify that the character of the witness for truth and veracity is good.

When land and the timber on it are owned in common and undivided by two parties, and one has cut a part of the timber under an alleged license, the burden of proof is on him to show, not only that he had a license, but that it was unconditional, and not limited by the reservation of a lien on the lumber.

Prentiss *v.* Roberts.

Instructions to the jury, that, after he has proved that he had a license to cut the timber, the burden is on the other party to show that it was conditional, and a lien reserved, are erroneous.

TROVER for an undivided half of certain logs owned in common by the plaintiff and Daniel Lord, and alleged to have been wholly converted by the defendant, the vendee of Lord.

On the trial, before APPLETON, J., the plaintiff testified, that he and Lord had owned timber lands together for several years, and had granted permits, signed by both of them, to cut logs thereon; he could not say whether Lord had ever given permits without the plaintiff's signature. In 1856, he and Lord agreed to grant permits at a certain price per thousand, or that Lord should have a permit if he desired to operate himself; Lord agreed to take a permit, if he operated; afterwards the plaintiff consented that Lord should commence, and take a permit when he came to Bangor, with the distinct understanding that what was cut before the permit should "be on the same terms and conditions contained in their usual form of permits, that is, the lumber to remain the property of the plaintiff until the stumpage should be paid," &c., to which, Lord assented. Subsequently, the plaintiff found that Lord and the defendant were operating on the land, and, in June, 1857, after the logs they had cut had been sawed, the plaintiff called on the defendant for the stumpage; the defendant said he would see Lord, and if it was right he would pay it. In July, the plaintiff saw him again, when he refused to pay the stumpage, and has not paid it.

Daniel Lord, called by the defendant, testified, amongst other things, that he made most of the bargains as to permits to cut lumber, signed sometimes both names to permits, by the plaintiff's authority, and had sometimes blank permits signed by the plaintiff; cut timber himself on their lands from time to time; always made a bargain beforehand, but never but once took a written permit. In the fall of 1856, witness agreed with the plaintiff to cut at an agreed

price for stumpage; "nothing was said about a lien, or any form of permit, except that he was to cut in the manner provided in the form they had usually used, that is, to cut clean, prudently, and all such as would make No. 4 boards." Witness sold to the defendant part of the logs cut on the Prentiss and Lord land; gave the defendant no notice that there was any claim on the logs for stumpage; was not then aware that Prentiss claimed a lien for stumpage.

The defendant's counsel asked the witness whether Prentiss had reserved a lien in any verbal permission, to cut timber in former years; and, also, whether the plaintiff had ever before, in any operation, demanded a lien or other security from him for stumpage. To these questions, the plaintiff objected, but the Court overruled the objections. The witness answered both questions in the negative.

The defendant asked the witness what was the state of the accounts between him and the plaintiff at the time of the alleged permit, and the witness answered that, including the stumpage on the logs in question, the accounts were about square. The question and answer were given without objection, and thereupon the plaintiff objected to evidence showing the state of their accounts. The Court excluded the evidence, including the foregoing. The defendant offered to prove that Lord was not indebted to the plaintiff on account; but, on objection, the Court excluded it, but admitted evidence that the course of business between the plaintiff and Lord had been to adjust their stumpages in account between themselves. And the Court instructed the jury, at the instance of the plaintiff, that the state of accounts between the plaintiff and Lord had nothing to do with this case; but that they might consider, as bearing upon the question at issue touching the alleged reservation of a lien in this case, whether the plaintiff and Lord had practiced settling their stumpages in account without reserving a lien.

On cross-examination, the same witness, the defendant objecting, testified that he and Prentiss had rendered ac-

counts to each other, containing debit and credit, as they respectively claimed, and identified the accounts as then shown to him. The plaintiff offered these accounts in evidence to show that a balance was due from Lord to him on old account. The Court offered to admit these, if the plaintiff wished to open the whole question as to the state of the accounts between them. The plaintiff not consenting, they were excluded. The Court permitted the parties to show that there were accounts, but not how they stood.

The plaintiff introduced evidence of declarations made by the defendant as to Lord's character for truth. The defendant's counsel then asked the defendant what was Lord's general character for truth and veracity. The plaintiff objected, but the objection was overruled, and the defendant answered that it was good. The plaintiff introduced no testimony impeaching Lord's character, except as before stated.

The plaintiff asked the Court to instruct the jury, that the plaintiff, owning one half of the land, owned one half of the logs, unless they were satisfied that he had released his title to them by granting Lord permission to cut without reserving a lien for stumpage; that such permit to cut without a lien must be assented to by the plaintiff to be effectual; and the burden of proof was on the defendant to show such license.

This instruction the Court did not give, but instructed the jury, that, it appearing by the evidence of both parties that the plaintiff and Lord were tenants in common, and that the logs were cut under license, it was for the plaintiff to show that a lien was reserved, and that it was agreed, either expressly or by their conduct and course of business, that the plaintiff should hold the logs for the stumpage; and that to make such agreement effectual, it must have received the assent of both the plaintiff and Lord.

The verdict was for the defendant, and the plaintiff excepted to the rulings, refusals and instructions of the Court, and also filed a motion for a new trial, on the ground that the verdict was against law and the evidence in the case.

The case was elaborately argued by *Prentiss*, *pro se*, and *A. W. Paine*, in support of the exceptions, and by *J. A. Peters*, for the defendant.

For the plaintiffs, it was contended,—

1. As the plaintiff is admitted to own the land, he owned the logs, and the burden is on the defendant, to make out his title to them against that of the plaintiff. *Brackett* v. *Hayden*, 15 Maine, 349; *Heath* v. *Williams*, 25 Maine, 209; *Maine Stage Co.* v. *Longley*, 14 Maine, 444; *Eaton* v. *Lynde*, 15 Mass., 242; *Ewell* v. *Gillis*, 14 Maine, 72; *Brown* v. *Ware*, 25 Maine, 411; 2 Greenl. on Ev., 539. Hence, the defendant should be held to prove that the permit to cut was unconditional, and not the plaintiff to show that a lien was reserved. The *onus* was placed by the Court on the wrong party.

2. The testimony, admitted to show the character and terms of former permits, should have been excluded. To this point, numerous authorities were cited.

3. The account rendered by Lord to Prentiss should have been admitted, as tending to impeach Lord as a witness.

4. The declarations of the defendant as to the credibility of Lord were properly introduced, and evidence of general good character for truth is admissible only when the general character of the witness is impeached. 1 Greenl. on Ev., § 461; 2 Phillips on Ev., 432, (Hill's ed.)

For the defendant it was argued,—

1. If a tenant in common cuts from the common premises, his co-tenant cannot have a lien on the timber cut. He has a remedy, but not by a lien. *Dickinson* v. *Williams*, 11 Cush., 258; *Moses* v. *Ross*, 41 Maine, 360; *Mumford* v. *McKay*, 8 Wend., 446; *Baker* v. *Wheeler*, 8 Wend., 505; *Calhoun* v. *Curtis*, 4 Met., 413; *Bradley* v. *Boynton*, 22 Maine, 287.

2. What the plaintiff testified as to his contract with Lord, was not his declaration or confession, to be taken in

whole, or not at all, but his testimony as a witness, which might be received in part and rejected in part.

3. The admission of the defendant's declarations as to Lord's character for truth was in effect an impeachment of his veracity. The question allowed to be put to defendant was not objectionable. 1 Greenl. Ev., § 461.

4. The evidence as to former permits was admissible to impeach the plaintiff's statements, to show the relations of the parties and the surrounding circumstances, and the probability or non-probability of the statements of the parties as witnesses. Such testimony is admissible, even in written contracts, where there are doubts. *Cummings* v. *Dennett*, 26 Maine, 397; *Folsom* v. *Ins. Co.*, 38 Maine, 414; *Emery* v. *Webster*, 42 Maine, 204. See also *Locke* v. *Brown*, 14 Maine, 108; *Thompson* v. *Harrington*, 12 Pick. 425; *Leach* v. *Perkins*, 17 Maine, 462.

5. The instruction as to the burden of proof was right. Both parties testify to a permit. But the plaintiff claims that there was a lien reserved. It is for him to prove it. To decide otherwise, would be to declare that when a man cuts on land of another, by permission, the presumption of law is that a lien is reserved. Suppose the parties could not be witnesses, and that permission is shown, by the conduct of the parties, recognizing the right to cut. Must the party cutting show that there was not a lien, or the other party that there was? Is not the burden on the plaintiff to prove his own case — his own allegations? His story is that he permitted with a lien; Lord's, that he permitted without a lien. Must not the affirmative be shown, rather than the negative?

The opinion of the Court was drawn up by

TENNEY, C. J. — The logs in question were cut on land owned by the plaintiff and Daniel Lord, in common and undivided, in equal moieties, and sold by the latter to the defendant, who appropriated them to his own use.

The testimony of the plaintiff, and of Lord, certainly, as

reported, tends to show, that the latter cut the logs, under a verbal agreement between them. The great question in controversy, at the trial, seems to have been, whether in this verbal agreement the plaintiff was to have a lien upon the logs to be cut by Lord, for his security for his part of the stumpage. The former asserts, in his testimony, that a lien was secured, which is denied by the latter, in the evidence given by him.

The plaintiff testified, that it was agreed that there was to be a written permit, but until the parties should be ready to execute it, Lord might commence the operation, and the first time he should come to Bangor, he would take the permit, and whatever he should cut before the permit, should be on the same terms and conditions which were contained in the plaintiff's usual form of permits; that is, the lumber cut was all to remain his property till the stumpage should be paid, and the payment therefor was to be made when the major part of the lumber should arrive at Sunkhaze, Greenbush, or the boom.

According to the testimony of the witness Lord, called by the defendant, the plaintiff offered to let him have all for $2,50 per M. for pine, and $1,50 for spruce, if he, Lord, should wish to operate himself. Lord told him he would think of it and let him know. The next time Lord called upon the plaintiff, in about a week after the plaintiff's offer, December 1st, Lord told him he would take his part at that price, and he went on and made the operation. Nothing was said about the lien, nor about the form of the permit, except that he was to cut in the manner provided in the form of permits which they usually made use of, that is, he was to cut clean and prudent, and all such trees as would make No. 4 boards. Nothing was said about his credit,—no doubting of it. Nothing was said about security,—any security.

It is apparent that the question of fact, whether the agreement gave a lien upon the logs to the plaintiff, as his security for his stumpage or not, might be decisive of the ques-

tion touching the defendant's liability, in this action. If there was no lien reserved, and Lord was permitted to cut the logs, his acts could in no sense be tortious. It is not denied by the plaintiff, that whatever the contract was, in relation to the lien, the logs to be cut, under the agreement, would be the property of Lord absolutely, or subject to the lien, for the stumpage only, as the ground taken by one party and the other should be established, as a fact. The defendant succeeded to Lord's rights in the logs, and if there was no lien in favor of the plaintiff, it is very clear that there was no conversion by him.

The testimony of the plaintiff and Lord, being in conflict on the question, whether there was a lien or not, the exceptions are to the rulings, and to the instructions given to the jury, and to the withholding those requested by the plaintiff.

1. The witness Lord, having testified that, in previous years, the plaintiff had verbally permitted him to cut timber on lands owned by them, in common and undivided, was asked by the defendant's counsel whether the plaintiff had ever claimed a lien as security for his stumpage; and also, whether he had ever before, in any operation, demanded a lien or other security of him for the stumpage. These questions were allowed by the Judge to be answered, against the objection of the plaintiff, and they were answered in the negative.

2. The defendant offered evidence to show that the course of business between the plaintiff and Lord, had been to adjust their stumpages, in account between themselves, and the evidence was received against the plaintiff's objection. And the instructions to the jury, upon this point, directed them to consider, whether the course of business between them was not to settle their stumpages, in account, and whether such was not their mode of settling them, without the reservation of a lien by the plaintiff, as bearing upon the question before them, whether a lien was reserved for the plaintiff in this case or not.

The evidence so offered being in the case, and the Judge

having given instructions how far to consider it, the evidence and the instructions related to transactions between the plaintiff and Lord, wholly anterior to their agreement, under which the logs were cut that are now in controversy, and the question under this head and the one preceding, are somewhat similar; and they may be considered in connection.

If there was a contract between the plaintiff and Lord, relative to the cutting, and of this there seems to have been no question, nothing is presented in the evidence; which is all reported, tending to show, in the least degree, any connection between the contract in question, and those between the same parties, previously made and performed, touching the cutting of timber on the lands owned by them in common and undivided, by which any reference was made to those previous contracts as having any element incorporated into the one in dispute. One was entirely independent of the other, according to all the evidence in the case. It may certainly as well be presumed that both parties chose that the new contract should differ from the former ones, as otherwise. It nowhere appears that any controversy arose in the settlement, under the previous contracts; and, if the new contract was really similar thereto, the purpose that the parties could have for a statement of all the details is not apparent. The circumstances of one or both parties may have changed since the former were made, and, for various reasons, a change in the new one might be desirable. It is the undeniable right of the parties to the contract, to change it from those that preceded it, for good reasons, or for bad reasons, or from motives which are even capricious. One may be satisfied that a previous bargain was on his part improvident, and, to the whole extent thereof, ruinous to him; and, in a subsequent one, and upon the same subject matter, take care that it shall be essentially improved. And the question, in case of a dispute of what the bargain was, must be determined by proof of its provisions, and not by proof of another bargain. A different principle might result in

great injustice to one party or to the other. Such evidence, as bearing upon the issue, is, at best, uncertain, and liable essentially to mislead a jury. It is not uncommon that the parties to a verbal contract, and others who had knowledge thereof, may differ in their testimony of what it was. If the case is nicely balanced, it is not proper to disturb that balance, by showing what another contract was, which was independent, but the result is often attained, by invoking the principle, that the party on whom is the burden of proof shall be required to disturb that balance, if he would prevail. *Melior conditio defendentis est.*

The introduction of evidence, in relation to the statement of the accounts, under former proceedings of the parties, was to show how former contracts were treated, as having been made by the evidence of how they were settled. This was merely another species of evidence, tending to show what other and distinct contracts, made and cancelled, were, in order to throw light on the one in dispute.

It is sometimes the case that the *situation* of the parties, and the circumstances surrounding them, may throw light upon a question of dispute touching a contract; but we cannot think that, ordinarily, another agreement, independent, can be of this character, and the authorities relied upon by the counsel for the defendant are inapplicable to the case before us.

Many of the authorities cited for the plaintiff on this question are in point to maintain his position.

The introduction in practice of the defendant's principle, in cases where a dispute should arise as to what the facts really were, in a given case, would tend to substitute, for an express verbal contract, another of a different character, for the reason that the evidence of what the latter was should be conflicting; to establish one thing, to allow proof of a different thing. The language of the Court, in the case of *Robinson* v. *Fitchburg and Worcester Railroad Co.*, 7 Gray, 92, in a matter where an attempt was made to show carelessness in the defendant's engineer, by evidence of spe-

cific acts of carelessness in running the train, on other occasions than the one in question, was adjudged to be clearly incompetent, contains the principle applicable to the case before us; it is said, "it would not only lead to collateral inquiries, and so distract and mislead the jury from the true issue before them, but it had no legal or logical tendency to prove the point in issue. Because a man was careless, or negligent of his duty, in one or two specific instances, it does not follow that he was so at another time, and under different circumstances." It would be equally illogical for a jury to infer that the terms of one verbal contract are incorporated into, or excluded from another, entirely distinct, between the same parties, and upon the same subject matter, merely from proof of the former.

3. The plaintiff was not prejudiced that the accounts of himself and Lord, containing debt and credit, rendered to each other, were not admitted, as the exclusion was on the ground that he would not consent that the question on the state of the accounts should be opened. It is not easy to perceive any foundation for the introduction of these accounts, unless the whole matter involved in their mutual dealings could be fully disclosed by each party, so far as it should be pertinent.

4. The plaintiff was allowed, the defendant objecting, to show that the defendant, in speaking of Lord's ability to pay, said that "Lord was perfectly good, but he was a little slippery sometimes;" also, "that he could not rely at all upon what he told him, he could place no confidence in what he said." The defendant's attorney thereupon asked the defendant the question, "what is Lord's character for truth and veracity." To this question the plaintiff objected, for the reason that the plaintiff had not impeached Lord's general character for truth. The objection being overruled, the defendant answered, "that it was good, and he would believe him as soon as any body else." It cannot be denied, that these declarations were suited, if unexplained, to affect unfavorably the character of Lord for truth, in this case, be-

ing made by the party relying on his testimony, in support of the defence. Whether these declarations, testified as made by the defendant, were admissible, is not now a question before us, as their admission was in answer to questions put by the excepting party. It was competent to show that these declarations were not made, for this would contradict the witnesses, introduced to prove them. This was not done, and the question is, whether they could be explained, for the purpose of removing or mitigating their effect. Their introduction was, in effect, an impeachment of the character of the witness for truth. If other witnesses than the defendant had testified for the plaintiff, that they knew the character of Lord for truth, and that it was bad, and, on cross-examination, had named individuals, who had said, as it was in testimony that the defendant had done, it would be competent for the defendant to show, by these witnesses themselves, that they did not entertain such opinions as the declarations expressed; and we think the evidence of the defendant was equally admissible. When the plaintiff was allowed to introduce the declarations of the defendant, it is difficult to perceive why the legitimate effect should not be allowed to be counteracted by the evidence received.

5. The only remaining question relates to the instructions requested by the plaintiff, but refused, and those which were given. The remark of the Judge to the jury that, if either party was believed, the logs were cut under a license, is regarded by the plaintiff as exceptionable. The remark contained no rule of law; it was, at most, stating in unequivocal terms what the evidence was. The jury were not instructed that they must so treat it; they were at liberty to find how the fact was in that respect, though it would seem, if the language of the testimony of the plaintiff had given to it its ordinary and legitimate import, there could be little doubt of the correctness of the remark. The instruction in law, as requested, was, that the title of the undivided half of the land being in the plaintiff, the title to the logs, to the same extent, was in him also, unless the defend-

ant satisfied the jury that the plaintiff had released the title, by granting Lord permission to cut without reserving a lien for the stumpage, or in some other way. The jury were instructed that the burden of proof was on the plaintiff that a lien was reserved, the license to cut being established, and that, in order to recover, the plaintiff must show that a lien was reserved. These instructions are based upon the fact that the jury should be satisfied that the logs were cut under a license.

If the simple authority was given by the plaintiff to Lord to cut and use the logs for his own benefit, and nothing else was contained in the agreement, the contract is like the common case of the sale and delivery of personal property. If such was the proof, the right of Lord was unqualified to the logs cut. It carried the right to cut and take the logs after they were cut. In the supposed state of the proof, the entire right of the plaintiff to the logs so cut, as it existed before the license, was overcome. If it were otherwise, the purchase and delivery of goods would give the vendee an imperfect title only, till he should prove that no condition, exception or reservation was annexed to the sale. Such a principle cannot be admitted.

What is the question here? It is whether the plaintiff gave an unqualified license to Lord to cut and take the logs, for his own benefit, for the price agreed. Suppose a person, having a perfect title to land on which timber trees are standing and growing. Another cuts the trees thereon and appropriates them to his own use. He claims to have had a license for a valuable consideration from the owner. The burden is on him to show such license, if denied. It is denied, and he, as a witness, testifies that he had such license. If the case stops there, and the testimony is believed, the license is established. But the owner of the land testifies that he gave no license. There is no change in the burden of proof. The issue is, whether a license was given or not. It is throughout on the party asserting the license, though the evidence may preponderate one way and the other, as

one party or the other introduces the evidence, and the one setting up the license cannot prevail, unless the proof is satisfactory that the license was given.

In this case, each party to the agreement had title to one undivided half of the land; each had the right to the same proportion of the trees then standing and growing thereon. Neither could have been divested by the other without his consent. The controversy relates to an undivided half of the trees, which belonged to the plaintiff. The title to them was in him, till, by evidence, it shall be proved that he has parted with it. This title throws the burden of proof upon the other side. What was the question? Was the plaintiff's right given up at all, and if so, to what extent? The burden was on the defendant in this. A part of this burden was disposed of by the plaintiff's testimony, but no further than that testimony extended. Lord testified that he had a license to cut for the consideration agreed, without any reservation for security of the stumpage. The plaintiff, testifying of the same agreement, and of the same time, said he gave the license to cut subject to a lien for the security of his part of the stumpage. This, if believed, would neutralize the testimony of Lord, as to the existence of the lien. The burden so far remains where it was. The fact that the plaintiff testified to, that he gave a license to Lord to cut the timber, subject to the lien, which, at the same time, he asserted, cannot change the burden of proof as to the lien. The license being so qualified, the reservation of the lien is asserted on the part of the one who had the title, and it is denied on the other. The title to the logs continues where it was till the jury shall be satisfied that it was relinquished unconditionally. To do this, the burden is on the defendant. The instructions were erroneous.

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

RICE, MAY, GOODENOW and DAVIS, JJ., concurred.

CUTTING, J.—I concur in the opinion as drawn by the Chief Justice, so far as it respects the instruction of the Judge at *Nisi Prius* as to the burden of proof, who assumed a fact to have been proved as isolated and independent of other elements intimately and inseparably connected.

The testimony of Prentiss was, in substance, that he gave a verbal permit reserving a lien for stumpage, which was contradicted by Lord, (a witness called by the defendant,) only as to the reservation of the lien. If the testimony of the former was believed, his suit was maintainable; otherwise, if full credit was given to that of the latter. But the instruction assumed Lord's evidence to be true, because, so far as it went, it was not contradicted by Prentiss. It also assumed that the testimony of Prentiss, in relation to the reservation of the lien, was independent of his admission of a verbal permit. It assumed one portion of his testimony to be true and the other portion false, and called upon him to prove, by testimony *aliunde*, that it was not so. According to the instruction, then, the jury were virtually told to believe Lord and disbelieve Prentiss, unless the latter, taking upon himself the burden, had satisfied them that the condition annexed to the permit was true. Whereas, upon the whole evidence, it should have been left to the jury to determine whose version of the contract was the true one, without an instruction as to the burden of proof changing from the one side to the other. Or, in other words, "it was for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him." 1 Greenl. Ev., § 201.

The foregoing are reasons, which, together with those advanced by the Chief Justice, induce me to concur in sustaining the exception to the instruction. But I do not concur in that part of the opinion which sustains the exceptions in the admission of certain testimony.

It appeared that Prentiss and Lord were directly opposed to each other in their testimony respecting the lien,—the

one swearing that it *was*, and the other that it *was not* reserved. That they were the owners, as tenants in common, of the land on which the lumber was cut, was not controverted. Now the question naturally arose, under such conflict of testimony, as to their *credibility*. Both had the same means of knowledge, for they were the only contracting parties. Under such circumstances, it would be very desirable to know how they had contracted in former years, in reference to reserving a lien, or otherwise; and, as such fact appeared, it would greatly tend to corroborate the one or the other. I think such an inquiry was legitimate, and the facts elicited might properly be considered by the jury in determining the credibility of witnesses so interested as to be admissible only by force of the statute. Much has heretofore been said by Judges, in their opinions, as to the influence of "surrounding circumstances." This question is well calculated to test their sincerity; and one of the surrounding circumstances is, unquestionably, the antecedent conduct of the parties in reference to the same subject matter. It forms no new issue, but discloses facts creating a probability, more or less strong, by which to judge of the character of subsequent from prior proceedings, and thereby to arrive at the truth, involved, as it was in this case, in doubt and mystery. The reasons advanced in the opinion against its admissibility might very properly be urged upon the jury in considering its effect. It was admitted, not for the purpose of making a new contract, but to show what the old one really was. I have heretofore used the term "credibility of witnesses," but not intended in the odious sense of an impeachment, for their characters as such were not attacked in the usual manner. I used the word credibility as a substitute for recollection, or misconstruction of the true nature of the contract.

Inhabitants of Howland, *petitioners for a writ of certiorari, versus* County Commissioners of Penobscot County.

Where the County Commissioners have laid out a highway, but it does not appear that they have made any adjudication whether damages were sustained by persons over whose land the way was located, this is, in effect, an adjudication that no damages were sustained, and a party aggrieved may petition for a jury to assess damages within the time limited; but it furnishes no sufficient cause for a writ of *certiorari* to be issued, at the instance of the town where the road is located.

The Massachusetts statute of 1787, creating a Court of Sessions, and the decisions under it, are obsolete and inapplicable.

The neglect of the Commissioners to return a plan of the way laid out is not material, if they have returned a sufficient description.

The requirement that stone monuments shall be erected at the angles or *termini* is only directory, and their erection is not necessarily to be recorded, but may be subsequent to the location and record.

The neglect of the Commissioners to designate one of their number for their chairman, on or after the first Monday of January, may be an inaccuracy, but, without proof of injury thereby to the petitioners, does not call for interference by *certiorari*.

Whether, in case the Commissioners, on the failure of the town to make a road duly located, have put it under contract to several contractors, they have a right to issue a warrant of distress against the town before the entire road is completed, *quære*. But if such a warrant has been prematurely issued, and attempt made to enforce it, the remedy is not by writ of *certiorari*.

This was a petition for a writ of *certiorari*, to quash the proceedings of the County Commissioners, in laying out a road in the town of Howland, in 1854. The Court, after hearing the case *pro forma*, denied the prayer of the petitioners, and they filed exceptions. The facts are sufficiently stated in the opinion of the Court.

McCrillis, Flagg & Hilliard, for the petitioners.

1. The right to take private property for public uses is conditional, upon compensation being made. The commissioners laying out a road should either award damages to the land owners as compensation, or determine that they are not

damaged. In this case they have done neither. Hence, there has been no valid appropriation of the land.

Many of the provisions of our statute are similar to those of the Massachusetts statute of 1787, creating a Court of Sessions, as well as to those of intervening statutes. It may be said that our statute does not in terms require the Commissioners to award damages, or return that none should be awarded. But the decisions of the Courts require it. *Commonwealth* v. *Coombs*, 2 Mass., 489. But it is not admitted that our statute does not require it. It requires the Commissioners to make a correct return of *all* their doings. R. S., c. 25, § 3.

If there has been no valid appropriation of the land, the town could not have built the road without being liable to the owners of the land as trespassers.

2. The description of the road laid out is defective in several particulars.

3. The Commissioners for the year when this road was located, had elected no chairman, and were not qualified to act as a board, not being duly organized.

4. The warrant of distress against the town was issued prematurely. The agent appointed by the Commissioners undertook to compel the town to pay for building the road from time to time, as the work went on. He underlet the work to several contractors, giving them three years to complete it. The work to be done in 1860 was completed and accepted, leaving the principal part to be done in 1861 and 1862. It is contended that the town is not liable, nor can a warrant of distress issue, until the road is finished. The law contemplates only a single contract. If the town is liable to a warrant of distress when a small part of the road is made, there may be a succession of such processes from different contractors as they complete their sections. Yet the whole road may never be finished, and the part made may thus be rendered of no value.

C. S. Crosby, for the respondents.

The opinion of the Court was drawn up by

CUTTING, J.—This is a petition for a writ of *certiorari* to quash the proceedings of the County Commissioners of the County of Penobscot for certain errors or defects, apparent in their record, relating to a certain highway in the town of Howland.

Seven such errors have been assigned; *four* of which, *only*, have been relied upon by the petitioners' counsel, which may be considered in their order.

First, "Because there was no adjudication by said County Commissioners, nor any record of any, whether any damages were sustained by persons over whose land the said highway was located, and, in point of fact, damages were sustained by such persons."

It appears from the record and the admitted affidavits of some of the owners of real estate, over which the way passes, that these allegations are true. But for that cause, unless the petitioners have sustained or are liable to suffer an injury, they cannot maintain this process. And it has been argued with much force, that the injured and innocent proprietors, who have recently awoke from a long sleep, may reverse the proceedings and thereby render nugatory all expenditures by the town. Certainly, such fears should at once be allayed, and therefore it becomes necessary to consider that question.

If such proprietors have sustained damages by having a road made through their otherwise, perhaps, inaccessible lands at the public expense, and have received no remuneration, the question would readily arise whether it was occasioned by their own fault, or that of the Commissioners. The statute makes ample provision for the security of the rights of all parties, when duly asserted, otherwise such rights must be barred; for it is the policy of the law that at some time all contentions should be terminated. It may then be expedient to consider concisely how such interests are guarded and protected by the statute, imposing duties upon the Court as well as vigilance upon the proprietor.

A petition in writing, signed by responsible names, must first be presented to the Commissioners, as the basis of their subsequent action, stating that the public convenience and necessity require the way to be laid out and established, also its *termini* and route. *Then*, if a view be granted, the Commissioners are required to give "thirty days' notice of the time and place of their meeting, by causing copies of such petition, with their order thereon, to be posted up in three public places in each town, in which any part of such highway may be, and to be served upon the clerk of such towns, and to be published in some newspaper, if any there be, in the same county; which notice shall be considered sufficient for *individuals*, as well as the public." *Then*, "if after such view and hearing of the parties, the Commissioners shall adjudge the same to be of common convenience and necessity, they shall have power to lay out such highway, and shall estimate the damages, if any, which any person may sustain by reason thereof, and shall make a correct return of their doings, under their hands, with an accurate plan or description of said highway, to their next regular session, and shall cause the same to be duly recorded." "They shall, also, cause to be entered of record, that the original petition, upon which their proceedings are founded, is continued until their second next regular session, to be held thereafter; and all persons aggrieved by their decision, in estimating damages, shall present their petition for redress at the first or said second next regular session; and if no such petition be then presented, the proceedings upon the original petition shall be closed, and so entered of record; and all claims for damages, not before allowed, shall be forever barred." Stat. of 1841, c. 25, §§ 1, 2, 3, 4.

This statute does not require the Commissioners to ascertain and determine the legal title, description, location or boundaries of each proprietor's lot, over which the highway passes, when no one appears to claim damages between the times of the notice first given, and the close of the original petition, — notices sufficiently given, both by publications and

a public record, and a time sufficiently long to enable any person injured to present his claim for damages and to establish his title. The Commissioners, when none such appears, may well conclude that none such exists, and that no adjudication is necessary. For them to adjudge that this person, or that, has, or has not, suffered an injury, when neither is known as a proprietor, and when neither deems it prudent to be known as a claimant, would be simply ridiculous, and the argument of counsel, that, under such circumstances, the constitutional rights of the citizen have been invaded, is untenable.

The petitioners' counsel have cited *Commonwealth* v. *Coombs*, 2 Mass., 489, to the effect that damages must be assessed, or a return made that none are sustained, a decision pronounced in 1807, on the construction of the statute of 1787, conferring certain powers and enjoining certain duties to be performed by a locating committee appointed by the Court of Sessions, who were under oath "faithfully and impartially to estimate all damages which any person may suffer in their property, by the laying out of the road." And the Court say that such a return was necessary, "because it may be the foundation of further proceedings, either by the town, or by any owner of the land, to correct any supposed errors in the estimation of damages."

But that statute has since become obsolete, as well as the decision, both in Massachusetts and Maine. Later statutes and decisions now constitute the rule of law, under which an omission of the Commissioners as to damages would not debar an injured proprietor, on an application seasonably made, from his right to a trial by jury. Their adjudication in that particular may not be necessarily "the foundation of further proceedings."

That decision has before been cited at our bar, but, with what success, can be ascertained by a reference to *Inhabitants of Vassalborough, petitioners for certiorari*, 19 Maine, 338. Indeed, its spirit was exorcised in its native land, in 1851, when, under a statute similar to our own, their Court say,

"The provision, § 11, is, that if damage shall be sustained by any persons in their property, the Commissioners shall estimate and return the same. Now, if no damage is returned, the conclusion is, that, in the judgment of the Commissioners, none has been sustained; it is a judgment against his claim for any damages, and if the party is aggrieved by such judgment, it is a case within the statute, and he must petition for a jury within the time limited; otherwise, he acquiesces in such judgment." *Monagle* v. *County Commissioners of Bristol*, 8 Cush., 360.

The *third* error assigned, and relied upon, is not sustained by the record. No plan was returned, but there was a sufficient description. It is true that it does not appear that any stone monuments were erected at the angles or *termini*. But, on this point, we refer to *Inhabitants of Monterey* v. *County Commissioners of Berkshire*, 7 Cush., 394, where it is decided that such a requirement is only directory, not necessarily any part of the record, and must, from necessity, be subsequent to the location and record of the highway.

The *fifth* assignment for error must share the same fate. The neglect to designate a chairman of the board of Commissioners, on or after the first Monday of January, may have been an inaccuracy, but no sufficient cause to claim our interference, there being no evidence of any injury occasioned thereby to the petitioners. 19 Maine, 338, before cited.

The foregoing are the principal reasons urged why the prayer of the petitioners should be granted; and we have seen that they have no foundation to rest upon, either on principle or authority; and consequently we have come to the conclusion that the highway was legally located and established, thereby imposing a duty on the petitioners, as good and loyal citizens, to see that it was opened and completed, which they have thus far neglected to do; in consequence of which the power of the Commissioners has subsequently been invoked and exercised, under the statute, in the appointment of an agent, who has laid the whole road

under contracts, two of which, as the record shows, have been completed, and, for their discharge, a warrant of distress against the petitioners has already been issued. And, it is contended—

Seventhly, that the statute contemplates one entire contract, and that no warrant could issue until it was performed and audited.

The first part of the proposition we think may be incorrect, but the latter part, when that question is duly presented, may require grave consideration. If a warrant has been prematurely issued and an attempt made wrongfully to enforce it, this is not the proper remedy. Perhaps *audita querela* might be administered as a temporary relief; as to which we give no opinion. *Exceptions overruled.*

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

SARAH M. PIPER *versus* CHARLES D. GILMORE.

Certain notes payable to A. were by him deposited with B., in pledge as security for his indebtedness to B. C., being desirous of collecting a claim of his own against A., made inquiries of B. as to the notes; and B., without being informed of the purpose of the inquiry, replied that the notes belonged to A.: — *Held*, that, without proof that B. intended to deceive C. to his injury, these facts do not operate as an *estoppel in pais*, to prevent B. claiming money paid to him on the notes, notwithstanding the money was attached and seized by C. at the time of payment.

In such a case, in order that B. should be estopped from setting up a title to the money, it must be shown that he wilfully gave false information to C., with an intention to deceive him, and to induce him, on the faith of it, to act in a different manner than he otherwise would have done, whereby C. was led so to change his action, and was thereby injured.

TRESPASS against the defendant as sheriff of Penobscot county, to recover damages for his taking $290 in specie, alleged to be the property of the plaintiff. Plea the gen-

eral issue, with a brief statement justifying the taking of the money as the property of Mark W. Piper, by virtue of a writ of attachment in favor of Henry Pendexter, against Mark W. Piper and Martin V. B. Piper. The action, *Pendexter* v. *Piper*, was entered and prosecuted to judgment, and the $290 applied to satisfy the execution.

In July, 1854, Pendexter, having bought a farm of Mark W. Piper and Martin V. B. Piper, gave them his notes for $800, and a mortgage of the farm as security. The notes not having been paid, the mortgagees gave notice of their intention to foreclose it. May 19th, 1856, Martin assigned his interest in the notes and mortgage to the plaintiff.

There was evidence tending to show that Mark was, at the time of Martin's assignment, indebted to the plaintiff, $425 and interest; that Martin delivered Mark's share of the notes and mortgage to the plaintiff, Mark being then in New York; that, on his return to Kenduskeag in 1857, he obtained further advances of the plaintiff, and agreed with her that she might hold the notes and mortgage as security.

In 1858, R. S. Prescott, agent of Pendexter, and of the owner of the equity of redemption in the farm, asked the plaintiff if Mark owned half of the notes. She replied that he did; that she "had no control so as to allow for the oats, on Mark's part, but no doubt Mark would do what was right."

Soon afterwards, Prescott caused the writ in *Pendexter* v. *Piper & al.* to be made and delivered to an officer, and when Pendexter paid his mortgage notes, the officer attempted to seize the specie, and succeeded, after a struggle, in securing $290, the plaintiff retaining the balance.

There was evidence that Mark W. Piper at the time owned real estate in Kenduskeag, which the officer did not attach.

Cutting, J., presiding, instructed the jury, that if the plaintiff told the agent of Pendexter that Mark owned half of the notes and mortgage, and he was deceived by such declarations, whatever the knowledge or intention of the

plaintiff may have been, and he attached the specie on the strength of such declaration, and was thereby injured, the plaintiff could not be allowed to claim title to the money attached. And if Mark had other property which could have been attached by Pendexter, and he was deceived by the plaintiff's declarations, and did not attach such property, the jury might consider whether this was an injury to Pendexter.

It did not appear that Mark or Martin was insolvent at the time, nor that the plaintiff knew that Pendexter was about to attach the money, or made any claim to the notes or money, or was about to commence or had commenced a suit.

The jury returned a verdict for the defendant. The presiding Judge inquired of them, to whom they found the money belonged, and they replied that they did not consider that question.

The plaintiff filed exceptions to the instructions of the Court.

McCrillis & Mace, for the plaintiff.

Rowe & Bartlett, for the defendant, argued that if the attachment was induced by the plaintiff's representations, she could not maintain an action for damages arising from it. *Rangely* v. *Spring*, 21 Maine, 130; *Hatch* v. *Kimball*, 16 Maine, 146; 1 Story's Equity, §§ 385, 387, 390.

Declarations made by one party, and acted upon by the other, and his action thereby changed to his injury, operate in the way of *estoppel* upon the party making them. *Dewey* v. *Field*, 4 Met., 381; *Stone* v. *Dunkin*, 2 Camp., 344; *Harding* v. *Carter*, cited by Parke on Ins., 4; *Chapman* v. *Searles*, 3 Pick., 38; *Hearne* v. *Rogers*, 8 Barn. & Cress., 577; *Lewiston Falls Bank* v. *Leonard*, 43 Maine, 344.

The opinion of the Court was drawn up by

May, J.—In determining the correctness of the instructions complained of, we may, with propriety, assume that the notes upon which the money attached by the defendant's

deputy, was paid to the plaintiff, were, as against Mark W. Piper, rightfully held by her as security for his liabilities. She seems to have held his share as a pledge for that purpose. The testimony shows that, while she so held them, Prescott, the agent of the attaching creditor, and of the owner of the equity of redemption in the premises mortgaged to secure said notes, called upon her and inquired "if Mark W. Piper owned half the notes;" and she replied that "she had bought Martin's part, and that Mark's part of the mortgaged notes was his. She had no control, so as to allow for the oats, on Mark's part. No doubt he would do what was right."

She does not appear to have been apprized of the agency of Prescott, nor of any desire on his part to make an attachment to secure the demand of Henry Pendexter, his principal, which was afterwards put in suit. The notes were not attachable, and there is no evidence that she then knew that payment of the notes would soon be made, if made at all. At this time, Mark W. Piper was the general owner of his half therein, and, if not paid, the loss would fall upon him. There had been no written assignment of his part to the plaintiff. Her title to them was but an equitable title, but the money due upon them when paid, according to the arrangement of the parties, would become hers. The receipt of it would so far operate as a payment of her debt against Mark. She did not say that the money, when paid, would not be hers. Strictly speaking, therefore, there was no falsehood in the statement that "Mark's part of the mortgaged notes was his."

Under these circumstances, the jury was instructed "that if the plaintiff told the agent of Pendexter that Mark owned one half of the notes and mortgage, as testified to, and he was deceived by such declarations, whatever the knowledge or intention of the plaintiff, and attached the specie on the strength of such declarations, and has been thereby injured, the plaintiff could not now be allowed to claim title to the money attached. This instruction makes the know-

ledge and intentions of the plaintiff touching his statements wholly immaterial. By it, he is estopped from showing the honesty of his purposes, the truth of his statements, or his ignorance of the purposes, wishes or rights of the attaching creditor. Is such an instruction in conformity with the law?

Estoppels *in pais* are created by the law for the purpose of doing justice. They are called equitable estoppels, in contradistinction to an estoppel by a deed or record. Whether they exist in specific cases is often a question of great difficulty. The rules of law in regard to them seem to be well established. They may arise from a variety of facts, and often depend in a great degree upon the relations which exist between the parties. The general rule of law in regard to them, in England and this country, is, that "a party will be concluded from denying his own acts or admissions, which *were expressly designed* to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another." *Cummings, adm'r*, v. *Webster*, 43 Maine, 192; *Rangeley* v. *Spring*, 21 Maine, 130; *Wallis* v. *Truesdell*, 6 Pick., 455; *Welland Canal Co.* v. *Hathaway*, 8 Wend., 430. The rule, as laid down in *Pickard* v. *Sears & al.*, 6 Ad. & Ellis, 469, is, that "where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time." In all the cases where an estoppel has been held to exist, it is believed that it will appear, upon examination, that there was some evidence tending to show that the party estopped had some knowledge of the rights, interests, or intentions of the other party, or of his relations to the thing to which his declarations or acts related; or, that he had some intention of misleading the other party into some action that might be prejudicial to him. In every case there will be found some degree of bad faith, either expressly designed or construc-

tive. The authorities wherever the question has been raised, most, if not all of them, agree that the declarations or conduct must have been wilful in order to have the estoppel attach.

What is meant by the term wilful is well determined, not only in England but in our own State. In the case of *Freeman* v. *Cooke*, 6 Dowl. & L., 187, and 2 Exch., 654, it was decided that unless the statement was *intended* to induce the other party to act on the faith of it, or was such that a reasonable person would act upon the faith of it, *believing that it was intended by the party making it that he should so act*, no estoppel would be created, notwithstanding the other party did in fact believe the statement, and was induced to alter his position accordingly. See Harrison's Dig., vol. 7, p. 614, Phila. ed., and cases there cited. The rule upon this point is, that *whatever a man's real meaning may have been, he must so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it*, or the party making the representation will not be precluded from contesting its truth. Such is also the settled law of Connecticut. *Taylor & al.* v. *Ely & al.*, 25 Conn., 250; *Preston* v. *Mann & al.*, *ibid.*, 118.

In commenting upon the general rule in regard to estoppels *in pais*, as laid down in *Pickard* v. *Sears & al.*, before cited, WHITMAN, C. J., in the case of *Copeland* v. *Copeland*, 28 Maine, 525, remarks, that "in the position thus established, it must be observed that several things are essential to be made out in order to the operation of the rule; the first is, that the *act or declaration of the person must be wilful*, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, *be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured if the representation be untrue.*"

In the case of *Morton, adm'r*, v. *Hodgdon*, 32 Maine, 127, it is said by WELLS, J., in the opinion concurred in by

the Court, that, "before one can be conclusively bound by a declaration made in relation to his interest in property, such declaration must be *designed* to influence the conduct of the person to whom it is addressed, and must have that effect." The facts in this case will be found to be not very dissimilar from the present case. The declaration there relied on was held not to have been wilful, because it appeared that the party making it *did not know that the other party had any demand against Clark, nor that he needed or had any occasion for information on the subject.* The same learned Judge, in *Sullivan* v. *Parks*, 33 Maine, 438, says, in delivering the opinion of the Court, that "the declarations of a party, which should estop him, as to a third person, *must be made to one who has a right to know the relations of the party to the property in question; if made only to a person having no such right, they would not necessarily create an estoppel.*"

In the case before us, the limitation or qualification of the general rule, relating to estoppels *in pais*, as shown by the preceding authorities, seems to have been overlooked; and the instructions given, being in direct conflict with such limitation or qualification, are manifestly erroneous. It becomes unnecessary to consider the other instructions.

Exceptions sustained.

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

INHABITANTS OF VEAZIE *versus* GIDEON MAYO & *als.*

Although the statute of 1853, c. 41, regulating the mode in which a railroad shall cross streets and ways, is a general and remedial statute, passed by the Legislature in the exercise of the power of police, and applies to all corporations existing at the time, as well as those subsequently created; still, it cannot be construed as requiring railroads already constructed, or whose location has been completed and duly filed, and the construction commenced under a binding contract, to locate anew in order to comply with its provisions.

In such a case, the provision making a railroad which has not conformed to the statute, in crossing a street or way, a nuisance, and holding the directors of the company personally liable, does not apply.

ON REPORT of the facts by APPLETON, J.

THIS was an action of the CASE against the defendants, as directors of the Penobscot Railroad Company, under the statute of 1853, c. 41, § 3.

Whilst the Penobscot Railroad Company was constructing its road across a street in the town of Veazie, one John Phillips was injured by falling into the cut, whilst travelling along said street, in the evening. He brought his action against the town, and recovered damages and costs. The present suit was instituted by the town against the defendants, as being personally liable under the statute, for the damages paid to Phillips, and other damages. The facts are the same as in the case reported in this volume, *Veazie* v. *Penobscot Railroad Company;* see page 119.

A. G. Wakefield, for the plaintiff.

N. Wilson, for the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—The statute of 1853, c. 41, § 3, provides, that "no railroad shall be located across any county road, until the place, manner and conditions of such crossing shall have been ordered and determined in writing by the County Commissioners, and recorded in the County Com-

missioners' office." "And no railroad shall cross any street of a city, not a county road, without the written assent of the mayor and aldermen of the city, which written assent shall determine and state the manner and conditions upon which such crossing may be made, and shall be recorded in the County Commissioners' office. And every such crossing, made contrary to the foregoing provisions, shall be considered a nuisance, and liable to all the provisions of law relating to nuisances, and the directors of the company making the same shall be personally liable therefor."

Under the provisions referred to, the plaintiffs claim to recover of the defendants, as damages, the amount of a judgment, rendered in favor of one Phillips against the plaintiffs, for an injury caused by a cut across a highway, at a time when the defendants were directors of the Penobscot Railroad Company, in the town of Veazie, made for that railroad. The railroad was located by the County Commissioners, in 1852, prior to the passage of the Act invoked in support of this action, and the provisions of that Act, it is not insisted by the defendants, were afterwards conformed to by the company.

The plaintiffs having offered to prove the making of the cut, as alleged in the writ, by the railroad company while the defendants were its directors, without compliance with the requirements stated, so far as the crossing of the highway was concerned, and that the allegations in the writ of Phillips against the plaintiffs, were true, that the work on that section of the road was not commenced till after the Act of 1853, c. 41, was in force, although work had been done on other parts of the railroad, before the Act went into operation, a nonsuit was directed.

It appears, that before the passage of the Act invoked in support of this action, a contract had been made between the railroad company and Hezekiah C. Seymour, for the construction of the railroad, including the part where the cut in question was made, by one Nash, who was a sub-contractor under Seymour.

Although the statute of 1853, c. 41, is to be treated as a general law and a remedial statute; and the passage thereof is to be regarded as the exercise of a power of police, which must of necessity exist in the people; and this law is to be applied, so far as it can be done with propriety and consistently with its terms, to all corporations embraced in its provisions, whether existing at the time or coming into existence afterwards, still it cannot be construed as creating the obligation in railroads, which have been located, to locate anew, so as to conform to these provisions. The language of the Act being prospective, it could not have been designed to refer to the railroads last mentioned, and such interpretation is not insisted on by the plaintiffs. Neither can the Act apply with propriety to a railroad, where the location has been completed and duly filed in the office of the County Commissioners, and the construction of the road actually commenced, under a binding contract between the corporation and the party who is to make the railroad. The time for a change of location, at the crossings over such road or street, may have been so far exhausted that the necessary delay to make such change, according to the statute of 1853, may work a forfeiture of the charter. And a contract for construction is of binding obligation, so that neither party, nor the Legislature, can impair it.

In the opinion in this case, 45 Maine, 560, when it was before the Court, it is implied that the statute of 1853 will not apply to railroad corporations chartered before its enactment, where they had entered upon the construction of the road under prior existing laws. This doctrine is correct, and, if the case required, it might be extended to roads previously chartered, when the location had been completed, and a binding contract made for its construction.

Nonsuit to stand.

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

COLLIER SNOW, *Adm'r*, *versus* ISAAC SNOW.

Where a testator bequeathed to his widow the use of his personal property during her life and widowhood, she to use what may be necessary for her support and convenience, and, after her decease or marriage, one-half of what remained to descend to his son A., and the other half to his son B., B. to come into possession "when he shall arrive at the age of twenty-one years, or at the death or marriage" of the widow, the legacy to B. is contingent, and he having died a minor, and before the widow died or married, it lapses and is void.

It seems, that where the bequest is absolute in its terms, but *to be paid* at a future time, it vests in the legatee, and is transmissible to his representatives if he dies before the time fixed for payment; but when the bequest is *to take effect* at a future time, or the time is annexed to the *legacy* itself, and not to the *payment* of it, it is contingent, and lapses by the death of the legatee before the time.

When a minor had been for some years at work on his own account, and died leaving no widow, issue or father surviving, his administrator may maintain an action for money had and received, against one who has collected his wages; and it is no defence that such person acted as agent for the mother of the minor, and paid what he collected to her, and that she distributed it amongst some of the minor's heirs.

ON REPORT of the facts by APPLETON, J.

THIS was an action for money had and received, brought by the plaintiff as administrator of Edward Snow.

William Snow, the father of the defendant and of Edward Snow, died in 1846, leaving a will, the provisions of which, so far as relevant to this case, are fully stated in the opinion of the Court.

Edward died before coming of age, and then his mother died without having married again. The plaintiff was appointed administrator on the estate of Edward, and commenced this action.

The plaintiff claimed to recover of the defendant any money in his hands arising out of half of the father's personal property bequeathed to Edward. But the Court ruled that the legacy to Edward did not vest in him, because he died a minor before his mother died or married.

It appeared that Edward had for some years followed the

sea upon his own account, and that after his decease the defendant collected $70 wages due the deceased, besides his apparel.

The defendant offered to prove that he received this money while their mother was alive, collected it by her authority, paid it to her, and had had no control or possession of it since; and that the mother divided it amongst some of the heirs. This testimony was excluded.

The facts were reported for the full Court to make such order as the law and evidence should demand.

J. A. Peters, for the plaintiff, argued that Edward's debtor had no right to pay his wages to any one but his administrator. Neither the defendant, nor the mother, had any claim to the money until administered upon. Nor does the alleged division amongst some of the heirs constitute a defence. 2 Kent's Com., Lecture 30, §1; *Jackson* v. *Coombs*, 7 Cowen, 36; same case, 2 Wend., 153; *Miles* v. *Boyden*, 3 Pick., 213. Edward having been acting for himself for some years entitled him to his own wages against his father or mother either. *Whiting* v. *Earl*, 3 Pick., 201; *Wodell* v. *Coggeshall*, 2 Met., 89; *Canover* v. *Cooper*, 3 Barb., 115.

2. The devise to Edward, if real estate, would clearly be a *vested* remainder. 4 Kent's Com., 202. The same rule applies to chattels. 4 Kent, 281, 282, 283, 9th ed., and note by the younger Kent. If so, his personal property went to his administrator, and the defendant is liable in this action.

Rowe & Bartlett, for the defendant, contended that, as the widow, by the will, had the absolute right to use what she needed of the personal property, she had entire control of it, and the devise over to Edward was inoperative. *Ramsdell* v. *Ramsdell*, 21 Maine, 288. But, if not inoperative, it was contingent, and never vested in him.

2. If the defendant had no authority to settle with Edward's debtor, then there has been no settlement, and the debtor is still liable, and the money received by the defend-

ant belongs to the debtor. But, if the plaintiff ratifies the settlement, he must ratify the whole transaction. The defendant received the money, and paid it to the mother. Before he paid it, the plaintiff might have claimed it of him, but now it is too late. If he accepts the settlement as binding, he must look to the mother's estate for the money. But, if this action can be maintained, the plaintiff cannot recover of the defendant the shares of those heirs who have received the money.

The opinion of the Court was drawn up by

TENNEY, C. J.—On June 12, 1846, William Snow, the father of the plaintiff's intestate and the defendant, made his will, which makes a part of this case. The defendant was appointed administrator with the will annexed, but this suit is not against him in his capacity of administrator.

The testator devised to Lydia, his wife, the use, income and improvement of real estate described in the will, during her widowhood, or so long as she should remain his widow. He also bequeathed to her the use of all the stock on the homestead, which he owned, together with all the household furniture, including the bedding, clothing, crockery ware, hardware and all other articles used in and about the house. Also, all the farming tools, harnesses, carriages, equipage, and the articles used about the barns and stable. Also, the use as above of the vessels, and their proceeds, as hereinafter mentioned, viz., one-fourth part of the Orrington Packet, one-fourth part of the vessel called the ———, one-eighth part of the vessel called the ———, and one-eighth part of the vessel called George. Also, the privilege of using so much of the money which the testator had on hand when said will was made, as should be necessary for her support and convenience. Also, the privilege of receiving all moneys, due by note or account, to be used as aforesaid if necessary, and the use and income and benefit of all his personal property, not named previously, wherever the same may be found, together with the privilege of taking off and

cutting all the wood and timber standing or remaining, at the time of the making of the will, on a parcel of land therein described, so long as she should remain his widow.

The testator devised to his son, the defendant, certain real estate after the marriage or decease of his wife Lydia; also, one half part of all his personal estate which should remain after the marriage or the decease of said Lydia, including all the articles specified in the bequest to his wife, provided he should support, &c., in health and sickness, and common education, Edward Snow, the plaintiff's intestate, until he shall be twenty-one years old, and provided, also, that he should support and maintain Betsey Snow, the testator's daughter, in health, sickness, &c., until Edward Snow, his son, should arrive at the age of twenty-one years. After that time, the said Isaac was to furnish and provide one half as aforesaid, until said Betsey should marry or choose to maintain herself, &c.

A devise was made to Edward, the son of the testator, of certain real estate, and the remaining part of all the testator's personal property, which should exist after the decease of his wife Lydia, referring to the same property specifically named in the bequest to his wife of the use of personal property. Then follows the following clause;—"Said Edward shall come into possession of the above named estate when he shall arrive at the age of twenty-one years, or at the decease or marriage of Lydia," the testator's wife. And it was provided that, at the age of twenty-one years, Edward should furnish one half part of what was necessary for the support of the testator's daughter Betsey, &c.

Edward Snow, the plaintiff's intestate, died when he was about twenty years of age, and, subsequently, his mother died, without having been married after the death of the testator.

The report of the case shows that Edward Snow had been for some years following the seas, upon his own account; that he had sailed in a brig, as mate, and died on the voyage or afterwards, and that the defendant went to New York,

whence Edward had sailed, brought home his wearing apparel, and settled with the master of the brig for the wages, and received therefor the sum of seventy dollars.

The defendant offered to show that the wages were received while the mother was alive, who lived with him, and that he went at her request and as her agent, and delivered the money so received to her, who divided it among some of the heirs, and that he has had no control or possession of it since. This evidence was not received.

The action is for money had and received, and the claim is for any money in the defendant's hands, arising out of the personal property devised to Edward, and also for the wages received by the defendant.

The presiding Judge ruled, that the claim first named could not be upheld, as Edward did not survive his mother, and died while he was a minor.

When a legatee, named in a will, dies before the death of the testator, the legacy is said to have lapsed, there being no person to take, at the time when the will is to take effect. 3 Bac. Abr., 476.

The general rule is, that if a legatee die before the testator, or before the condition upon which the legacy is given be performed, or, before it be vested in interest, the legacy is extinguished. Treat. Eq., lib. 4, pt. 1, c. 2, § 3. The rule will not extend to a legacy to two or more, for though, by the civil law, there is no survivorship among legatees, yet it is settled that a legacy to two or more, jointly, is not extinguished by the death of one, but will vest in the survivor. Gilb. Rep., 137; 2 Atk., 220. But when the legacy is to two or more, *severally*, or to be divided, share and share alike, and one dies, his share will lapse. 1 P. Wms., 700; 2 P. Wms., 489.

The testator gave "£100 apiece to the two children of I. S., at the end of ten years after his decease." The children died within ten years. Lord Chancellor COWPER said, "this is a lapsed legacy, and shall not go to the executors of the children; for the diversity is, when the bequest is to take

effect at a future time, and when the payment is to be made at a future time." "That whenever the time is annexed to the legacy itself, not to the payment of it, if the legatee dies before the time of payment, it is a lapsed legacy, in that case." *Ewer* v. *Jones*, 2 Salk., 415.

"If a contingent legacy be left to any one, as when he attains, or, if he attains the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy, an interest which commences *in præsenti*, although it be *solvendum in futuro*. 2 Black. Com., 513. And, in note 17, by Mr. Christian, it is said, "if the legacy is given when, or, if the legatee attains a certain age, or to him *at* that age, the time is said to be annexed to the substance of the legacy, and it is not vested or transmissible to his representatives, if the legatee dies before that age." 2 Dane's Abr., c. 43, art. 3 and 4, pages 243, 244 and 245, where it is said in reference to the case cited from 2 Salk., and the distinction was taken, "where the payment is to be made at a future time," and "where the bequest is to take effect at a future time;" for "whenever the time is annexed to the *legacy* itself, and not to the *payment* of it, if the legatee dies before the time of payment, it is a lapsed legacy."

The common law has been changed by the statute of Massachusetts, of Feb. 6, 1784, so that the principles which we have noticed have been modified in cases where a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived. This provision is incorporated into our present revised statutes, c. 74, § 10, and is a reënactment of the code of 1841, in c. 92, § 19, and which is similar to the provision in the statutes 1821, c. 33, § 15. This provision cannot apply to the case before us, as it is reported, as it does not appear that Edward Snow left lineal descendants, nor did he die before the testator.

When the whole will in this case is examined, it cannot

be doubted, that the time when Edward Snow could be entitled to the possession of the property, which was of a personal character, was annexed to the legacy itself. A remainder, at most, was the subject of the bequest. It depended on two contingencies; one, whether any thing would remain at the death or the marriage of his mother, and the other, whether he would ever attain the age of twenty-one years. The fall of the legacy by the death or marriage of the mother, would not be avoided by the legacy of one half of the remainder of the property to Isaac, the defendant, as it would be if the legacy had been joint. The two were several and distinct one from the other. The one to the defendant was to come to his possession on the death or marriage of the mother, without restriction as to time.

The receipt of the wages of Edward Snow, as the mate of the brig, by the defendant, not being controverted, the facts offered to be shown will not avoid the liability to the plaintiff therefor. The money is treated by the defendant as that of the intestate. The mother had no legal claim for that money upon the master or the owners of the vessel. If payment had been refused, she could in no mode have enforced it; but it was purely gratuitous, and did not relieve the party indebted from liability still. But the plaintiff having treated the settlement made by the defendant as proper, it is to be regarded as a ratification of payment *pro tanto*, at least. The administrator of the intestate's estate alone could maintain a suit for this money, whether in the hands of the original debtor or the one who received it of him. The right of the mother to receive this money failing, the basis of the defendant's agency falls at the same time.

The delivery of the money so received to the mother, did not exonerate the defendant from his obligation to pay it to the plaintiff; having once the money in his hands, knowing it to have been the property of the intestate, the passing of it over to the mother did not relieve him, because she had no right to its custody as against the plaintiff. The distribution of it among the heirs, by her, was without authority, and he cannot invoke it for his protection.

It is insisted, for the defendant, that the ratification of the defendant's acts in the receipt of the money must be so extended as to embrace the ratification of the authority, derived from the mother of the defendant and the intestate. This proposition is not attempted to be sustained by any authority, and cannot be admitted. When the plaintiff found that the defendant had received the money belonging to the estate which he represented, (which is not denied by the latter,) he was entitled to the equitable action for money had and received, and he could not be bound by the fact that the defendant claimed to have acted as an agent for a person having no power over the fund which was in his hands. The evidence offered was properly excluded.

Other views have been presented on the first point in the case, by the counsel, which we have not considered, as they were not involved in the case. The construction of the will was one question presented, and the other was the admissibility of defendant's evidence, which was rejected.

According to the agreement of the parties, the defendant is to be defaulted on account of the money received by the defendant for the intestate's wages.

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

SAMUEL GARNSEY, *Adm'r*, *versus* JOHN GARDNER.

The assignment of a debt may be made by parol, or may be inferred from the conduct and acts of the parties. If made by one of the parties with a stranger acting as the agent of the other, it will be valid, if the acts of the stranger were authorized or subsequently ratified by his principal.

Where A sued B, and attached property, and C became receipter and surety for the payment of B's debt, and, on judgment being obtained, paid it to the officer having the execution, and A subsequently accepted the money paid; and afterwards C sued the judgment against B in A's name, obtained a new judgment, and levied the execution on real estate attached in the suit; — it was *held* that C had all the rights of an assignee, and was entitled to relief in equity against A, who had refused to convey to him the land levied upon.

BILL IN EQUITY, brought by the plaintiff as administrator of Robert R. Haskins, late of Bangor, against John Gardner, of Boston.

It appears by the bill of complaint, that, in 1833, Gardner recovered judgment against John Butterfield, of Milford, for $78,81, debt, and $17,48, costs, and Haskins, having been a receipter on the writ, and surety for the payment of the debt, paid the debt and costs recovered, to the officer having the execution, who paid it to Gardner's attorney. The officer delivered the execution to Haskins, it not having been discharged or annulled. In 1846, Haskins, in the name of Gardner, brought a suit on the judgment against Butterfield, attached real estate, obtained a new judgment and execution, and levied on the real estate attached, all at his own expense, but in Gardner's name, the amount of the levy being $219,41.

Haskins, in his life time, and after his decease, the plaintiff, as his administrator, called upon Gardner to convey by deed of quitclaim the land levied upon as aforesaid, but Gardner refused to do so.

Upon these facts, the bill claims that Gardner holds the land in trust for the estate of Haskins, and prays relief, and for an injunction to restrain Gardner from conveying the

land until further order of Court, or until the final decree in this case.

The defendant demurred to the complaint, on the ground that the complainant had not made out a case entitling him to relief in a Court of Equity.

A. W. Paine, for the plaintiff, argued that Haskins' money having been paid out for the debt, and accepted by the creditor, there was in law an equitable assignment to him of the demand. If a surety pays a debt, the security held by the creditor becomes in equity the property of the surety, his rights may be enforced in the name of the creditor, and courts will order the transfer of the *legal* title in accordance with the equitable one.

The case at bar is like that of one purchasing land by the money of another, where the title in equity is at once regarded as in the person who pays the money, and conveyance will be decreed. 2 Story on Eq., §§ 1201–1210. Also like a claim made against one, where another is ultimately liable, in which case equity will enforce the trust in favor of the person ultimately entitled to the benefit of it. §§ 1250, 1255, 1260.

The defendant, having received the money of Haskins by virtue of the latter becoming surety, cannot now retain the title to the land and the money too. On every principle of law and equity, the defendant holds the title in trust for the benefit of him who paid the money. *Buck* v. *Pike*, 2 Fairf., 1; *Russell* v. *Luce*, 2 Pick., 508; *Warren* v. *Ireland*, 29 Maine, 62.

In principle, it is a conveyance of land to one, upon a valuable consideration paid by another, where this Court has held that a trust is created. *Dwinel* v. *Veazie*, 36 Maine, 509; *Baker* v. *Vining*, 30 Maine, 121; *Buck* v. *Swazey*, 35 Maine, 41.

A. Sanborn, for the defendant, argued that the bill cannot be maintained—1, because the payment and receipt of the money are not set forth with sufficient particularity.

Hobart v. *Andrews*, 21 Pick., 526; *Walburn* v. *Ingilby*, 1 Mylne & Keene, 77.

2. Because, if Haskins was legally bound to pay, and did pay the debt and costs, he had a plain, full and adequate remedy at law, by action against Butterfield. 1 Story on Eq., 511; *Hogson* v. *Shaw*, 3 Mylne & Keene, 190.

3. Because Haskins had no legal or equitable interest in the judgment, *Gardner* v. *Butterfield*. It was not sold or assigned to him by Gardner, nor assigned by judgment of court. *Haskell* v. *Hilton*, 30 Maine, 419.

4. Because, if Haskins paid the debt of Butterfield to Gardner, as he alleges, it was extinguished, and could not be assigned. The suit on the judgment was groundless, and the levy void. Gardner has no title to the land, and does not hold it in trust for Haskins' estate. 1 Story, § 499, *b*, and notes.

5. Because, if Haskins was bound to pay, and did pay the debt, he is not *ipso facto* substituted for the original creditor, with the right to sue the judgment, and levy on Butterfield's land, and therefore the defendant does not hold the land in trust for him. 1 Story, § 493, and notes.

6. Because, the bill failing to show that Haskins was bound to pay the debt, he paid it voluntarily, and could not maintain assumpsit against Butterfield for money paid, much less a bill in equity to compel Gardner to assign the debt to him, or to convey the land. 2 Greenl. on Ev., §§ 113, 114, and notes; *Windsor* v. *Savage*, 9 Met., 346; *Stephens* v. *Broadnax*, 5 All., 258.

The opinion of the Court was drawn up by

May, J.—In case of a levy upon real estate, it is provided by our R. S. of 1857, c. 76, § 14, that, "when the debt had been previously assigned, for a valuable consideration, the creditor named in the execution holds an estate levied on to satisfy it in trust for his assignee, who is entitled to a conveyance thereof which may be enforced by a bill in equity." This provision is but a reënactment of the R. S. of 1841,

c. 94, § 18. Jurisdiction is also conferred upon this Court as a Court of Equity, "for relief in cases of fraud, trusts, accident or mistake." R. S. of 1857, c. 77, § 8.

The principal question, therefore, which is raised by the demurrer in this case, is, whether Robert R. Haskins, the orator's intestate, became the assignee of the judgment recovered in the suit, *Gardner* v. *Butterfield*, as is alleged in the bill, so that, under the facts and circumstances therein stated, the said Gardner can be regarded in equity as holding the estate levied upon in trust for said intestate.

The bill charges, in substance, that Gardner, in the year 1833, sued out a writ of attachment against said Butterfield, and duly obtained judgment and execution therein; and that said Haskins, having at the time of the service of said writ, become a receipter to the officer, obligated and holden to pay the said execution as surety for said Butterfield, upon recovery of the judgment and issuing of execution as aforesaid, did pay the amount thereof to said officer in pursuance of his obligation, who, thereupon, delivered the execution to said Haskins as his own, the same being in no way discharged or annulled; that said officer paid the sum due thereon to said Gardner, or his attorney, who received the same; and that, afterwards, in the year 1846, the said Haskins having kept the execution as his own till that time, put the said judgment in suit in the name of said Gardner, and at his own expense prosecuted said action until he recovered a new judgment therein, in 1850, when he took out execution and caused the same to be levied on the real estate in controversy. The bill also alleges that the said Haskins in his life time, and since his death, the orator, as his administrator, requested the said Gardner to convey by deed of quitclaim to each of them, the legal estate in said premises, which the said Gardner then, and still refuses to do.

The demurrer admits the truth of all these allegations. It is true the bill does not set forth, *in totidem verbis*, the terms of the receipt, nor whether any of Butterfield's property

was attached on the original writ, but it does allege that the said Haskins *became a receipter, and obligated himself, as the surety of Butterfield, to pay the judgment upon certain conditions*, which are alleged to have happened. His liability, according to the bill, did not depend upon any demand for property attached; but simply upon the recovery of judgment and execution.

Such liability, existing as it did, not by virtue of any thing upon the face of the demand in suit, but being collateral to it, was not that of a surety, strictly speaking, and may, perhaps, more properly be regarded as that of a guarantor. It seems to have all the properties of a conditional guaranty. Haskins may be regarded as having paid it as such. He paid it to the officer, who paid it to the defendant or his attorney, to whom the original demand, as the bill further alleges, was entrusted for collection.

Whether a guarantor, by mere payment, can demand an assignment of the debt, has often been questioned. There are authorities both ways. Some writers regard the question now as not definitely settled. Parsons' Mer. Law, 69. The later cases deny the right, and Story, in his Equity, vol. 1, § 499, *b*, affirms that this is the law. But, notwithstanding such may be the law, we are satisfied, from the facts before us, that the arrangement between the officer and Haskins, at the time of the payment, was, that Haskins should have the benefit of the judgment and execution, with all the legal incidents connected therewith. The delivery of the execution by the officer to Haskins *as his own, and as unsatisfied*, clearly manifests such an intention.

That an assignment of a debt may be by parol, as well as by deed, is well settled. Story's Eq., vol. 2, § 1047. So, too, it may be inferred from the conduct and acts of the parties. If made by one of the parties with a stranger, acting as the agent of the other, and the acts of such stranger are either authorized or subsequently ratified by his principal, such assignment will be valid. To hold otherwise would often make the law an instrument of injustice. The

arrangement, therefore, which was made between the officer and Haskins, if authorized or ratified, operated as a legal assignment of the judgment and execution.

Is there sufficient evidence, in the facts alleged in the bill, to show such authority or ratification? We think there is. The fact that the defendant, through his attorney, received the whole amount of his judgment; the absence of any claim by him upon the judgment or execution after the execution had been delivered to Haskins as his own; and the long silence of the defendant in relation to the whole matter, which continued until Haskins, some seventeen years after, had obtained a new judgment and execution, and satisfied them by a levy upon real estate, in our judgment, are sufficient evidence of such authority for, or of a subsequent ratification of the acts of the officer, especially when the defendant is uninjured thereby, having received, as he has, the full amount of his debt. An authority for, or a ratification of, the acts of an attorney, was inferred from facts somewhat similar, in the case of *Patten & ux.* v. *Fullerton*, 27 Maine, 58.

In this view of the case, it becomes immaterial whether Haskins was a receipter for property upon the writ, or, was merely a surety or guarantor of the debt. The assignment of the debt by the officer to him upon payment of the amount due, having been either authorized or ratified by the defendant, conferred upon the orator's intestate all the rights of an assignee, which are sufficient for the maintenance of this bill.

The orator, therefore, having brought his case within the purview of the statute, is entitled to the relief which he seeks and which the statute gives. The demurrer must be overruled, and the case sent back to the Court for the county of Penobscot, where the defendant can make further answer if he desires. *Demurrer overruled.*

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

NATHAN DANE, *State Treasurer, versus* CHARLES D. GILMORE *& als.*

Before an action can be sustained upon the official bond of a sheriff, the plaintiff in interest must show that the act complained of was an official act, and that he has ascertained the amount of his damages in a suit against the sheriff.

He may ascertain the amount of his damages, when his claim is for a wrongful attachment of his property, as well in an action of *trover*, as in an action of *trespass*.

In such action it is not necessary for him to allege in his declaration, that the sheriff took the property *in his official capacity*, in order to lay a foundation for a suit on the bond.

In a suit on the bond, he may show that the sheriff took the property in his official capacity by evidence *aliunde* the record of the former suit.

ON EXCEPTIONS.

DEBT on the official bond of the defendant as sheriff of Penobscot county for the year 1857.

The case was referred to the presiding Judge, with the right to except to any of his rulings in matters of law.

The plea was *non est factum* with a brief statement that the principal had performed all the conditions of the bond.

The plaintiff's specifications were, that Gilmore, in his capacity of sheriff, March 23, 1858, attached on sundry writs his property as the property of other parties, and that he afterwards commenced an action against said Gilmore, for taking his property, and had recovered judgment against him, upon which an execution had issued, and had been returned in no part satisfied.

The plaintiff introduced the bond in the usual form, duly executed and approved; also, against the defendants' objections, SIX writs against Benj. S. Arey & al., with Gilmore's return thereon, of an attachment of a lot of merchandise; also a writ, himself against Gilmore, (being trover for the same goods as those described in the returns on the writs against Arey & al.,) the record of the judgment against Gilmore in the same case, the execution and the return of

nulla bona thereon, all against the objections of the defendants.

The plaintiff called John A. Peters and Thomas H. Garnsey, who identified the goods attached on the writs against Arey & al. as the same goods for which the action of trover was brought.

The defendant seasonably objected to the testimony of these witnesses.

On this evidence, the presiding Judge found, as matter of fact, that Gilmore attached in his official capacity as sheriff, on the writs against Arey & al., the same goods for which the plaintiff in interest recovered judgment against Gilmore in the action of trover.

He ruled, as matter of law, that the evidence was admissible, and, upon it, the plaintiff in interest was entitled to judgment for the amount of his judgment against Gilmore, with interest thereon, till the final judgment in this suit, and the defendant excepted.

A. L. Simpson, for defendant.

1. The judgment in the suit against Gilmore is not a sufficient compliance with c. 80, § 12, of the Revised Statutes, because he was not sued as sheriff, nor for any act done by him in his official capacity, or under color of his office, or the act of any of his deputies.

A judgment against the sheriff, in his private capacity, is no foundation for a suit on his official bond. *Campbell* v. *Phelps*, 17 Mass., 244; *Bailey* v. *Butterfield*, 14 Maine, 112.

The *dictum* to the contrary, in *Lowell* v. *Parker*, 10 Met., 309, is not sustained by the authorities.

2. The only action against a sheriff which will lay a foundation for an action on his official bond is trespass, or a special action on the case, setting out the neglect or misdoings complained of. Trover is not a proper form of action.

At common law, *trespass* was the only action sustainable against a sheriff for attaching plaintiff's goods as the pro-

perty of another. *Darlin* v. *Stone*, 4 Cush., 359. This rule has not been changed by our statute which abolishes the distinction between trespass and trespass on the case; it does not abolish the distinction between *trespass* and *trover*.

3. In any event, the testimony of Peters and Garnsey was not admissible.

The acts of Gilmore must be shown *by the record*.

J. A. Peters, for plaintiff.

The opinion of the Court was drawn up by

KENT, J.—The plaintiff in interest claims to recover, in this suit, on the official bond of Gilmore, as sheriff, damages which he alleges he has sustained by reason of a wrongful act of that officer, in his official capacity. The act complained of is the taking and converting of sundry goods and chattels, the property of the plaintiff. The case, as stated by the plaintiff, is shortly this:—That he was the true owner of the goods; that the defendant Gilmore, as sheriff, took those goods out of his possession; that he commenced an action of trover against him therefor; that, in that action, he recovered judgment on default against Gilmore, for the value of the goods, which has not been satisfied, and he brings this action on his official bond to obtain judgment against the principal and his sureties, according to the statute.

Before such recovery can be had, the plaintiff must establish that the act complained of was an official act, and that he has ascertained the amount of his damages by a suit against the sheriff. The defendants deny that this has been done according to the requirements of the statute.

When any person unlawfully intermeddles with the property of another, and converts it to his own use, the owner may ordinarily maintain either trespass or trover against the wrongdoer. If the wrongdoer is a public officer and does the act by virtue or under color of office, that fact is not one that the plaintiff is bound to know, or to set out in his writ and declaration. He is not bound to recognize or put in

issue, by his declaration, the question whether the person who takes and carries away his goods did the act officially or as an individual. It would be an anomaly in pleading to require the plaintiff to set out, in a special count, the allegations which would put in issue matters not properly issuable in the suit. The plaintiff does not complain that he acted officially, but that he took away his goods. He is not bound to know any other fact. He cannot be required to set out, that on a certain day, the defendant, being an officer, and having certain writs against A. B. or C. D., by virtue thereof took the plaintiff's goods. It is enough for him to declare generally, in trespass or trover, that the defendant named did take his goods unlawfully. The only necessity, that requires the defendant to be described as a sheriff at all in the writ, is that it may be legally served by a coroner. But this is required in all cases where the sheriff is a party, whether as an individual citizen or as an officer.

When the defendant appears, he may defend on any legal ground. He may deny the taking, or he may justify it on the ground of his own individual right to the property, or his authority as an agent of the true owner. He may not, unless he sees fit, invoke his official character at all, or he may do so and plead, that, as an officer, having legal precepts against the plaintiff himself, or any third party, he took the goods. In the latter case, the question to be tried would be the title of such third party, as against the plaintiff's title.

It is clear that, as between the plaintiff and the sheriff, an action of trespass or trover is the proper remedy. It is not in itself, and in its inception, an action against the sheriff for official misconduct. It is an action against the person, who is a sheriff, for an act which he may or may not attempt to justify by invoking his official character. If he does so, and the pleadings show that the act was an official one, the record would probably be sufficient evidence in a suit on the bond.

But, in this case, the record only shows that, in the ac-

tion of trover, the defendant Gilmore was defaulted. He did not invoke his official character, or attempt to justify as an officer. He is described in the command to attach his goods, as "sheriff of the county of Penobscot;" but this, as before stated, is simply a description of the person, to give authority to the coroner, to whom the writ is addressed.

The presiding Judge, to whom the whole case was referred, with a right to except in matters of law, found, as a fact proved, that the goods sued for, in the action of trover against the sheriff, were attached, taken and sold by him as sheriff, as set forth in his returns on the six writs. But, to establish that fact, he admitted in evidence, against the objection of defendants, six writs against Benjamin S. Arey & als., in favor of sundry creditors, and the returns by the defendant Gilmore thereon. Also the writ and judgment and execution thereon in the action of trover against the sheriff, in favor of the plaintiff in interest in this case. Also, the parol testimony of two witnesses who identified the goods specified in the writ of trover, as the identical goods attached and taken by the sheriff on the six writs.

The defendants base their objection to the introduction of this testimony on the ground, mainly, that it is not competent to establish the fact of the identity of the goods in this manner, nor to show that the sheriff acted officially, or under color of office. It is urged that, if we admit that an action of trespass or trover could be sustained against the sheriff, without any special allegation in the writ of official action, yet, that such a suit and judgment by default thereon, is not sufficient to charge the sureties on his official bond. It is insisted that such a suit is not an ascertainment of damages within the statute, c. 80, § 12, which requires, that any person, before commencing a suit on the sheriff's bond, shall first ascertain "the amount of his damages by judgment in a suit against" the sheriff, "or by a decree of the Probate Court allowing his claim."

The defendants, who are sureties, now argue, that no judgment which does not in itself, or on its face, show that the

act complained of was an official act, or done under color of office, can be sufficient within the statute.

The statute in its terms does not require that the suit in which the damages are ascertained shall be in any particular form of action, nor does it require that the official character shall be set forth. The manifest intention of the Legislature was to prevent sureties from being troubled by suits before the liability of the officer, and the amount, had been settled by a proper suit. The amount of the damages seems to be the only matter absolutely fixed by such a judgment. But it is well settled law that where one person is surety for the faithful performance of duty by another, a judgment recovered against that other for a failure, if without fraud or collusion, is *prima facie* evidence in a suit against the surety. *Lowell* v. *Parker*, 10 Met., 309.

Where such a judgment has been recovered, the sureties, in a suit against them, may show that the taking was not by color of office, or, that the judgment was obtained by collusion, by which an act done by an officer in his private character, is made to appear as an official delinquency, or any other matter which exonerates the surety. *Harris* v. *Hanson*, 11 Maine, 247.

It would seem that, if it is shown that the judgment was recovered fairly for an official act or neglect, that it is binding on the sureties in a suit against them. But, how can this be made to appear? We have seen that the original action against the sheriff need not be instituted against him in his official capacity; that it would be anomalous, if not absurd, to require the plaintiff to set out matter as to official action, which could not be properly denied or traversed in that suit; that any action of tort by which the proper damages could be assessed is sufficient.

It is true, that, in the case at bar, all that the judgment against the sheriff establishes is, that Gilmore took sundry goods of plaintiff and converted them to his own use. On its face it does not show that in doing this he acted under color of office, or that he has been guilty of any official ne-

glect or wrong. It does fix the damages, in case the defendants are liable in this suit.

Unless the plaintiff can show *aliunde* the facts which establish official action, he can have no remedy on a bond given for the express purpose of securing individuals against the official misconduct of the sheriff. The Court, in the case of *Lowell* v. *Parker*, before referred to, had this exact case before them, and decided that such evidence *aliunde* is to be received. If from that evidence it appears that the act complained of in the first suit was official, and that the judgment was in fact for such act, it would be sufficient to show an official misfeasance, which is a breach of the bond, and establishes the plaintiff's right to judgment for such breach. We concur in this view, and see no objection to the introduction of the evidence in this case. It is the constant and well established practice to admit parol evidence to identify property, named in a deed, or contract, or judgment. If the fact does not appear of record, parol evidence is admissible to show that a judgment was rendered on a particular note. *Cave* v. *Barns*, 6 Al., 780. A note named in a schedule may be identified by parol. 4 Met., 80. Parol evidence may be admitted to prove the identity of a record, where the venue has been changed. *State* v. *Mathews*, 9 Port., 37.

In this case the returns of the defendant Gilmore show, as the case states, that he attached the same goods named in the action of trover. The parol testimony of identity was hardly necessary, but we see no objection to its introduction for that single purpose.

The facts found by the Judge are to be taken to be true by us. The only question for us is, whether he admitted improper testimony to establish them. We think, on principle and on authority, that it was competent for the plaintiff to show, by the record and by other proof, that the wrong for which the action of trover was instituted was done under color of office. The defendants offer no proof to the contrary, or which is calculated to raise a doubt as to the fact.

There was considerable discussion at the bar, whether an action of trover was a suitable remedy against an officer, who takes the goods of one man on a writ against another, and whether, if it could be sustained against the officer alone, it was sufficient to charge the sureties.

We can see no reason why the damages may not be as well determined in an action of trover as in an action of trespass. In neither form of action would the official character of the act complained of appear, if the count was a simple one. A judgment in trespass would establish only what a judgment in trover would — a simple wrongful taking — without establishing the official character of the act. In either case this must be established by proof *aliunde*.

It was settled in *Libbey* v. *Soule*, 13 Maine, 310, that trespass or trover, at the election of the party injured, may be maintained against an officer who takes the property of A on a writ against B. The decision in *Bailey* v. *Butterfield*, 14 Maine, 112, does not contravene this. That case only decides that the action against a sheriff for official misconduct must sound in tort, and not be founded on a contract, in order to charge his sureties on his bond. The sureties do not agree to be answerable for contracts. The expression of C. J. Shaw, in *Davlin* v. *Stone*, 4 Cush., "that trespass is the proper form of action at common law for such taking, but that now, by force of the statute, trover will equally well lie," if construed as meaning that trover would in no such case lie at common law, cannot be supported. Bacon's Abr., Trover, D; *Pierce* v. *Benjamin*, 14 Pick., 356; *Sanborn* v. *Hamilton*, 18 Vert., 590; *Thompson* v. *Currier*, 4 Foster, (N. H.,) 237.

The view we have taken does not require us to give a construction of the statute abolishing the distinction between actions of trespass and case. We are satisfied that, without that statute, trover was a proper action in a case like this.

We are strengthened in the view we have taken of the whole case, by the cases of *Archer* v. *Noble*, 3 Maine, 418, and *Harris* v. *Hanson*, 11 Maine, 241. It is evident from these cases, and others which may arise, that it would be im-

possible, in many instances to have the official nature of the act set forth in the record of the primary suit. The case last named was replevin, in which the form is given by statute; the sheriff defended, but he might have been defaulted. Judgment was rendered against him for damages and a large amount of costs; this judgment he refused to pay. It was held that his sureties were liable on his bond, although the issue tried on the first suit was upon the title of the plaintiff only.

We are satisfied, on the whole case, that there was no error in the rulings or decision of the Judge.

Exceptions overruled.—Judgment for the plaintiff, as given by the presiding Judge.

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

COUNTY OF WASHINGTON.

STATE *versus* JOHN UNDERWOOD *& al.*

A verdict was sustained for *larceny in this State*, against one who had goods in his possession which he had stolen in the Province of New Brunswick and brought with him into this State.

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

THIS was an INDICTMENT, charging the defendants with the crime of larceny. The articles stolen were alleged to be the property of one Christian Brahn; and the evidence, on the trial, sustained the allegation. It was alleged in the indictment, that the property was stolen from said Brahn, "at Eastport, in the county of Washington." There was testimony to prove that the property was stolen from the owner, from a vessel, to which he belonged, then at St.

Andrews, in the Province of New Brunswick; that the defendants were followed to Eastport, and the property found in their possession.

A witness was called on the part of the State, who testified, that he was acquainted with the laws of the Province of New Brunswick; that the English common law was in force in that Province, except so far as it had been changed by statute, and that the volumes offered in evidence were the Revised Statutes of that Province.

These statutes were admitted in evidence against the objection of the prisoners' counsel.

Upon the evidence, the jury, by the consent of the prisoners, returned a verdict of *guilty*, subject to the opinion of the full Court.

The jury also found specially, "that the prisoners did originally steal, take, and carry away the goods in the Province of New Brunswick; and that said taking and carrying away were felonious by the laws of said Province, and in violation thereof."

If, in the opinion of the full Court, the verdict can be sustained, on the evidence in the case, judgment is to be rendered thereon, otherwise, a new trial to be granted.

Appleton, *Attorney General*, for the State.

Bradbury, for the defendants.

This case was argued, A. D., 1858, and continued for advisement. The opinion, concurred in by a majority of the Court, was drawn up by

HATHAWAY, J.—The question presented by this case, is, whether or not stealing goods in a British Province, and bringing them, by the thief, into this State, and having them in his possession here, is larceny in this State.

The trial of a person indicted for larceny, at common law, must be had in the county in which it was committed, and, in legal contemplation, where goods are stolen in one county and carried into another, the offence may be prosecuted in

either county, for every asportation is, in law, a new caption. 3 Greenl. Ev., (8th ed.,) § 150, and notes.

"He who steals my goods from one who *had* stolen them, may be indicted as having stolen them from me, because, in judgment of law, the possession, as well as the property always continued in me; and he who steals them in the county of B, and carries them into the county of C, may be indicted in the county of C, *because*, the possession still continuing in me, every moment's continuing of the trespass is as much a wrong, and may come under the word *cepit*, as much as the first taking." 1 Hawk. P. C., c. 33, §§ 33 and 52.

"As the property in the goods stolen always remains in the true owner, unaltered by the wrongful taking, every carrying away is a new trespass. Hence, it follows that the *venue* may be laid in any county into which they are conveyed, as the offence of taking and converting is *there* in itself complete." Waterman's Archbold, p. 69, note 2; *Commonwealth* v. *Dewitt*, 10 Mass., 154, Rand's ed.; *State* v. *Douglas*, 17 Maine, 193; *State* v. *Somerville*, 21 Maine, 14.

For the *same reasons*, if a person steal goods in another State, (one of the United States,) and bring them into this State, he may be indicted and convicted of larceny here. *Commonwealth* v. *Collins*, 1 Mass., 116; *Commonwealth* v. *Andrews*, 2 Mass., 14, which cases are authoritative here, having been decided before the separation of Maine from Massachusetts, and the doctrine has been since recognized as the law in Massachusetts, in *Commonwealth* v. *Rand*, 7 Met., 475, and in *Commonwealth* v. *Uprichard*, 3 Gray, 434, in which last case the Court made a distinction between the case of goods stolen in another State, and that of goods stolen in a foreign country, and decided that the bringing into Massachusetts, by the thief, of goods stolen in one of the British Provinces, and the possession thereof, by him, in Massachusetts, is not larceny in that Commonwealth. In delivering the opinion of the Court, in that case, Mr.

Chief Justice SHAW said, "laws to punish crimes are essentially local and limited to the boundaries of the State prescribing them; the commission of the crime in Nova Scotia was not a violation of our law; this indictment proceeds on that ground, and alleges the crime of larceny to have been committed in violation of the laws of this Commonwealth, and within the body of this county. It is only by assuming that bringing stolen goods from a foreign country into this State makes the act larceny here, that this allegation can be sustained; but this involves the necessity of going to the law in force, in Nova Scotia, to ascertain whether the goods were stolen, so that it is by the combined operation of the force of both laws, that it is made felony here. It is said that they commit a new theft, by the possession of stolen goods, in our jurisdiction. But, what are stolen goods? Are we to look to our own law, or to the law of Nova Scotia, to determine what is a felonious taking? What is the *animus furandi*, and the like? If we look to the law of Nova Scotia, and that law is different from ours in defining and prescribing theft, then we may be called on to punish, as a crime, that which would be innocent here. If we look to our own law, then a taking and carrying away of goods in Nova Scotia, under circumstances which would not be criminal there, might be punishable here." If this reasoning of the learned Chief Justice were well founded and correct, it would apply, with equal force, to the case of goods stolen in another State, as to that of goods stolen in a foreign government, for in their administration of criminal law, the several States are sovereign, and in their respective jurisdictions, and in the laws which regulate their internal police, they are as foreign to each other as each State is to foreign governments. But it is not correct to say there is a necessity of going to the law in force in the foreign country, from which the goods were brought, to ascertain whether they were stolen.

The defendants were charged with violating the laws of Maine. The allegations in the indictment were, that they

stole certain goods, in the county of Washington, the property of a certain person named. It was necessary for the government to prove the property in the goods, and all the material allegations in the indictment as alleged. It was incumbent on the government to prove that the defendants actually took and carried away the goods feloniously in that county, or had such felonious possession of them, *there*, as would, according to the laws of this State, constitute "in legal contemplation," a felonious caption.

The laws of the foreign country are not included among the elements which constitute the crime for which the defendants were indicted. They were not charged with violating the laws of the foreign country, and those laws could not be legally introduced on the part of the prosecution, in the proceedings against the defendants. Whether or not, the defendants were guilty of stealing the goods, must be first determined, according to our laws concerning larceny, and, if they were thus guilty, then the guilty possession of the goods *here*, was larceny *here*. But if the taking and carrying away of the goods, in the foreign government, was not in violation of the laws, *there*, and the defendants thereby became the lawful owners of the goods *there*, before they brought them to Maine, *that* would have been matter of evidence at the trial, which would have disproved the allegation in the indictment, of property in the former owners, and the prosecution must have failed. Without noticing particularly the various decisions of the courts of the several States, upon this subject, it is sufficient to say they have not been uniform.

In Vermont, it has been held that, where property was stolen in Canada and brought by the thief into Vermont, the thief might be indicted and convicted in that State; and such we hold to be the law in this State, in accordance with well established principles, applicable to prosecutions for larceny of property stolen abroad and brought by the thief into any county in the State; and such we had understood

to be the law in Massachusetts, until the decision in *Commonwealth* v. *Uprichard*, before cited. In the *People* v. *Burke*, 11 Wend., 129, the defendant was convicted, in New York, for larceny of money *there*, which he had stolen in Canada and brought into New York. This conviction was under the statute which seems to have been enacted in consequence of a decision of the Court in that State, that, by the common law, such conviction would be unauthorized. In delivering the opinion of the Court in that case, Mr. Chief Justice SAVAGE said:—"It is not the larceny in Canada which we punish, but the larceny committed in the State of New York. The offender may be punished in any county where he carries the goods, as he is guilty of stealing wherever he has them. *This principle* was, in Massachusetts, without the aid of a statute, applied to the case of property stolen in another State and carried into that State." We do not perceive any difference in the applicability of the same principle, to the case of property stolen in a foreign country and that of property stolen in another State. Maine is a border State. Many of the inhabitants of the frontier towns are engaged in business which renders it necessary for them to have and to use their property on both sides of the line. Our treaty of extradition with England does not embrace persons charged with larceny, and, highly as we respect the decisions of the learned court of our parent Commonwealth, we are not disposed to depart from what we understand the law to be in this State, by adopting the doctrine of the *Commonwealth* v. *Uprichard* as law in Maine,—the more especially, when the consequence would probably be, *either* to render our border towns places of refuge for thieves, who might obtain a livelihood by stealing the property of our citizens and others, over the border, with every facility for a quick, and therefore a safe return to their places of retreat, on this side of the line, where they might enjoy the fruits of their pilfering and plunder with impunity, or *else*, to cause a legislative enactment, as was the case in New York, which would, un-

doubtedly, make the law what, without the aid of the statute, we understand it to be now.

Judgment on the verdict.

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

DAVIS, J.—It was well settled in Massachusetts, before our separation from that Commonwealth, that a person stealing goods in one State, and carrying them into another, may be convicted of the larceny in the latter. If the question were now raised for the first time, I should certainly dissent from the doctrine. I do not think it can be sustained, either from principle, or by the weight of authority. If this Court would deny the soundness of it altogether, and sustain the exceptions on that ground, I would concur in the decision.

But, if we conclude that we are bound by the early Massachusetts decisions, I see no way but to apply the doctrine to this case, and overrule the exceptions. The distinction which SHAW, C. J., attempts to draw in *Commonwealth* v. *Uprichard*, 3 Gray, 434, between the case of larceny in another State, and in a foreign country, is, in my judgment, entirely without any foundation. If a conviction can be sustained in the former case, I think it must be in the latter. And, until we are ready to reject the doctrine in both classes of cases, I think we should uphold it in both. I therefore concur in overruling the exceptions.

RICE, J., dissenting.—This case involves a principle of great importance. If this indictment be sustained, it will establish a precedent which, in my judgment, is unsound in principle and unsustained by authority. I do not, therefore, feel at liberty to permit the case to be placed upon the judicial records of our State unchallenged, or with my silent dissent.

The facts on which the indictment is based are not controverted. The prisoner committed a larceny in the Province of New Brunswick, and brought with him into this State a portion of the stolen goods. The indictment charges

him with a larceny of those goods, thus found in his possession, in the town of Eastport, in the county of Washington.

Do these admitted facts bring the prisoner within the criminal jurisdiction of this Court, and render him liable to punishment for a larceny in this State? I think not.

Every independent nation has exclusive jurisdiction over its own members, and has the right to judge for itself how far they are to be punished, and whether they are to be punished at all, or pardoned. Ruth. Inst., b. 2, c. 9, § 12.

The sovereign power of municipal legislation extends to the regulation of the personal rights of the citizens of the State, and to every thing affecting their civil state or condition. It extends, with certain exceptions, to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same. The judicial power of every independent State, then, extends, with the qualifications mentioned, to the punishment of all offences against the municipal law of the State, by whomsoever committed within its territory. It is evident that a State cannot punish an offence against its municipal laws, committed within the territory of another State, unless by its own citizens. Wheat. Int. Law, pt. 2, c. 2, §§ 6–13.

It is a general principle that the penal law of one country cannot be taken notice of by another. *Ogden* v. *Folliot*, 3 P. R., 726.

The penal laws of foreign countries are strictly local. 1 H. Black., 124.

In *Rex* v. *Powers*, Ry. & Moo. C. C. R., 349, the prisoner was charged with stealing, at Dorchester, a quantity of wearing apparel. The things had been taken by the prisoner from a box of the prosecutor's, at St. Helier, in the island of Jersey, and were afterwards found in his possession in Dorsetshire, where he had been apprehended on another charge. The case was considered by all the judges, except Lord Raymond, C. B., and Taunton, J., and they held unanimously that the conviction was wrong.

In *Mun* v. *Kaye*, 4 Taunt., 34, Heath, J., says:—

"Wherever a crime has been committed the criminal must be punished, according to the *lex loci* of the country, against the laws of which the crime was committed; and, by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed, in bringing the criminal to punishment;" and he adds, "the same has been the law of all civilized nations."

In *Regina* v. *Madge*, 9 C. & P., 29, it appeared that the property had been stolen by the prisoner at Boulogne in France, and had been found in his possession in London, where he was taken before the Lord Mayor, and committed for trial. This case was held to fall within the principle of *Rex* v. *Powers*, and PARKE, B., directed the jury to acquit the prisoner on the ground of want of jurisdiction, which was done.

A similar decision was held in *Rex* v. *Anderson & als.*, for goods stolen in Scotland. 2 E. P. C., 772, c. 16, § 156.

The courts of no country execute the penal laws of another. Story's Confl. of Laws, § 620.

A foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored. Per MARSHALL, C. J., in case of *The Antelope*, 10 Wheat., 69.

In the case of *Com.* v. *Uprichard*, 3 Gray, 434, cited by counsel for the defence, the prisoner was found in Boston, having in his possession certain gold and silver coin, which he had stolen in the Province of Nova Scotia. The indictment charged the prisoner with having committed a larceny of the coin aforesaid, in the county of Suffolk and Commonwealth of Massachusetts, of which offence he was found guilty by the jury; but the full Court, on a careful examination of the authorities, came to the conclusion that they had no jurisdiction of the offence.

In the case of *State* v. *Bartlett*, 11 Vt., 650, which was larceny of a yoke of oxen in Canada, but which were found

in the prisoner's possession, in Vermont, the prisoner was indicted in that State and convicted, and the conviction held to be correct. REDFIELD, J., in delivering the opinion of the Court, said, "If this question were entirely new, and now to be decided upon the weight of authority at common law, I confess I should incline to the view taken by the respondent's counsel, for it is expressly laid down by all English law writers upon this subject, that if the original taking be such whereby the common law cannot take cognizance, or if the goods be taken at sea, the thief cannot be indicted of the larceny in any country into which he should come with them." And he cites 2 Rus. on Cr., 175; the *Pirates' Case*, 3 Inst., 113; 1 Hawk., P. C., c. 33, § 32. But the Court in Vermont thought the rule, to take cognizance of such offences, had too long prevailed in that State to be changed, unless by act of legislation.

This opinion, it is believed, stands alone in the extent to which it goes, and is unsupported by any authority.

It is, however, contended that the doctrine finds support in analogous cases, where property stolen in one State is found in possession of the thief in another State of this Union. In such cases, it has been held that it was competent to indict and convict the thief in the State where he was found in possession of the stolen property. *Commonwealth* v. *Collins*, 1 Mass., 116; *John* v. *Andrews*, 2 Mass., 14; *Hamilton* v. *State*, 11 Ohio, 435; *State* v. *Ellis*, 3 Conn. 185. And in New York, under legislative provision, similar decisions have been had.

The decisions in these cases are based upon some supposed analogy between the common law rule respecting counties, and the condition of the United States, existing, as we do, under one general government. The supposed analogy will be found, on examination, not to exist. Text writers and jurists have undoubtedly been led into error on this subject, by a reference to the reason given for the common law rule for taking cognizance of a larceny in any county into which the stolen property may be taken by the thief. The reason

generally given being, that every moment's possession of the stolen property is a new larceny, and therefore the party is necessarily guilty in any county into which the stolen property may be carried by him. If this were so, the conclusion would undoubtedly be correct, and the thief would be guilty of as many separate offences, for each of which he would be liable to distinct punishment, as there would be found divisible points of time, during which the stolen property was in his possession. But the statement of a proposition so monstrous is its most effectual refutation. Larceny consists in a felonious caption and asportation. When the property is thus taken and carried away, the offence is complete and cannot be multiplied into an infinite number of offences by a simple retention of the stolen property. The courts always treat it as a single offence in practice, subject to but one punishment, however long the stolen property may have been retained, or into how many counties it may have been carried by the thief. One conviction is a perfect bar to a second prosecution for one taking, without regard to the length of time the property may have been retained, or through how many counties it may have been transported.

The offence is single, and against the State or sovereignty within whose jurisdiction it is committed. For convenience, the rule that the offender may be punished in any county into which the property was carried was adopted. That rule is certainly wise and salutary, but the bad reason which has been given for its existence has led many into error as to the nature of the crime of larceny and the elements of which it is composed. Set aside this bad reason for a good rule, and all difficulty on this subject will vanish, and *constructive* larcenies be stricken from the catalogue of recognized crimes.

Nor do the authorities by any means concur in support of the doctrine of constructive larcenies between the States. It has been decided in *Simmons* v. *Commonwealth*, 5 Bin., 617; *Simpson* v. *State*, 4 Humph., 456; *The People* v.

Gardiner, 2 Johns.; *State* v. *Brown*, 1 Hayw., 100, and in many other cases, that carrying property stolen in one State into another State, by the thief, is not larceny in the latter.

ASHE, J., in delivering the opinion of the Court in the case of the *State* v. *Brown*, cited above, uses the following pertinent and suggestive language:—"If this man were tried and convicted here, or tried and acquitted here, would the sentence of this Court be pleadable in bar to an indictment preferred against him in the territory south of the Ohio, where the crime was committed? I think not, because the offence against the laws of this State and the offence against the laws of that country are distinct; and satisfaction made for the offence committed against the laws of this State is no satisfaction for the offence committed against the laws there. The consequence, then, of trying this man here, and condemning him, will be, if a man steals a horse in one part of the continent, and goes with him to another, through several States, the culprit, according to the several laws of each State, being guilty of taking in each, may be cropped in one, branded and whipped in another, imprisoned in a third, and hanged in a fourth, all for the same offence. This is against natural justice."

Nor is this suggestion by any means fanciful, for if the doctrine of *continuing larceny* be sound, under the provision of § 2, art. 4, of the constitution of the United States, for the delivering up of fugitives from justice, he may, after punishment in one State, be returned to another and so on, and thus punished in all the States and territories through which he may have passed with the stolen property; and the same results may be reached in case the fugitive come from a foreign country, with whom we have treaty stipulations for the rendition of fugitives from justice. This certainly would be carrying the doctrine of *constructive* crime to an extent sufficiently broad to satisfy the most ardent advocates of imputed crime and exemplary punishment.

The fact, however, of the existence of the rendition clause

in the constitution of the United States, and of similar treaty stipulations with foreign governments, tends to show that the doctrine now contended for has not heretofore been supposed to exist. If so, why these provisions?

But the doctrine now contended for is not only contrary to natural justice, and unsound in principle, but it is inconvenient in practice, and involves the necessity of looking beyond our jurisdiction, and ascertaining, not only the acts done by the party accused, but we must also ascertain how these acts are characterized by the laws of the State or country in which they originally transpired. Thus, under this theory of constructive larceny, the property must have been *stolen* in the foreign jurisdiction, and brought into this State by the thief, to constitute larceny here. If the original taking in the foreign jurisdiction was not felonious, then the possession here could not be deemed felonious. To illustrate, by our R. S., c. 42, § 2, to convert a log, mast or spar, found in a certain situation therein described, is declared to be larceny. Anterior to the statute, the same act would have been trespass only. Similar acts may, for aught I know, be only trespass now by the laws of New Brunswick. Assume it to be so. Now suppose a man to obtain possession of a log, mast or spar in that Province, under such circumstances as, if taken in this State under the law above referred to, would be deemed larceny, and runs the same across the St. Croix into this State, and is found with it in his possession in this State, is he to be deemed guilty of larceny? Clearly not, for the reason, that the log, in the case supposed, was not originally *stolen* in New Brunswick. The possession there would have been *tortious* but not *felonious*, and, of necessity, such must be the holding here.

We must, therefore, of necessity, inquire into the provisions of the law, and the circumstances of the taking in the foreign jurisdiction, in this class of cases, if the doctrine now contended for is to prevail.

Nor do I assent to the doctrine, that the manner of obtaining possession of the property alleged to have been stol-

en in a foreign jurisdiction, or the law of that jurisdiction is only to be shown on the trial, as matter in defence. Such a rule would be an inversion of the whole order of criminal jurisprudence, and a gross violation of that great elementary principle which is fundamental in all free governments, that every person is presumed to be innocent until he is proved to be guilty.

The person who has personal property in his possession, in the absence of evidence to the contrary, is presumed to be the owner thereof. Possession is, in itself, evidence of ownership. If a person is accused of having obtained possession of property feloniously, or tortiously even, here or elsewhere, the burden is upon the party making the accusation to sustain the charge by proof; not upon the accused to disprove it.

The rule sought to be established in this case might also well be contested on the ground of public policy. It is sufficient for us to punish those who commit substantive offences against our laws, within our jurisdiction. To make ourselves the vindicators of the criminal laws of all nations, civilized or savage, on the plea that offenders against such foreign laws, by coming within our jurisdiction with the fruits of their former crimes in their possession, are thereby guilty of a violation of our laws, would be to carry the doctrine of comity to an unreasonable extent, and seems to me to be a work of supererogation.

It is also contended that the rule established in Massachusetts, before our separation from that State, by which parties coming within the limits of the State, with property in their possession which was stolen in another State, were held to be guilty of larceny in the Commonwealth, is binding upon us as a part of our own law, and that the rule thus established is broad enough in principle to cover the case at bar. The answer is, that the cases referred to do not in terms cover this case, and that, in Massachusetts, they have been held not to be authority to support a prosecution in all respects similar to the one at bar. 3 Met., 434. And,

further, the reasons on which these cases stand, are, even to the extent to which they go, wholly unsatisfactory.

But it is not necessary to question the authority of these cases. It is sufficient to say they do not cover this case, and it is not desirable to extend, by construction, an authority which assumes to establish, by inconclusive reasoning, a *constructive* crime.

For the reasons thus imperfectly set out, I am unable to concur with my associates, but think that the exceptions should be sustained.

MAY and GOODENOW, JJ., concurred in the dissenting opinion of RICE, J.

WILLIAM FREEMAN *versus* DANIEL HARWOOD.

One who holds property in trust cannot be the purchaser thereof at a sale by operation of law.

Shares of stock in an incorporated company were conveyed by the plaintiff to the defendant as collateral security for a debt, which was afterwards paid. The shares, while yet standing in the defendant's name, were assessed by virtue of an Act of the Legislature, and, for non-payment of the assessment, were sold at auction and struck off to the defendant; —

Held, 1st, that the sale was invalid; 2d, that the defendant was liable in trover for the value of the shares at the time of the alleged sale, and the dividends he had received thereon, and interest, deducting the amount of the assessments and expenses of sale.

ON REPORT.

THE case is fully stated in the opinion.

Various questions were raised by the counsel, but the Court found one decisive of the case. An abstract of the arguments upon the other points is therefore omitted.

J. Granger, for plaintiff.

The defendant held the property in trust. It is well settled that a trustee cannot, directly or indirectly, be a pur-

chaser of the trust property. 1 Hill. Ab., 236, 237, 238, 239; 14 U. S. Digest, 517, pl. 31; *Heywood* v. *Ellis*, 13 Pick., 372; *Pratt* v. *Thornton*, 28 Maine, 355.

P. Thacher, for defendant.

The property was not sold as trust property. The sale was *by the corporation*, under the authority of the Legislature. The authorities cited for plaintiff are cases in which the trust property was attempted to be sold by the trustee, and purchased, directly or indirectly, by him. But these shares were not sold by the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—This action is trover for the alleged conversion of forty-two shares of stock, in the Machias Water Power and Mill Company, commenced on July 23, 1853. The general issue was pleaded and joined, with a brief statement, that the shares in question were assigned to the defendant by Joseph M. Gerrish, at the plaintiff's request, on January 18, 1841, as collateral security to the defendant, for his accepting a draft for the plaintiff's accommodation, on that day, for the sum of $280, in sixty days, which the defendant paid at maturity; that the said shares having been assessed, by an Act of the Legislature, and under votes of the corporation, in a tax of ten dollars each, and having been advertised according to law, and the plaintiff having, after notice, neglected to pay said tax, and the cash so having been advanced, having never been paid by the plaintiff, the shares were sold at public auction in Boston, on March 19, 1845, and the defendant, being the highest bidder therefor, became the purchaser for the amount of the tax upon the same, and so became the absolute and *bona fide* owner thereof.

It appears from the evidence reported in the case that Joseph M. Gerrish, up to the time of the transfer of the shares to the defendant, held the same in trust for the plaintiff, who procured the transfer.

The facts disclosed at the trial, as the case finds, up to the time of the alleged sale of the shares, are substantially the same as those referred to in the defendant's brief statement. It appears, in addition, that the number of shares transferred to the defendant was fifty-nine, which embraced those in question. On what conditions, or at what time, these shares were to be assigned to the plaintiff, further than that they were to be held by the defendant as collateral security for his acceptance, does not appear in the report. But it is manifest, from the fact that the defendant, long after his alleged purchase of the shares, instituted a suit against the plaintiff, for the recovery of the money advanced to take up his acceptance, and the taking judgment in that suit, in 1848, and receiving the full amount of that judgment and interest thereon, on July 22, of that year, the causing of the sale of the shares to be made as the property of the plaintiff, and other acts, did not claim a forfeiture of the shares, and that none in fact took place.

We will now examine the proceedings of the corporation of the Machias Water Power and Mill Company and of the defendant, in relation to the sale of the shares by which alone the defendant claims to have derived a title thereto, with a view to ascertain whether such title has vested in him.

At a meeting of the corporation, on March 23, 1844, among other things, on motion of Daniel Harwood, it was voted, that the sum of ten dollars be levied and assessed on each and every share of the capital stock of the company. On motion of William B. Smith, it was voted, that Daniel Harwood, a Director and Treasurer of the company be, and he is hereby appointed agent, to collect the assessments ordered this day, and he is hereby empowered to enforce the collection of the same, according to law. On motion of Wm. B. Smith, it was voted, that, in default of payment of the assessments ordered this day, the sale of the shares shall be made in Boston, after notice being published as required by the Act of the Legislature of this State, approved Feb. 24, 1844.

It appears that a tax was assessed upon the shares of the corporation in pursuance of the votes before mentioned, and, in consequence of the neglect or refusal of certain stockholders to pay the assessments, after being called upon for that purpose, the defendant caused public notice to be given of the time and place of the sale of the shares, on which the tax, so assessed, had not been paid. And it appears that the tax assessed upon the shares of the plaintiff, in the hands of the defendant as collateral security, as before stated, was not paid, and the same were sold at public auction, on March 19, 1845, in the city of Boston, by Stephen Brown, a licensed auctioneer, "by order of Daniel Harwood, Agent Machias Water Power and Mill Company, and that fifty-nine shares standing in the name of Daniel Harwood, held as collateral from William Freeman, were sold to said Harwood for the amount of the assessment thereon."

It appears from the report that the full amount of the original subscription of $100 on each share had been fully paid, on the shares in question, by the plaintiff.

Was the purchase relied upon by the defendant valid in law? The legal title of the shares was in the defendant at the time of the alleged sale; and he treated that title as defeasible, by the payment of the same, which he had advanced for the plaintiff's benefit. There being no forfeiture of the shares at that time, the defendant held them as he had done before.

If, at a legal sale, the shares had produced more than the assessment thereon, and the sum so advanced with interest, with, perhaps, compensation for any trouble which the plaintiff's delinquency had occasioned to the defendant, the latter would have held the excess as the trustee of the plaintiff. For any value of the stock, beyond this, before the sale, he was also in the condition of a trustee for the plaintiff, and it was his duty, holding that relation, if he had chosen not to pay the assessment without a sale, to obtain as high a price for the shares as he could do. His interest as a purchaser would lead him to obtain the property at a small

price compared with its value. Therefore, the two interests are treated by the law so incompatible with each other, that they cannot at the same time exist in the same person in relation to the goods to be disposed of by sale. The cases of *Pratt* v. *Thornton*, 28 Maine, 355, and of *Parker* v. *Vose*, 47 Maine, are cited as containing the law on this question. The alleged sale was invalid.

That the shares have been disposed of by the defendant, so that they were not delivered to the plaintiff on a demand made in his behalf, before the institution of this suit, no question is made; and this amounts to a conversion.

It appears from this report, that the defendant has received dividends on the shares in question, which should be accounted for.

According to the agreement of the parties, the defendant is to be defaulted; and, in the opinion of the Court, the value of the shares becomes material; and, in pursuance of the further agreement of the parties, Nathan Longfellow, Esquire, of Machias, is appointed by the Court to report such value as he finds, his estimation to be final. The damages to be recovered are the value of the shares at the time of the conversion, which was when the defendant purchased them at the auction sale, in Boston, after deducting the amount paid by him on account of the assessment thereon, and the sale, and interest on the remainder from the time of sale to the time of judgment; to which should be added the dividends received by the defendant on said shares, with interest thereon, from the time of the receipt to the time of the judgment.

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

Samuel Witherell *versus* Maine Insurance Company.

A party cannot be bound by a paper which does not on its face purport to have been made by him, or in his behalf, unless it is shown, by other evidence, that he has adopted it, or agreed to be bound by it.

The reference in a contract to a paper of the same name or general description as the one produced in evidence, will not authorize a judge in his instruction to the jury to assume that the paper produced is the one referred to in the contract; but it is for the jury to determine whether the paper is the one referred to.

Objections to testimony, not made at the trial, are waived.

Warranties in a policy of insurance, or in the application when made a part of the policy, must be fully kept and performed, without reference to the question whether they are material or immaterial.

But misrepresentations do not avoid a policy of insurance unless they are material or prejudicial to the insurers.

The renewal of a policy of insurance, without any new application, stands upon the same ground as the original policy.

Misrepresentations in obtaining a policy of insurance are waived by a renewal of the policy, with a knowledge of the risk.

If the instructions applicable to the case are correct, the verdict will not be set aside, although the presiding Judge give erroneous instructions upon matters not relating to the case.

If the notice of a loss to the insurers is sufficient in form, it is for the jury to determine whether it is sufficient in substance.

If the assured uses his utmost exertions in protecting and securing the property insured, at, during, and subsequently to the fire, a loss by larceny falls upon the insurers.

On Exceptions by defendants.

Assumpsit on a policy of insurance upon a stock of goods, dated June 26, 1857, and renewed June 26, 1858.

Hayden, for the plaintiff.

Williams & Cutler, for the defendants.

The case is stated in the opinion of the Court which was drawn up by

May, J.—That Randall B. Clark was the general agent of the defendants, with full power to issue policies of in-

surance in their behalf, according to his own discretion, was not, at the trial of this action, and is not now denied. In 1857, while he was such agent, the plaintiff applied to him for insurance on his stock of goods in Calais, and inquired at what rate he would take the risk. Clark declined to insure until he had a description of the premises. The plaintiff, being himself but little acquainted with the premises, said he would write to one Claridge, his former clerk, and obtain one. The plaintiff testifies that all the description which was required by the agent related to the distances of the surrounding buildings from that in which the stock to be insured then was. He further says, that nothing was said about chimneys or stove pipes, and that the only thing talked about was the distances from other buildings. This is not contradicted by the testimony of Clark, the agent.

It appears that some days or a week after, the plaintiff brought a letter or memorandum from Claridge, containing the words and figures following, viz.:—"Distance of Pool's block from store, west side, 12 feet; length of block on Maine street, 59 feet; east side store, the block joins; length east side, 45 feet; buildings in rear store, 11 feet, with a street 4 rods wide. No fire in summer—burn coal—good pipe and chimney. "William C. Claridge.

"Calais, June 24, 1857."

This paper was put into the case by the defendants, and, with the plan to which it was attached, was claimed to be the application which is referred to in the policy, and therein made a part of the contract of assurance. This claim was denied by the plaintiff, who swears that paper was never delivered to Clark as an application for insurance, and that the memorandum signed by Claridge was not connected with the plan as attached to it. On the other hand, Clark swears that he made the plan under the direction and with the assistance of the plaintiff, but cannot say when.

Under such circumstances, it is very clear that the question whether the memorandum and plan were identified as the application referred to in the policy, was a question of

fact for the jury, and was therefore rightly submitted to them. A party cannot be bound by a paper which does not on its face purport to have been made by him, or in his behalf, unless it first be shown, by other evidence, that he has in some way adopted it as his own, or has agreed to be bound by it. The reference, in a contract, to a paper of the same name, or of the same general description as the one produced in evidence, will not authorize a Judge, in his instruction to the jury, to assume that the paper produced is the identical paper referred to in the contract. *Denny* v. *Conway Stock & Mutual Fire Ins. Co.*, 13 Gray, 492. Whether the jury have found against the evidence upon this question of identity, is not open to us upon exceptions, there being no motion to set aside the verdict as against the weight of evidence.

It is also objected, that it was not competent for the plaintiff to state in his testimony, that he did not consider the writing and plan produced, the application, when the policy itself makes these a part of the contract. No such objection appears to have been taken at the trial, and the objection, even if the testimony was inadmissible, now comes too late.

The jury were instructed that, if the letter of Claridge was a part and parcel of the application for insurance, it became a part of the contract between the parties, and if wood was used and fires made in the summer, when it had been represented that coal was used, and no fire made in the summer, the plaintiff could not recover. This was a sufficient recognition and statement of the rule, now so well settled, that a warranty in cases of this kind, the statements in the application being such, must be fully kept and performed without any reference to the question whether the thing warranted was material or immaterial.

On the other hand, the jury were told that if other things were stated in the paper containing the description, than what the agent had required, they would not bind the plaintiff, *unless they were a part of the application;* but the plain-

tiff was bound by the representations procured by him of Claridge, so far as relates to distances and directions of adjoining buildings; and that if there was any thing wrong in the letter or writing procured from Claridge, so far as relates to distances, and the variance was material, the plaintiff was bound by it, and could not recover. Here, again, the presiding Judge seems to have recognized the distinction between a warranty and mere representations, which work no injury to the plaintiff, unless they were material, or in some way prejudicial to the other party. We do not perceive that the defendants have any ground of complaint, that the jury were not properly instructed in these particulars.

The renewal of the policy seems to have been fully authorized. The agent does not appear to have required any new warranty or representations other than those which were made when the policy was issued, nor does any such appear to have been made. He seems to have acted upon these, unless he acted upon the knowledge which he had acquired of the premises, from his own personal view sometime after the policy was first issued. Under such circumstances, the renewal of the policy stood upon the same grounds as the policy itself. There being no change in the original application or representations for insurance, so far as the evidence discloses, there was no necessity for putting any thing in writing in relation to the terms of the new application upon which the policy was renewed, as is now contended.

The instruction, that if the agent saw fit to renew the policy, *after the knowledge of the risk*, the company would be bound by it, notwithstanding the representation in the letter as to distances, but not as to fuel or fires, is not erroneous. The representation that the buildings in the rear of the store were 11 feet distant, when in fact they were some 5 feet nearer, according to the testimony of Solomon B. Pool, is a circumstance by which the defendants could not have been defrauded or injured if the agent did not renew the policy upon such representation, but *upon his own knowledge of the fact.* He seems to have been authorized

to issue policies without any written application; and this would involve the power to waive any written change in an application for renewal, and to renew them in the same manner. His knowledge, as well as his action, would be the knowledge and action of the company, by which they would be bound.

Exception is also taken to the preliminary remark of the Judge, in his charge, that if the plaintiff had complied with all the conditions of the policy that were material, and has suffered loss by fire, he is entitled to recover to the amount of his loss, not exceeding $2000, the sum secured by the policy. The ground of the objection is, that the word material, as used in this instruction, authorized the jury to decide what part of the contract was material, and that, under this instruction, they might have found that any particular fact warranted as true was immaterial, and that therefore the plaintiff might recover, notwithstanding such fact was not proved. But in view of the subsequent instructions as to the necessity of proving all the facts stated in the application, if the paper signed by Claridge, and the plan, had been proved to be such, it is fully apparent that the word material was here used in the sense of necessary, and must have been understood by the jury in the same manner as if the Judge had said, if the plaintiff has complied with all the conditions of the policy necessary to be proved, then he may recover. The jury, as reasonable men, could not have understood, in view of the whole charge so far as reported, that they were to determine, under this particular instruction, what facts were material, or required by law to be proved, in order to the maintenance of the suit, but simply whether such facts as the Court should instruct them were essential to the maintenance of the suit, had been proved.

Again, it is urged that the Judge erred in making a distinction between stock and mutual insurance companies, which was calculated to mislead the jury. It is not denied that the instructions, so far as they relate to stock companies, are right, and we are unable to see how the defendants

could have been prejudiced by those relating to mutual companies, even upon the hypothesis that they were erroneous, which we by no means intend to admit.

The next objection is, that there was error in regard to the instruction relating to the notice of loss, required by article 13, of the conditions annexed to the policy. The instruction was, that the paper called a statement of loss, marked B, and put into the case, in matter of form was sufficient, but whether so in substance was left to the jury, with the further instruction that, if it was designed as a fraudulent representation as to the amount of the loss, the plaintiff could not recover. The argument now addressed to the Court upon this point, so far as it relates to the substance of the notice, was very proper before the jury, but certainly has but a slight bearing upon the question, whether the jury was the appropriate tribunal to determine its sufficiency in that respect. If it was a fact for the Court to determine, we cannot say, in view of the liberality with which conditions of this kind are to be construed in favor of the assured, that the jury have not decided the matter correctly. We perceive no error in the instructions on this point. *Bartlett* v. *The Union Mutual Fire Ins. Co.*, 46 Maine, 500.

The only remaining exception relates to the rule of damages. On this point, the jury were instructed that larceny might be one of the incidents attending a fire, and that, if the plaintiff had used his utmost exertions in protecting and securing the property insured, at, during, and subsequent to the fire, such loss, if any, should fall upon the insurers. The rule of damages, as laid down by Parsons, in his Commercial Law, c. 19, § 7, p. 526, is, that in cases of actual ignition the insurers are liable for the immediate consequences; as the injury from water used to extinguish the fire; or injury to *or loss* of goods caused by their removal from immediate danger of fire, but not from a mere apprehension from a distant fire, even if it be reasonable; or, if the loss or injury might have been avoided by even so much care as is

usually given in times of so much excitement and bustle. The instruction given not only required the larceny to be an incident of the fire, but required more care than the rule, as stated by Mr. Parsons, demands, of which the defendant cannot complain.

In *Agnew* v. *The Insurance Company*, decided by the District Court for the city of Philadelphia, and reported in the American Law Reporter, vol. 7, p. 168, HARE, J., in delivering the opinion of the Court, remarks, that, "if duty requires the occupants of a house about to be destroyed by fire to carry their property out of the door, or even to throw it from the windows rather than permit it to become a prey to the flames, they ought not to be the losers by fulfiling the obligations thus imposed upon them; nor can it make any matter whether the injury arises from the fracture of a mirror or other piece of furniture by the fall, or the abstraction of a bale of goods after it reaches the pavement by a thief." The marginal note in the case, is, that "a loss which arises from the efforts made to prevent goods from being destroyed by fire must be borne by the assurer and not by the insured, whether the particular injury in question be produced by water used to extinguish the flames, or results from dangers, such as theft, to which the property is exposed in an attempt to remove it to a place of safety."

We cannot doubt that where there is an actual fire and the goods are removed by reason of imminent danger, occasioned by such fire, and the insured exercises his utmost exertions to protect and secure the property, any loss arising from a larceny of the goods is within the risks insured against, and must be borne by the insurer. Especially should this be so in a populous city. A different rule might be prejudicial to the interest of those who insure. That such is the rule in regard to injury done to goods in being removed under such circumstances, or by reason of water thrown upon them to put out the fire, or by other acts done *ex necessitate* to preserve them, seems to be well settled. Beaumont on Ins., 41. *Scripture* v. *Lowell Mutual Fire*

Ins. Co., 10 Cush. 356. And no reason is seen for any difference between such an injury and an actual loss by theft. *Case* v. *Hartford Fire Insurance Co.*, 13 Ill., 676. *City Fire Ins. Co. v. Corlus*, 21 Wend., 367. That such a loss is within the policy, especially when it occurs in cities, is settled in New York, 1 Bosworth, 367, and in Pennsylvania, 10 Casey, 96. *Exceptions overruled.*

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

COUNTY OF WALDO.

JOSEPH H. KALER *versus* EDWIN BEAMAN *& al.*

A deed of a right of way from the highway to the grantee's mill, gives him no right to pile lumber on the sides of the way.

In a grant of water power, the words "water enough, applied to an overshot wheel, to carry a gang of thirty marble saws, or a six horse power," do not restrict the manner of using the water, but describe the quantity granted.

One having an easement in another's land is bound to use it in such manner as not unnecessarily to injure the other's rights, or he will be liable as a trespasser.

ON REPORT.

TRESPASS *quare clausum fregit*, for cutting plaintiff's flume and encumbering his land with lumber, &c.

The case is stated in the opinion.

J. G. Dickerson, for plaintiff.

N. Abbott, for defendants.

The opinion of the Court was drawn up by

RICE, J.—December 19, 1845, Joseph Kaler, whose title

the plaintiff now has, conveyed to Daniel Merrill, under whom the defendants claim title, a tract of land in Belfast which is particularly described by monuments, "with the right of a free and open road where it now travels, from the high way" to the described parcel, being a mill privilege; also, the right to draw from said Kaler's flume, when it shall best convene said Merrill, "water enough, applied to an overshot wheel, to carry a gang of thirty marble saws or a six horse power."

By this deed, Merrill acquired title in fee to the land described in his deed, which constituted his mill privilege, and an easement in the land of his grantor of a free and open road, where it was then travelled, from the highway to said mill privilege. This gave Merrill the right to the free and unobstructed use of the road, as a way, for the accommodation of his mill privilege, but not to be used as a place of deposit for lumber or other materials. For all purposes not inconsistent with the grantee's paramount right to use it as a "free and open road," the soil and the beneficial use thereof remaining in the grantor. The defendants, therefore, by piling lumber thereon, without the consent of the plaintiff, were trespassers.

As to the defendants' right to the water. By the terms of the deed they are not restricted in its application to any particular use. The terms of limitation in the deed have reference to the *quantity* to which the grantee is entitled, not to the purposes or uses to which it should be applied. They are entitled to "water enough," that is, sufficient in quantity, "applied to an overshot wheel, to run a gang of thirty marble saws, or a six horse power." *Johnson* v. *Rand*, 6 N. H., 22; *Deshon* v. *Porter*, 38 Maine, 289.

Merrill, by his deed, had the right to draw the specified quantity of water from Kaler's flume, at such point as would best convene himself. But he must exercise that right in a reasonable manner. Though he was authorized to select from what part of the flume he would draw the water to which he was entitled, he would not, in the exercise of that

right, by wantonness or negligence, so conduct as unnecessarily to injure the plaintiff, in the exercise of his remaining rights.

The defendants also have, by the terms of Merrill's deed, a right to the use of one half of the surplus water, over and above what was necessary to carry Kaler's plaster mill and grist mill, and Merrill's thirty marble saws or six horse power. If the defendants in any manner exceeded the above limitations of their rights they would thereby become trespassers, and become liable for so much damage, as they might occasion to the plaintiffs by such excess.

As the case is presented, no questions arise under the contract of Oct. 14, 1854.

The only remaining questions are purely matters of fact, which appropriately should have been presented to a jury. But, as the parties have agreed that we shall settle them upon the evidence reported, to save further litigation and expense, we proceed to do so.

The evidence very clearly shows that the defendants have exceeded their rights, both in the manner in which they have occupied and used this road by incumbering it with lumber, and also, in the quantity of water they have drawn from the plaintiff's flume, without reference to the manner in which the right to draw water has been exercised.

As to the amount of damage which the plaintiff has suffered, necessarily, from the unauthorized acts of the defendants, the evidence is not so distinct as is desirable. At best, from the data we have, it must be matter of estimation, perhaps, to some extent, speculation. The plaintiff claims that he has sustained damage to the amount of several hundred dollars, while the defendants deny that he has received any substantial injury. It was the duty of the plaintiff to make this point clear. It is, however, manifest, from the evidence before us, that he has been damnified to a very considerable amount.

The question of damages, however, is evidently one of secondary importance to the parties. Their respective rights

under their deeds having been settled, the principal object of this suit has been obtained.

A default must be ordered.—Judgment for the plaintiff for one hundred dollars damages.

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

RICHARD RANKINS *versus* ROBERT TREAT *& als.*

The defendants agreed with the plaintiff to convey to him one-sixteenth of a ship, upon the payment by him of certain notes, and that the earnings of the one-sixteenth should go to him. The plaintiff failed to pay the notes, and the contract was rescinded by the parties on that account;—

Held, that the plaintiff could not recover for earnings if it appeared that at the time of the rescission of the contract there were no net earnings, although there had previously been.

Where A agreed to purchase part of a vessel of B, paid part of the money, and received a contract that, when certain other payments were made, he should have a conveyance, and, in the mean time, have the earnings of the part in question; and the vessel, proceeding on a voyage, was successful at first, but afterwards unsuccessful, A, having at last failed to make his payments, cannot claim the earnings for the first part of the voyage, on the ground that it was prior to the breach of his contract, if the parties have treated the transaction as an entirety, and the contract was not rescinded until the end of the voyage, when there were no net earnings to be divided.

ON REPORT.

ASSUMPSIT to recover one-sixteenth of the earnings of a vessel. The case is fully stated in the opinion.

A. H. Briggs, for plaintiff.

N. H. Hubbard, for defendants.

The opinion of the Court was drawn up by

RICE, J.—Plaintiff, on the twentieth of October, 1855, agreed to purchase one-sixteenth of the new ship Robert Treat, for which he agreed to pay $2534,57; one thousand

in cash, and the balance in three equal payments, in four, eight and twelve months, with interest from October 10, 1855. The cash was paid and the defendants agreed to give him a title to the one-sixteenth if the other payments were made as stipulated. The contract of sale closed with these words, "it being understood that the earnings of said one-sixteenth of the ship to go to Capt. R. Rankins."

It is to recover the alleged earnings of the one-sixteenth that this suit is brought. The plaintiff sailed in the ship, as master, on wages. He proceeded to New Orleans, where he took in a cargo and sailed thence to Cadiz and Alicante, at which latter place he arrived on January 28, 1856, and finished discharging his cargo about the 20th of February, 1856. From thence the ship sailed to different ports, and finally to New York, where the plaintiff and defendants settled an account of the voyage, August 27, 1856. By this settlement, which is in the case, it appears that the disbursements of the ship, during the voyage, exceeded the entire receipts, leaving no net earnings to be divided. The plaintiff left the ship at New York, and has not completed his contract of purchase by paying the notes given, or either of them, and the ship, as we infer, has been sold for the benefit of the defendants.

The plaintiff, in a former suit claimed, among other things, to recover the $1000, cash, paid in part fulfilment of his contract of purchase, but, it appearing that he failed to complete his contract, he did not succeed in that suit.

He now claims that he went into possession of one-sixteenth, by virtue of his contract, and that, though the whole voyage of the ship was unsuccessful, yet the voyage to Alicante was successful, and that the ship had earned a valuable freight to that port, before he had failed to fulfil any part of his contract, and that, therefore, he is entitled to recover his proportion of that freight in this action.

The defendants reply, that his right to a portion of the earnings of the ship, like his right to the ship itself, depended upon the contingency whether he made his payments

as agreed, and that, failing to complete his purchase, and thereby forfeiting his advance payments on the ship, he also, as an incident thereto, forfeited all claims to the ship's earnings. Whether such is the legitimate construction of the contract, is, in this case, immaterial. There is no evidence in the case showing, or tending to show, an abandonment of the contract on the part of the plaintiff, at Alicante, or that the defendants, at that time, claimed a forfeiture for the non-fulfilment thereof. There was, at that time, no change in his relations to the ship. If he was in possession before that time as part owner, he remained thus in possession, so far as the evidence shows, until the ship arrived in New York. Nor does the evidence show whether the contract was finally abandoned by the plaintiff or rescinded by the defendants, or whether it was annulled by mutual consent. The account rendered was an entirety, of the whole voyage. The parties have treated the transaction as a whole, and there is nothing in the case which will authorize the Court to divide it into separate and distinct parts.

If, therefore, the plaintiff forfeited his right to the earnings under the contract, he cannot prevail for that reason; if, on the contrary, he was entitled to the earnings of one-sixteenth of the ship, he must fail, because he shows, by his own account, that, at the time the contract was abandoned or rescinded, for failure on his part to fulfil it, there were no net earnings to be divided. *Plaintiff nonsuit.*

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

RUSSELL HOTCHKISS *& als. versus* WILLIAM R. HUNT *& al.*

In a contract for the sale of goods, when the price, time and manner of payment, and time and manner of delivery, are agreed upon, delivery will, in the absence of all other facts, pass the title.

But when there is an express or implied agreement that the title is not to vest until payment or delivery of notes, a delivery will not pass the title, until the condition is performed.

When, by the terms of an agreement of sale, the article sold is to remain in the possession of the vendor, for a specific time, or for a specific purpose, as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be sufficient to pass the title, even as against subsequent purchasers.

If one having possession of property of others for a specific purpose, sends it to third persons, who receive it and hold it as security for money advanced to the sender, such sending, receiving and holding is a conversion, both by him and them, and the owners may maintain trover without any demand.

Nor will it make any difference, that the persons receiving it acted ignorantly and in good faith.

A proposition made by the owners of property tortiously held by others, to acknowledge their title and hold it for them, is not a waiver of the conversion, unless assented to by both parties.

In trover for the conversion of property, *by receiving it as a pledge for money advanced to a bailee*, evidence in defence that he could not send it to the place to which he had agreed to send it for manufacture, and therefore sent it to the defendants, is immaterial and inadmissible.

The petition of the plaintiffs to a Court of Insolvency in Massachusetts, setting forth that they hold certain notes against an insolvent debtor, and that they are the owners of certain property, which they hold as collateral security for the payment of those notes, and praying for leave to sell the property and to apply the proceeds towards the payment of the notes, and that they may be admitted to prove the balance of their claims against the insolvent, and the order of court giving them leave as prayed for, together with evidence of a sale to the plaintiffs at auction, are not a bar to an action of trover for a conversion of the property by the defendants, before these proceedings took place, the plaintiffs not claiming title under them.

The title of a mortgagee is sufficient to maintain trover against all persons not setting up any claim under the right to redeem.

When property is held as security for the payment of certain notes, the title to it is not changed so long as any of the notes remain unpaid.

Manufacturers cannot lawfully set up a lien for labor performed upon articles tortiously converted to their own use.

Hotchkiss *v.* Hunt.

On Exceptions to the ruling of May, J.

Trover for 600 Para hides.

The plaintiffs introduced evidence tending to show that they were originally the owners of the hides sued for; that they had some negotiations with Edward A. Frye for a sale of them to him; that, after some transactions which the defendants claimed passed the title in the hides to Frye, the following agreement was executed by Frye to the plaintiffs, viz.:—"Boston, 8th October, 1857. It is hereby agreed and set forth that whereas Edward A. Frye has given his promissory notes to Hotchkiss Bros. & Co., for the following amounts, as follows, viz.:—

One note dated ——,	at 2 mos. for	$1514,69
One do. " ——,	at 3 " "	1530,80
One do. " ——,	at 3 " "	1546,92

Amounting to forty-five hundred and ninety-two 41-100 dollars, he, the said Edward A. Frye, agreeing to pay said notes at the maturity of the same, and the said Hotchkiss Bros. & Co. on said payment being duly made, within or at the said maturity, shall sell and convey to the said Edward A. Frye nine hundred and twenty wadded or green salted Para hides, said hides weighing 33,840 lbs. which said Frye has received from said Hotchkiss Bros. & Co., the ownership of said hides to be vested in the said Hotchkiss Bros. & Co. until said hides are tanned, at the cost and risk of said Frye; if such payment shall not be made as aforesaid, said Hotchkiss Bros. & Co. shall be authorized to take and dispose of said hides, or leather, in the way they judge best and apply the net proceeds to payment of said notes. Said hides are to be sent to Orford tannery, Grafton county, New Hampshire, except 273 cases which will be sent to a tannery not yet decided on. Signed, Edward A. Frye. Witness, S. Brown, of 23 Ferry St., N. Y., Broker"; —that Frye, without the knowledge or consent of the plaintiffs, forwarded the hides sued for to the defendants, requesting them to sign and return their notes to him for specified amounts; and that they did as requested; and that, before the com-

mencement of this suit, their agent called on the defendants in respect to the hides, and they declined saying or doing any thing about them.

The defendants testified that they were in the habit of receiving hides from Frye to tan, and of advancing their notes upon them, and that there was an agreement between them and him, that they should hold the hides as security for such advances; that they received these hides believing them to be the property of Frye, and advanced him their notes amounting to $4000, upon them; that plaintiffs' agent called on them and asked them if they would agree to tan the hides for the plaintiffs, but they declined to do so.

One of the defendants testified that they now denied, and always had, that the plaintiffs had any interest in or right to those hides. The defendants proposed to show that the Orford tannery, named in paper of Oct. 8th, was carried on by defendants' brother; that in the fall of 1857, the supply of bark entirely failed them, and the tannery was not in working condition, and that if the hides had longer remained in store they would have been so heated as to become nearly worthless.

To this inquiry the plaintiffs objected, and the Court, sustaining the objection, ruled the proposed testimony inadmissible.

There was evidence that the plaintiffs received a part of one of the notes described in the agreement, and accepted a new note for the balance, and also promised to assist him in meeting the other notes; but that the second and third notes had never been paid.

There was other evidence in relation to the original transactions between Frye and the plaintiffs, and certain proceedings before the court of insolvency in Suffolk county, Massachusetts, but it is sufficiently stated in the opinion.

The defendants requested certain instructions to the jury, which the presiding Judge declined to give any further than they were contained in the instructions already given.

The questions of law raised upon the instructions and the refusals to instruct, are stated in the opinion.

The verdict was for the plaintiffs. The jury also returned a special verdict, which became immaterial in the view of the case taken by the Court.

The defendants excepted to the exclusion of testimony, to the instructions and refusals to instruct.

Edward Avery, of Massachusetts, for defendants.

I. The evidence in relation to the Orford Tannery was admissible, as tending to show that Frye exercised proper care over the hides, and as rebutting any evidence of conversion by Frye or the defendants. 2 Greenl. Ev., § 643.

II. A continuous holding of the goods by Frye was not a sufficient delivery to the plaintiffs to revest a title to the hides in them, under the contract of October 8. Chitty on Contracts, pages 741 to 743, and notes to page 742; *Quincy* v. *Tilton*, 5 Maine, 277; *Gleason* v. *Drew*, 9 Maine, 81, 82; *Chapman* v. *Searle*, 3 Pick., 38.

The legal effect of this contract is to be determined in connection with all the facts relating to the giving of it; the relation of the parties to the subject matter of the same; and the other evidence relating to the acts of the plaintiffs under or in relation to it.

It contemplates a change in the condition of the hides by persons other than Frye; it authorizes Frye to part with the possession of them, and to add to their value by the expenditure of his own funds; it makes Frye responsible for all costs and risks incident to their tanning and possession; upon the most favorable construction for the plaintiffs, it continues the ownership in them only until they are tanned; in case of non-payment by Frye, it only authorizes the plaintiffs to sell, &c., not for themselves, but for account of Frye and for his benefit.

By its terms it is fairly to be inferred that Frye was to have possession of the hides until the maturity or *payment* of all the notes.

The place designated at which the hides were to be tanned is not of the essence of the contract.

III. The proceedings in insolvency were a judgment *in rem*, sought by the plaintiffs, of a court of competent jurisdiction, and determined,—

1. That the plaintiffs owned the notes described in the petition, and were, to the amount of those notes, creditors of Frye.

2. That the plaintiffs held, by virue of the contract of October 8, 1857, the hides claimed of the defendants as collateral security for the payment of said notes.

This judgment is conclusive upon the plaintiffs. Laws of Mass., 1838, c. 163, § 3; 1 Greenl. Ev., §§ 525, 541, 543, 533, 534; Story's Conflict of Laws, §§ 591, 592, 593; *Anderson* v. *Frye*, 6 Ind., 76. *Smith* v. *Smith*, 17 Ill., 482; 2 Smith's Leading Cases, p. 431.

The petition and order are in the nature of judicial admissions, and should have been submitted to the jury as such, with proper instructions as to their effect. 1 Greenl. Ev., §§ 27, 186, 210, 527, *a*.

The exercise of ownership over, and the attempt to enforce the notes after a breach of the contract by Frye, amounts to an admission of the existence of the contract of sale, which precludes the plaintiffs from afterward treating it as void. They are presumed to have waived the breach and rely on the contract itself. *Hill* v. *Green*, 4 Pick., 114; *Walker* v. *Davis*, 1 Gray, 508; *Brinley* v. *Tibbets*, 7 Maine, 75.

IV. The defendants, having received the hides in good faith, are not guilty of a conversion. 2 Greenl. Ev., § 642; *Baker* v. *Middlebrouk*, 24 Conn., 207; *Strickland* v. *Barrett*, 20 Pick., 415.

V. If, by any act, the plaintiffs assented to or affirmed the defendants' possession, such assent or affirmation purged any previous tortious conversion. *Hewes* v. *Parkman*, 20 Pick., 90; *Bell* v. *Cummings*, 3 Sneed, 275; *Rotch* v. *Hawes*, 12 Pick., 136; *Brewer* v. *Sparrow*, 7 B. & C., 310; 1 Hilliard's Torts, 47.

VI. The defendants had a lien upon the hides and were

entitled to retain possession of them. *Taggard* v. *Buckmore*, 42 Maine, 77; *Ames* v. *Palmer*, 42 Maine, 197.

VII. The receipt of money on the first note named in contract of October 8, 1857, and the acceptance of the note sent by Frye to the plaintiffs for $1200 advanced by them, and the agreement to aid and assist him in payment of the other notes, was a waiver of the terms of the contract. *Hayden* v. *Madison*, 7 Maine, 76; 13 Ill., 610.

Ware, of Massachusetts, and *Williamson*, for plaintiffs.

The opinion of the Court was drawn up by

KENT, J.—The facts upon which the questions in this case arise, when carefully examined, are few and simple, although the report is somewhat voluminous.

The plaintiffs were the undisputed owners of six hundred *Para hides*. They negotiated for a sale of them to Edward A. Frye, and, after various propositions and a long correspondence, they finally agreed to sell them to Frye at a certain price, and receive his notes on time, in payment. Frye assented to the purchase, having made the final proposition as to time of payments of the notes. The hides were at New Haven, where, after the agreement for sale and payment had been made, they were weighed off, and Frye took them into his possession and caused a part of them to be transported to his store in Boston, and left the remainder on a wharf in New Haven, he paying wharfage therefor.

On the day after the weighing, the plaintiff sent to Frye a bill of the hides, and a minute of the time, &c., of the notes to be given, and requesting him to send the notes at once. The notes were not sent, but, six days afterwards, Frye asks for a change of times of payments of the notes. The plaintiffs reply, that they will consult on the subject. The notes were never sent according to the original agreement, but about ten days after the weighing of the hides, on the 8th of October, a new agreement in writing was made, between the parties, by which, as is contended by the plaintiffs, the original bargain was substantially rescinded, and the title, if

it ever passed out of them, was reinvested in them. After the contract of the 8th of October, Frye, without the knowledge or assent of the plaintiffs, sent a part of the hides, (the 600 now in question) to the defendants to be tanned. The defendants advanced their notes to Frye, holding, and claiming to hold, the hides as security for such advances, according to an agreement between the parties. This action of trover is brought to recover from the defendants the value of the six hundred hides.

The first question is — was the property of the hides in the plaintiffs at the time of the alleged conversion? The defendants contend that, by the sale and delivery under the first agreement, and the facts connected therewith, the property passed absolutely to Frye, and that the title thus acquired has never been divested.

They say that the contract of the 8th of October was not a resale, or, if it was, that the title was not perfected under such agreement of resale, because there was no delivery, and no consideration. The plaintiffs contend that the delivery under the first contract was conditional and depended upon the payment of the price by the notes. That on the failure to send the notes, the title, which would otherwise have been perfected, did not pass, and that the subsequent agreement takes effect as a new contract, or as an essential modification, if not entire rescission of the first agreement. It is undoubtedly true, that when the elements of a sale, price, time and terms of payment, and the manner and time of delivery are agreed upon, delivery will, in the absence of all other facts, pass the title. But where there is an express or implied agreement, or understanding that the title is not to vest until payment or delivery of the notes agreed upon, a delivery will not pass the title until the condition is performed, and the vendor, in such a case, may reclaim the property, even from one who has purchased in good faith, and without notice from the vendee. *Coggill* v. *H. & N. Haven Railroad Co.*, 3 Gray, 545.

It would seem that it is a question of fact for the jury,

whether there was such expressed or implied agreement entering into and making part of the contract of sale.

But we do not think it necessary to discuss this point more fully, as there is another point made by the plaintiffs, which, if sustained, disposes of this part of the case. The plaintiffs say, that, admitting that the title did pass to Frye by the weighing off and possession taken by him, yet, by the contract of the 8th of October, made before any right of a third party had intervened, the old contract was rescinded and a new one made, by which the title was revested in the plaintiffs, and Frye afterwards held the hides as their property, according to its terms.

On this point the Judge instructed the jury, that, *if* the title did pass to Frye by delivery under the first contract, the parties might, by mutual agreement, rescind the former contract, and make a new one different from the first, and, if they did so, that the legal effect of the new contract in writing was a rescission or modification of the original contract, and revested the title in the hides in the plaintiffs, as between the parties, no rights of a third party having intervened, *without any further or other delivery* than arises from the fact that Frye, by the new contract, was to hold and retain the hides for the plaintiffs, and a possession by Frye, as their agent, would be, legally, sufficient to revest the title in the plaintiffs as against subsequent purchasers and persons unlawfully intermeddling with their rights. Is this ruling erroneous? There can be no doubt that the parties might rescind or annul the first agreement, or that Frye might resell or reconvey the hides to the plaintiffs if he had acquired a legal title thereto. The agreement to release Frye from his obligation, connected with the new agreement to tan, are a sufficient consideration.

The written contract of October 8th is signed by Frye alone, and in it he distinctly says, "the ownership of said hides to be vested in the said Hotchkiss Bros. & Co. until said hides are tanned, at the cost and risk of said Frye." This language not only recognizes the title but may fairly

be said to convey it. The whole instrument shows that, under this new agreement, the parties intended that the former sale and delivery were to be annulled, and that, instead of an absolute sale, the plaintiffs were to resume their former ownership, if they had parted with it, and to retain the title until the hides were tanned and the notes were paid. It is insisted, however, that if the title actually passed under the first sale, that a resale can be effected only in the same manner as the original sale, and that, unless a delivery is proved, the title will not revest. This proposition, as a general rule, seems to be well established. But where, by the terms of the agreement, or by a fair implication therefrom, the article thus sold or resold is to remain in the possession of the vendor for a specific time or for a specific purpose, as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be complete and sufficient.

In the case of *Barrett* v. *Goddard*, 3 Mason, 114, it appeared that certain bales of cotton were sold by marks and numbers, then lying in vendor's warehouse, for which a note was given on six months, and it was agreed that they might remain rent free, at option of vendee, in vendor's warehouse; and, although there was no separation or formal delivery in any manner, it was held that the delivery was complete as against a subsequently attaching creditor, whose title was by assignment. Judge STORY says:—"The principle is sound, that a continuance of the possession of the vendor does not prevent the delivery being complete, if nothing further remains to be done on either side, and the possession is by mutual consent. There is nothing in reason or principle to make the present case different, simply because the bales of cotton remained in the plaintiff's warehouse. *It was part of the bargain* that they should so remain, and a part of the consideration of the promise." This case is cited and part of the above language quoted by C. J. SHEPLEY, in *Means* v. *Williamson*, 37 Maine, 556.

The case of *Gleason* v. *Drew*, 9 Maine, 81, sustains the same view. That was a case of resale, and the point was urged that there was no delivery. The Court admit the general principle, that the same formalities were requisite in resale as in the original sale, but hold, that where, under the new agreement for a resale, one of the terms was that the vendor should retain the property as the vendee's, with a right to repurchase, that the property would be reinvested in the original owner without any other delivery.

The case of *Quincy* v. *Tilton*, 5 Maine, cited by the defendants, only enunciates the general principle, as above stated. It does not touch the case where, by the terms of the agreement, the vendor was to retain possession as agent, bailee, or conditional purchaser of the vendee.

The same rule is found in the civil law. Pothier says—"By the feigned delivery which results *from the clause authorizing the seller to retain the thing* as a usufructuary, hirer, lessee, or from the mere clause of constitution, the buyer truly takes possession of the thing, and thereby truly acquires the property of it. By these clauses the seller takes possession of the thing in name of the buyer." Pothier on Sale, (Cushing,) 203; *Holley* v. *Higgeford*, 8 Pick., 73.

We have seen the report and opinion in the case of *Beecher* v. *Mayall*, decided by the Supreme Court of Massachusetts, in 1860, and not yet published. It is very similar in its facts to the case before us. In that case certain steam boilers were sold by the plaintiff to a firm, who took possession; soon afterwards, at request of the firm, the first sale was cancelled by mutual consent, no part of the original purchase having been paid. It was then agreed, that the firm should repair the boilers for the plaintiff, for which work they were to be paid by certain other articles included in the original sale. The action was tort, to recover the value of the defendant, who claimed under the original sale and contended that the resale, if made, did not operate to revest the property in the plaintiff, *there being no redelivery*. The presiding Judge instructed the jury that, in case

of a resale there must be a delivery, actual or constructive, but, that slight evidence of delivery would be sufficient, and that the jury might presume it from subsequent acts of control and possession on part of the plaintiff, if proved. The Court, upon exceptions, decided that this instruction was wrong; that if there was a sale and a resale, or surrender of all the rights under the first sale, that any further evidence of delivery, to be shown by subsequent acts of the parties, was unnecessary; that if, upon the resale, it was stipulated that the vendors in the resale were to proceed to repair the articles, and were to have a possession for that purpose merely, their possession would be the possession of the plaintiff; that, although the Judge ruled that slight evidence of delivery would be sufficient, yet, as it assumed that *something* was necessary beyond the contract, to give up the sale and retransfer the property to the plaintiff and keep possession of the same to make repairs, in pursuance of the conditions of the resale, it was erroneous.

We are satisfied that the ruling of the Judge on this point was essentially correct, and that, after the contract of October 8th, the title of the hides was in the plaintiffs. That contract puts the title in the plaintiffs, and they agree to sell and convey the hides to defendants on the payment of the notes named at maturity. It is expressly provided that the ownership shall remain in plaintiffs, until the hides are tanned, and the leather is then to be taken and sold by the plaintiffs and the money applied to pay the notes.

This renders it unnecessary for us to consider the requests, objections and rulings which have reference to the question whether the first sale to Frye was perfected by the delivery. Assuming all that the defendants claim on this point, and rejecting the findings of the jury as immaterial, or even as incorrect, if there was a resale under which the title vested in plaintiffs, the first sale and the evidence admitted and rejected on that point, becomes immaterial. This applies to the evidence of a custom in New Haven to deliver goods before payment. This evidence only affected the question,

whether the title passed to Frye under the first sale, and therefore, in the view we take, is immaterial. This was the view taken by the presiding Judge. The same remark will apply to the requests and the rulings on all points connected with the first sale and the effect of the delivery under it.

On a careful examination of the rulings on the question of conversion, we find no error prejudicial to the defendants. The jury were instructed, in substance, that the possession of Frye, under the written contract, was lawful for all purposes contemplated by the contract; but that, if he sent the hides to defendants, and, by agreement with them, they took them as pledge or security for advances made to Frye, by them, that such sending and receiving, and holding, was a conversion, both by Frye and defendants, and no demand was necessary. It is not necessary, as seems to be assumed in the requests, that there should be a fraudulent intent proved. A claim of right, honestly made, does not justify intermeddling unlawfully with another's goods. A demand is necessary when there has been no actual assumption of ownership or right to control or dispose of the article unlawfully. Frye, when he undertook to dispose of the hides to obtain money or notes for his own use, was guilty of a wrongful conversion, and the defendants, when they took them for the purpose of securing such advances, were also guilty of a conversion, although acting in good faith and ignorantly. If the bailee of property for a special purpose, sells or pledges it without right, the purchaser does not thereby acquire a lawful title or possession, and the owner may maintain trover against him without demand. *Galvin* v. *Bacon*, 11 Maine, 28; *Parsons* v. *Webb*, 8 Maine, 38; *Stanley* v. *Gaylord*, 1 Cush., 536.

It is insisted that if there was a conversion it was waived by certain transactions, previous to the institution of this suit. The Judge ruled that a tortious conversion might be waived or assented to, so as to prevent the maintenance of the action. It was left to the jury to determine the fact on all the evidence. He ruled, as matter of law, that the offer

or request in the paper produced, that the defendants should hold and tan the hides for the plaintiffs, would not of itself purge or waive the tort, nor would any efforts on their part, to have the defendants acknowledge their right and title, and hold and tan the hides for them, unless the defendants assented to do so, and, if they did not so assent, the plaintiffs might withdraw their request, and it would not be a waiver of a prior conversion.

It would hardly be contended that a mere proposition, by the true owner to a wrongdoer, who had taken the property unlawfully, that he should acknowledge his right, and thereafter hold the property as his bailee, to do work thereon, would divest the owner of his right of action, if the proposition was not accepted or acted upon. If a man should find his horse in a livery stable, claimed by the keeper as his, and the owner should propose to the stable man to acknowledge his title and right, and thereafter keep the horse at livery for him and at his expense, and the proposition should not be accepted, would any one contend that the owner was estopped from bringing an action of trover, on the ground of waiver of the prior conversion?

The fact of waiver was submitted to the jury, and the ruling on this point was correct.

The evidence offered in reference to the Orford tannery was properly excluded as immaterial. The plaintiffs do not complain that the hides were not sent to the Orford tannery named in the contract, and this change of the place of tanning is not the conversion relied upon. If it had been, the facts offered in evidence might have been material. But the facts relied upon to show a conversion have no connection with the place, and would have the same effect if the contract had named the defendants' tannery at Liberty as the place of tanning.

The fact that the hides could not be tanned at Orford, did not give, or tend to establish a right in Frye to dispose of the hides for his own purposes. It was not the *place* to

which he sent them, but the *purpose* for which he sent them, that constitutes the wrongful conversion.

The defendants introduced in evidence a petition of the plaintiffs to the Judge of the Court of Insolvency, in Suffolk county, Massachusetts, wherein they set forth that they hold the notes named in the contract of October 8th, that they are owners of the hides in question, in process of tanning, which they hold as security for the payment of said notes, under the agreement of October 8th, a copy of which is annexed, and pray leave from the Judge to sell the hides and to apply the proceeds towards payment of the notes, and to be admitted as creditors of Frye for the balance. They also introduce the order of Court, which, without any other adjudication, gives leave to sell as prayed for. The assignee assents to a sale, on condition that the petitioners shall not become purchasers at a less sum than twelve hundred dollars; also, the certificate of sale at auction, to the plaintiffs, for thirteen hundred dollars.

On these papers, the defendants requested the Court to instruct the jury, that the plaintiffs were *estopped* from setting up any other claim inconsistent with that set forth in the petition, and from claiming to be general owners. This was the only request for instructions on this point. The Judge declined so to instruct, and did instruct that these proceedings were not a bar to this action.

The first fact to be noticed is, that all these proceedings in the Court of Insolvency were subsequent to the alleged conversion and to the date of the writ in this case. The claim is, that the recital or assertion in this subsequent petition, that the hides were held by the plaintiffs as owners and as security for the notes, operates as an *estoppel*, and defeats the title and right to further maintain an action for a prior conversion. If the defendants claimed any right or title under, or by virtue of the sale, made in pursuance of the license of the Judge, it might well be contended that the plaintiffs should not be allowed to question the title they acquired by virtue of a sale which they had asked for and caused to be

made. But no such claim is made. In fact, the plaintiffs themselves became the purchasers at that sale, thus adding to their former title whatever rights could accrue to them from such sale.

It is true, that a distinct judgment of a Court which has jurisdiction to determine absolutely the question of title, directly upon the point of title in the thing, will usually be conclusive upon the parties in the proceeding, and, in many cases, upon all the world. The decrees of forfeiture, and other decrees *in rem* in admiralty, may thus operate when the question of title is distinctly passed upon as a finality.

In this case, we have no evidence in the report, touching the nature and extent of the powers of the Massachusetts Court of Insolvency, or of the statute under which it existed. But, assuming that it had power to do and order what was done and ordered in this case, we fail to perceive in the record any adjudication or decree touching the title, or any thing beyond a license to sell. It may be likened to a license granted by a Court of Probate to an administrator, to sell real estate, upon his petition setting forth the title in the deceased. A sale by virtue of such license would not convey any title against a third party, who was the real owner of the land. The license to sell neither creates nor defeats a title. The Court simply authorizes a sale, makes no adjudication as to title, leaving the right of all, not connected with the estate, untouched. Nor would a recital in such petition, or in a suit at law, that the deceased held certain lands in mortgage, or as security, estop the administrator, or the heirs, from setting up a claim in fee to such lands, upon proof establishing the title against a party not connected with the proceedings. If we look at the recitals in the petition, we find nothing there inconsistent with a title in the plaintiffs. It distinctly alleges that the plaintiffs "are the owners" of the hides. The other parts of the petition may, perhaps, be said to represent this ownership as being that of mortgagees. But such a title might be good to sustain this action against the defendants, who do not set up

any claim under the right to redeem, or, if they did, might find that right of no avail against the mortgagees. There are no grounds to sustain the requested instruction, that these proceedings estop the plaintiffs from establishing, by proof, a legal title against these defendants, who are strangers to the proceedings in the Insolvency Court.

The receipt of a part of the first note and the acceptance of the note sent by Frye, and the agreement to aid him in meeting the other notes, was not a waiver of the terms of the contract such as to invalidate the title to the hides. If the first note had been fully paid or relinquished, the title would still be in the plaintiffs, so long as any one of the notes remained unpaid. A question of waiver was one of fact.

We have examined the several questions in the depositions which were objected to, and we do not discover any error in the rulings of the Judge in admitting or excluding them. It is unnecessary to specify the several objections.

The case, as presented, did not require any other rulings on the point of a lien for work, than those given. If the defendants had not been guilty of a wrongful conversion before and independent of any demand, according to the rule given by the Judge, then the action could not be maintained. If they had been thus guilty, then clearly they could not legally set up a lien for labor performed on the articles converted.

If the acts of the defendants were not a conversion, the defence was sufficient without a lien. If they were a conversion, no lien could exist.

It is unnecessary to consider the question whether, in any event, under all the contracts, a lien could be set up by the defendants against the plaintiffs.

Exceptions overruled.—Judgment on the verdict.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT.

1860.

COUNTY OF CUMBERLAND.

HUGH M. PLUMMER *& als. versus* S. R. LYMAN *& als.*

A parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there has been no privity, is within the statute of frauds as a promise to pay the debt of another.

Although a written promise to accept a non-existing bill operates as an acceptance, if the bill is drawn within a reasonable time, a verbal promise to accept such a bill is not valid.

Where A has a lien on a vessel for materials used in building it, and B holds the vessel to secure him for advances made to the builder, a promise made by B to accept the order of the builder in favor of A, for the amount of his claim, cannot be enforced, unless it appears to have been made for some consideration, such as a discharge of A's lien on the vessel, or his promise to discharge it, or to release his claim on the builder.

The fact that the acceptance of the order would, by operation of law, discharge the lien, would not be a consideration for a previous verbal promise to accept it.

ON REPORT, by DAVIS, J.

ASSUMPSIT on the following order:—

"$224. "Cumberland, Dec. 17th, 1857.

"Messrs. Lyman, Marrett & Co.,—Six months after date, please pay to Plummer & Gerry two hundred and twenty-four dollars, and charge the same to my account.

"David Spear."

This order was duly protested for non-payment.

In the summer of 1857, Spear was building a vessel at Cumberland; the plaintiffs furnished lumber which was put into said vessel, and to pay for which the above order was given. On Wednesday, Dec. 16th, the vessel was launched at about noon, and was brought up to Portland the following Saturday evening, between 9 and 10 o'clock.

Jesse Plummer, one of the plaintiffs, testified that he first heard of the vessel being launched on Thursday of the same week; had a conversation with Marrett, one of the defendants, and learned that the defendants had an interest in the vessel, and asked Marrett if he would pay the plaintiffs' claim. Marrett said he would not without Spear's order, but did not wish the plaintiffs to attach the vessel on their lien, as it would put the defendants to trouble. Marrett said if Spear would give an order on the defendants, they would accept it. Witness went to Cumberland the next day, (Friday,) and obtained the order from Spear which is given above, and presented it to Mr. Lyman and to Mr. Marrett, but they both refused to accept it. He then went to see Spear, but Spear would do nothing further. He could not see Spear until Saturday. After seeing him, he went to Cumberland to attach the vessel on the lien, but she had gone to Portland.

John E. Donnell testified that he heard part of the conversation between Jesse Plummer and Marrett, and understood Marrett to say that, if the plaintiffs would get an order from Spear, the defendants would accept it.

Orlando M. Marrett, one of the defendants, testified that the defendants had no title to the vessel until the day she was launched, when they took a carpenter's certificate, and filed it at the custom house. The defendants had advanced in cash and merchandize to Spear, from $10,000 to $12,000, and had no funds of Spear in their hands at the time of witness' conversation with Plummer. If Plummer had attached the vessel to enforce his lien, the defendants would have had to pay his claim. Witness could not recollect all his conversation with Plummer, but is confident he never

agreed to accept an order from Spear. The defendants sold the vessel, and received the proceeds, which were not sufficient to remunerate them for their advances and expenses.

The evidence was reported to the full Court, they to draw such inferences as a jury might draw, and enter a nonsuit or default, as law and the rights of the parties should require.

Howard & Strout, for the plaintiffs.

The property in the vessel was in the defendants, after the launching, when they had filed the carpenter's certificate in the custom house. It appears by the testimony of Plummer and Donnell that, rather than have the plaintiffs enforce their lien, Marrett promised to accept an order from Spear. Marrett denies this, but the acts of the parties show that he is in error; for Plummer went to Spear and obtained an order, and gave Spear *a receipt in full*, and then presented the order to Marrett.

The case shows a promise, upon a sufficient consideration, to accept an order. It was an original promise, and not within the statute of frauds, *Townsley* v. *Sumrall*, 2 Peters, 170; and is binding upon the parties. *Coolidge* v. *Payson*, 2 Wheat., 75; Chitty on Bills, 285, and note.

It makes no difference that the order is not negotiable. The promise was to accept an order, and, not being within the statute of frauds, it constituted a legal obligation, whether the order was negotiable or not.

Shepley & Dana, for the defendants.

The advances of the defendants having greatly exceeded the value of the vessel, the equity of the case is with them.

Admitting the alleged promise, it was a parol agreement to accept a non-existing order, or draft, upon which the defendants cannot be liable. Chitty on Bills, 284; Bayley on Bills, 145; *Laing* v. *Barclay*, 1 B. & C., 398; *Coolidge* v. *Payson*, 2 Wheaton, 66; *Storer* v. *Logan*, 9 Mass., 58; *Wilson* v. *Clements*, 3 Mass., 1.

A promise to accept, is not an acceptance. *Johnson* v. *Collins*, 1 East, 105; 3 Mass., 13.

Before the alleged promise, there was no privity between the plaintiffs and defendants. The plaintiffs had dealt directly with Spear, and the defendants were not liable for his debts. Spear owed the plaintiffs, and the plaintiffs say that defendants promised to pay the debt. The promise, if proved, was to pay the debt of another, and was within the statute of frauds.

The conduct of the plaintiffs shows that they did not regard the alleged promise as an absolute and independent one, but as collateral to the indebtedness of Spear. After the defendants declined accepting the order, the plaintiffs attempted to enforce the lien on the vessel, in a suit against Spear. A parol promise, collateral to a subsisting indebtedness, cannot be enforced.

The plaintiffs were not injured by the defendants not accepting the order, as they had until Monday noon to enforce their lien on the vessel. With ordinary diligence, the plaintiffs might have made themselves secure. That they did not, was occasioned by their own negligence and not by any act of the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—The action is upon an alleged verbal promise, made by the defendants, that they would accept an order to be drawn on them by David Spear, in favor of the plaintiffs; and the cause of action alleged, is a failure to comply with the promise.

It was admitted that, in the summer of 1857, David Spear was building a vessel at Cumberland, and all the lumber for which the order was given by him was furnished by the plaintiffs, and put by him into the vessel, which was launched on Wednesday, Dec. 16, 1857, about noon, and was brought up to Portland the following Saturday evening, about eight or nine o'clock. No question is made that the plaintiffs had a lien on the vessel under the statute.

It appears from the testimony of Jesse Plummer, one of the plaintiffs, which is the most favorable evidence for them, that the defendants, having made to Spear large advances to aid him in building the vessel, which were equal, or nearly equal to the full value of the same, and they having, as they claimed, the legal title of the vessel for the security of the payment of such advances, were unwilling that the plaintiffs should enforce their lien against the vessel. One of the defendants being solicited on the part of the plaintiffs, to pay the amount of the claim of the latter against Spear, said, if they would obtain his order, as evidence of his approbation that the payment should be made, they would accept it. Soon after, the witness obtained the order of Spear on the defendants, not negotiable, payable in six months, for the balance of their claim, payment of the sum of two hundred dollars having been made by Spear at the time he gave the order, and the plaintiffs gave a receipt for the account. This order having been shown to the defendants by the witness, and they being requested to accept it, refused to do so. This was after the vessel was launched, but more than two full days before the lien would expire.

It is regarded as well settled by our law, that a written promise to accept a non-existing bill operates as an acceptance, provided the bill be drawn within a reasonable time; but a verbal promise to accept a non-existing bill has not been treated as valid. *Coolidge* v. *Payson*, 2 Wheat., 66; *Weston* v. *Clements*, 3 Mass., 1; Chitty on Bills, 312, note (g).

It is insisted for the defendants, that the promise in the case before us, if made as alleged, is within the statute of frauds, it being at most a verbal agreement to accept an order to pay a debt of another.

The testimony does not disclose a case of a promise on the part of the defendants to accept an order of Spear on them, as the consideration of a discharge of the plaintiffs' lien on the vessel; or a promise to discharge it; or for giving to Spear a receipt by the plaintiffs of their claim; or

that they signified a readiness to make the discharge of the lien, at the time they presented the order to the defendants for acceptance; and a demand on them to accept it; or that they informed them that they had given to Spear a receipt of their claim. But the cause relied upon in support of the action is a naked promise, that the order of Spear would be accepted.

The acceptance by the defendants of such an order of Spear on them as would discharge the account against him, would, by operation of law, discharge the lien; but this would not be the consideration of the previous verbal promise of the defendants to accept an order, not then drawn, and which might never be drawn, to pay the debt of Spear, when such discharge of the account was not a condition to the acceptance of the order.

The case differs from that of *Townsley* v. *Sumrall*, 2 Pet., 170, relied upon by the plaintiffs, which was a promise to accept bills and not performed, goods having been previously received by the defendant to the amount of the bills promised to be accepted when they should be drawn. This was held to be a promise, not to pay the debt of another, but the debt of the defendant himself,—damage to the promisee furnishing as good a consideration as a benefit to the promisor.

It is not easy to perceive that the refusal to accept the order by the defendants was injurious to the plaintiffs. The receipt to Spear was valid only so far as the plaintiffs received actual payment. The order, not being accepted and not negotiable, was no discharge of that part of the account to which it was intended to apply, as between the plaintiffs and Spear. The receipt could be explained, and the plaintiffs could not be injuriously affected thereby. The defendants refused to accept the order as they had promised. They had no knowledge of the receipt when they refused to accept the order. They were not misled by the receipt, and had no reason to suppose that the lien was discharged; and they certainly could not claim an advantage from the receipt,

as being a discharge of the lien, more than could Spear, as being the discharge of the balance of his debt. The plaintiffs did not treat the receipt as a discharge of the debt, or of the lien on the vessel, inasmuch as, after the defendants' refusal to accept the order, they took out a process in order to enforce the lien by attachment, and were prevented from doing it by their own delay.

The promise of the defendants, relied upon, appertained to the debt of another, and not to their own, and is not a foundation in law for the action. *Plaintiff nonsuit.*

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

HIRAM WILLARD *versus* GEORGE WHITNEY.

The records of a court, when once made up, are conclusive upon all parties until altered or set aside by a court of competent jurisdiction.

The statements contained in them must be taken as true, and cannot be contradicted or explained by evidence *ab extra.*

But if any errors are shown to exist in any record they may be corrected by the court.

The docket entries are regarded as the record of the court until the record is extended, but they cannot be received to contradict the record when once extended.

Evidence that a docket entry has been erased may be received as the basis of an amendment of the record, but not to contradict it.

An officer, representing creditors subsequently attaching, may impeach a judgment against the debtor for fraud; but, in an action against himself for not keeping property attached on the writ, he cannot impeach the judgment to lessen his own liability, or for the benefit of the debtor.

In such an action, the value of the property attached, as stated in the officer's return, and in a receipt taken for it, in the absence of all contradictory proof, may be taken as the true value of the property for which the officer is liable.

An attachment is not dissolved by the death of one of the defendants, unless it be shown that a commission of insolvency issued on his estate.

ON EXCEPTIONS to rulings and instructions of DAVIS, J., and on a motion for a new trial, because the verdict was against evidence, and on the ground of newly discovered evidence. The motions were not argued.

This was an action of the CASE against the late sheriff of Somerset county, for the alleged default of his deputy, Daniel Bunker, in not keeping certain property attached by him on a writ of plaintiff against Thomas McMullen and George McDaniels.

The plaintiff offered a copy of his writ, &c., against McMullen & al., a copy of judgment, execution and return thereon. The defendant suggested a diminution of this record, but the proof offered was received *pro forma*. The evidence showed that the original writ was dated January 25, 1854, and was returnable to the March term, 1854; that the case was duly entered, and continued from term to term till the March term, 1858, when the death of McDaniels was suggested, and the writ amended by leave of Court by striking out his name; that the other defendant was then defaulted, and, after a hearing in damages before the clerk, judgment was entered for the plaintiff.

The defendant offered evidence consisting of erased entries upon the writ and docket in the handwriting of the person who was clerk, April 1, 1854, tending to show that judgment was rendered on default at the March term, 1854, and execution issued thereon; that the docket entries of such a judgment and the issuing of execution thereon, were not erased prior to Sept. 18, 1854; and that the person who was then clerk at the time of the trial lived, and for several previous years thereto had lived in one of the Western States.

As these minutes of proceedings were not entered upon any other book of records, nor incorporated into the final record, of which the plaintiff introduced a copy, the presiding Judge ruled that the attachment of the property (on the McMullen writ) was not thereby dissolved.

The defendant offered evidence to prove that, at the hear-

ing in damages in March, 1858, the plaintiff fraudulently took judgment against McMullen, for more than four times the amount he knew and had admitted to be due, but it was excluded by the Judge.

There was no evidence as to the value of the property attached, except Bunker's return on the writ, and the receipt he took for the property, in both of which it was valued at $450.

The Judge instructed the jury on this point, that they were authorized to find for the plaintiff for the amount of the judgment rendered in March, 1858, with interest for that time.

The jury found a verdict for plaintiff for $413,86, being the amount of that judgment and interest.

To these rulings and instructions the defendant excepted.

John S. Abbott, in support of the exceptions, made the following points.

1st. The evidence as to the *first* judgment, execution, &c., was received without objection, and shows that the attachment was dissolved. *Leighton* v. *Reed*, 28 Maine, 87; *Suydam & al.* v. *Higgeford*, 23 Pick., 467.

2. If the evidence had been objected to, it should be received, because *this* defendant was no party to that suit, and because Mr. Hobbs, who was the clerk of the Court, moved from the State without making up that judgment, and hence, the dockets are competent evidence. *Pruden & ux.* v. *Alden*, 23 Pick., 184; *Davidson* v. *Slocum*, 18 Pick., 464.

3. The proceedings which vacated the attachment having been erased by the former clerk, his successor could not incorporate them into the last judgment; and, hence, they must be proved *aliunde*, as in case of such amendments as vacate attachments and do not appear of record. *Putnam* v. *Hall*, 3 Pick., 445; *Hill* v. *Hunnewell*, 1 Pick., 192; *Willis* v. *Crocker*, 1 Pick., 203; *Fairfield* v. *Baldwin*, 12 Pick., 388; *Moulton* v. *Chapin*, 28 Maine, 505; *Clark* v. *Foxcroft*, 7 Maine, 349; *Leonard* v. *Bryant*, 11 Met., 370;

Downs v. *Fuller*, 2 Met., 135; *Hawes* v. *Waltham*, 18 Pick., 454.

4th. The evidence as to the fraud of the plaintiff in taking judgment for too much was improperly excluded. *Sargent* v. *Salmond & al.*, 27 Maine, 539; *Valentine* v. *Farnsworth*, 21 Pick., 182; *Andrews* v. *Herring*, 5 Mass., 211; *Fairfield* v. *Baldwin*, 11 Pick., 396, 397; *Pierce* v. *Jackson*, 6 Mass., 243, 244; *Pierce* v. *Partridge*, 3 Met., 44; *Caswell* v. *Caswell*, 28 Maine, 237.

5th. The instructions as to damages were erroneous. The oxen were attached as the property of two tenants in common. One of them died pending the action, and judgment was taken against the other. There is no proof of partnership, no proof of joint indebtedness. Hence the damages could not, in any event, have exceeded the value of an undivided half of the oxen, at the time of the demand, being the interest of the judgment debtor.

N. S. Littlefield, for plaintiff.

The opinion of the Court was drawn up by

APPLETON, J.—The records of the Court show the proceedings in relation to a suit from its entry to its final termination. The statements therein contained must be regarded as true. They are not subject to explanation or contradiction *ab extra*. If facts are erroneously inserted, in the record, upon sufficient proof, the Court may order their erasure. If material and existing facts, which should appear, are omitted in the narration of proceedings, the Court may order their insertion. The record is a narration of the proceedings in Court, and if, through neglect, mistake, or fraud, errors occur, upon the suggestion of others, or upon its own mere motion, the Court may rightfully order that it be so altered as to conform to the facts. When the record is once made up, it is conclusive upon all parties, until altered or set aside by a Court of competent jurisdiction. *Balch* v. *Shaw*, 7 Cush., 282.

The docket entries are minutes made during the progress

of a cause, from which the record is made up. They are regarded as the record of the Court until the record is extended. *Reed* v. *Sutton*, 2 Cush., 115. But the docket entries are not receivable to disprove or contradict what the record asserts. Neither the former minutes of the clerk nor the statements of others as to previously existing but now erased minutes, are to be received in contradiction of the extended record.

If the facts be as the defendant asserts, he should have moved the Court to order the record to be so amended as to conform thereto, and, upon proper proof, the Court would have ordered it done. It does not appear that any such motion was made or that the facts, as alleged, were proved to exist to the satisfaction of the Court, so that the Court, upon its own motion, should have ordered the amendment made. If the facts alleged were made to appear of record, then the defendant might well have invoked them in the defence.

The minutes upon the docket are erased. The clerk, by whom they were made and erased, has not been called to explain why made or erased. "Every entry is a statement of the act of the Court," says SHAW, C. J., in *Reed* v. *Sutton*, 2 Cush., 115, "and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized practice, which pre-supposes such an order. We must therefore presume the several entries on the docket under this action were made by the clerk by proper authority. Taking the abbreviated entry, for "continued out of the Commonwealth," the same evidence which proves the entry once rightfully made, proves the cancellation and revocation of it, and then it stands as if no such entry had been made." But the evidence of docket entries erased, however properly admissible with other proof, as the basis of an amendment of the record, cannot be received for the purpose of its contradiction.

In the case of *Leighton* v. *Reed*, 28 Maine, 87, it appeared of record that the action had been entered defaulted, and that execution had issued, and that, at the next term,

"on motion of the plaintiff, it was ordered by the Court, that the judgment and execution aforesaid be annulled and that the execution aforesaid be returned into the Clerk's office, and the action was, thereupon, brought forward" to that term. It was there held that the attachment was dissolved. But in the case at bar the record discloses no such facts. It is the usual record of an action which has been entered and continued from term to term and then defaulted.

If the facts be, as alleged by the counsel for the defendant, they should have been set forth in the record. No action should ever be brought forward without a saving of the just rights of third persons, and this can only be done by stating in the record the facts in reference to the default, the issuing of the execution, the bringing forward the action on motion, the taking off the default and the cancellation of the execution. When this is done, the rights of all receive the protection of the law.

It is urged in defence, that the judgment, *Willard* v. *McMullen*, was fraudulently rendered for too large a sum, and that such fraud is an excuse for the defendants' not keeping the property attached, and for not selling the same on the execution which issued in that suit.

The law is well settled that a creditor may impeach for fraud a judgment collusively and fraudulently rendered against the debtor. So too, the officer while representing creditors, may, by setting up fraud in a judgment, defeat the prior rights of the fraudulent creditor on such judgment. In *Clark* v. *Foxcroft*, 6 Greenl., 296, it was held in a suit against the sheriff for not levying an execution, that it was a good defence that the plaintiff's judgment was fraudulent, *the sheriff first proving that he represents a creditor of the judgment debtor*, by showing a legal precept in his hands. In *Fairfield* v. *Baldwin*, 12 Pick., 388, the right of an officer to invoke a subsequent attachment, to defeat a prior fraudulent judgment, was affirmed. In *Paine* v. *Jackson*, 6 Mass., 242, the sheriff being indemnified by a subsequent attaching creditor was permitted to defeat a prior judgment by proof of its fraud. Creditors, whose rights may be injuriously

affected by a fraudulent judgment, may impeach it, and they may do this through the intervention of the sheriff by whom their rights are represented.

The judgment recovered by the plaintiff against McMullen is binding upon the parties till reversed. Even if rendered for too large a sum, it is a valid judgment till its reversal. *Smith* v. *Keen*, 26 Maine, 411.

The sheriff, in the present case, holds the property attached, to be applied to the satisfaction of such judgment as the plaintiff may recover, or, if he fail in his suit, or neglect, if successful, to place his execution seasonably in the officer's hands, to be restored to the debtor. The debtor cannot collaterally contest the good faith of the judgment against him. Neither can he in the name of the sheriff. The creditors, if any there be, of the judgment debtor do not desire to. The sheriff is not a creditor nor the representative of creditors. The defendant shows no defence for not keeping the property attached to respond to the judgment rendered in the suit upon which the attachment was made. If there was a fraud upon the debtor, he has his appropriate remedy. But the officer cannot legally volunteer in the defence of his rights, or for his protection.

The rule as to damages was correct. The estimated value of the goods in the officer's receipt, and as stated in the return, must, in the absence of all contradictory proof, be deemed satisfactory evidence on this subject.

The attachment was not dissolved by the death of one of the defendants. *Bowman* v. *Stark*, 6 N. H., 459. The issuing of a commission of insolvency must be shown to dissolve an attachment, and of that no proof was offered. *Maxwell* v. *Pike*, 2 Greenl., 8; *Martin* v. *Abbott*, 1 Greenl., 333. Upon the motion for a new trial, upon the ground of newly discovered evidence, no proof has been offered.

Exceptions and motion overruled.

Judgment on the verdict.

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

JOHN A. HOLMES *versus* FRANCIS O. J. SMITH.

Assumpsit will not lie upon an award made in pursuance of a submission *under seal.*

ON EXCEPTIONS, by the defendant, to rulings of DAVIS, J.

The case is stated in the opinion.

The case was elaborately argued by

F. O. J. Smith, pro se, in support of the exceptions, and by

E. Fox and Shepley & Dana, contra.

The opinion of the Court was drawn up by

CUTTING, J.—The writ, dated Feb. 10th, 1859, discloses "an action of *assumpsit*, upon an account annexed, with general money and labor counts."

The most prominent question presented, is, whether the plaintiff can recover in that form of action.

It appears that, in 1853, the parties entered into a verbal contract, (they never having executed the draft for contract) by which the plaintiff was to do all the work and, in every respect, complete the road bed of the Buckfield Branch Railroad, from the depot, in Buckfield, to the Androscoggin river, at Canton point, with certain exceptions not necessary here to mention; *that*, subsequently, the plaintiff fulfilled the contract in full or in part, and that certain controversies and disagreements arose between the parties, as to the character of the labor performed, and its value, &c.; *that* afterwards, on July 3d, 1854, by an agreement, executed under their hands and seals, the subject matters in dispute were referred to *Asa P. Robinson, Esq.*, whose award, on its rendition, was to "be executed by each party to the other"; *that Robinson* heard the parties, and, without arriving at any definite conclusion, reported to each his views upon the evidence submitted, together with such facts as were within

his own personal knowledge, for the purpose, as he says, of producing an amicable settlement; concluding his primary *report* as follows, viz.:—"Having *thus far* analyzed this difference and expressed my opinions fairly and frankly, and impartially, upon the principles which would govern me in deciding the matter, I deem it but proper to *send it back* to the parties for their consideration, in the hope they may be able to agree without further reference to me, but, if knowing my opinions as above expessed, they still insist upon *resubmitting* to me for a decision, I am ready to go further."

And the arbitrator further states, *that*—"On the 15th day of April, (1856,) the foregoing report was by consent delivered to the parties personally, and, on the 16th, *resubmitted* to me, for further determination," by agreement of the parties, as follows:—

"1st. Let Mr. Robinson decide, upon the knowledge he has of the agreement and intentions of the parties, as reported by him, what, if any, valuation should be made in the *cash price* for the work, not including profits, from that originally inserted by him in the draft for contract, and on the admission that payments are made in cash as fast as estimates are furnished.

"2d. What, if any, enlargement of the quantities reported by Stephenson, of rock and loose rock and earth should be made, and upon what evidence in error in Stephenson's report.

"3d. What the quantities found, on the prices decided on, amounts to, to be accounted for by *Smith* to *Holmes*, leaving them to adjust and apply the payments made."

And it further appears *that*, upon the authority thus conferred, the arbitrator made his final report, which was the basis of the verdict rendered, the Judge ruling, as the plaintiff contended, that it was final and conclusive, subject only to be impeached for fraud.

Upon the foregoing statement in brief, abstracted from the voluminous documents presented, we are to determine

whether the present action of *assumpsit* on the general counts can be maintained against the seasonable objection of the defendant.

Except for the intervention of the special agreement, to refer, an action of assumpsit would lie, but that specialty, having created a *superior* security, suspends the *inferior* during its continuance. An action of assumpsit will not lie on a covenant of seizin in a deed, to recover money paid; or on the breach of the poor debtor's bond; or on an original promise after the same has ripened into a judgment. It is well understood by all accurate pleaders, that an original cause of action may be merged in one of a higher nature or degree, otherwise two suits might be maintained and judgments recovered on the same original claim. Without further remarks as to the expediency of the right form of action, we refer the inquisitive mind to the case of *Richards* v. *Killam*, 10 Mass., 243.

Had an action for *covenant broken* been brought on the special agreement to refer and abide, we perceive no sufficient reason why the plaintiff should not have recovered in damages as awarded, provided the award was final and conclusive, as ruled by the Judge; otherwise exceptions were well taken in that particular.

The true rule as to the form of the action, disclosed by the authorities, is this:—"If the submission be by bond, the prevailing party may have an action of debt on the bond; *if by other deed*, he may have covenant; if by instrument not under seal, or by parol, he may have *assumpsit* on the submission." 2 Petersdorff's Abr., 219, note.

But it may be remarked that we do not understand the plaintiff's counsel to contend against the force of many of the preceding propositions. Their first proposition is that, "where matters of account in dispute are submitted to arbitration, but not by bond, and the arbitrator made an award, the plaintiff may give the sum awarded in evidence on the common counts in *assumpsit* without a special count, though the sum has been given in under a Judge's order,"—citing

Keen v. *Balshore*, 1 Esp. R., 194. We are under no necessity of questioning that ancient authority, for it is not in conflict with any modern principle or rule of law. A simple award without an antecedent bond, or a special agreement, or "other deed" to abide, can be considered no more than an assessment of damages preliminary to the commencement of the action, which would in no way affect or destroy the original cause. And the question still returns, was the contract to refer, a simple or special one?

Secondly, it is contended that the agreement to refer was a simple contract, for, say the counsel, "the written agreement of the parties *under seal* was *modified* by a subsequent agreement *not under seal.*" Thus reducing the special to a simple contract on which the prevailing party may have *assumpsit*. Can such a proposition be sustained by the evidence?

It appears that the document embracing the submission, and modification (so called) and the award, was introduced by the plaintiff under rulings, if the case is correctly reported, somewhat objectionable; for the whole history relating to the contracts and the prior proceedings of the parties is proved *secondarily* by the report of the arbitrator. But being now before us, they are to receive a construction. And no one, after reading the arbitrator's report and final award, can arrive at any conclusion other than that his jurisdiction was conferred by the *special* agreement of the parties, and that the "*resubmitting*" was for the express purpose of enabling the arbitrator "*to go further*" and decide upon his own *personal* knowledge as communicated to them respectively. The subsequent modification, if any, was as to the matter of evidence, rather than as to any deviation from the parties' original intention of having the controversy adjudicated and settled, with, perhaps, this exception, "leaving them to adjust and apply the payments made."

The term modification, as used by the plaintiff's counsel, may have been very appropriate, but, at the same time, suicidal, for a contract modified still remains in force, subject

to the modification, whereas, nothing short of a rescission would answer the plaintiff's purpose.

It is further contended that the award was incomplete, inasmuch as it does not settle the whole controversy so that an action of debt or covenant could be brought upon it. But in our opinion the award did settle the whole controversy, if the subsequent rulings of the Judge were correct, subject only to be reduced by the defendant in either form of action, on the original agreement to refer and abide, by showing his payments. But we do not understand that if the award had been perfect in every particular, that either an action of debt or covenant broken, would lie based on the award itself, to enforce its performance. It was not a judgment, and it possessed in itself no germinating element; the germ was in the agreement to perform, which, if by a *specialty*, might disclose itself in an action of *covenant broken*, if by parol or a simple contract, in *assumpsit*. Hence, we recognize the harmony and the justice of the rule before cited as embracing the whole law upon this subject. So has it been determined heretofore. *Bowes* v. *French*, 11 Maine, 182; *Tullis* v. *Sewall*, 3 Ham., (Ohio,) 510. *Exceptions sustained.— Verdict set aside,—and a new trial granted.*

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

DAVIS, J., dissenting.—The writ in this case contains the common counts for work and labor, and also a count for certain specified services, at given prices, "according to the award of A. P. Robinson." The only plea is the general issue. It is too late, after a verdict, to object to the sufficiency of the declaration, as upon both the award and the original cause of action.

The submission was by *deed*. Can *assumpsit* be maintained upon the *award ?*

Where there have been a submission and an award at common law, a party often has his choice of several reme-

dies. If the submission is by a bond, *with a penalty*, *debt* will lie, either on the submission or on the award. If the submission is by other deed, *covenant* will lie on the submission, or *debt* on the award. If the submission is by parol, or by a writing not under seal, *assumpsit* will lie, on the submission, or on the award. 2 Greenl. Ev., 69, 70. But will not assumpsit lie on the *award*, in all cases?

No English case has been cited in which this question has been directly decided. In 2 Petersdorff, 221, note, it is said that assumpsit will always lie on the *award*, whether the submission is by deed or otherwise; but no case is cited to sustain the proposition.

A similar suggestion is made in *Piersons* v. *Hobbs*, 33 N. H., 264.

In *Bowes* v. *French*, 11 Maine, 182, it seems to have been held that assumpsit will not lie in such a case. But the case was determined on other grounds, and is not decisive as an authority.

The case of *Tullis* v. *Sewall*, 3 Hammond, (Ohio,) 510, was there cited in argument, as it is also in the case at bar. But in that case no authorities are cited, though the opinion of the Court is direct, and the question is well considered. The decision is placed on two grounds.

In every action upon an award, it is necessary to allege, and prove, a submission. Therefore it is insisted that the action is upon the *submission* as well as upon the *award;* and that the form of the action must conform to the submission.

And, because the allegation of a submission must be *proved*, it is said that *the making of a deed* is put in issue, which cannot be done by the plea of *non assumpsit*. "Neither the declaration, nor the plea, would present the real foundation of the action." "When the declaration is *in debt*, the defendant can plead no other general issue that will control the submission but *non est factum;* for the plea of *no such award* would admit the submission."

The same error underlies both of these propositions. A

suit upon an *award* is not a suit upon the *submission*. The authority of the arbitrators is alleged generally; and the submission is merely *inducement* to the action. If the action is *debt*, the defendant may call in question the authority of the arbitrators under the plea of *nil debit*. "Whenever the deed or record is but inducement to the action, and matter of fact the foundation, *nil debit* is a good plea." *Bean* v. *Farnham*, 6 Pick., 269.

It is no anomaly, as is suggested, for a party to be obliged to prove a deed, or a judgment, upon the plea of *non assumpsit*. In a suit for rent reserved by a deed poll, to be paid by the grantee, the plaintiff must prove the execution and acceptance of the deed, upon the general issue in an action of assumpsit. *Gardiner* v. *Gilbert*, 9 Mass., 510; *Guild* v. *Leonard*, 18 Pick., 511. So assumpsit will lie on a foreign judgment, and the jurisdiction of the Court be a matter of inquiry upon a plea of *non assumpsit*. *Buttrick* v. *Allen*, 8 Mass., 273. In no case is it any objection to the maintenance of assumpsit that the evidence to sustain it is a deed, if such deed is not the foundation of the suit. *Hoyt* v. *Wilkinson*, 10 Pick., 31; *Willoughby* v. *Spear*, 4 Bibb, 397. And in the case, *Bean* v. *Farnham*, 6 Pick., 269, previously cited, it was held that, in a suit upon an *award*, the *submission* is not the foundation of the action, *but only matter of inducement to it*. It must be proved, in order to show the authority of the arbitrators, such authority not being presumed without proof. But their authority being proved, in whatever way conferred, the award imposes a duty from which a promise is implied, according to well settled principles of law.

But it is not necessary, in deciding this case, that we should come to such a conclusion; for, after there had been a partial hearing, the submission was so modified by the parties that no action could be maintained upon it.

There had been labor performed, and payments therefor had been made to the amount of many thousands of dollars. The parties submitted the amount of *each* to the arbitrator,

covenanting "to pay or secure the balance" he should find to be due from one to the other. On this no action would lie but that of covenant.

The arbitrator reported a statement of facts, but declined to make any award. There the matter would have ended.

But the parties returned the submission to him, modified by a writing, not under seal, so that he was no longer authorized to determine the case between them, and find the balance due from one to the other; but he was authorized to determine the amount and price of the labor, "leaving the parties to adjust the payments," &c.

By this modification, the covenants of the parties in the original submission, "to pay or secure the balance" determined to be due, *was entirely vacated and annulled;* for the arbitrator no longer had any authority to find any balance. He was merely to determine and state one side of an account. It is manifest that no action of *covenant* would any longer lie on the submission. As it was not a bond, with a penalty, no action of *debt* would lie upon it. Such a case comes clearly within the rule laid down in the case of *Mill Dam Foundry* v. *Hovey*, 21 Pick., 417, — that, whenever a specialty is so modified by a simple contract that *covenant* will not lie, *assumpsit* may be maintained, using both the specialty, and the modification, as evidence in support of it. "The rule is well settled," says PIERPONT, J., in *Briggs* v. *Vermont Railroad Co.*, 31 Verm., 211, "that, when a contract under seal is altered by the parties by a writing not under seal, or by a parol agreement, the whole becomes a simple written or verbal contract; and the rights, liabilities, and remedies of the parties are thenceforward to be determined by the same rules as are applicable to simple contracts."

As the arbitrator had no authority to find any *balance due* from one to the other, or to award that one *should pay* any sum to the other, the submission and award, giving them their utmost force, amounted to no more than an agreement of the parties, under seal, that the amount due from the de-

fendant to the plaintiff was a given sum, but containing no express promise to pay it. Where there is such an agreement, it may be used to support an action of assumpsit. *Hoyt* v. *Wilkinson*, 10 Pick., 31; *Miltenberger* v. *Schlegel*, 7 Barr., 241.

In fact, the award in this case, not being that one *should pay* a sum to the other, (the arbitrator having no authority to make such an award,) was in effect the statement of an account. Such an award does not merge the original cause of action; but assumpsit may be maintained upon it, and the award used in evidence to support it. *Bates* v. *Curtis*, 21 Pick., 247; *Kingston* v. *Phelps*, *per* KENYON, Peake's Cas., 228; 2 Greenl. Ev., 81.

It is suggested that the *report* of the arbitrator, made previous to his award, containing a detailed statement of facts, was improperly admitted in evidence. None of the facts stated were submitted to the jury. But it will be seen, on examining the exceptions, that no objection was made to the *admission* of this evidence. After it had been admitted, "the defendant objected to the *competency* of the evidence to maintain the action." And though there appears to have been a ruling that it was "admissible," no objection was made to it on the ground that there was a statement of facts attached to the submission and award. This point not having been raised at the trial, it is too late to raise it now.

The only question remaining is that of the *conclusiveness* of the award. And the rule that an award at common law is conclusive between the parties to the submission, and can be impeached for fraud only, is too well established to need the citation of authorities in support of it.

Nor does it make any difference that the award is introduced collaterally, if such is the case, instead of being the foundation of the action. It often happens that the remedy is collateral, instead of being direct; but the parties are equally concluded by it.

Thus, upon a bill in equity for the specific performance of

an award for the conveyance of real estate, the terms of the submission need not be set forth, the simple allegation of a submission being sufficient; and the award is conclusive. *Foss* v. *Haynes*, 31 Maine, 81.

So an award, establishing a boundary line between the parties, is conclusive, when introduced in an action of trespass, or in a real action. *Clark* v. *Burt*, 4 Cush., 396; *Goodridge* v. *Dustin*, 5 Met., 363. So, also, is an award determining the title to real estate. *Whitmore* v. *Mason*, 14 Ill., 392. Or the amount of work done under a contract. *Alton Railroad Co.* v. *Northcutt*, 15 Ill., 49. Or the legal construction of a contract. *Porter* v. *Buckfield Branch Railroad*, 32 Maine, 539.

So it has been held that, if parties submit the amount of damages caused by an injury, to an arbitrator, his award is conclusive in an action on the case, subsequently commenced, for negligence in causing such injury. *Bailey* v. *Lechmere*, 1 Esp., 377.

The rulings and instructions in the case at bar were in conformity with these principles; and I think the exceptions should be overruled.

JOHN W. LANE *versus* SAMUEL TYLER *& al.*

Generally a partner cannot sue his co-partner at law upon any claim growing out of partnership transactions, and involving partnership interests.

But one may sue his co-partner upon any agreement which is not so far a partnership matter as to involve the partnership accounts; and also for a balance found due after a final adjustment of partnership accounts; and in all other cases in which the rendition of judgment will be a bar to any other suit growing out of the partnership transactions.

Improvements upon land owned by partners as tenants in common, made with partnership funds, are partnership property.

An express promise by a tenant in common does not bind his co-tenant; and, by a partner after dissolution of the partnership, does not bind his co-partner, when made to one having knowledge of the dissolution.

ON EXCEPTIONS to the ruling of DAVIS, J.

ASSUMPSIT to recover an alleged balance due the plaintiff, by reason of an error in the settlement of an account.

The facts are stated in the opinion. After the evidence of the plaintiff was out, the presiding Judge ordered a nonsuit, and the plaintiff excepted.

F. O. J. Smith, for plaintiff.

Shepley & Dana, for defendants.

The opinion of the Court was drawn up by

MAY, J.—There is but little controversy between the parties as to the law of this case. It is conceded that generally no partner can sue a co-partner at law for any claim growing out of partnership transactions, and involving partnership interests. It is equally clear that one may sue his co-partner upon any agreement which is not so far a partnership matter as to involve the partnership accounts. So, too, one may sue his co-partner for any balance found due to him after a final adjustment of the partnership accounts, and in all other cases where it appears that the rendition of a judgment in the suit will be an entire termination of the partnership transactions, so that no further cause of action can

grow out of them. In such cases, it seems that an express promise to pay any partner the balance found due to him may well be inferred. Parsons' Com. Law, 181, and cases there cited.

In the case before us, it appears that the plaintiff and defendants were co-partners, composing a firm under the name and style of Tyler, Rice & Co. The co-partnership is said to have been dissolved in 1853, and there has as yet been no adjustment of its affairs. Its accounts remaining unsettled, no balance has been ascertained as due to any member of the firm; and it does not appear that a judgment in this suit can, in any manner, operate as a final adjustment of the partnership affairs among its members. It is apparent, therefore, that, if this action can be maintained, it must be upon the ground that it does not involve partnership interests or accounts.

It is true that, by the plaintiff's deed to the defendants, dated September 1, 1853, the several partners, at law, became seized, as tenants in common, of the land and flats described in said deed, upon which the firm, with partnership funds, made great improvements by the erection of a store. These improvements were partnership property, and would have been so regarded, even if the land upon which they were made had been owned by the plaintiff alone. *Averill* v. *Loucks*, 6 Barb., 19; *Deming* v. *Colt*, 3 Sandf., 284; *King* v. *Wilcomb*, 7 Barb., 263.

It appears that the firm, as such, kept an account with "Real Estate on Commercial Street," being the same on which the store was built, in which were charged all the bills incurred by the partnership on account of such estate, and the improvements thereon, amounting in all, including interest, to $5957,79. This account contains a charge of $819,09, paid to Tyler, one of the firm, as one half of the cost of the partition wall standing on the line between said Tyler and the premises aforesaid, which half the firm assumed to pay. It is now said that this charge is erroneous, inasmuch as the amount paid was the whole cost of the wall instead of one half.

The same account shows that the firm have been paid in part for these advancements by receiving the plaintiff's note and mortgage for $5000, made payable to the defendants, the consideration of which was a deed from the defendants to the plaintiff, dated January 2, 1854, wherein they quit-claim all their right, title and interest in said premises, including the store then standing thereon. There is also another credit of $75, paid as interest upon said note up to April, 1854, thus leaving a balance due to the firm for advancements which the firm had made, of $882,79. This sum appears to have been paid to the firm, by having that amount charged to the plaintiff upon the partnership account against him. This arrangement appears to have been made between the parties in pursuance of an order drawn by the plaintiff upon the firm, in which the plaintiff says:—"Please charge me with eight hundred and eighty-two dollars and seventy-nine cents on account of real estate deeded to me, which, with my note and mortgage to said Tyler and N. C. Rice for $5000, *will balance your account* with real estate on the books of the late firm of Tyler, Rice & Co."

Thus it appears from the books and accounts of the firm, that all the payments made by the plaintiff were made in liquidation of the claims of the firm, for moneys advanced, and bills paid on account of said real estate. They were made directly to the firm. In fact, the parties throughout, in every thing except the form of the conveyances, and the use of the defendants' names as payees in the note and mortgage, seem to have treated the real estate, as well as the improvements thereon, as partnership property. The testimony of the plaintiff is in harmony with this view. On cross-examination he says, that he took the property from Tyler, Rice & Lane at the bills. Under such circumstances we should naturally expect the payments to have been made to them, as we find they were in fact made. There is nothing in the case tending to show that the firm has been remunerated for its advancements, in any other mode. If there was, therefore, any error in the amount charged to the plaintiff, upon his order, occasioned by an overpayment by

the firm to Tyler, for the partition wall, and we think the evidence is satisfactory that there was, still, such error having occurred in partnership transactions and involving, as it does, the partnership accounts between the members of the firm, cannot be corrected in this action. The only appropriate remedy, as matters now stand, is in equity.

It is further urged that the plaintiff can recover upon the ground of an express promise. This action, as it now stands, is upon a joint promise against two defendants. It must be proved as alleged. The promise testified to as having been made by Tyler, whether we regard it as made by him as a tenant in common or as a member of the firm, having been made, as it was, long after the firm was dissolved, cannot bind the other defendant. Tyler does not appear to have had any authority to bind him. Whether Tyler himself would be bound by it, we give no opinion. The nonsuit upon the facts before us was rightly directed.

Exceptions overruled.—Nonsuit to stand.

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

EDWARD M. PATTEN *versus* OLIVER MOSES *& al.*

The owner of a promissory note may maintain an action thereon in the name of a third person, by his consent.

An indorsement of a promissory note payable to an insurance company, by one who has been their president, and who acts as such in making the indorsement, passes the title to the indorsee, especially when the company receives and converts to its use the avails of the note.

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

ASSUMPSIT upon a promissory note, dated Nov. 1, 1855, payable to the Commercial Mutual Marine Insurance Company or their order, in fourteen months from its date.

The testimony tended to show that the plaintiff was not the owner of the note; that the Traders' Bank were the holders of the note, claiming to be the owners of it; that their attorney called upon the plaintiff and obtained his permission to bring the suit in his name; that the Traders' Bank were prosecuting the suit; that George H. Folger was President of the company for three years previous to April, 1856, and frequently drew checks, signed and indorsed notes for the company, in the name and as President of the company; that he resigned in April, 1856, and no successor was chosen; that, in August, 1856, he indorsed this note, as President of the company, to the Traders' Bank, by whom it was discounted; and that the company received and used the avails of the note.

E. & F. Fox, for plaintiff.

Evans & Putnam, for defendant.

1. The suit is not maintainable in Patten's name, though he consented to the bringing of it.

There is no evidence whatever that the Traders' Bank have authorized the use of Patten's name. This is fatal. *Bragg* v. *Greenleaf*, 14 Maine, 395; *Fisher* v. *Bradford*, 7 Maine, 28; *Golder* v. *Foss*, 43 Maine, 366.

Plaintiff's attorneys have no authority, as such, to bring suit in any other than client's name.

If, as defendant contends, the note is still the property of the original payees, the insurance company, the objection would be equally strong, they never having authorized suit in anybody's name.

2. The property in the note is still in the insurance company, never having been duly and legally transferred.

Folger was not the President of the company, and had no authority to transfer the note, or indorse it at the time he assumed to do so. He ceased to be President, April 23, 1856. The note was transferred in September following. Nor is there any evidence that after his resignation he *acted* as President in any thing, except in the transfer of this note.

The insurance company had ceased taking risks or paying losses at the time of his resignation. They never held him out to the public afterwards as having any authority to bind them.

Not being what he assumed to be, the burden is on plaintiff to show that he was so recognized and permitted to act by the company as to bind it.

The proof is insufficient for that purpose.

There were no such "*notorious*" acts as is spoken of in *Bank* v. *Dandridge*, 12 Wheat., 64; nor such "*recognition*" by the board of directors of authority. See also Angell & Ames on Corporations, § 287; *Canal Bridge* v. *Gordon*, 1 Pick., 304; *Sampson* v. *Steam Mill Co.*, 36 Maine, 80; *Pen. & Ken. R. R. Co.* v. *Dunn*, 39 Maine, 599.

None of the cases bearing upon the question present so loose and unsatisfactory grounds of presumption as does this. In most of them the *positive proof* existing here, that the acting officer was *not* what he pretended, was wanting. *Lovett v. German Reformed Church*, 12 Barb., 68; *Melledge* v. *Boston Iron Works*, 5 Cush., 179.

The opinion of the Court was drawn up by

GOODENOW, J.—In *Cabot* v. *Given*, 45 Maine, 144, it was decided that, in a suit by an *indorsee* against the *maker* of a promissory note, payable to an insurance company, and indorsed and transferred for the company by the President, parol evidence that he was acting President at the time of the indorsement, is admissible, and sufficient, without producing the records of the company; and that proof of the handwriting of such President, is sufficient evidence of the indorsement and transfer of the note, without evidence that he had *special authority* for that purpose.

In a note to *Miller* v. *Race*, 1 Smith's Leading Cases, 609, it is stated, that "it appears to be settled in the American cases, that the holder of a negotiable note is, *prima facie*, entitled to recover, upon merely producing the note; but that if the *defendant* prove 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*, or for a valuable consideration."

The note in suit is dated Nov. 1, 1855, on fourteen months, signed by the defendants, and payable to the Com. Mutual M. Ins. Co., or order, for the sum of $321. And indorsed, "waiving right of demand and notice.

"Com. M. M. Ins. Co., by

"George H. Folger, President."

The deposition of Frederic S. Davis shows that it was discounted by Traders' Bank, Boston, August 30, 1856, for the office.

From the deposition of Harvey Jewell, it appears that, on April 23, 1856, George H. Folger resigned his situation as President, but that he continued as one of the directors of the company, until May 5, 1857, when he resigned as director. The deposition of George H. Folger shows that he was a director during the years 1855 and 1856, and was President up to about the first of May, 1856, and *ex officio* Treasurer. That the note was indorsed by him to raise money at the Traders' Bank, *for the company*, and that, in behalf of the company, he actually received the amount of the note, *less* the discount. That the company ceased paying losses about April, 1856; and that no one acted as President after him; that the finance committee authorized the discounts; that the negotiations of the paper were made by the President and sanctioned by the financial committee.

Folger was President in 1855, and was reëlected on the first Monday of April, 1856, and resigned the office the 23d of the same month, but continued as director until May, 1857.

But it is alleged that Folger indorsed the note after he resigned the office of President; and this is proved. But it is not proved, as alleged, that the plaintiff in fact, or the plaintiffs in interest, had any knowledge of such resignation. It may well be inferred that they had not. As prudent

men, if they had knowledge of that fact, they would, probably, have declined to take the paper upon his indorsement as President. He had been President in 1855, had been recently reëlected, was a director, and held himself out as President, with the knowledge of other directors and of the financial committee. Why should not strangers be justified in trusting him and negotiating with him, as President? It is like the case of a partner in a firm; he may bind the *firm* after a dissolution of the partnership, and before notice of the dissolution, express or implied.

The insurance company have placed Folger in a situation to impose upon the plaintiffs, and they should be estopped to deny his authority to indorse the note, especially after having received the avails of it. The defendants will be safe against any future claim, by any other plaintiffs, when they have once paid the note to the present plaintiff, or had judgment against them in this case.

It is certainly reasonable that losses, resulting from the unfaithfulness of an agent, should be borne by the principal whose misplaced confidence has afforded the means of producing them, rather than by strangers, acting fairly in the ordinary course of business. 2 Story on Eq., § 1258. But here there is no loss.

A default must be entered and judgment for plaintiff for the amount of the note and costs.

DAVIS, J.—The defendants, in argument, pressed mainly the *first point*, relying upon *Bragg* v. *Greenleaf*, 14 Maine, 395. But in that case the *owner* of the note did *not bring the suit*, or *order* it brought. The suit was brought by a nominal plaintiff, who had no interest in it.

Here the *suit was brought* by *express direction* of the Traders' Bank, *the owners*, and is carried on by them,—Patten consenting to the use of his name, but taking no interest in the suit.

In regard to the *transfer* of the note, while it might not bind the insurance company upon the contract as *indorsers*,

it was sufficient to *pass the property* to the Bank. The insurance company are estopped by the acts of their officers from claiming the note. I concur in the opinion that judgment must be entered for the plaintiff.

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

JOHN M. WOOD, *in Equity*, *versus* ICHABOD GOODWIN & *als.*

When a railroad company owning a railroad lying in two different States, under charters from each of those States, mortgage the whole road and franchise, and their right to redeem in one State is sold on execution, the purchaser of the equity is entitled to redeem the whole road from the mortgage.

When the mortgagees are in possession for condition broken and to foreclose the mortgage, the owner of the equity will save the effect of the foreclosure by payment of what there is *now* due on the mortgage, but will not be let into possession unless he pays or provides security for the remainder of the debt secured by the mortgage *not yet due;* although the mortgage provides that the mortgagees shall not be entitled to possession till the condition is broken.

BILL IN EQUITY.

THE case was heard on *bill*, *answer*, and *documentary proof*.

The *bill* is dated March 14, 1861, and was filed in the clerk's office, March 18, 1861.

It alleges that the Great Falls and South Berwick Branch Railroad Company, a corporation established by the laws of this State, was seized, Sept. 1, 1854, in fee or otherwise, of a railroad lying within the county of York, and running to the line of the State of New Hampshire, and of the real estate upon which that railroad was located, (a particular description of which is not necessary,) and, being so seized, conveyed in mortgage to the defendants, as trustees for the Eastern Railroad Company, the said railroad, with the franchise, real estate, easements, &c., to secure certain bonds,

some overdue, and some not yet due; that, on the first day of June, A. D. 1855, the plaintiff commenced an action against said G. F. & S. B. B. Railroad Company, which was duly entered in court, and such proceedings were had, that, on the sixth day of December, A. D. 1857, he recovered judgment against said company, for $22,101,00 damages, and $484,58 costs of suit; upon which judgment execution was issued in due form of law, and was placed in the hands of the sheriff of York county for service; and he seized on said execution all the right in equity which said corporation then had of redeeming said railroad and its franchise from said mortgage, and, after due proceedings, sold and executed a deed of the same to the plaintiff, January 6, 1858; that the respondents entered into possession of said railroad, &c., April 20, 1858, for the purpose of foreclosing said mortgage, and had ever since remained in possession; that, on the twentieth day of November, 1860, he demanded of them a true account of the amount due on the mortgage, and of the receipts, &c., but that they had neglected and refused to render such accounts; that the plaintiff is ready to perform all the conditions of the mortgage, and he prays that he may be let in to redeem, that the respondents may be ordered to account, and that, on payment of the amount now due on the mortgage, he may be let into possession.

The *answer* alleges that the G. F. & S. B. B. R. R. Company, claiming to be the owners of a longer railroad than that described in the *bill*, extending from a point in Maine to a point in New Hampshire, made the mortgage referred to in the bill, embracing the portion of the road lying in New Hampshire as well as that lying in Maine, and denies that any separate mortgage of the portion in Maine was ever made; that the respondents have no knowledge that the plaintiff commenced the action, obtained the judgment, or purchased the equity of redemption, as alleged in the *bill*, save from common report; that he did call upon them by letter for an account as alleged in the bill, and they had not rendered any to him, but that their books were con-

stantly open for his inspection, as he well knew; that they took actual possession of said railroad in both States, Dec. 29, 1857, for the purpose of foreclosing said mortgage and fulfilling the duties of their trust; that said possession was commenced and held under judgments of the courts of Maine and New Hampshire; that more than one half of said railroad lies in New Hampshire, and that the foreclosure of said mortgage had become absolute long before the plaintiff called upon them for an account; and that they are lawfully in possession of said railroad under said judgments and foreclosure, for the purpose of fulfilling their trust duties; and that the plaintiff will not, upon the payment of what he proposes to pay, be entitled to disturb their possession. A copy of the mortgage, and of the judgments referred to, are annexed to the *answer*.

The judgment in New Hampshire was rendered by the Court of Common Pleas, holden at Dover, in the county of Strafford, on the third Tuesday of August, A. D. 1857. Judgment as on mortgage. Execution issued by which the respondents were put in possession of the railroad, &c., Dec. 29, 1857. The judgment in Maine was rendered by the Supreme Judicial Court, held at Alfred, in and for the county of York, on the first Tuesday of January, A. D. 1858. Judgment as on mortgage. Execution issued by which the respondents were put in possession of said railroad, April 20, 1858.

The provisions of the mortgage, which embraced the road in Maine and New Hampshire, do not become material, except the provision that the mortgagees were to *leave* the possession and control of the railroad in the mortgagers until condition broken.

The plaintiff introduced attested copies of the judgment, execution, officer's return thereon, and the sheriff's deed to him, which it is not necessary to recite, as no question was raised in regard to the regularity of these proceedings.

Drummond, for plaintiff.

The defendants took possession to foreclose, April 20,

1858. The bill was filed March 18, 1861. The mortgage was not then foreclosed, and the plaintiff is in season.

The defendants have waived a tender by refusing to render an account on demand. After demand, they are the moving party, and must render the account. *Roby* v. *Skinner*, 34 Maine, 270; *Stone* v. *Locke*, 46 Maine, 445.

The plaintiff, by the purchase of the equity of redemption, stands in the place of the mortgagers. If they would be entitled to redeem, he is.

They included in the same mortgage a railroad lying partly in Maine, and partly in New Hampshire. It necessarily follows that the redemption of the part which lies in each State must be governed by the laws of that State. If a man include in the same mortgage land situate in two different States, he does not thereby lose the right to redeem, but when he does redeem, he must follow the law *rei sitæ*. But it is said that in this mortgage the *franchise* of the railroad is included, and that that is in its nature *entire* and *indivisible*. I do not contend that a franchise may be apportioned on a railroad according to its length; I admit that a franchise *is* entire and indivisible. But it does not follow that a railroad may not have more than one franchise. In this case, there are *two*.

This road has two charters, one from Maine, and one from New Hampshire. Each charter confers a franchise. To all intents and purposes, there are, in contemplation of law, two different railroads included in this mortgage. The railroad lying in Maine acquires all its privileges, &c., from Maine, and is controlled by the laws of Maine.

The case, therefore, comes within the principle that when several parcels of real estate are included in one mortgage, the holder of the equity of redemption of either parcel may redeem.

As to the terms of redemption.

The defendants are the holders of a mortgage including two railroads. One of them is located in New Hampshire. So far as that road is concerned, the mortgage is foreclosed.

It is conceded that, under such circumstances, the defendants cannot be compelled to accept less than their whole debt. The law is so settled in this State. *Smith* v. *Kelley*, 27 Maine, 237.

But it is equally well settled, that in such cases the mortgagees must release to the person redeeming their interest in the whole property; or, they may elect to retain that not claimed by the plaintiff and allow its value upon the mortgage debt. There is no reason why this rule should not be applied where the property lies in different States. It would be inequitable in this case to allow the mortgagees to retain one half the property mortgaged, and receive full payment of their debt besides.

Our Court can enforce its decrees. The *right* of the mortgagees to elect, is also a *duty*. If they will not make an election, or will not release, the Court can deduct the value of the road in New Hampshire, from the whole mortgage debt, and upon payment by the plaintiff of the balance, decree to him the road in Maine, discharged of the incumbrance. The Court will assume in case the respondents refuse to release to the plaintiff the New Hampshire part of the road, that they *have* elected to retain it and apply it in part payment of the mortgage debt. In this manner, the rights of all parties would be fully protected.

Some of the bonds secured by the mortgage are overdue and some have a long time to run before becoming due.

The plaintiff, by payment of those now due, will of course destroy the effect of all the proceedings to foreclose.

We claim, also, to be entitled to possession, until, at any rate, there shall be (if ever,) another breach of the conditions of the mortgage. The mortgage provides that the mortgagers shall have possession until a breach of the condition. There has been such breach, and the mortgagees have accordingly taken possession.

But by redemption all the consequences of that breach of condition are repaired.

It will be observed that the fact that the defendants are

trustees, gives them no more powers, &c. The mortgage is to them as trustees for the Eastern Railroad Company. As to all the world, save that company, they are merely mortgagees. They have no more powers, &c., than their *cestuis que trust* would have had, had the mortgage been given directly to *them*.

Suppose a mortgage be given to secure the payment of $1000 in one year, and $1000 in ten years, and that it provides that the mortgager shall have possession until breach of condition. The mortgager fails to make the first payment and the mortgagee sues and obtains it. The mortgager brings his bill in equity to redeem, and, long before the second instalment becomes due, obtains a decree in his favor. Is he not also entitled to possession? That usually follows as a matter of course. Why not in the case supposed? I find no authority upon this precise question. But all the authorities treat redemption as restoring the parties to the same position, in all respects, which they occupied before breach of condition. At law, the estate is gone with the breach; but equity allows the mortgager to save his rights after that; and to have the same rights as he would have had if he had performed the condition.

By what authority do the mortgagees hold possession? not by virtue of the mortgage alone, because that provides *they shall not have possession save for condition broken.*

But, after payment of all there is due, they cannot then hold *for breach of condition.* The condition is not broken. They have their pay in full, and stand in equity precisely as if they had been paid as the payments became due.

Why shall they, then, hold possession in contravention of the provisions of the mortgage, for fear there may be a breach of the condition?

When the breach of a condition is waived, it is waived forever; and has no effect whatever. It is the same as if the condition had been performed. Bac. Ab., Condition, O, 3.

Now if, after there had been a breach of condition, the

mortgagers had paid the amount due, and the mortgagees had received it, it would have been a waiver of the breach of the condition.

No one would contend that the mortgagees could maintain afterwards an action for the possession, upon *that* breach of the condition which had already been waived by them.

Why, then, can they rely upon a breach which has been repaired by proceedings in equity, and after they have accepted all that is due them, and thus, in fact, as well as by operation of law, waived the breach?

If they are entitled to remain in possession, it is for condition broken. Does the mortgage become foreclosed in three years from time of payment? Or in three years from the next breach of condition, without further acts on their part? They are in by judgment of law to foreclose the mortgage. What steps must be or can be taken to foreclose the mortgage, in case of another breach of the condition?

I can come to no other conclusion, than that, by payment of all there is due, the parties are *restored to their original rights*, and that the plaintiff is entitled to possession, unless he shall again fail to perform the condition of the mortgage.

W. H. Y. Hackett, of New Hampshire, for the defendants.

[His argument did not come into the hands of the Reporter.]

The opinion of the Court was drawn up by

Davis, J.—This is a bill in equity, to redeem the Great Falls and South Berwick Railroad from a mortgage to the defendants, *in trust*, to secure the payment of certain bonds. The mortgage was given Sept. 1, 1854. After the bonds first payable became due, the defendants, as trustees, took possession of the railroad for condition broken. The right of redemption was afterwards sold by the plaintiff, upon an execution in his favor against the railroad company; and, having purchased the right of redemption himself, he de-

manded an account of the trustees under the mortgage, which they neglected to render.

If the special Acts of Maine and New Hampshire, passed in 1848, had been duly accepted by the Great Falls and Conway Railroad Company, and the Great Falls and South Berwick Railroad Company, those two companies would have been merged in the new one, by the name of the Portsmouth, Great Falls and Conway Railroad Company. In that case, there would be no valid mortgage and no equity of redemption. But, as neither of the special Acts appears to have been accepted according to its terms, we may assume that the Great Falls and South Berwick Railroad Company continued to exist, and that the mortgage is valid. Nor do we perceive any reason why the plaintiff, upon the case as stated and proved, is not entitled to redeem.

A part of the railroad is within this State, and the other part in New Hampshire. Whether there were two distinct corporations, or one only, under the charters granted by the two Legislatures, there was but one mortgage, and that embraced the whole railroad. The plaintiff proceeded upon the assumption that the mortgage was valid. He cannot deny it. He has no claim, if it was not. And the mortgage embracing the whole railroad, both in this State and in New Hampshire, the plaintiff must redeem the whole, if any. And, in order to do so, he must provide for the whole debt secured by it. For the mortgagees have a lien upon *every part* of the railroad to secure *every part* of the debt.

A part of the bonds secured by the mortgage are due; the rest have not yet matured. The trustees have taken possession. It is contended for the plaintiff, that he may pay up the amount *now due*, and be entitled to take possession, and hold it, until the condition shall again be broken by a non-payment of the bonds next maturing. But this is not the case. The trustees having taken possession for condition broken, are entitled, under the mortgage, to retain possession until the whole debt is adequately provided for, without requiring them to rely upon the mortgage. So long

as any necessity appears for them to rely upon this security, they are entitled to possession. The plaintiff will not be permitted to eject them, without paying all that is due, and depositing money, or otherwise providing, for the payment of the remainder as it shall become due.

But the plaintiff, by paying all that is now due, will save a forfeiture. He will thus be placed in the position of the mortgagers; and the right of redemption will not be foreclosed. The trustees will be entitled to possession, and must account for the earnings. And, if the plaintiff shall pay them enough, with the earnings, to discharge all the bonds, as they become due, he will then be entitled to possession.

Whether the necessary proceedings have been had to give the plaintiff title to that part of the railroad lying in New Hampshire, is a question which the Court in this State have no power, in this case, to determine.

A master may be appointed to determine the amount now due and payable, after deducting the earnings of the railroad since the defendants took possession.

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

EDWIN S. HOVEY *versus* EBENEZER HARMON.

Whatever disability was imposed upon a person, by the appointment under the statute of 1821, by the Judge of Probate, of a guardian over him, as a person *non compos mentis*, without a previous formal decree as to his mental condition, was removed by the subsequent discharge, by the Judge of Probate, of such guardian upon his own petition, and without notice.

It seems, that, under the statute of 1821, there must be a formal decree, by the Judge of Probate, that a person is *non compos mentis*, before a valid appointment of a guardian over him, as such, could be made.

ON REPORT.

WRIT OF ENTRY to recover certain real estate in Portland. Writ dated July 24, 1858. Plea "*nul disseizin*," with a "brief statement" denying plaintiff's title and right of possession, and claiming that the title and right of possession were at the commencement of the suit in tenant's wife, with whom and by whose assent he occupied them.

It was admitted that, prior to July 11, 1835, Stephen Neal owned the demanded premises; that he died, December 28, 1836, intestate, leaving one child, Lydia S. Dennett; that said Lydia, prior to 1831, was married to Oliver Dennett, whose wife she continued to be till December 18, 1851, when said Dennett died.

The demandant read in evidence a deed from said Lydia S. Dennett to himself, dated July 15, 1858, covering the demanded premises.

The tenant then read in evidence a deed covering the same premises, from the said Stephen Neal to Samuel E. Crocker, dated July 27, 1835.

The demandant then read in evidence attested copies of the records of the Probate Court for the county of Cumberland, showing the appointment of a guardian for said Stephen Neal, on the third Tuesday of April, 1834, as "a person *non compos mentis*, and incapable of taking care of himself," the contents of which are sufficiently stated in the opinion.

The tenant offered in evidence attested copies of the petition of said guardian to be discharged from his trust, and the proceedings of the Probate Court thereon, on the first Tuesday of September, 1834. The contents of these papers are stated in the opinion.

The tenant also offered to prove, by competent evidence, that, at the time the deed from Neal to Crocker was executed, Neal was of sound mind, and fully capable of selling and conveying his property.

The testimony thus offered was excluded by the presiding Judge.

Thereupon, the case was withdrawn from the jury, and reported to the full Court, for the settlement of the questions of law arising in the case, and affecting the rights of the parties.

Albert Merrill, for plaintiff, submitted an elaborate argument in support of the following propositions:—

First. The original decree of *guardianship* was conclusive evidence, against all the world, of said Neal's incompetency to contract or convey his property, while said decree remained neither reversed, revoked nor annulled, by the same or some other competent tribunal.

Second. Said decree was not reversed, revoked or annulled, by said proceeding of the Probate Court, on the first Tuesday in September, 1834, on the petition of said guardian, nor was said Neal in any manner relieved by it from the legal disability to contract and convey his property imposed by said original decree.

This decree does not state, *in terms*, that the original decree was reversed, revoked or annulled, or that "the guardianship was discharged"; but only "*that said Neal Dow be dismissed and removed from his said office and trust of guardian of the said Stephen Neal.*"

Although the mere dismissal of the guardian, as stated in this decree, would not relieve the ward of the legal disability of the original decree of *guardianship*, or have any

effect to restore his competency to contract or convey, yet, even as such dismissal, we maintain that it was entirely void, both as to said ward and the presumptive heiress, and his and her privies in estate.

Rand and *Deane*, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—In England, the Court of Chancery has the control of the person and property of lunatics. The king, as a branch of his prerogative, is entitled to their custody, and the chancellor, in respect to them, acts under a special and separate commission from the crown, authorizing him to take care of their property for their benefit. Upon application made by the relatives of the supposed lunatic, or by those interested in the estate, and upon proofs furnished *ex parte*, he issues a commission of lunacy to certain persons by him appointed, whose duty it is to inquire concerning and make return to him of the mental condition of the individual in question. The issuing a commission is a matter of discretion, regulated solely for the benefit of the lunatic, with reference to the care of his person and property. It does not issue as of course on probable proof of the fact of lunacy. *Ex parte, Tomlinson*, 1 Ves. & Bea., 57. The alleged lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time to produce his witnesses before the jury. *In the matter of Russell*, 1 Barb. Ch. Rep., 39. He may, if he chooses, but with the chancellor's permission, traverse the inquisition, and he is examined in court to ascertain if such be his wish. Though the jury may find a party of sound mind, yet if the Court are of opinion that they erred in their finding, it may, in the exercise of a sound discretion, direct the issuing of a new commission of lunacy, and, in one instance, no less than three were issued before there was a finding of *non compos mentis*. *In the matter of Lasher*, 2 Barb. Ch. R., 97.

There may be a partial or a total recovery. If partial, the chancellor suspends in part the proceedings against the lunatic, thus removing, to a limited extent, the disability under which he labors. *In the matter of Burr*, 2 Barb. Ch. R., 280.

If the recovery is entire, a petition is presented for a *supersedeas*, signed by the former lunatic, and a hearing is had before the chancellor, upon proofs by affidavit and the personal examination of the party. Sometimes, however, the examination is by some one acting under the authority of the Court. *In re Dyce Sombre*, 1 Phillips' Ch. Rep., 437. "The care and custody of lunatics being confided to this Court," remarks Chancellor KENT, *in the matter of Wendell*, 1 Johns. Ch., 600, "the whole control of the inquisition, and the manner in which that control shall be exercised, would seem to depend entirely on the discretion of the Court. The lunatic may be brought into Court, and an inquiry had, by inspection, after the inquisition is returned, as in *Heli's* case, (3 Atk., 634,) and, in the case of returning sanity, this is frequently the course, aided by affidavits and the certificates of physicians." As the whole jurisdiction is in the Court, the only object of proof is *ad informandam conscientiam*, and to enable the Court to arrive at correct conclusions as to the facts presented for determination. When the evidence shows the restoration of the lunatic a *supersedeas* issues.

The cause is entitled, in the matter of A B, a lunatic. There are no parties litigant before the Court. The proceedings in chancery, in the matter of lunacy, are not regarded as directed *against* the party. They are for his benefit. *In re The Princess Bariatinski*, 1 Phillips' Ch. R., 377.

The settled and general jurisdiction, existing at common law in the ordinary or ecclesiastical Courts, is, with us, conferred upon the Probate Court, to which is superadded the authority to manage and control the affairs of the idiot and the insane, the drunkard and the spendthrift. It is because, to a very considerable extent, the jurisdiction exercised in

England by Courts of equity, has been conferred upon the Court of Probate, that we have thus adverted to the course of procedure there.

The rights of the parties in this case, however, must mainly depend upon the statutes in force in 1834, when proceedings were had, upon the effect of which we are now called upon to adjudicate.

By the statutes of 1821, c. 51, § 49, the Judge of Probate is authorized to appoint, upon the application of his friends, relatives or creditors, a guardian, "to take care of the person and estate" of one said to be an idiot, lunatic or distracted person.

By § 51, "in case any such idiot, lunatic, or distracted person shall be restored to the use of his reason, the residue and remainder of the estate, real and personal, shall be returned and delivered to him," &c.

By § 55, any Judge of Probate "may dismiss any guardian of a minor, idiot, *non compos*, or lunatic person," * * * "whenever *it shall appear to the said Judge to be necessary or expedient*, and to appoint some other guardian in his place; *provided*, that no such guardian shall be dismissed as aforesaid, before he shall have had notice in writing from said Judge, fourteen days at least before the time of hearing, to appear and show cause why he should not be dismissed." As his own views of necessity or expediency are to control his action, the Judge may remove, with or without appointing a successor, as in his judgment will best promote the interests of the ward. So he may act in the matter upon the petition of those interested, or upon his own knowledge derived from the official conduct of the guardian as disclosed in the records of his Court. The subject matter of appointment and removal is submitted to his judgment and discretion. If the lunatic recovers, the Judge should not appoint a guardian; for the lunacy and the protection of the lunatic's estate, which constitute the reasons for, and the justification of his judicial action, will have ceased.

It appears, by the records from the Register's office, that

upon the representation of Samuel F. Hussey, a friend of Stephen Neal, that said Neal was "*non compos* and incapable of taking care of himself," the Judge of Probate directed the Mayor and Aldermen of the city of Portland to make inquisition as to the mental condition of said Neal, which they did, and adjudged him to be *non compos* and incapable of taking care of himself, and made due return of their doings in the premises.

The notice to Stephen Neal, given pursuant to the requirements of § 49, recites the inquisition to have been made by the Selectmen of the town of Portland, when, in fact, no *such* inquisition could have been made as there were no such officers to make it. It makes no allusion to the inquisition made by the Mayor and Aldermen of the city of Portland, upon which the action of the Judge of Probate was based. It nowhere appears that notice was given of the inquisition *as* made and by whom made, unless the person notified was bound to know that the Selectmen of the town of Portland meant the Mayor and Aldermen of the city of Portland.

The notice to Neal was obviously informal, but it is not necessary to discuss its sufficiency. Assuming it sufficient, it is next to consider what was decreed by the Judge consequent upon giving such notice.

The decree, after referring to the representation of Hussey, the inquisition as had, and the notice *as* given, proceeds as follows:—"And it being fully *proved* here in Court that the said Stephen Neal is *non compos mentis* and incapable of taking care of himself, I do therefore DECREE that a guardian be appointed over him, pursuant to law. And I do further decree that Neal Dow, of Portland, in said county, merchant, be appointed guardian of said Stephen Neal, he giving bonds with sufficient sureties, in the sum of ten thousand dollars, and thereupon a letter of guardianship to issue to him in due form of law."

It will be perceived that here is simply the finding of those facts which would render the appointment of guardian

for Stephen Neal proper, and then a decree "that a guardian be appointed over him."

Subsequently, the guardian applied for a discharge from the further performance of the trust he had accepted. In his petition he represents "that within a few months the bodily and mental powers of his ward have very much improved, so that he is believed to be *capable of managing his own affairs and taking care of himself, which he is desirous to do.* His improvement in his health and general condition, is apparent to all his friends, who are not only willing, but desirous that he should be relieved from the legal disability under which he has been placed and *should once more have the absolute control of his personal property.*"

The decree of the Judge, after reciting the term of the Court at which it was made, thus proceeds:—"Upon the foregoing petition and representation, *the facts therein stated being fully proved*, I do thereupon decree that said Neal Dow be dismissed and removed from his said office and trust as guardian of the said Stephen Neal.

"Barrett Potter, *Judge.*"

To authorize the appointment of a guardian, the Selectmen, by § 49, were to judge the person said to be a lunatic, "*to be incapable of taking care of him or herself.*" By that section, nothing else is to be certified to the Judge of Probate. Now the petition of the guardian represents that the bodily and mental powers of his ward have very much improved, so that he is believed "to be capable of managing his own affairs and taking care of himself."

It will be perceived, that the belief is asserted of the existence of facts which negative the material facts found by the Mayor and Aldermen of the city of Portland. They found that Stephen Neal "was incapable of taking care of himself." The belief is asserted that he "is capable of managing his own affairs and taking care of himself." If the belief was well founded, it is not easy to see why Neal should have remained longer under guardianship. Certainly not for his own benefit, for he is capable of "taking care of him-

self," and, therefore, he would not need the aid of another. The decree rests upon the "facts therein (the petition) stated being fully proved," not that the belief of the petitioner was proved, but that the facts believed by him, which induced the action on his part, and which, if existing as believed to exist, would, and did, furnish ample ground for the decree of the Judge of Probate, were proved. It would be absurd to apply the subtleties of special pleading in the construction of the records of the Probate Court. No one who reads can doubt as to the meaning of the petition, nor as to that of the Judge in his decree. Nor is it readily perceived why the Court should strive to misunderstand what is plain to the understanding of every body else.

It has been seen that there was no *decree* that Neal was of unsound mind, but only a decree that a guardian be appointed and his appointment. So there is no decree removing the disability from the lunatic, but there is one removing the guardian. The facts which show the appointment of a guardian necessary, and those which show his dismissal or removal expedient, are respectively found. A guardian has been appointed and removed, and that constitutes the whole of the judicial action of the Probate Court. There could be no decree removing the disability of the ward, because there was none specially imposing it.

It would seem, indeed, according to the opinion of the Supreme Court, in *Kimball* v. *Fiske*, 39 N. H., 110, that there should be a formal decree that the person said to be a lunatic is of unsound mind. "There does not appear," remarks BELL, J., in the case just referred to, "to be any formal record that the plaintiff was a person of unsound mind; and it is contended that, without such a *decree*, there can be no valid appointment of a guardian. And we think that it is clearly so, not only from the nature of the case, but from the terms of the statute." In *Chase* v. *Hathaway*, 14 Mass., 222, PARKER, C. J., in delivering the opinion of the Court, says,—"In the case now before us, it appears that no formal decree was ever passed declaring the appellant *non*

compos; or, if passed, that the only evidence of it rests in the recital, which precedes the letter of guardianship. * * This seems to us as irregular as it would be for a common law court to issue execution without any evidence of a judgment, except what might be contained in the execution."

But it is not necessary to determine the sufficiency of the decree. If the law be as is asserted in the cases cited, it would seem that there has been no valid record of the appointment of guardian. If a decree thus formal is not necessary, then the matter stands thus,—a guardian has been appointed and removed, and nothing more. What was done in the Probate Court has been undone, and, so far as relates to the mental capacity of Neal, it is as if nothing had been done. Its loss and its subsequent restoration have both been judicially established. The record shows the latter as much as the former.

It is insisted the proceedings as to the dismissal of the guardian are invalid, because, before his removal from his guardianship, no public notice in relation thereto was given.

By § 55, notice to the guardian is required when the proceedings are or may be adverse. But here the guardian applied for his own dismissal. It would have been idle to have notified him, and there was nobody else to be notified, for the dismissal or removal of a guardian is a matter of discretion on the part of the Judge.

The right of the Judge to remove, after notice, on his own motion or upon petition, includes the right to accept a resignation voluntarily made. Nor, when the guardian is dismissed, whether on his own petition or on that of another, is the Judge of Probate obliged necessarily to appoint a successor. If the reason for the original appointment had ceased, as in case of a recovery, then the necessity of making a new one would cease with it.

The petition for a *supersedeas* is ordinarily signed by the former lunatic. But in *ex parte* M, before the Vice Chancellor, a *supersedeas* issued on the petition of the committee of the lunatic, who stand in a relation to him analogous to that

of guardians under our statutes. 2 Hoff. Chan. Prac., 263. No reason exists why the guardian may not petition equally with the committee.

The record here shows that, upon the facts in the petition of the guardian being fully proved, the Judge of Probate decreed his dismissal and removal from his office and trust of guardian. The proof was such as satisfied him it was "necessary and expedient" so to do, and that it was neither necessary nor expedient to appoint a successor. The statute does not require notice to be given in the matter. The Probate Court had acquired jurisdiction. The record need not disclose notice of every step in the course of proceedings, unless such are the requirements of the statute. It was determined in *Kimball* v. *Fiske*, 39 N. H., 110, that the proceedings of Courts of Probate in relation to the appointment of guardians of insane persons are not void, however irregular or erroneous, if the Court had jurisdiction of the subject matter of the proceeding. The same principle is equally applicable to the removal of a guardian.

The conclusion is, that Stephen Neal was under no legal disability arising from the proceedings in the Probate Court, when the deed under which the tenant derives title was given.

Nor can this result be a source of regret. If Neal was, in fact, insane, the plaintiff's rights will be amply protected upon proof thereof. If sane, he has none requiring or needing protection. *The case to stand for trial.*

CUTTING, MAY, GOODENOW and DAVIS, JJ., concurred. TENNEY, C. J., did not sit.

JOANNA W. EDWARDS *versus* NATHANIEL LORD.

Common carriers of passengers are bound to use greater than ordinary care — such care as is used by very cautious persons; and if a passenger receives an injury, which any reasonable skill and care on their part could have prevented, they are liable therefor.

ON EXCEPTIONS to the rulings of DAVIS, J., and on motion to set aside the verdict, as against the weight of evidence.

CASE to recover damages for an injury to the plaintiff by the upsetting of a stage wagon, in which she was a passenger, and of which the defendant was alleged to be the owner.

As no question of law was raised upon the motion, a report of the evidence, which was very voluminous, is omitted.

The defendant contended *inter alia*, that there was no such want of care on the part of his driver, as to render him liable.

Upon this point the defendant requested the presiding Judge to instruct the jury, "that the plaintiff, to entitle her to recover, must satisfy the jury beyond a reasonable doubt, that the injury, for which she seeks compensation, occurred without fault on her part, and through the neglect or want of ordinary care and prudence on the part of the defendant, or his servants."

But the Judge instructed the jury, "that if the defendant was at that time a common carrier of goods and passengers, for hire, and the plaintiff was, at the time of the accident, in his care as a passenger, on her passage to Gray, and his son was his servant employed by him to drive the horse, he was bound to use greater than ordinary care — such care as is used by very cautious persons; and if any reasonable skill and care on his part could have prevented the accident, the defendant was liable."

The verdict being for the plaintiff, the defendant excepted.

John J. Perry, for defendant, in support of the exceptions.

The instruction on the *degree of care* necessary was erroneous.

The carrier of passengers is held liable only on the ground of *negligence*. Redfield on Railways, 323; 2 Greenl. Ev., § 222.

"*Negligence*" is the habitual omission of that which ought to be done; or the habit of omitting to do things, either from carelessness or design.

There is a conflict of authorities in regard to the rule in cases of this kind. The more reliable authorities are, that ordinary care only is required. *Boyce* v. *Anderson*, 2 Pet., 150; Redfield on Railways, 325, note; *Keith* v. *Pinkham*, 43 Maine, 501.

The case last cited is conclusive, and settles the case at bar.

H. P. Deane, for plaintiff, argued that the instruction complained of was correct, and cited *Ingalls* v. *Bills & al.*, 9 Met., 1; *Caldwell* v. *Murphy*, 1 Duer, 241; 2 Greenl. Ev., § 221; Redfield on Railways, 323, 324.

In *Keith* v. *Pinkham*, 43 Maine, 501, the question was not raised.

Public policy requires that carriers of passengers should be held to exercise the strictest care.

The opinion of the Court was drawn up by

APPLETON, J.—Common carriers have been held liable for all damage and loss to goods during the carriage, from whatever cause, unless from the act of God or from the public enemy. But carriers of passengers have not been held to the extreme of liability, which has been enforced against carriers of goods.

The law is thus laid down in 2 Kent, (602) 812:—"He (the carrier of passengers by any mode of conveyance) is bound to give all reasonable facilities for the reception and

comfort of passengers, and to use all precautions, as far as human care and foresight will go, for their safety on the road. He is answerable for *the smallest negligence* in himself and his servants." The care to be used must be proportioned to the loss or injury arising, or likely to arise, from negligence. In *Philadelphia and Reading Railroad Co.* v. *Derby*, 14 Howard, 486, the Court say,—"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the *greatest care and diligence*. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet gross." These views were reaffirmed in *Steamboat New World* v. *King*, 16 Howard, 469, in a very able opinion of Mr. Justice CURTIS. In *Caldwell* v. *Murphy*, 1 Duer, 241, the Court say,—"The charge of the Judge, that the law exacted from a carrier of passengers extraordinary care and diligence, and that they are liable, unless the injury arises from force or a pure accident, was entirely correct." The instruction given was in words in which the general result of the authorities is summed up. 2 Greenl., § 221.

It is true, *Boyce* v. *Anderson*, 2 Pet., 150, lays down the rule to be that of ordinary care, the care which all bailors for hire owe their employers, but a more stringent rule was adopted in *Stokes* v. *Salstonstall*, 13 Pet., 192. The remark of the Court in *Pinkham* v. *Keith*, 43 Maine, 501, though in conformity with law, as laid down by MARSHALL, C. J., in *Boyce* v. *Anderson*, 2 Pet., 150, does not state with suffificient rigor the obligations which the law imposes upon the carriers of passengers. Indeed, the law in relation to the relative duties and obligations of the common carrier and the passenger to be carried, did not arise in *Pinkham* v. *Keith*, and was not involved in the decision of the cause.

The instructions given do not appear to be at variance with the law as it seems now to be established.

The fact, whether or not the defendant was a common carrier, was submitted to the jury, with instructions of which defendant does not complain. There is no such gross error or mistake in their verdict as will justify our interposition.

Exceptions and motion overruled.

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

JOHN J. DAVIS *versus* JOHN F. DAVIS, and THE NIAGARA INSURANCE COMPANY, *Trustees.*

Where a policy of insurance provides that the "said loss or damage shall be paid within sixty days after due notice and proof thereof, in conformity to the conditions annexed to this policy," no action can be maintained thereon until the notice is given, and the required proof is furnished.

Until such notice is given and proof furnished, the claim is contingent, and the company cannot be charged as trustees of the insured in an action commenced after a loss, but *before* notice and proof.

ON EXCEPTIONS to the ruling of DAVIS, J., discharging the trustees upon their disclosure.

The trustees disclosed that the writ was served Nov. 30, 1861; that previously they had insured the stock of goods of the principal defendant for $2000; that by the policy the damages in case of loss were "to be paid within sixty days after due notice and proof thereof, made by the insured, in conformity to the conditions annexed to the policy"; that the conditions annexed, specified in detail what proof was to be made; that, Nov. 28, 1861, during the life of the policy, the goods insured were damaged by fire; but that, at the time of the service of the writ, preliminary proof had not been made to the company, though it was afterwards made in conformity to the conditions of the policy.

Upon this disclosure the presiding Judge discharged the trustees, and the plaintiff excepted.

G. F. Emery, for plaintiff.

1. The trustees are chargeable, unless their liability is avoided by the failure to make the preliminary proof before service of this process. Phillips on Ins., § 1980. *Clamagoran* v. *Banks*, Martin, N. S. 551; *Dwinel* v. *Stone*, 30 Maine, 384.

2. The preliminary proof was not required to fix the liability of the company. Their liability is fixed at time of fire. The only contingency is as to the *time* of payment, and the *amount* to be paid. It was *debitum in presenti, solvendum in futuro.*

By the policy the "damage or debt" *is to be paid* within sixty days, &c.

The *time of payment* only is fixed, and this is not such a contingency as will discharge the trustees. *Clapp* v. *Hancock Bank*, 1 Allen, 395; *Dwinel* v. *Stone*, 30 Maine, 384.

3. But the proof having been furnished before *disclosure*, the company are chargeable. *Boyle* v. *Franklin Ins. Co.* 7 W. & S., 76; *Franklin Ins. Co.* v. *West*, 8 W. & S., 350.

Deblois & Jackson, for trustees.

The opinion of the Court was drawn up by

APPLETON, J.—The trustees in their policy of insurance promised and agreed "to make good unto the insured" all such loss or damage, not exceeding the sum insured, as shall happen by fire, &c., "the said loss or damage to be paid within sixty days *after due notice and proof thereof*, made by the insured *in conformity to the conditions annexed to this policy.* At the time of the service of the plaintiff's writ on the trustees, neither notice nor proof of the loss, in conformity with the conditions of the policy, had been given.

The preliminary proof required by the policy was a condition precedent to the right of the insured to recover. "It was," remarks WESTON, C. J., in *Leadbetter* v. *Etna Ins.*

Co., 13 Maine, 265, "a condition rightfully imposed, fully accepted, and made a part of the policy." Without it the insured could not recover. When service was made, it was uncertain whether due notice would be given. It was the same uncertainty which exists before the maturity of a note, whether or not, in case of non-payment, the indorser will receive due notice. The liability of the insurer does not become absolute, unless the preliminary proof, as required in the conditions of the policy, is obtained. If no proof is furnished, the liability does not attach. The magistrate most contiguous to the place of the fire may not be able conscientiously to give the certificate required by the ninth condition of the policy. Or he may unreasonably refuse. But "if unreasonably refused," remarks WESTON, C. J., in the case before cited, "it was their misfortune, and without it they cannot recover." In *Worsley* v. *Wood*, 6 D. & E., 711, GROSE, J., uses the following language:—"It does not seem to me that a fire without fraud will give the assured a right of action; it must be a fire, accompanied with the notice, affidavit and certificate, specified in the proposals."

It was doubtful, then, if ever a liability would attach. The contingency is not of proving a case, but of ever having one to prove,—of there ever being a time when the insured would have a right of action.

By R. S., 1857, c. 86, § 55, "no person shall be adjudged trustee by reason of any money or other thing due from him to the principal defendant, unless, at the time of the service of the writ upon him, *it is due absolutely*, and *not* upon any contingency." The contingency under this section, as settled in *Stone* v. *Dwinel*, 30 Maine, 384, "is not a mere uncertainty as to how the balance may stand between the principal and the supposed trustee; but it is such a contingency as may preclude the principal from any right to call the supposed trustee to settle or account."

Exceptions overruled.—Trustees discharged.

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

STATE *versus* RICHARD R. ROBINSON, *Appellant.*

STATE, *by libel of* EZRA G. HAWKES, *versus* CERTAIN INTOXICATING LIQUORS *claimed by* RICH'D R. ROBINSON, *Appellant.*

In a *complaint* for search and seizure, the description of the place to be searched was, "the store occupied by said R., situated on the northerly side of F. street, in said P., being numbered 197 on said street." In the *warrant*, the description was the same, except the number was stated to be 179: — *Held*, that warrant justified the search in No. 197, it appearing in evidence that R. occupied only that store, which was situated on the northerly side of F. street.

When a claimant of seized intoxicating liquors appeals from the decision of the magistrate, the appeal is properly entered at the term of the court held for the transaction of criminal business.

On the trial of the issue in such case in the appellate court, the same oath is to be administered to the jurors as in other criminal cases.

Under the laws of the United States, intoxicating liquors imported may be sold *by the importer*, in the original packages, without regard to the State law.

But they cannot be sold, even in the original packages, by any other than the *importer*.

If a person claims the right to sell intoxicating liquors in this State on the ground that he has imported them, the burden of proof is on him to show that he was the importer.

ON EXCEPTIONS to the rulings and instructions of DAVIS, J.

THE first case was a search and seizure process, and the second was the libel of the liquors seized. The cases are stated in the opinion.

Evans, in support of the exceptions.

Drummond, Attorney General, contra.

The opinion of the Court was drawn up by

DAVIS, J. — Both of these cases were brought, by appeal, from the Municipal Court of the city of Portland. Though tried separately in this Court, certain questions were reserved on exceptions, which may conveniently be considered together.

The *complaint* prayed for process to search "the store occupied by said Robinson, situated on the northerly side of Fore street, in said Portland, being numbered 197 on said street." The *warrant* directed the officer to search the store, &c., giving the same description, except that the number was stated to be 179.

It was proved that Robinson occupied only one store, and that his store was on the northerly side of Fore street, being numbered 197.

The description was sufficient without the number, and was correct. The false demonstration in regard to the number could not injure the defendant, because it could not mislead the officer. The rest of the description was not only sufficient, if it had stood alone; it was sufficient to enable the officer to correct the mistake in regard to the number. So that the whole description of the place to be searched, must be regarded as sufficient. *Downing* v. *Porter*, 8 Gray, 539; *State* v. *Bartlett*, 47 Maine, 388.

In the case against Robinson, for having the liquors in his possession unlawfully, *the exceptions must be overruled, and judgment be entered on the verdict.*

The liquors being libelled, they were claimed by Robinson. They were condemned, and he appealed to this Court. He entered his appeal at the next term of the Court for criminal business, where it was tried.

Upon the trial, it was contended by his counsel, that the case upon the libel was a *civil* action, and that the Court for *criminal* business had no jurisdiction of it.

Though the proceeding against the liquors is *in rem*, it is of a criminal nature. The gravamen of the charge is, that they were intended for unlawful sale. The libel is but a continuation of proceedings. And the statute itself provides that such appeals "shall be entered as all other appeals in criminal cases." Sec. 24.

The jury were sworn "well and truly to try the issue between the State and the claimant."

The process being a criminal one, the party prosecuting

is the State. The libel is really in behalf of the State, though the statute form does not require it to be so alleged. Any person claiming the liquors must make a written statement of the foundation of his claim, denying the allegations in the libel. The issue is between him and the State. The proper oath was administered to the jury.

Among the liquors seized were four baskets of champagne wine, which a witness for the libellant testified to have been, in his opinion, imported; and he further testified that he believed them to be original packages, and that they had never been opened. The jury were instructed that, if they were imported under the revenue laws of the United States, and were original packages, unopened, and the claimant intended to sell them in this State in such packages, and not otherwise, he had shown no right to do so; and that such a sale, upon the evidence in the case, would be in violation of law.

Upon this point, the line of division between the power of the federal government and that of the State, has been settled. Under the power granted by the constitution to regulate commerce with other nations, Congress may authorize a person to import intoxicating liquors, and to sell the same in the original packages. But here the power of Congress ceases, and the jurisdiction of the State begins. *Brown* v. *the State of Maryland*, 12 Wheat., 262. No one but the importer himself has the right to sell, except as allowed by the laws of the State; and he can sell only in the original packages. The power of the State is plenary to regulate or prohibit all sales, except such as are thus made by the importer himself. Those who purchase from him have no such right to sell. *The License Cases*, 5 How. 504.

It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had

shown no right to sell, were correct; and *the exceptions must be overruled.*

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

THOMAS J. HOWARD, *Executor, in Equity, versus* THE AMERICAN PEACE SOCIETY, *& als.*

Heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication.

Extrinsic evidence is admissible to aid in giving a construction to devises or bequests in a will, and to show what property was intended to be devised, and what person was intended to take: —

1st. When the description of the thing devised, or of the devisee, is clear upon the face of the will, but upon the death of the testator, it is found that there are more than one estate or subject matter of devise, or more than one person, whose description follows out and fills the words used in the will; —

2nd. When the description of the thing intended to be devised, or of the person who is intended to take, is true in part, but not in every particular.

Thus, such evidence is admissible to show that by a bequest to "*The Congregational Society of Auburn*," the testator intended "*The First Congregational Society in Auburn;*" and that by a bequest to "*The Congregational Foreign Missionary Society*," the testator intended "*The American Board of Commissioners for Foreign Missions.*"

When the name used in a will does not designate with precision any person, and the circumstances concur to indicate that a particular person was intended, and no similar conclusive circumstances appear to distinguish any other person, the person thus shown to be intended will take.

The general provisions of the statute of charitable uses (43 Eliz., c. 4) are in force in this State, not as the basis of the equity power of the court in cases of trusts, but as incorporated into our chancery jurisprudence.

A bequest to "*the suffering poor of the town of Auburn*" is not void for uncertainty; nor because no trustee, to execute the trust, is expressly named in the will.

Under our statute (R. S. c. 87, sec. 8, par. 7) the Supreme Court is authorized to determine from all the provisions of a will, and from extrinsic evidence, whether the testator intended that the executor not expressly appointed trustee, should act as such.

Howard *v.* The American Peace Society.

A bequest to the Congregational minister of the Congregational society of the town of Auburn, absolute and subject to no contingency, there being none at the date of the will, will apply to the person who first became such in the legal sense of the term.

It will not be held to apply to a person who preaches to that society temporarily, but only to the regularly settled pastor.

BILL IN EQUITY to determine the legal construction of the will of Edward Crafts, which contains the following provisions:—

"1. I give and bequeath unto the Congregational Foreign Missionary Society one-third part of all my personal property.

"2. I do also give and bequeath unto the American Peace Society one-third part of my personal estate.

"3. I also give and bequeath unto the suffering poor of the town of Auburn one half of the remainder of my personal estate.

"And I further give the Congregational Society of Auburn the income of all my real estate.

"And lastly, as to the residue of my personal estate whatever, after payment of all my just debts, I give and bequeath the same to the Congregational minister of the aforesaid society of the town of Auburn.

"And lastly, I appoint Thomas J. Howard, the executor of this, my last will and testament."

The case is stated in the opinion. It was argued in writing, by *E. Shepley* for the American Board of Commissioners for Foreign Missions.

S. & D. W. Fessenden, for the heirs at law and the American Missionary Society.

Shepley & Dana, for the First Congregational Society in Auburn and the American Peace Society.

The opinion of the Court was drawn up by

TENNEY, C. J.—On May 29, 1850, Edward Crafts, of Auburn, executed his last will and testament, in which he made certain devises and bequests, as set forth specifically

in the bill, and appointed the plaintiff the executor of the same.

On June 15, 1852, the will was admitted to probate by the Judge of Probate, for the County of Cumberland, as the last will of said Edward Crafts, and the plaintiff was duly appointed executor thereof, and entered upon the discharge of his trust by giving bond according to law.

An appeal was taken by some of the heirs at law of the testator, from the decree of the Judge of Probate, approving said will, to the Supreme Judicial Court, and they prosecuted their appeal therein, upon which such proceedings were had that the instrument was adjudged and decreed to be the last will and testament of Edward Crafts.

This is a bill in equity brought by the executor, as such, in which he prays that the respective rights and interests of the parties claiming under the will may be adjusted and determined; and he shows that he has proceeded in the settlement of the estate, and holds in his hands a balance amounting to the sum stated in the bill that remains to be distributed, after paying all the claims, which have been presented against the estate, and that, at the decease of the testator, he was seized and possessed of certain parcels of real estate, situate in the State of Maine, as described in the inventory of the estate.

And the plaintiff says, that, owing to the uncertain terms in which the will of the testator is expressed, the intention of the testator is a matter of doubt, and that he cannot safely pay over or deliver to any person or corporations the legacies and bequests named in the will, until it is settled, upon a full examination of the several matters, who is justly entitled thereto.

The plaintiff charges, that the "American Board of Commissioners for Foreign Missions," a corporation, whose office is at Boston, claim to be the legatees named in the first clause in said will, wherein one-third part of the personal property of the testator is bequeathed to the "Congregational Foreign Missionary Society." And that the Ameri-

can Peace Society," a corporation, whose office is at Boston, claim one-third part of said personal estate, under the second clause of the will. And the plaintiff and others, selectmen and overseers of the poor of the town of Auburn, claim that they or some trustee, to be appointed by the Court for that purpose, are entitled to one-sixth part of said personal estate, under the third clause of the will, to hold the same in trust for the suffering poor of the town of Auburn, or that the executor should hold the same as trustee to execute the trust aforesaid; and the plaintiff further shows, that the "First Congregational Society in Auburn," a religious society, incorporated under the provisions of the statutes of Maine, claim to be the devisee in fee, under the fourth clause of the will. And that Rev. John Elliot of Auburn, and the Rev. Thomas N. Lord, each, severally claim to be the residuary legatee under the last clause of the will. And the plaintiff further charges that Martha Howard, and others named, claim as heirs at law of the testator, that some or all of the devises and bequests in the will are invalid and void for uncertainty, and that they are entitled to a residue of said estate, which they claim as not having been specifically devised or bequeathed by any valid and certain provision in the will.

None of the heirs at law of the testator are named in the will as devisees and legatees therein. The heirs at law are not to be disinherited by conjecture, but only by express words, or necessary implication. *Thomas* v. *Thomas*, 6 Term Rep. 671.

It is perceived, from the foregoing, that the "American Board of Commissioners for Foreign Missions" claim the bequest made to the "Congregational Foreign Missionary Society," and that the "First Congregational Society in Auburn" insist that that society is intended by the name of the "Congregational Society of Auburn," as it appears in the will, and that John Elliott and Thomas N. Lord, severally claim to be residuary legatees in the will, as the Congregational minister of the aforesaid society, of the town of

Auburn. And that the selectmen and overseers of the poor of Auburn are the trustees, to represent the "suffering poor of said Auburn," as the *cestuis que trust.*

Certain legal rules have been adopted by Courts in such cases, as are here presented, touching the admission and exclusion of parol evidence, to aid in giving a construction to devises and bequests in a will, and the effect of such evidence as is competent.

In the case of *Miller* v. *Travers*, 8 Bing., 244, it is said, by TYNDAL, J.,—"It may be admitted, that in all cases in which a difficulty arises, in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, "*Ambiguitas verborum latius, verificatione suppletur.*" But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other. The first is where the description of the thing devised, or of the devisee, is clear upon the face of the will; but, upon the death of the testator, it is found that there are more than one estate or subject matter of devise, or more than one person, whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and, at his death, it is found that he has two manors of that name, South Dale and North Dale; or, where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in

part but not in every particular. As when an estate is devised, called A, and is described as in the occupation of B, and it is found that, though there is an estate called A, yet the whole is not in the occupation of B; or, where an estate is devised to a person whose surname or christian name is mistaken, or whose description is imperfect or inaccurate; in which latter class of cases, parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

The foregoing rules are supported by the authority of cases previously adjudged. In *Dean* v. *Page*, referred to in the case of *Hay* v. *Earl of Coventry*, the Court held, "that sufficient did not appear on the face of the will, to warrant them in saying that an estate of inheritance was given to the daughter; that, if it were left to conjecture, they might suppose that some mistake might be made in the limitation, but they would not determine on conjecture, or put into the testator's mouth what he had not said."

In 4 Russ. Rep., 581, it was held that "evidence of collateral circumstances was admissible, as of the ages of several devisees named in the will; of the fact of their being married, or unmarried and the like, for the purpose of ascertaining the true construction of the will. But it is very clear that such evidence is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family. The evidence is introduced to prove facts, which, according to the language of Lord COKE, 8 Rep., 155, stand well with the words of the will."

It is a maxim of the law in such matters that *falsa demonstratio non nocet*, "but," says Lord KENYON, in *Thomas* v. *Thomas*, before cited, "I have always understood, that such *falsa demonstratio* should be added to that which was sufficiently certain before."

The rule laid down by ANDERSON, C. J., in Gadb. Rep.,

131, is, "an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator."

The cases of *Standen* v. *Standen*, 2 Vesey, Jun., 589, and *Selwood* v. *Mildmay*, 3 Vesey, Jun., 306, illustrate the rules which have been referred to, where parol evidence is admissible.

In the case of *Beaumont* v. *Fell*, the name of the legatee was mistaken. The testator gave a legacy to Catherine; it turned out there was a person whom he frequently called Gatty, and not according to her real name, which was Gertrude; and, when parol evidence of that was received, it left no doubt but that the testator meant Gatty. *Thomas* v. *Thomas*, before cited, 676, 677.

It is said, in *Miller* v. *Travers*, 8 Bing., 244, "an uncertainty which arises from the applying the description contained in the will to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject matter of devise, or a new devisee, when the will is entirely silent upon either, cannot be imported by parol evidence into the will itself."

In the case of *Allen* v. *Allen*, 12 Adolph. & Ellis, 451, it was held that parol evidence of the declarations of the devisor, that she had left her property to her grandson, who had only one brother and sister, were admissible to show which grandson should take under the devise. And it was no objection to such evidence, that the declarations were subsequent to the making of the will. In the opinion of the Court, Lord DENMAN, C. J., says,—"It is within the very terms of the only case in which, according to the opinion of the Court of Exchequer, thrown out in their judgment in *Doe dem*, *Hiscocks* v. *Hiscocks*, declarations of the testator can be received in evidence of intention. In the whole list of cases on this subject, no one can be found in which such evidence, under such circumstances, has been excluded."

It is believed that the authorities in this country, which

have been relied upon by both sides in argument, are in harmony with the English doctrine on this subject, which has been adverted to in the cases cited. In the case of *Tucker & als., Ex'rs*, v. *Seaman's Aid Society & als.*, 7 Met., 188, where the same matter is very fully discussed by C. J. SHAW, with his usual ability, in giving the opinion of the Court, he says,—"In general, no extrinsic evidence of the intention of the testator is admissible to control or alter the written provisions of a will. It would be contrary to the general rule of the common law, viz.: that when a party has expressed his contract or his testament in writing, duly executed, such writing is in its nature better evidence of his intentions than any extrinsic evidence could be. But another and more conclusive reason is, that the law requires a will to be executed in the presence of three witnesses, and with other solemnities, calculated to insure correctness and guard against mistake and imposition."

Again, it is said in the same case, "the general rule certainly is, that the intent of the testator is to govern in the construction; but it is the intention expressed by the will, and not otherwise. To get at the intention expressed by the will, every clause and word are to be taken into consideration, because one clause is often modified and explained by another; every implication and every direct provision is to be regarded. And further; as a will must necessarily apply to things external, any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the words of the will; such as the names, descriptions and designations of persons, the relations in which they stood to the testator, the facts of his life, as having been single or married one or more times, having had children by one or more wives, their names, ages, places of residence, occupation; so of grandchildren, brothers and sisters, nephews and nieces, and all similar facts. If then, when the will comes to be thus applied, there is no reasonable doubt as to the person and things intended, there is no room for any further admission of evidence to show the in-

tent of the testator." "If, in the matter of description, there is a mistake, that is, if there is no one who corresponds to the description, in all particulars, but there is one who corresponds in many particulars, and no other who can be intended, such person will take."

"Still, however, there is a well defined class of cases, wherein extrinsic evidence of the actual intention of the testator is admissible, which is that of equivocation or latent ambiguity." "But when the will clearly describes a particular estate, and names a person in being, who is the object of the testator's bounty, it was early held as a legal construction of the statute, that, from the *necessity* of the case, extrinsic evidence must be admitted to show which was intended."

"The principle established by the cases is, that the estate must pass by the will. If the will applies definitely to two or more persons, so that either would be entitled to take it, under the will, but for the existence and claim of the other, then parol evidence is admissible to prove which was intended. When that proof is supplied, the will operates by its own force and terms, to give the property to that one as if such person had been the only one named or described. The evidence does not create the gift, but simply directs it."

It remains to apply these principles to the devises and bequests in the will, and to the legal evidence in the case.

The bequest to the "American Peace Society," is to a body corporate of that name, which existed at the time the will was executed, and, for aught which appears to the contrary, continues its existence to the present time. No question is made of the right of this corporation to take under the will, but all interested in that legacy consent thereto.

The "First Congregational Society in Auburn" appears to have been formed as a corporation by virtue of the statute of 1841, c. 18, § 1, in the year 1844. It is objected, however, in behalf of the heirs at law of the testator, that the first meeting was not held according to the provisions of that Act, inasmuch as the place and time of that meeting

was not named in the notice therefor. On inspection of the records, this objection does not rest upon any fact. The return of the notice given by the person directed to notify the parties interested, refers to another paper, and that paper was the warrant, manifestly on the same sheet on which the return was made. By authority of the statute, the warrant and the return of notice, the meeting was held and the parish organized, pursuant to the statute, under the name of the "First Congregational Parish in Auburn." In the constitution subsequently adopted and signed by the members of the parish, according to the statute, the corporation was to be known as the "First Congregational Society in Auburn." The records of this society, of which copies have been introduced from its first formation, to the latter part of the year 1858, show that the organization has been kept up, and the existence of the society continued. And it appears also, that on May 29, 1850, the day on which the will was executed, the society had a place for regular meetings and of worship.

The evidence shows that, at the time of the execution of the will, there was no other Congregational society in the town of Auburn, excepting the one referred to in the copies of the records. There being no other claimant for this bequest, the case is analogous to that of *Minot & al., Ex'rs.*, v. *The Boston Asylum and Farm School for Indigent Boys & als.*, 7 Met., 416, where the defendants were held to be entitled to the devises and bequests made to the "Boys' Asylum and Farm School." "The First Congregational Society in Auburn" are adjudged and decreed to have been intended by the testator in the bequest to the "Congregational Society of Auburn," and are entitled to take accordingly.

It is proved that the "American Board of Commissioners for Foreign Missions," is a corporation, created by the Legislature of Massachusetts more than thirty-five years ago, having its principal place of business in Boston, in the Commonwealth of Massachusetts, and has done a large

amount of business; has been employed to obtain and receive donations, and to appropriate them to impart the Holy Scriptures to unevangelized nations, and for the support of persons to teach and preach the gospel in foreign lands, and to labor there as missionaries, and for purposes connected therewith. That the society has, during that time, by its own agents, by ministers of the gospel, and others, made known extensively its proceedings and wants, and has solicited donations and received bequests from Congregational churches and societies, and their members. That there did not exist within the United States, on or before May 29, 1850, any society or association, known or designated as the "Congregational Foreign Missionary Society;" and that the American Board has received donations from the Orthodox Congregational societies in Auburn, Lewiston, and Minot.

It is further proved, that the plaintiff in this bill prepared the will, which was executed by the testator on May 29, 1850,—that, before that time, he and the testator had known of the existence of a society and its proceedings, as employed to obtain and receive donations from Congregational societies or churches, or from their members, and to appropriate them to the support of foreign missions, so far that a collection for the support of foreign missions was taken up monthly in the "Congregational Society in Auburn," and the wants and proceedings of such society had been made known publicly to the Congregational societies in Auburn and Minot; that the Congregational meeting house in Auburn was distant from the testator's residence about seventy-five rods, and a part of the time about twenty rods; the meeting house in Minot about three miles, and the meeting house in Lewiston five or six miles from the testator's residence. That the plaintiff and testator, before the execution of the will, had had conversation together touching such society and its proceedings, which was known to the latter. That the plaintiff had no knowledge of any other society as soliciting and receiving donations from Congregational societies, or their members, for the support of

foreign missions, nor did he know that the testator had any such knowledge. That the plaintiff was desired by the testator to insert a clause in his said will for the purpose of giving one-third of all his personal property to the society, whose proceedings, as before mentioned, had become known to him, and, in compliance with such desire, the plaintiff did insert the first bequest in said will as it was executed by him. That, at that time, the corporate name of such society had not been made known to the plaintiff, nor did he know that the testator had knowledge thereof. That, at the time the plaintiff drew the will of the testator, the testator spoke of the foreign missionary cause as being a worthy object, and what money he had, he said, he thought he had a right to dispose of as he thought proper; he also spoke of the "Congregational Foreign Missionary Society" in contradistinction to the missionary societies of the Methodists and the Baptists, which he named.

From this evidence alone, we should entertain no doubt that the American Board of Commissioners for Foreign Missions was intended by the testator. But it is shown that the form of church government in the Calvinistic Baptist churches is congregational, and that among them are two Foreign Missionary Societies, one at the North and another at the South. The former, called the "Baptist Missionary Union," has existed many years and has for its object a work very similar to that of the "American Board"; but we are satisfied, from the evidence, that it has never been styled a "Congregational Foreign Missionary Society;" nor are their churches known by the name of "Congregational churches." It has been further shown that there is in New York a corporation called the "American Missionary Association," having for its object the receiving and distributing of moneys, contributed for missionary purposes in this country, and in foreign lands, for the publication of a paper entitled the "American Missionary," and other papers and pamphlets of a missionary character, and for the propagation of the gospel of Christ, in its peaceful and anti-slavery character.

The principal place of business is in New York. That it was a voluntary association from Sept., 1846, to Feb. 1, 1849, when it became a body corporate; that it has transacted a large amount of business yearly; that, since its incorporation and before, it has been employed to obtain and receive donations, and to appropriate them to impart the Holy Scriptures to unevangelized nations, and to support persons to teach and preach the gospel in foreign countries, and to labor there as missionaries; and that it has procured the scriptures to be distributed and the gospel to be preached in this country as in foreign and unevangelized ones. That, during the period mentioned, the association, by its own agents, ministers of the gospel and other persons, have made known extensively through the whole of the free States, excepting California, and some of the slave States, the employment of the association, and has solicited donations from Congregational societies and churches, and received donations and bequests from their churches and societies. That, before May 29, 1850, the association had received donations from persons in North Auburn, the sum of two dollars and fifty cents; and, from persons and Congregational churches and societies in a large number of other towns in the State of Maine, other donations. That the donation from Lewiston Falls was from the "Female Anti-Slavery Society," in Sept., 1848, and consisted of clothing, valued at seven dollars. That soon after the organization, in 1846, the association began to publish and has ever since continued to publish a monthly paper, called the American Missionary, setting forth, among other things, the objects, doings and necessities of the association, which has been extensively circulated.

It is very manifest that, at the time of dictating his will, the testator did not intend that the bequest to the "Congregational Foreign Missionary Society," should be for the benefit of any Methodist or Baptist society, inasmuch as the subject of this bounty was expressly contra-distinguished from the latter societies.

But it is insisted, that there is an uncertainty whether the American Board, or the American Missionary Association was intended by the testator, in the clause which we are now considering, to such an extent, that the bequest must be treated as void for that reason.

This, then, may be regarded as a case where the name used in the will does not designate with precision any person or corporation. We must then apply the rule before adverted to, that "when the circumstances come to be proved, so many of them concur to indicate that a particular person was intended, and no similar conclusive circumstances appear to distinguish and identify any other person, the person thus shown to be intended will take."

It is very clearly proved that, before the execution of the will, the testator had known of a society and its proceedings, which obtained donations from Congregational churches, to support foreign missions, and that monthly collections were taken in the Congregational society in Auburn, and that the wants and proceedings of such society had been made public in the Congregational societies of Auburn and Minot, both of which were near the residence of the testator; that he had spoken of the proceedings and wants of such society, for the benefit of which he caused the bequest, that we are now considering, to be inserted in the will. And it is proved that the American Board had received, before May 29, 1850, for many years, donations from the churches and societies in Auburn, Lewiston and Minot, thus identifying the society whose wants and proceedings had been made known to the testator, with that board.

No evidence is adduced that the testator had any knowledge of the "American Missionary Association," or a society corresponding therewith, in its objects and efforts.

It is very manifest that the testator entertained the intention to bestow his bounty upon a missionary society, whose purpose was to spread the gospel in foreign countries. This is the distinguishing object of the American Board, and, from the evidence, we infer, that the legitimate opera-

tions of that society are confined thereto. On the other hand, the American Missionary Association has the purpose of propagating the gospel, not only in foreign lands, but in our own country, "in its peaceful and anti-slavery character." Hence, with greater propriety can the American Board be called a "Foreign Missionary Society," than can the "Missionary Association." We have no evidence that the testator was disposed to appropriate means for home missionary enterprises, or for the lessening of the evils of slavery.

When all the evidence is examined, we cannot doubt that the "American Board of Commissioners for Foreign Missions" was the society intended by the testator as the legatee, in the first bequest in his will, being a body corporate, well known in its various action for foreign missionary purposes, though its corporate name had not come to his knowledge. And it is adjudged and decreed accordingly.

The third bequest in the will, "unto the suffering poor of the town of Auburn," though not the subject of argument, in behalf of the persons referred to, demands the attention of the Court. In the preamble of the statute of 43 Elizabeth, c. 4, generally denominated the statute of charitable uses, among the uses enumerated as charitable, are gifts, devises, &c., for the relief of aged, impotent and poor people. And it has been decided in this State, that the general provisions of this statute are in force here. The jurisdiction, however, of this Court, over trusts, is derived from R. S. of 1841, c. 96, § 10, and R. S. of 1857, c. 77, § 8, and hence the provisions of the statute of Elizabeth are not the basis of the equity power in cases of trusts, and the Court is not restricted thereby, but the statute is rather incorporated into our chancery jurisprudence. *Tappan* v. *Deblois*, 45 Maine, 122.

Is this bequest void for uncertainty, and does it fail because no person is named in the will as having the express power to execute the trust implied? It cannot be doubted, that the testator, at the time he dictated his will, had in his

mind a distinct class of persons, who should be the objects of his bounty, as their necessities, expressed in the will, should from time to time be disclosed. And this class, in his contemplation, was composed of those who should be compelled to submit to privations, but who were not expected by him to seek or receive relief under the pauper laws of the State. If he had reference to the class last referred to, the bequest would really be to the town of Auburn, in its corporate capacity, and would not be for the benefit of those, who, from feelings of sensibility or other causes, would prefer want, to some extent, to aid from public charity, and who were really intended by him. This provision in the will was the result of a laudable desire to supply the wants of those in a humble pecuniary condition, and prevent the necessity for a call upon the municipal authorities to relieve their sufferings; and should not fail, unless for substantial reasons.

The case of *Attorney General* v. *Syamfer*, 1 Vern., 224, was where the testator gave £1000 to such charitable purposes as he had, by another writing, directed. The paper referred to was lost, so that the bequest stood as a gift to charitable uses. The trust was established, and the direction to a particular object left with the king, as *parens patriæ*.

Ann Cane made her will, and, after making several bequests therein, gave all the rest and residue of her personal property unto James Vaston, to such charitable uses as he should appoint, recommending poor clergymen who had large families and good moral characters. James Vaston died in the lifetime of the testatrix. The charity was sustained and executed by the Court, the Lord Chancellor saying, "the most general gift to charitable purposes has been decreed to be carried into execution, and the trustee, not being alive to administer the charity, cannot defeat the intention. Here she has pointed out clergymen as the objects of her bounty, which is sufficiently distinct." *Moggridge* v. *Thackwell & als.*, 3 Bro. C. C., 517.

The case of *White* v. *White & al.*, 1 Bro. C. C., 12,

was where the testator gave a moiety of the residue of his property to such lying-in hospital as his executor should appoint. The Lord Chancellor remarked,—"I remember to have read a case somewhere, where a legacy was given to B, for the benefit of non-conforming ministers, with the advice of C and D. At the testator's death, B, C and D were all dead, yet the Court sustained the legacy." And it was referred to a master to see unto which of the lying-in hospitals it was fit it should be paid.

A bequest was made to the poor inhabitants of St. Leonards, and the trust was supported. *Attorney General* v. *Clark*, Ambler, 422. The same was done where the gift was to poor dissenting ministers, living in any county. *Waller* v. *Childs*, Ambler, 524.

The Court of Chancery will aid a defective conveyance to legal charitable uses. *Case of Christ's College, Cambridge*, 1 W. Black., 91.

The same general question was considered by the Supreme Judicial Court of Massachusetts, when the District, which is now the State of Maine, was a part of that Commonwealth, in the case of *Bartlett & al.* v. *King*, 12 Mass., 537. And it was held, that a bequest to promote the propagation of christianity among the heathen, to persons who at the time constituted a voluntary association, and in trust for pious and charitable uses, was not void, as against public policy, for uncertainty, nor for the reason that there was no Court in Massachusetts at that time to compel the execution of such a trust. It was remarked, by DEWEY, J., who delivered the opinion of the Court, that "it does not seem to be necessary that there should be any particular or certain persons designated, who are strictly *cestui que trust*, in the common use of the term." "In trusts of this kind, the individuals who are ultimately benefited, are always uncertain. All the certainty required is a general description or limitation, and not a particular description of the individuals. On this ground, therefore, we do not perceive any more difficulty in giving effect to the bequest, than exists in

all cases, of donations to charitable uses; whether given to trustees directly, or in trust for other trustees, to be expended in promoting the objects for which they are given."

Going v. *Emery*, 16 Pick., 107, was a case where a residue of the testator's estate, after making certain devises and bequests, was bequeathed to the cause of Christ, for the benefit and promotion of true evangelical piety and religion. It was held that, by virtue of the statute of 43 Eliz., c. 4, the devise was not void for uncertainty.

The will of the late Mary Preble was before this Court, in the case of *Deering* v. *Adams*, 37 Maine, 264, and in a certain contingency the estate of the testatrix was given and appropriated to constitute a fund, the interest of which was to be applied for the benefit of the poor of Portland and vicinity. This part of the will is adverted to in the opinion of the Court, and no suggestion made that the devise would be void for uncertainty.

The authorities, which have been referred to, well sustain the bequest to the suffering poor of the town of Auburn; so that it cannot be treated as void for uncertainty.

We now advert to the other inquiry, whether this bequest must fail because no trustee is named in the will, and because there is no indication that one should be appointed to take charge of the fund. Assuming this to be true, the authorities cited fully establish the doctrine, that the bequest shall not therefore fail, and in addition, on this point, we refer to the following: — *Saunderson* v. *Stearns*, 6 Mass., 37; *Stone* v. *Hobart*, 8 Pick., 464; *Hall* v. *Cushing*, 9 Pick., 395; *Nash* v. *Cutler*, 19 Pick., 67.

An important question is now presented in relation to the duty of the plaintiff, as the executor of the will, touching this bequest. The donation is limited to a class of persons who are designated in such a mode that they can be ascertained by their pecuniary condition alone. To make the provision effectual, some one must perform this duty. Persons may be found in the town of Auburn, who would be legitimately embraced in the provision, and such may be

their situation, that the relief from their sufferings might require the whole amount referred to in the will. In such case, the entire legacy might not be improperly distributed at once. But if this should not be found to be the state of this class of individuals, no violence is done to the language of the will by giving it such a construction, that the fund provided may be invested and the income distributed according to the testator's general direction; or, if no persons should be found answering to his description of persons, the fund might accumulate.

The statute provides, in c. 87, § 8, head 7, that this Court have equity jurisdiction to determine the construction of wills, and whether an executor, not expressly appointed a trustee, becomes such from the provisions of the will. It is very manifest that some designation of individuals must be made. If this is not to be done by the executor, it must be by a person appointed a trustee, to execute the trust.

In looking at the whole will, and to the evidence in the case, it cannot be doubted that the testator had confidence in the ability, judgment and discretion of his executor. If it should be found that it would be proper, in the opinion of the executor, for the reasons before stated, that this donation should be passed at once to the suffering poor of the town of Auburn, he might, with propriety, discharge his duty by the distribution of the whole sum. If otherwise, he might make the investment and distribute the income and, perhaps, a portion of the principal, till the aggregate should reach the whole, as circumstances might require. And we are of the opinion that the testator intended that his executor should execute this trust.

We have seen that two individuals claim as residuary legatees under the will, each the whole of the residuum, as the "Congregational minister" of the "Congregational Society of Auburn."

It appears from the evidence that no one was holding such a relation to that society, in any sense of the term, at the time the will was executed. Hence, the testator cannot be

supposed to have had in his mind any particular individual. And it follows from this that this provision had respect to a time then future, when there should be a minister of that society; and, it being absolute and subject to no contingency, whenever it should vest, it must apply to the one who should be the minister of the society, and who should first become such in the legal sense of the term.

The Rev. John Elliot claims this legacy. It appears, by evidence in the case, that he commenced to preach to that society the first of March, 1850, and continued to do so, till about the first of August, 1851. The only reference to him in the records of the society, is a vote passed at its meeting on August 24, 1850, which is as follows:—"Voted, that we instruct our committee to extend an invitation to Rev. Mr. Hawes, to preach two Sabbaths, also employ Rev. (Mr.) Elliot to preach until we can obtain some other man, or until we can agree on some other person to settle with us." It cannot be supposed that Mr. Elliot was the minister of the society, in the opinion of the testator, for, if he were such, the bequest, it would seem, would be made to him by name, as Mr. Elliot was employed there when the will was executed.

Rev. Thomas N. Lord also claims, as residuary legatee, under the will. The evidence shows that he was the acting *pastor* of the church and society of the "First Congregational Society in Auburn," for six years preceding July, 1857, and the settled pastor since October, 1858, and that he was installed as such on October 27, 1858. By the records of the society it appears, that the society was duly notified that a meeting thereof would be holden on October 13, 1851, and one article was to see if the parish will coincide with the First Congregational Church in Auburn, in extending a call to Rev. Thomas N. Lord, to become their pastor. And, at the meeting so notified, it was voted to concur with the First Congregational Church in Auburn in extending a call to Rev. Thomas N. Lord to become their pastor.

The records show also, that, upon proper notice, a meeting of the society was held on Oct. 19, 1858, to act upon the following articles in the call, among others,—"To see if the society will concur with the church, in extending a call to Rev. Thomas N. Lord, to become their pastor," and "to see if the society will choose a committee to act in concert with the committee in calling a council for installation of the Rev. Thomas N. Lord." And it was voted, that the society concur with the church in extending a call to Rev. Thomas N. Lord to become their pastor, and chose C. S. Packard a committee in behalf of the society to act in concert with the committee in calling a council for the installation of the Rev. Thomas N. Lord.

It appears further from the records, that a meeting of the society was duly called, to be holden on Dec. 25, 1854, and, among other things, was the article in the call to see if they will give their agent, Mr. Asa Holmes, any further instructions relative to the late Edward Crafts' bequest, made and pertaining to the minister of the First Congregational Society of Auburn, and at the meeting it was voted,—"Agreeably to notice, instructed Mr. Asa Holmes, agent of said society, to present the claims of Rev. T. N. Lord, to the proper authorities, in behalf of the bequest to him, by the late Edward Crafts of Auburn, deceased."

The records disclose no invitation to any other person to become the pastor of the church and society, or either, from the date of the will to the installation of Mr. Lord, and there is nothing in the records, or evidence, that, during that time, any other person was recognized by the church or society as being the minister of that society.

Rev. Thomas N. Lord, we think, is entitled to take under this clause of the will, and it is so decreed.

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

COUNTY OF ANDROSCOGGIN.

JABEZ T. WATERMAN, *Adm'r*, *versus* EZEKIEL TREAT.

Where an officer attaches personal property, and delivers it to a receipter, taking a receipt for the re-delivery of the property *or* the payment of a sum of money, the attachment is thereby dissolved.

No subsequent valid attachment can be made, in such case, without a new seizure of the property. And the receipter is not liable upon the receipt for an attachment of the same property, returned upon a new writ, on the next day, but antedated so as to correspond with the receipt, although, at the time the receipt was given, it was expected that the new writ would issue, upon which the property was to be attached.

ON REPORT.

ASSUMPSIT upon a receipt given to plaintiff's intestate to release certain property from an attachment made by him.

The case is stated in the opinion.

David Dunn, for plaintiff.

Record & Luce, for defendant.

The opinion of the Court was drawn up by

APPLETON, J. — On the 28th April, 1854, Benjamin Dunn, the original plaintiff in this action, attached, as a Deputy Sheriff, one hundred and fifty thousand pine logs, valued at seven hundred dollars, on a writ in favor of *Stillman Noyes* v. *William Morse*, and on the same day took the defendant's receipt therefor.

On the 29th April, two writs in favor of *Asa Kimball*, and *Asa Kimball & al.* v. *Morse*, were placed in Dunn's hands, upon which he returned the same logs as attached, subject to the prior attachment on the writ of *Noyes* v. *Morse*. It is agreed, that these writs were made on 29th of April,

but antedated as of the preceding day, as were the several returns thereon.

Judgments were recovered in the suits, *Kimball* v. *Morse*, and *Kimball & al.* v. *Morse*, and the executions issued thereon were seasonably placed in the hands of Dunn, by whom they were returned unsatisfied. Suits were then brought against him for official neglect, in which judgments were rendered against him, which he has satisfied.

The execution, *Noyes* v. *Morse*, has been paid by the defendant to the plaintiff, being the officer having the execution, and the question here presented is, whether the officer, by his attachment made in fact on 29th April, and *after* the receipt was given, acquired a lien thereby on the goods attached, which he can enforce against the receipter, there having been no actual seizure of the goods by him when the second attachment or alleged attachment was made.

The apparent discrepancy in the different decisions as to the liability of receipters will, on examination, be found to arise from the difference in the words used. A material variation in the forms adopted by different officers will require adjudications correspondingly variant.

The defendant promised "to pay Benjamin Dunn, deputy sheriff, or his order, seven hundred dollars on demand, *or* to re-deliver the goods and chattels following, viz.:—One hundred and fifty thousand pine logs of the value of seven hundred dollars." This promise, it will be perceived, is in the alternative. The receipter has the right to elect which he will do. It has been repeatedly held, in analogy with *Buswell* v. *Bicknell*, 17 Maine, 345, that where the officer has attached goods on mesne process and has delivered them upon a written promise by the receipter to pay a given sum *or* to re-deliver them on demand, that the receipter has the election to determine which he will do, and that, consequently, the attachment is thereby dissolved. *Weston* v. *Dorr*, 25 Maine, 176; *Waterhouse* v. *Bird*, 37 Maine, 329; *Stanley* v. *Drinkwater*, 43 Maine, 468.

If, then, the attachment was dissolved on 28th April, the

goods were no longer in the custody of the sheriff, or in that of the defendant as his servant. The subsequent attachment created no lien on the logs. There was, in fact, no seizure of the property returned as attached, on any writ save on that first issued.

It was undoubtedly understood and expected on the 28th April, when the receipt was given, that other writs would be issued, in which the logs were thereafter to be attached. But such understanding and expectation created no attachment. *Plaintiff nonsuit.*

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT.

1860.

COUNTY OF SOMERSET.

ZACHARIAH TUFTS *versus* JOSEPH SHEPHERD *& als.*

As a note, made for the accommodation of the payee, has no validity, as a contract, until it has been negotiated, the retention of more than the legal rate of interest will be usurious, where the person discounting it knew the purpose for which the note was made.

And the makers may show the usury, in a suit against them, by such indorsee, or by another person who received the note from him after it was dishonored.

Where such a note, payable in one year, was negotiated on the day after its date, and the party purchasing it made an agreement with the payee, which was written on it, that "the note is to run a year and a day," the time of payment named in the note was not affected by the memorandum of the agreement.

And, even if the memorandum constituted a part of the note, the day of payment, by it, was within the year, and the three days of grace, until the expiration of which the note would not be due.

REPORTED from *Nisi Prius*, TENNEY, C. J., presiding.

THIS was an action of ASSUMPSIT against the defendants, as makers of two promissory notes, which were dated January 30, 1856, each of which was for the sum of $500, and was payable to the order of Reuben Flanders, in one year, with interest, and by him indorsed.

On the day after the date of the notes, Flanders sold them to one John Tufts, a brother of the plaintiff. He received for them $960, having agreed to allow Tufts interest at the rate of 10 per cent. The evidence in the case tended to show, that Tufts was informed, at the time of the purchase of the notes, that they were made for the accommodation of Flanders. Tufts agreed to wait one year from the day of his purchase of the notes for their payment; and made a memorandum on each of the notes in these words: — "This note runs one year and one day from date."

On the 27th day of February, 1857, Flanders paid $100 as interest, and Tufts made on each note an indorsement of that date, as follows: — "Rec'd one year's interest on the within."

The plaintiff obtained the notes of John Tufts a short time before September 4, 1858, when he commenced this action.

The defendants contended, that the notes were usurious; that, as they were made for the accommodation of said Flanders, to enable him to raise money, which fact was known to the said John Tufts, they stood in the position of sureties; that said Tufts, by extending the time of payment beyond one year, without the assent of the defendants, thereby discharged them from their liability; and that, as the notes had been dishonored before they were taken by the plaintiff, the same defence is now open to them as would be if the action was now prosecuted in the name of John Tufts.

Coburn & Wyman, for the plaintiff.

J. Crosby, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J. — The notes in suit were overdue when they were transferred to the plaintiff by John Tufts, to whom they were originally transferred by Flanders, the payee. The promisors can avail themselves of any defence against the plaintiff which would have been good against John Tufts, if he had not tranferred the notes.

There can be no doubt that John Tufts, when he received

the notes, knew that they were made by the defendants for the accommodation of Flanders. They, therefore, had no validity, as contracts, until they were discounted by him, and the retention of more than the legal rate of interest was usurious. *Knights* v. *Putnam*, 3 Pick., 184.

He discounted the notes the day after their date; and he agreed with Flanders to wait for payment one year and one day from the date. And, at the request of Flanders, he wrote upon the margin of each note—"this note runs one year and one day from date." It is contended that this was an alteration of the notes, and an extension of the time of payment. But the writing was evidently not intended to constitute any part of the notes. It was merely a memorandum of the agreement made between Tufts and Flanders. The time of payment was specified in the notes, and this would have been repugnant. But, construed as the evidence of the arrangement made by Tufts and Flanders, it agrees with the obvious intention of the parties.

Nor was this an agreement to extend the time of payment. The parties to it do not seem to have taken the days of grace into the account at all. This is apparent from the computation of interest. No days of grace were reckoned in the discount of the extra interest. The forty dollars reserved amounted to the interest for one year, and no more. The notes were therefore to be paid by Flanders in one year from that day. This agreement constituted no part of the notes, and did not, therefore, extend the time of payment beyond the days of grace. They were not due until one year and three days from their date.

The rights of the plaintiff being the same as those of John Tufts, he is entitled to recover nine hundred and sixty dollars, with interest thereon to Feb. 27, 1857, and, after deducting one hundred dollars from the amount, with interest upon the balance, to the date of the judgment. And the defendants are entitled to judgment against the plaintiff for their costs.

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

SKOWHEGAN BANK *versus* WILLIAM G. CUTLER.

In an action, brought on the statute, for aiding a debtor in the fraudulent transfer of certain property, an amendment will not be allowed of an additional count alleging a fraudulent transfer of other property under which the damages claimed were not in any part embraced in the first count.

The taking of a negotiable promissory note by the debtor, in settlement of a debt due him on account, even if done to prevent its attachment upon trustee process, is not a "transfer" within the meaning of that statute.

Nor would a transfer of the note, by indorsement, render the indorsee liable; for the note could not be attached, or sold on execution.

Where the name of a party was inserted in a transfer, as vendee, without his knowledge, if he afterwards ratified it, by accepting it, the transfer, until then inoperative, was perfected; and, if fraudulent, he is liable.

No transfer of a share of the capital stock of a bank will secure it from attachment, until it is entered on the books of the corporation "showing the names of the parties, the number of shares and the date of the transfer," according to sec. 11, c. 46 of R. S.

To hold the transferee liable under the statute, there must be proof that the transfer was thus recorded.

But this cannot be shown by the verbal statement of the cashier, if objected to; his testimony that "he made the transfer on the books of the bank" is inadmissible.

In order to bring any case within the statute, the sale should not only be consummated so as to be valid between the parties, but it should be so made as to be valid against all persons, except on the ground of fraud.

ON EXCEPTIONS, by defendant, to the ruling of GOODENOW, J.

The case was argued by

J. Crosby, in support of the exceptions, and by

Coburn & Wyman, *contra*.

The facts in the case are stated, or sufficiently indicated, in the opinion of the Court, which was drawn up by

DAVIS, J.—This is a special action on the CASE, charging the defendant with aiding and assisting his father, Lysander Cutler, in fraudulently transferring certain property to secure it from his creditors. The plaintiffs are creditors of

Lysander Cutler to the amount of several thousand dollars, and bring their suit under c. 148, § 49 of the R. S. of 1841; R. S., 1857, c. 113, § 47.

The writ originally contained but one count, alleging such transfer of six shares of the capital stock in the People's Bank to the defendant. Afterwards, on motion of the plaintiffs, and against the objection of the defendant, the writ was amended by adding another count, alleging that A. & P. Coburn were indebted to Farrar & Cutler, of which firm Lysander Cutler was a partner, in the sum of $585,68, upon account; that said Farrar & Cutler were indebted to the plaintiffs in the sum of $1200; and that said Lysander Cutler fraudulently procured a promissory note of said A. & P. Coburn for the amount due from them, and then fraudulently transferred said note by indorsement to the defendant to secure said debt from his creditors, whereby the defendant became liable to them for double the amount, being $1171,36.

The additional count is obviously for a new and entirely distinct cause of action, as much as a count for a different note in assumpsit, or for a different parcel of land in a writ of entry. It had no connection with the previous count. The damages claimed under it were in no part embraced in the first count. Such an amendment could not properly be allowed.

But the new count is clearly defective. Assuming that the fraudulent assignment of an account would be a transfer of property within the meaning of the statute, which is not admitted, Lysander Cutler had a right to take a negotiable promissory note for the debt due the firm; and, even if it was done to prevent its attachment upon trustee process, it was no "transfer" of property. Such note, when taken, could not be attached, or seized on execution; and a transfer of it by indorsement would not render the indorsee liable under this statute, however otherwise liable.

The new count, moreover, does not allege that the defendant aided or assisted in the transfer, or in any way par-

ticipated in the supposed fraud. For this, or for some other reason, the plaintiffs withdrew all claim under it before the case was submitted to the jury. The presiding Judge instructed the jury to disregard all testimony relating to it; and it appears from their verdict that they did so. The defendant not having been injured by the amendment, cannot claim a new trial because it was allowed.

In regard to the transfer of the bank stock, the plaintiffs introduced the certificates of Lysander Cutler's title, with his transfer thereof to the defendant upon the back of each. The defendant was a witness in his own behalf, and admitted the transfer to himself; but he denied that he had any knowledge of it until several days afterwards. It is argued, therefore, that he could not have aided or assisted in making it. But no transfer was perfected until the defendant accepted it, and thus ratified it. That he did this, he admits. This was aiding and assisting therein, and rendered him liable, if it was done fraudulently, as much as if he had participated in the transfer at its inception.

No transfer of such stock will secure it from attachment, until it is entered on the books of the corporation, "showing the names of the parties, the number of the shares, and the date of the transfer." R. S., 1841, c. 76, § 12; R. S., 1857, c. 46, § 11. The plaintiffs undertook to show that the transfer to the defendant was so entered on the books of the People's Bank. For this purpose, they offered the deposition of Sumner Percival, the Cashier, not taken upon written interrogatories, in which he testified that he "made the transfer on the books of the Bank." The defendant objected to the admission of this portion of the deposition, contending that the only proper evidence would be the books. But the presiding Judge admitted it, and ruled that it was legal evidence of the transfer, without the production of the books, sufficient for the consideration of the jury. The record of the transfer could not thus properly be proved by parol testimony. The verbal statement of the cashier was inadmissible; and, if it was incumbent on the plaintiffs to

prove that the transfer was recorded on the books of the Bank, in order to maintain their action, a new trial must be granted.

It cannot be necessary, in order to give creditors a right of action against a fraudulent vendee, that the sale should place the property beyond their reach. A fraudulent transfer, however perfect in form, is void as to them; and they may attach the property, or seize it on execution. A transfer recorded is no more valid against them than if not recorded, while the fraudulent purchaser holds the property.

But if, instead of seizing the property, they sue the fraudulent vendee, under the statute, they must prove a transfer. If the property consists of shares in a corporation, of which there can be no manual possession or delivery, they must prove a transfer in writing. And the vendee is not liable until such transfer is consummated, at least so as to be binding upon the parties to it. Need it be more? Would a deed of land, duly executed and delivered, but not recorded, render a fraudulent grantee liable to such an action?

In order to bring any case within the statute, we think, the sale should not only be consummated so as to be valid between the parties, but that it should be so made as to be valid against all persons, *except on the ground of fraud*. A transfer of bank stock is not thus valid, until recorded. Until that is done, a creditor may attach it, without alleging or proving fraud. Unless the transfer is recorded, therefore, he cannot be injured by it. There being no legal evidence in this case that the transfer was entered on the books of the bank, and parol evidence of that fact having been improperly admitted, the verdict must be set aside, and a new trial granted.

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

JOHN S. ABBOTT *versus* DAVID JACOBS.

The direction, "Mr. Officer, attach suf't," indorsed upon a writ, although it is not signed, is sufficient.

To render the officer liable for his neglect to attach property, it is not necessary that the execution should be put into the officer's hands, within thirty days after the rendition of judgment, if, before judgment, the debtor had become insolvent and had no property.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action on the CASE, against the defendant, as an officer, for neglecting to attach property on the plaintiff's writ against one *Leadbetter*, and was submitted to APPLETON, J., presiding at *Nisi Prius*, reserving the right to exceptions.

The direction indorsed upon the original writ was, "Mr. Officer, attach suf't," but was not signed. The officer made no return of property attached. Evidence was introduced to prove that, at the time, Leadbetter had attachable property much exceeding in value the amount which the officer was directed in the writ to attach.

Before judgment in that action, Leadbetter had failed, disposed of his property, and left the State. The execution which issued when judgment was rendered was not put into the hands of an officer.

The Court ordered judgment for the plaintiff. The defendant excepted.

Abbott, *pro se*.

Stewart, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The direction to the officer to attach property was sufficient. 19 Maine, 310. He having neglected to make any attachment, and the debtor having become insolvent before the judgment was recovered, it was not necessary to put the execution in his hands within thirty days, or

to have an officer's return that the debtor had no property. The liability has no analogy to that of the indorser of a writ. *Exceptions overruled.*

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

ABNER G. DEVOLL, *in Equity*, *versus* ENOCH SCALES *& al.*

Where a claim, on which an action had been brought, was settled, before the term of the Court was begun, and the plaintiff wrongfully entered the action, took judgment and execution, and long afterwards assigned the execution, the Court, exercising its equity powers, will grant a writ of injunction, to relieve the debtor in the execution against its enforcement.

BILL IN EQUITY.

Hutchinson, for the plaintiff.

Abbott, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.—This is a bill in equity, in which the plaintiff, Devoll, prays that the defendants may be enjoined from enforcing a judgment, obtained by Scales against him, in 1853, and assigned by Scales to Gray, the other defendant.

This judgment was obtained in a suit upon a prior unsatisfied judgment against Devoll, obtained by Scales in 1836. After the second suit was commenced, and the writ served, but before the return day, Devoll settled the demand by conveying to Scales one hundred acres of land, and giving him his promissory note for sixty-five dollars, secured by a mortgage of other land. Scales thereupon gave him a written discharge, of which the following is a copy:—

"Brighton, Nov. 29, 1853.

"In consideration of a conveyance of one hundred acres of land, by deed from Abner G. Devoll, and a mortgage

deed from said Devoll to secure the payment of sixty-five dollars, said deeds bearing even date with this writing, I hereby discharge him from a judgment recovered in my name, in the county of Kennebec, at the August term of the Court of Common Pleas, A. D. 1836, the debt in said judgment being $96,40, and the cost $15,76;—now, therefore, if there is no attachment placed on file in the Registry of Deeds, in the County of Somerset, on debts against said Devoll, within six days after the above deeds are recorded, then this writing is to be a full discharge of the above described judgment—and not otherwise.

"Enoch Scales."

The proofs in the case show, without controversy, that no attachment was, *in fact*, made of the lands conveyed by any creditor of Devoll, either before or after the deeds were recorded. The discharge, therefore, became operative, and the original judgment was annulled.

But Scales, claiming that he "was informed" that the land had been attached, entered his action in Court, and caused judgment to be entered therein upon default. Such a proceeding was wrongful, and the judgment so obtained was without any shadow of right in equity.

Scales justified himself on the ground that the hundred acres of land were of much less value than Devoll represented it to be. But this gave him no right, while retaining the land, and the note for sixty-five dollars, to disregard his discharge and enter his action in Court without the knowledge of Devoll. However valid such an excuse may be in morals, it has no foundation in law, or in equity.

But Scales asserts in his answer, and testifies as a witness, that, after judgment was entered up and execution issued, he notified Devoll, and, upon a new settlement, Devoll paid him a part of the execution, and promised to pay him the remainder.

It appears that, June 27, 1854, Scales reconveyed to Devoll the hundred acres of land. But he received therefor notes for $100, with a mortgage of the land to secure the

payment thereof. He also still retained the note for $65, secured by a mortgage. Devoll still retained the written discharge of the original judgment, and we are not satisfied that he has ever waived it. Scales has always retained the entire consideration for which it was given. He obtained his second judgment without right, and without the knowledge of Devoll, after the cause of action had been fully discharged; and having taken out execution, he has assigned it to Gray, without indorsing any payment of any sum thereon. A judgment so obtained ought not to be enforced.

Writ of injunction to issue.

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

GEORGE LEWIS *versus* HENRY WARREN *& al.*

As to the rule of the common law, which required that judgment in an action upon a bond shall be for the penal sum named, and the modifications of it by various statutes.

In this State there is now no existing statute which authorizes a judgment in an action of debt upon bonds, &c., differing from the common law rule, unless poor debtor's bonds, in certain cases, are exceptions.

In an action on a replevin bond, in which the penalty is more than twenty dollars, if the damages assessed be less than that sum, the plaintiff will have full costs, although the action was not commenced before a justice of the peace.

ON EXCEPTIONS from *Nisi Prius*, APPLETON, J., presiding.

THIS was an action upon a replevin bond. The writ in the replevin suit was quashed, there being only one surety in the bond. Judgment was rendered for a return of the property. A writ of return was issued, upon which the property replevied was taken and delivered to the plaintiff. The issue which the jury tried in this action was,

whether the property replevied was returned in as good condition as when taken. The verdict was for the plaintiff, and the damages were assessed at one cent.

A question as to costs arose, the defendant contending that, as the plaintiff had finally recovered a sum less than twenty dollars as damages, the action should have been commenced before a justice of the peace; and that, by the statute, he was entitled to only one quarter of the damages as costs.

The presiding Judge allowed the plaintiff his full costs, as claimed and taxed by him.

The defendant excepted.

Folsom, for plaintiff.

Stewart, for defendant.

The opinion of the Court was drawn up by

RICE, J.—The action of debt is the usual remedy by the common law for the recovery of a sum certain. And, in an action of debt for covenant broken, the amount of the plaintiff's recovery was the penalty; nor could the action be relieved against by either payment or tender; no defence would avail but a release under seal. And this severe rule of the common law was only mitigated by the practice of the Courts of Chancery, which interposed and would not allow a man to take more than in conscience he ought. 2 Black. Com., c. 20, p. 34; Sedgwick on Dam., 412.

This severe rule has been modified by statute regulation in England, which, however, it is not necessary to review at this time.

The subject attracted the attention of the Legislature, in this country, at an early day.

In c. 189, of the Province laws, Anc't Chart., 499, in an Act for the hearing and determining cases in equity, it was provided that, when any action shall be brought and prosecuted on any bond, or other specialty, with penalties, for the payment of sums of money, performance of covenants,

contracts, agreements, matters or things to be done at several times, and the plaintiff recover the forfeiture of such penalty, the Court shall enter up judgment for the whole amount of such forfeiture, and award execution only for so much of the debt or damage as is due or sustained at that time, so always that the said judgment shall stand and be a security to the plaintiff, his executors and administrators, for any further and after payments or damages he or they may have a just right to, by the non-performance or breach of the covenants, &c.

This provision, in nearly the same words, is found re-enacted in Massachusetts, in c. 77, § 6, laws of 1798, and in Act of March 1, 1799, § 6; also, in this State, in laws of 1821, c. 50, § 3.

The object of all these enactments evidently was to authorize the Courts to relieve against the severe penalties of the common law rule, by the exercise of chancery powers, as had been done by the Court of Chancery in England.

By c. 463 of the laws of 1830, it was provided that, in actions on a certain class of bonds, &c., the judgment should be as before, that is, for the penalty, but the jury, instead of the Court, should ascertain, by their verdict, the amount of damages sustained by the breach of the conditions of the bond or covenant, and for which sum execution should issue.

By c. 497, laws of 1831, chancery powers were conferred on the S. J. Court, in cases of recognizances, similar to those before conferred in cases of bonds and other specialties.

Chapter 366 of the laws of 1839 had reference solely to poor debtor bonds given on execution, and provided that, if the verdict be for the plaintiff, judgment shall be rendered thereon, without regard to the penalty of the bond, and, if in the opinion of the jury the plaintiff had sustained no damage, their verdict was to be for the defendant, notwithstanding there may have been in law a breach of the conditions of the bond.

This provision is substantially incorporated in c. 115, § 78,

of the R. S., of 1841, and is believed to be the only case in which a *judgment* on bonds or penal sums is authorized to be entered except for the penalty of the bond.

By the last part of § 78, c. 115, the jury were authorized to estimate the damages the plaintiff had sustained, in all actions upon any bond or penal sum in which the conditions were different from those mentioned in the first part of the same section, and also in all actions in the S. J. Court, on a recognizance entered into in the District Court, to prosecute an appeal with effect, if they should find that the conditions in any such bond, penal sum, or recognizance have been broken; but in all those cases the *judgment* was to be entered for the penal sum, and execution to issue for the damages assumed, with costs.

The Act of 1842, c. 31, § 9, took from the jury the right to assess damages in all the cases referred to in the last part of § 78, c. 115, R. S., 1841, except bonds and penal sums, "conditioned for the performance of covenants and agreements," and recognizances entered into in the District Court, &c., but in no respect changed the character of the judgments to be rendered.

The R. S. of 1857, c. 82, § 27, leaves the matter as it stood under the statute of 1842.

At the present time, there is no existing statute in this State, authorizing a judgment in an action of debt on bonds, &c., differing from the common law rule, except in cases of poor debtors, if, indeed, under the provisions of § 48, c. 113, that be an exception.

The power of the Court to grant relief in chancery, in this class of cases, is to be found in c. 77, § 8, clause second, R. S., 1857.

It is further contended that, inasmuch as the plaintiff did not recover more than twenty dollars, the action should have been brought before a justice of the peace.

By the provisions of c. 151, § 13, of the R. S. of 1841, and § 97, of c. 82, R. S. of 1857, if, in any action originally brought before the Supreme Judicial Court, it shall ap-

pear, on *rendition* of *judgment*, that the action should have been brought before a justice of the peace, &c., quarter costs only can be recovered.

Whether an action ought to have been so brought is ordinarily to be determined by the amount of the judgment. *Lawrence* v. *Lord*, 44 Maine, 427.

The judgment in this case must be for the amount of the penalty in the bond, and, that being more than twenty dollars, the plaintiff is entitled to full costs.

Exceptions overruled.

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

WARREN SPENCER *versus* INHABITANTS OF BRIGHTON.

The statute c. 117, §§ 46, 47, of R. S. of 1841, (R. S. of 1857, c. 84,) providing that an inhabitant of, or proprietor of land in a town, may voluntarily pay his proportion of an execution against the town, was intended to grant a perpetual exemption, both to the person and estate of any inhabitant so paying, if he shall proceed in the mode prescribed by the statute. *Vide* Laws of 1858, c. 53.

Although a portion of the inhabitants, by such payments, are thus exempted, an action may be sustained against "the inhabitants of the town," by one whose land has been seized and sold to satisfy the unpaid balance of the execution.

The execution, in such case, should issue against *the inhabitants of the town;* but if it be levied on property by law exempted, the party taking the property will be liable therefor.

ON REPORT from *Nisi Prius*, TENNEY, C. J., presiding.

THIS was a special action on the CASE, founded on certain provisions contained in c. 117 of the R. S. of 1841.

It appears, from the report and the documentary evidence that makes part of the case, that, in the year 1852, the inhabitants of Thomaston recovered judgment against the de-

fendant town; the execution that issued thereon was put into the hands of an officer to be collected. The officer, in his return, certifies that for want of goods and chattels of the debtors in the execution, for which he made diligent search, he seized, advertised and sold sundry lots or parcels of land situate in the defendant town, and the proceeds of sale were applied to the satisfaction of said execution.

Some of the lots thus sold belonged to the plaintiff; and were conveyed, by the officer's deed, to J. S. Abbott, who purchased them at the officer's sale. The plaintiff brings this action to recover against the defendants the value of his lands sold, with interest thereon at the rate of twelve per cent..

It was stipulated in the report, that the officer's deed to Abbott might be referred to by either party and either party might order a copy of it to be made by the clerk; but if no copy was ordered, the deed should be considered as having conveyed the lots, for the value of which this action is instituted. There was a similar agreement as to certain deeds proving the plaintiff's title to the lots sold.

A part of the sheriff's return is as follows:—"The total amount, for which said tracts were sold, as aforesaid, was eighty-three dollars, which is the amount of this execution and fees, costs and expenses thereon, allowing certain payments made by sundry inhabitants and proprietors, as specified in the annexed schedule." The schedule contains the names of about one hundred persons, with the amount paid by each.

Upon the legal evidence in the case, the Court shall direct what judgment shall be rendered, and the form of execution that shall be issued. If judgment shall be for the plaintiff, the amount of damages as provided by the statute to be determined by George C. Getchell.

The case was argued by

J. S. Abbott, for the plaintiff, and by

Hutchinson, for the defendants.

The opinion of the Court was drawn up by

RICE, J.—From the terms of the report, the title to the lands of the plaintiff, sold to satisfy the execution of *Thomaston* v. *Brighton*, is not controverted, nor is the validity of the deed from the officer to John S. Abbott now in dispute.

It appears from the return of the officer on that execution that money was received from sundry "inhabitants and proprietors" in part satisfaction thereof, and that the estate of the plaintiff, for which this action was brought, was seized and sold to satisfy the balance due on said execution, with costs and charges.

A question is now raised, whether in case judgment in this suit should be rendered in favor of the plaintiff, execution can be properly issued against the persons or property of such "inhabitants and proprietors," as have already made payment in part satisfaction of the original execution on which the plaintiff's estate was seized and sold.

Section 46 of c. 117, R. S., 1841, provides that, whenever any such warrant of distress or execution shall be issued as aforesaid against any town, it shall be lawful for any inhabitant thereof, or for any proprietor of lands therein, either before or after the issuing of such precept, to pay his part or proportion of such order or judgment; which part or proportion shall be ascertained by an assessment thereof, made by the assessors of said town; and which service they shall be required to perform, at the request of any such inhabitant or proprietor, or on notice given them by the county commissioners.

Section 47 of same chapter provides, that every person so paying his part or proportion, to the treasurer of the corporation for the use of the person interested, or to such person himself, shall be discharged, both as to his person and his property, from such warrant or execution; and by § 48, if any such warrant or execution has, or shall be levied on the property of any person, who at the time has not paid his part or proportion, every person having so paid, or that shall so pay his part as aforesaid, shall be discharged

from all executions that may be issued on any judgment, *against the inhabitants of such town*, on account of said levy, and his person and estate shall forever be discharged.

The intention of the statute is to grant a perpetual exemption, both to the person and estate of such inhabitants and proprietors as shall pursue the prescribed measures pointed out in the statute to ascertain and pay their just proportion of any such warrant of distress or execution against the inhabitants of the town in which they reside or in which they possess estate, liable to seizure.

Whether a voluntary payment by an inhabitant or proprietor, made otherwise than in the manner pointed out in the statute, would operate on such an execution, may admit of doubt. *Grose* v. *Hilt*, 36 Maine, 22.

The statute evidently contemplates that execution should go against the inhabitants of the town, and if any inhabitant or proprietor would claim to be exempted from paying any portion of such execution, or of having his property exempted from liability to seizure to satisfy the same, he must be able to show that he has complied with the requirements of the statute in paying his part or proportion of the original warrant of distress or execution against the inhabitants of such town.

In this, as in all other cases of special exemption, the party seeking his remedy will proceed at his peril in the seizure of property. If he seized that which is by law exempted, he will be liable therefor.

The plaintiff is entitled to judgment for the value of this land at the time sold, with interest, at the rate of 12 per cent., and, according to the agreement, the damages are to be assessed by George C. Getchell, Esq., on a hearing of the parties.

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

Trustees of Ministerial & School Fund in Solon *versus* David Rowell & *als.*

No particular form of a brief statement is prescribed; nor is it required to be subscribed by the defendant or his attorney.

It has always been practically understood that formal words may be omitted in a brief statement; and, if the special matter is so indicated by it, that it may be readily apprehended, it is sufficient.

The defendant was not estopped from availing himself of the statute of limitation, where he signed a note, which then had upon it the attestation of a subscribing witness to the signatures of the other makers of the note, the witness not being present when he signed it; notwithstanding the promisee, in ignorance of the fact, afterwards took it, as and for a note witnessed as to the signatures of all the makers.

On Exceptions to the adjudication of Tenney, C. J., presiding at *Nisi Prius*.

Assumpsit upon a promissory note of which the following is a copy:— "Solon, April 17, 1848.

"Value received, we jointly and severally promise to pay Elisha Coolidge, treasurer of the ministerial and school fund for the town of Solon, or his successor in said office, fifty-two dollars and seventy-six cents, on demand, and interest annually. (Signed) "Samuel Eaton,

"Attest, Benj. F. Eaton. "Jona. Eaton,

"David Rowell."

The interest had been paid annually and indorsed upon the note.

Rowell only defended; the other defendants were defaulted. Plea, the general issue, with a brief statement as follows:—"And for brief statement pleads the statute of limitations." The plaintiffs replied by counter brief statement, that "the [defendant's] brief statement is not such as to present any ground of defence other than under the general issue.

2. "That the note in suit was signed by the defendants in presence of an attesting witness, to wit," &c.

3. "That the note was signed by the defendants Samuel

and Jonathan Eaton, in the presence of an attesting witness, to wit, Benj. F. Eaton; that it was then carried to said Rowell, who signed it, thereby adopting said attesting witness, as an attesting witness to his own signature, and afterwards carried to said Coolidge, who received the note as and for a note signed by all the defendants, in presence of an attesting witness, and with the full belief that it was such a note, and paid the money therefor under such belief and upon the credit of said Rowell, and with no knowledge that said Rowell was surety, and with no knowledge or suspicion that it was not signed by all of the defendants, but with the full belief that it was signed by all the defendants in the presence of the attesting witness, until after the commencement of this suit. Wherefore the plaintiff claims that said Rowell is estopped from setting up in defence that the note was not signed by him in presence of a subscribing witness."

The parties agreed to submit the case to the Court without the intervention of the jury, with leave to file exceptions.

It was proved, that the note was signed by Samuel Eaton and Jonathan Eaton, and their signatures witnessed by Benj. F. Eaton, since deceased, whose name is on the note as a subscribing witness. Some days after the note was so signed and witnessed, it was carried to David Rowell, the other defendant, who signed the same, the subscribing witness not being present. The note was not for Rowell's benefit; he signed it only as surety, and made none of the payments that were indorsed upon it. After the note was signed by all the makers and the subscribing witness, it was carried to Elisha Coolidge, who paid the money thereon, to whom, or who was present, does not appear in evidence.

Coolidge had no knowledge that Benj. F. Eaton's name was not upon the note as a subscribing witness to the signatures of all the makers thereof, but supposed it to be so; and he never heard, or had reason to suppose, that Benjamin F. Eaton did not witness the signature of said Rowell, until after the institution of this suit.

Upon the facts found as aforesaid, the Court ordered judgment in favor of said Rowell. The plaintiff excepted.

J. S. Abbott, in support of the exceptions.

The statute of limitations must be pleaded, by special plea or brief statement. If the brief statement is insufficient, it may be demurred to or disregarded, or it may be stated in reply that it is insufficient. *Day* v. *Frye*, 41 Maine, 326. The brief statement should be signed. *Manning* v. *Labaree*, 33 Maine, 343. Here it is not signed; nor is there any indication by whom it was written. The plaintiffs, among other things, replied that, "the brief statement is not such as to present any ground of defence, other than under the general issue."

The plaintiffs are entitled to judgment under the general issue. In such an action as this, the statute of limitations is not available, unless pleaded specially or by brief statement.

The facts are to be taken in connection with the issues presented; and an issue, upon the statute of limitations, not having been legally presented, no judgment upon such a defence can be rendered for the defendant. The finding of the facts outside the issue will not aid him.

The defendant, Rowell, should be estopped to deny that he signed the note in the presence of the subscribing witness.

Suppose Rowell had been present when the note was delivered to Coolidge, and the money paid over, — and that, on being interrogated, he had told Coolidge he signed the note in the presence of the attesting witness, would he be permitted afterwards to deny it, and rely on the statute of limitations?

It is believed, in such case, Rowell would be estopped. If so, it follows, that there *may* be a case in which the statute of limitations would not be a defence, although the note was not signed in the presence of an attesting witness.

The money was agreed to be loaned, and was loaned, on the name of Rowell, mainly. The note signed by the other

promisors and duly attested, was presented to Rowell for his signature. He signed it, without indicating that Benj. F. Eaton was not an attesting witness to his signature. He thereby adopted the name of the attesting witness, as an attesting witness to his own signature. He put this note into circulation, as and for a note duly attested as to himself, and thereby induced the plaintiffs to part with their money.

His acts should estop him from now setting up the statute of limitations in defence in *this* case, as much as his words in the supposed case.

J. D. Brown, for Rowell, replied.

The opinion of the Court was drawn up by

TENNEY, C. J. — This is an action upon a promissory note of hand, purporting to have been signed by all the defendants, upon which is the name of Benj. F. Eaton as a subscribing witness.

The defendant David Rowell, pleaded the general issue, which was joined, and with it the following: — "And for brief statement, pleads the statute of limitations." By a counter brief statement, the plaintiff says "that the brief statement is not such as to present any ground of defence, other than under the general issue."

No particular form of a brief statement is prescribed, nor is it required to be subscribed by the defendant or his attorney. "The general issue may be pleaded in all cases, and a brief statement of special matter of defence filed," is the language of the statute. R. S, c. 82, § 18. It has always been practically understood that formal words may be omitted; and that, if the special matter is so indicated that it can be readily apprehended, it is sufficient.

The special matter in defence, in this case, was brought to the notice of the plaintiff by the defendant. Rowell's pleadings in terms were concise, but it is difficult to perceive how there could have been any misunderstanding of the intention. No objection was interposed to the evidence introduced by the defendant, for the purpose of showing that

the note in suit was not a witnessed note, so far as it regarded Rowell, and that the attestation of the witness upon the note did not apply to him.

The case finds that Benj. F. Eaton was a witness to the signature of Samuel Eaton and Jonathan Eaton alone; that Rowell, the other defendant, signed the note when the witness was not present; that he was a surety only, and had no benefit from the consideration, and that, of the payments made upon the note, he neither paid nor contributed any part thereof.

The statute of limitations is a bar to this suit against Rowell, if the note is not to be treated against him as a note signed in the presence of an attesting witness. By R. S. of 1841, c. 146, § 7, it is provided that none of the foregoing rules shall apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness. Section 97, c. 81, R. S. of 1857, is similar. The case of *Stone & al.* v. *Nichols & al.*, 23 Maine, 497, we think is in point. That was a case where a party signed the face of the note in the presence of an attesting witness, who put his name upon the note, as such, and the note was delivered to the payee; and, subsequently, the other defendant signed his name on the back of the note, the witness not being present. It was held not to be a witnessed note of the latter. It is immaterial whether the makers are all on the face of the note; if some put their names on the back as makers, they are equally holden. In such case, if all sign in the presence of another, and he writes his name on the note as an attesting witness, it applies to all.

Exceptions overruled.

Judgment for the defendants.

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

SHADRACH MELLOWS *versus* ARETAS HALL.

In an action for carelessly setting a fire by which trees upon the plaintiff's land were burned, if the plaintiff recover less than twenty dollars, full costs will be allowed him.

It was not the intention, in the R. S. of 1857, to change the code of 1841, relating to such cases.

TRESPASS on the case, for carelessly setting a fire which spread and burned trees upon the plaintiff's woodland. The defendant pleaded the general issue.

The amount of damages assessed for the plaintiff not exceeding twenty dollars, it was contended by the defendant that only one quarter of the amount of damages could be legally allowed as costs to the plaintiff. APPLETON, J., presiding, ruled that the plaintiff was entitled to full costs. The defendant excepted.

D. D. Stewart, for the plaintiff.

Folsom, for the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—It is not denied by the defendant that, if this action had been commenced and prosecuted to final judgment while the Revised Statutes of 1841 were in force, by the authority of *Sutherland* v. *Jackson*, 32 Maine, 80, and of *Morrison* v. *Kittridge*, 32 Maine, 100, the plaintiff would be entitled to full costs, notwithstanding the damages recovered were less than twenty dollars.

But it is insisted that the provisions of the statutes named, in c. 116, §§ 1 and 2, were essentially changed in the revision of 1857; and that was done before the institution of this suit; hence the authorities referred to are inapplicable.

In R. S., 1841, §§ 1 and 2, justices of the peace had original and concurrent jurisdiction in all civil actions, wherein the debt or damage did not exceed the sum of twenty dol-

lars; excepting real actions, actions of trespass on real estate, actions for disturbance of the right of way, or of any other easement, and all other actions where the title to real estate, according to the pleadings or brief statement filed in the case by either party, may be in question. But, in the personal actions, mentioned in the exception contained in the preceding section, when the sum demanded does not exceed twenty dollars, a justice of the peace shall have original jurisdiction concurrently with the District Court.

In the code of 1857, c. 83, § 1, justices of the peace have original and exclusive jurisdiction of all civil suits, where the debt or damages demanded do not exceed twenty dollars, except those in which the title to real estate, according to the pleadings or brief statement filed in the case by either party, is in question.

By section 3, in the chapter referred to in the former code, and in section 2, of the chapter cited in the latter, the provisions are the same in relation to the removal of cases brought before justices of the peace, when it appears, by the pleadings or brief statements therein, that the title to real estate is in question, to a higher court, at the request of either party.

Every essential element in the statute of 1841, in question, is retained in that of 1857. "Real actions" found in the exception of the former is omitted in terms in that of the latter, but this exception, as it stood, was unnecessary in both revisions, as a real action is not, strictly speaking, an action where "debt or damages" is demanded, but possession of real estate. The language, "all other actions where the title to real estate, according to the pleadings or brief statement filed in the case, by either party, may be in question," used in the former law, embraces all the other actions previously specified, in the same section, and the specifications were unnecessary in the present law.

Sec. 2 of c. 116, R. S. of 1841, is omitted in the statute now in force, but every essential matter therein is incorporated into §§ 1 and 3 of the latter revision, excepting that

justices of the peace shall have original jurisdiction, concurrently with the District Court. This omission is supplied in R. S., 1857, c. 77, § 3, which provides, "It [Supreme Judicial Court] has the jurisdiction, civil, criminal and appellate, of the former District Court, and may exercise it as that Court was authorized to do, or as the laws prescribe."

Exceptions overruled.

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

GOODENOW, J., non-concurred.

LEVI LEATHERS *versus* JAMES E. COOLEY *& al.*

To sustain an action upon a recognizance taken to prosecute an appeal from a judgment of a justice's court, it is not necessary that it be recorded at length in the appellate court; the certificate of the clerk upon it, showing it to have been filed before the suit was commenced, is a sufficient record.

But a final judgment for the plaintiff must be proved; and where the appellant had neglected to furnish copies of the papers necessary to make up an extended record, the clerk's docket, showing an entry of the amount of debt and costs recovered, may be admitted as a record of the judgment, although the time has elapsed, within which the papers can be filed, to authorize the clerk to extend and complete the record, as of the term when judgment was recovered. — TENNEY, C. J., and APPLETON and CUTTING, JJ., dissenting.

ON EXCEPTIONS from *Nisi Prius*, APPLETON, J., presiding.

THIS was an action of DEBT upon a recognizance to prosecute an appeal from a judgment rendered by a justice of the peace. The appeal was entered at the first term of the Supreme Court which was holden after the appeal was taken. The appellant neither filed nor furnished copies of the papers in the case. The action was continued from term to term from the year 1855 to 1858, when it was referred by rule of Court. At the September term, A. D. 1858, the referee made his report, awarding that the plaintiff recover against the defendant the sum of twenty dollars as damages,

and also his costs; which report was accepted, and the clerk made the following docket entry:—"Report offered and accepted." The plaintiff's costs were taxed, and the bill, assented to by the appellant's counsel as being correctly taxed, was filed with the clerk on the 4th day of December, 1858; on which day the plaintiff also filed the recognizance, and on the seventh day of the same month brought his action upon it. The clerk's certificate of the time of filing the recognizance is indorsed upon it.

The clerk testified that he had never made an extended record of the judgment, because he had not received any copy of the writ and other papers; that the docket entries were all the record he had made of the case.

He also testified on cross-examination—the plaintiff objecting that parol testimony could not be received to affect the docket entry—that he did not enter the amounts of debt and costs in figures upon the docket at the time the bill of costs was filed, nor until the day of the present trial. That it was not the custom or practice in that county to record any recognizance at length, but to place the same upon file.

On the defendant's motion, the Court ordered a *nonsuit;* to which order the plaintiff filed exceptions.

D. D. Stewart, in support of the exceptions.

The ground upon which the nonsuit was ordered was that the plaintiff failed to show any *final judgment* in the appealed action.

The plaintiff introduced the recognizance; no objection is made that it fails to recite any fact necessary to constitute it a valid recognizance. By the clerk's certificate, it is proved to have been filed and recorded before this suit was commenced, although after final judgment. This is sufficient. *Benedict* v. *Cutting*, 13 Met., 181. A recognizance is a contract of record, and a suit on it is not barred until after twenty years.

The entries upon the dockets show a seasonable entry of

the appeal; the continuance of the action from term to term; a reference of it by rule of Court; that, at the September term, 1858, the report of the referee was offered and accepted; that judgment was rendered thereon, in the plaintiff's favor, for twenty dollars as damages, and also for his costs. Here was a final judgment for debt and costs. Under the general order of the last day of the term, the clerk is directed to enter up judgment as of that day, in all actions which are not continued, and are to be carried forward upon the docket of the next term, unless some other day has been named in the case, where judgment has been rendered as of some *previous day* of the term. Costs are but an incident to the judgment. And, even when the record is extended, before the costs are taxed and filed, the practice is universal, to leave a blank, that the amount of the costs, when ascertained, may be inserted in the record of the judgment.

Here the costs were taxed soon after the final adjournment of the Court; the taxation was expressly assented to, as being correct, by the adverse counsel, and duly filed in the case.

What more could the plaintiff do? Nothing, but to take out an execution against the defendant. But this he was under no legal obligation to do. *Cook* v. *Lathrop*, 18 Maine, 260. The condition of the recognizance imposed upon him no such duty. That condition, on the part of the defendants, was simply to prosecute the appeal with effect, and pay all costs arising thereafter—which costs they are bound to pay as soon as taxed. *Myrick* v. *Farwell*, 33 Maine, 253.

The authorities are full, clear, and decisive that the clerk's docket is the record of a suit, and of its final disposition in all cases where no other record has been made. *Read* v. *Sutton*, 2 Cush., 115; *Fay* v. *Wenzell*, 8 Cush., 317; *Pruden* v. *Alden*, 23 Pick., 184; *Benedict* v. *Cutting*, 13 Met., 181; *Longley* v. *Vose*, 27 Maine, 185; *Fitzgibbon* v. *Brown*, 43 Maine, 170; *Chamberlain* v. *Sands*, 27 Maine, 467.

The parol testimony of the clerk was inadmissible. The entries upon the docket cannot be affected, controlled, or impeached, by parol testimony. *Matthews* v. *Houghton*, 11 Maine, 377; *Read* v. *Sutton*, 2 Cush., 123.

But, if admitted, it alters nothing. The clerk may make up his record at any time; when made it takes effect, by relation back, *nunc pro tunc*.

It was the duty of the appellant to bring up the papers in the case, and it is not for him to object that the record is not perfect in all its parts, when that imperfection is the result of his own failure to comply with the requirements of the statute.

The plaintiff has a record of the *recognizance* in the appellate Court, and that is sufficient to sustain this action, which is collateral to the matter determined by the magistrate below.

It is not essential to the maintenance of this action on the recognizance, that execution shall ever issue against the defendant for the debt and costs in the appealed action.

The clerk may issue execution upon the docket entry and the award, without a copy of the writ. That, if necessary, may be filed at any time. *Kellar* v. *Savage*, 20 Maine, 202.

Folsom, for the defendant.

The recognizance was not filed in the appellate Court, until after final disposition of the action, and more than three years after it was taken. There was no entry *of record* that it had been filed, nor has it ever been recorded in the appellate Court. It not having been taken by a Court of record, it is indispensable to the maintenance of this action, that it has been entered of record in the Supreme Court. *Langley* v. *Vose*, 27 Maine, 179, and cases there cited. The case of *Paul* v. *Newell*, 6 Maine, 239, is distinguishable from this; there the recognizance was taken in a Court of record.

This being an action of *debt*, cannot be maintained, because no record of the recognizance is shown. This record must be the recognizance as entered of record.

2. No record of the judgment in the original suit in the appellate Court was proved. The clerk testified that he had made no record because no papers had been furnished. There can be no breach of the condition in the recognizance, until final judgment in the case. It is the fault of the plaintiff that there is no record of the judgment. It was his duty, by the 35th rule of the Court, as the "prevailing party" to furnish them. It was the duty of the appellant, on entry of his appeal, to produce the copies of the papers, but the plaintiff waived his right to require the appellant to furnish them, by consenting to proceed to trial before the referee, upon the original. The plaintiff might, at any time, have obtained an order of Court, requiring the appellant to file the copies; and, having neglected to do so, until he had become "the prevailing party," the rule of Court made it his duty to produce them.

The entries upon the docket cannot aid the plaintiff; for they can only be received where the record can be legally made up by the clerk at his convenience; but to admit them when the clerk is expressly forbidden to extend the record, would be rendering the 35th rule of the Court a nullity.

The opinion concurred in by a majority of the Justices was drawn up by

MAY, J.—The objection urged in defence to the plaintiff's right to recover, is, that the recognizance upon which he has declared was never recorded in the appellate Court, and that the record does not show that judgment had been rendered in the action wherein it was taken, prior to the commencement of this suit. The only record evidence of the recognizance, and of the rendition of judgment, consists in certain entries found upon the docket of the appellate Court, and upon the back of the recognizance, from which it appears that judgment was in fact rendered and the recognizance filed in that Court before the bringing of this suit. It further appears that the judgment had not in

fact been extended upon the record, because the writ and papers in the case had not been furnished. The entries upon the docket appear upon their face to have been made at the September term, 1858.

The rule is now well established that the docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record. *Pruden* v. *Alden*, 23 Pick., 184. The entries thereon are presumed to have been made by the clerk under the direction and authority of the Court, and this presumption cannot be controlled by the testimony of the clerk or the Judge. *Read* v. *Sutton*, 2 Cush., 115; *Longley & al.* v. *Vose*, 27 Maine, 179. The entries upon the docket sufficiently show that judgment had been entered up before this suit was brought, and the testimony of the clerk, which was offered in defence, to show that such was not the fact, having been seasonably objected to, was wholly inadmissible.

The objection that the recognizance was not in fact entered at large upon the record is alike unavailing. It is sufficient that it was returned to and placed upon the files of the Court. The minute made by the clerk upon the back of it, as well as the direct testimony in the case, shows that this was done before suit brought. This was held to be sufficient in the case of *Paul* v. *Newell*, 6 Maine, 239, where the recognizance was taken in the Court of Common Pleas. In the case also of *Benedict* v. *Cutting*, 13 Met., 181, where the recognizance was taken, as in the present case, before a justice of the peace, and not returned to the appellate court until after final judgment, and then not extended upon the record, it was held that an action afterwards brought upon it might be maintained, because the recognizance itself, being put upon the files of the Court, was a record within the meaning of the law, though not extended on the book of records, and showed upon its face the cause of the caption and the jurisdiction of the justice, and we cannot doubt that such is the law.

The cases of *Bridge* v. *Ford*, 4 Mass., 641, *Dodge* v.

Kellock, 10 Maine, 266, and *Libby* v. *Main*, 11 Maine, 344, upon examination, are found not to be in conflict with the law as above stated. They were all cases of demurrer to the declaration, and each declaration, upon inspection, was found to contain no allegation of any record, and were therefore properly held to be insufficient. The question was not raised whether the return of the recognizance to the appellate Court, and placing it on file, would be a sufficient record, and there was no allegation or proof, in either case, that any such fact existed.

The suggestion of the counsel in defence, that there could not have been any judgment lawfully made up before the bringing of the suit, because the party prevailing had not filed the papers in the case, as required by the 35th rule of this Court, is based upon evidence tending to contradict the record, and therefore not admissible, and comes with an ill grace from the defendant, whose duty it was to put the papers on file; and the judgment having in fact been made up, as appears by the docket, which is the only record, the Court will not receive parol evidence of any fact tending to show that it was not made up in accordance with the rule of the Court referred to. The defendant is estopped by the record as it is. He ought not to be permitted to gain advantage, or inflict injury, by his own neglect.

Exceptions sustained.—Nonsuit set aside.

RICE, GOODENOW, DAVIS and KENT, JJ., concurred.

CUTTING, J., dissenting.—The administration of justice requires this Court to be governed by fixed rules as well of the common law as those established by the Court itself, in furtherance thereof; and the question in this case arises, whether those rules shall be of any avail. The present action is debt upon a recognizance given by the defendant before a justice of the peace, conditioned that "he shall prosecute his appeal with effect and pay all costs after such appeal." And the averment in the plaintiff's declaration, among other things, is, that at the September term of this

Court, 1858, he recovered judgment against the defendant for $20,00 debt, and costs of suit, taxed at $62,67, of which $54,07 accrued after the appeal. The *recovery of the judgment* was a material allegation, and was to be shown at the trial by record evidence remaining in the appellate Court, it being a Court of record. It is not denied that the defendant appealed from the decision of the magistrate and gave the recognizance as before stated. It became, therefore, his duty to furnish the original recognizance and copies of the original papers, and file them in the appellate Court, at the time of the entry of his appeal; otherwise, unless for good cause shown why it was not done, on motion of the appellee's attorney, his appeal should have been rendered ineffectual. But it seems, in this case, no such proceedings were had; neither the papers were furnished by the defendant, or any motion made by the plaintiff, founded on such omission. The appeal was entered at the September term of this Court, 1855; the action referred in the summer of 1858, and the report made and accepted at the September term of the same year; at which term the following is the docket entry under the action, and the only record evidence offered, viz.: "Referred to H. A. Wyman, Esq., 17 (day) Report offered and accepted. Debt $20,00; cost $62,67."

The present action on the recognizance was commenced on December 7, 1858, the plaintiff having caused the recognizance to be filed three days before, and came on for trial at the December term, 1859. From the foregoing elements of proof it became necessary for the plaintiff, in order to maintain his action, to show by legal testimony that he had recovered a judgment, which, in the opinion of the presiding Judge, he failed to do, and a nonsuit was ordered.

Now, then, the question arises, whether at the trial there was legal evidence before the Court, that a judgment had been rendered before the commencement of the action. A judgment is defined to be—"the decision or sentence of the law, given by a Court of justice, as the result of proceedings instituted therein, for the redress of an injury."

And a record to be—"a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done." But, "every minute made by a clerk of a Court for his own future guidance in making up his record, is not a record." 4 Wash., C. C. Rep., 698. There was then no record of a judgment, or sufficient materials for a record in the possession of the clerk, either when the action was commenced or at the time of the trial; at which time "the clerk testified that he had never made any extended record of the judgment, because he *never* had received any copy of the writ and appeal papers." And, by the 35th RULE of this Court, he never can hereafter make up and complete his record, except upon petition to, and permission by this Court, after due notice to the adverse party, and on the payment of costs by the petitioner to such party, if he appears, and to the clerk for recording the judgment.

It is not denied that docket entries, in some cases, through necessity, may be introduced as evidence instead of an extended record, before the clerk has had time and an opportunity to complete the record, but all the elements necessary for the record should be in his possession, and not otherwise through the neglect of the prevailing party. In this case the copy of the writ, the very basis of the action, and of the proceedings before the magistrate, has never been filed in this Court or been in the clerk's possession. In fact, from what was shown by the plaintiff on the trial, it sufficiently appeared that no record had been or could be made without subsequent proceedings in this Court, which depended wholly upon a future contingency. The elements for the record of a judgment were vague, scattered and chaotic. The great industry of the plaintiff's counsel, and the indulgence of the Court, may hereafter collect and put them into form, and, until that time shall arrive, the plaintiff will have no legal proof of a judgment. In my opinion the *nonsuit* was properly ordered.

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

William Allen *versus* Andrew Archer & *al.*

The action of a town in changing the limits of a school district, without the "written recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts," is void.

It is competent for the Legislature to make valid the action of a town, which would otherwise be void on account of some informality or technical defect.

The description, in a vote of a town, of a school district, as "all the territory between" two given lines, is not so defective that the vote will be held to be void.

Unless the records of a town meeting show that the notices calling it were posted in public *and conspicuous* places, the proceedings are void.

Persons undertaking to act as assessors of a town, without having been legally elected as such, are personally liable for the acts of a collector to whom they have issued a warrant for the collection of taxes assessed by them.

The provisions of c. 6, § 29, of the R. S., do not apply to such a case.

The time when a trespass is alleged to have been committed is not material to be proved as laid; it is sufficient if it is within the statute of limitations.

Under a declaration in trespass, it is immaterial whether the acts complained of were committed by the defendant, or by another person acting under his direction.

Upon motion made in the law Court, a report will be discharged upon terms, for the purpose of allowing the officer of a town to amend his records according to the fact, where the defects are technical, and the justice of the case requires it.

On Report.

Trespass for taking a yoke of oxen. The evidence was that, previously to March, 1858, the plaintiff's residence was included in the limits of school district No. 6, in Fairfield; that, at the annual meeting in March, 1857, a committee was appointed to re-district the school districts in the town; that, at the annual meeting in March, 1858, the report of that committee re-districting the town was accepted, but without any written recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts; that by that report the plaintiff's residence was included in district No. 14, which was described as embracing the territory from Abram Potter's north

line to Ephraim Avery's south line; that, at the same meeting, the defendants and another person, were elected assessors, and Timothy Jones, collector, and that they were severally duly qualified; that the constable's return, upon the warrants calling these meetings in 1857 and 1858, was, that he "had posted up in four public places in said town, true and attested copies of the within warrant;" that, thereafter, in 1858, the selectmen of Fairfield issued a warrant in due form, calling a meeting of the legal voters of school district No. 14, and it was admitted that, at a legal meeting of said district (if legally constituted), it was voted to raise a sum of money by assessment, for a legal purpose, and the vote was duly certified to the defendants as assessors of the town; that the defendants, as assessors, thereupon proceeded to assess, upon the polls and estates of the residents of said district, the sum voted to be raised, and, on the tenth day of May, 1858, delivered these warrants with the tax bills and their certificate to said Timothy Jones, as collector of taxes of said town; that he demanded of the plaintiff his tax, which he refused to pay, and thereupon, on the fifteenth day of June, 1859, seized the oxen sued for, and the plaintiff, to obtain possession of the oxen, paid the tax, interest and costs; that all the districts in the town had organized under said vote, in March, 1858, and that no person in district No. 14, (except the plaintiff) had made any objection to the proceedings; and that the Legislature, on the second day of April, 1859, had passed an Act to confirm and make valid the proceedings of the town, in March, 1858, "in relation to the re-districting said town for schools."

Upon this evidence, the full Court was to render such judgment as the law requires.

Webster, for plaintiff.

1. There having been no written recommendation of the municipal officers, &c., District No. 14 was never legally established. R. S. c. 11, § 1.

2. The warrants for the town meetings of 1857 and 1858

not having been posted in "*conspicuous places*," the proceedings at those meetings are void. *Bearce* v. *Fossett & als.*, 34 Maine, 575; *Fossett & als.* v. *Bearce*, 29 Maine, 523; *Christ's Church* v. *Woodward*, 26 Maine, 172; *State* v. *Williams*, 25 Maine, 561.

3. The report, as accepted, does not establish District No. 14, with territorial limits. *Deane* v. *Washburn*, 17 Maine, 100; *Whitman* v. *Hogan*, 22 Maine, 564; R. S. c. 11, § 1; 7 Pick., 106; 4 Cush., 250, 487.

4. The district not having been legally established, the defendants are liable for assessing their tax. *Tucker* v. *Wentworth & als.*, 35 Maine, 493.

5. The defendants, not having been legally chosen assessors, are liable for acts done by Jones, the collector, under their direction.

Snell, for the defendants, submits a motion in writing, supported by affidavits, that the constable of Fairfield have leave to amend his return on the warrants for the meetings of 1857 and 1858, according to the fact, by inserting in each return the words, "*and conspicuous*" after the word "*public*;" or that the report be discharged and the case sent back to *Nisi Prius*, for such proceedings in relation to the proposed amendments as law and justice may require; and cites, in support of his motion, *Gordon* v. *Assessors of Concord*, not reported.

Assuming that these meetings were legally called, we say: —

1. The provision of the statute requiring the recommendation of municipal officers, &c., relates only to changing the lines of existing districts, and not the forming of new districts.

2. If it does, these proceedings are made valid by the Act of April 2, 1859. As this Act infringes upon no vested rights, it is valid.

3. The district is sufficiently described; the north and south lines are fixed, and they extend to the east and west lines of the town.

4. The assessors are not liable for assessing this tax. R. S., c. 6, § 29. *Patterson* v. *Creighton*, 42 Maine, 377.

5. The plaintiff has failed to make out his case.

He has not identified the oxen seized by Jones as the ones sued for. The writ alleges that the *defendants* took and carried away a yoke of plaintiff's oxen, July 1, 1859, but the proof is, that *Jones* took a yoke of his oxen, June 15, 1859; and he has shown no connection between the defendants and Jones. He has not proved that the defendants were assessors, and must therefore fail in his action.

The opinion of the Court was drawn up by

RICE, J.—Chap. 11, § 1, R. S., provides that school districts shall remain as they are until altered or discontinued. A town, at its annual meeting, may determine the number and limits of school districts therein; but they shall not be altered, discontinued, or annexed to others, except on the written recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts, and on conditions proper to preserve the rights and obligations of the inhabitants.

The first clause of the above section recognizes the legal organization of existing school districts. The statute also provides that such organization shall not be changed except on the recommendation, in writing, of the municipal officers and superintending school committee. This prohibition was undoubtedly designed to prevent changes in existing districts without good and sufficient cause, and applies to all alterations thereafter to be made.

These preliminary proceedings were not had in the case before us. The changes made by the town were therefore informal, and unauthorized by law.

The proceedings of the town, however, appear to have been taken with much deliberation, and the re-arrangement of the districts seems to have given general, indeed, almost universal satisfaction to the inhabitants. This, however, does not change the legal character of these proceedings.

By c. 349 of the laws of 1859, the doings of the town of Fairfield, at the annual town meeting, held in said town on the eighth day of March, in the year 1858, in relation to re-districting said town for schools, are confirmed and made valid.

Statutes made to confirm acts by public officers, which would have been void for some informality, have never been questioned on constitutional grounds. *Tate & ux.* v. *Stootzfoot & als.*, 16 S. & R., 35; *Walter* v. *Bacon & al.*, 8 Mass., 468; *Lock* v. *Dane*, 9 Mass., 360.

Confirming Acts are not uncommon, and are very useful. Deeds acknowledged defectively have been confirmed; and proceedings and judgments of commissioned justices of the peace, who were not commissioned agreeably to the constitution, or where their powers ceased on the division of counties, until a new appointment, &c. *Underwood* v. *Lilly*, 10 S. & R., 97.

Retroactive laws which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair: the omission of formalities which do not diminish existing obligations, are consistent with every principle of natural justice. 10 S. & R., 97.

Such statutes have been held valid, when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a note of hand defectively made or acknowledged. 1 Kent's Com., 456.

Laws of this character, which are intended only to cure informalities and technical defects, and which do not interfere with vested rights, nor impair the obligation of contracts, are justly deemed statutes of repose, and tend to prevent litigation and strife in the community. They in effect declare, in relation to the informal and technically defective proceedings to which they refer, that hereafter such proceedings shall be deemed valid and obligatory upon all parties who had not, at the date of their passage, acquired

vested rights under them. Such is the character of the Act of April, 1859, c. 349.

The territorial description of school district No. 14 is certainly not very full and specific. We cannot, however, determine from the report that it is clearly defective. All the territory between two given lines may constitute a perfect description of the locality of such territory, and, in the absence of evidence to show the contrary, such will be presumed to be the fact.

The notices for calling the meetings of the town, in 1857 and 1858, as shown by the record of the officer's return, were defective, inasmuch as the return does not show that said notices were posted in public and *conspicuous* places, as required by c. 5, § 6, R. S., 1841, and c. 3, § 7, R. S., 1857.

Such defect has been held to be fatal in the proceedings of towns, and in the election of officers, in numerous cases in this State. *State* v. *Williams*, 25 Maine, 569; *Christ's Church* v. *Woodward*, 26 Maine, 172; *Fosset* v. *Bearce*, 29 Maine, 523; *Bearce* v. *Fosset*, 34 Maine, 575.

In the case last cited, it was said by APPLETON, J., in giving the opinion of the Court,—"The defendants, claiming to act as officers of the town, were bound to show the legality of the meeting at which they were elected, as, if that was not a legal meeting, they hold no official position." And again, "the defendants, consequently, are to be regarded only as citizens of Bristol, and can have no greater rights than other inhabitants of that town." The defect in that case was precisely the same as in the case at bar.

The defects in the manner of notifying the meeting in 1858, at which time the defendants were chosen assessors, were not affected by the confirming Act of 1859, cited above; that act being confined in its operation to the acts of the town in re-organizing the school districts.

Nor do the provisions of c. 6, § 29, R. S., apply in this case. The defendants, having failed to show that they were legally elected asssesors, necessarily fail to show that the

tax in question was one which they were by law required to assess.

Whether it would not be wise for the Legislature to enlarge the provisions of the section last cited, so as to include cases like the present, is not for us to determine.

It is objected, by the defendants, that it is not alleged in the plaintiff's writ that the defendants were assessors. That is true, and that is one of the grounds on which the plaintiff desires to recover. The complaint is, that the defendants, not being assessors, assumed to act as such, and, in that assumed capacity, ordered the collector to seize and sell his property.

It is further contended, that there is a variance between the allegation in the writ and the proof as to the identity of the property taken—that the writ alleges that defendants took the plaintiff's oxen, July 1, 1859, while the proof shows that said oxen were taken on the 16th of July, by Timothy Jones, collector of Fairfield.

The precise time of taking is not material, if it was within the statute of limitations. Nor is it material whether the defendants took the oxen by their own hands, or by the hands of the collector, acting under their direction. The proof in the case shows satisfactorily that the taking by Jones was the act complained of in the plaintiff's writ, and was done by direction of the defendants.

From the facts, as exhibited by the report and proofs introduced in this case, the plaintiff is entitled to judgment for the amount of the tax, cost and interest from the time of taking.

There was a motion made at the law term, accompanying this report, that the report be discharged, to allow the constable an opportunity to amend his return according to the fact, to show that legal notice was given of the time and place for holding the meetings in 1857 and 1858. The affidavit of the constable tends to show that the facts would authorize such an amendment, if there are no other legal obstacles in the way. The defect being in its nature techni-

cal, and there being no suggestion of unfaithfulness on the part of the defendants, if they shall so elect, at the first term after this decision is announced in Somerset county, and pay the plaintiff his costs, the report may be discharged and the case stand for trial, otherwise judgment to be entered as above.

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

CHARLES WOODBRIDGE *versus* HIRAM B. CONNER.

As all participating in a trespass are principals, an action lies, as well against one who orders a wrongful act, as against him who does it.

Where the plaintiff proved the taking of his property by the defendant's order, which, *prima facie*, was a trespass, the defendant, to justify the act, must show that the taking was lawfully authorized.

ON REPORT from *Nisi Prius*, TENNEY, C. J., presiding.

TRESPASS. A witness called by plaintiff testified that he received verbal directions from the defendant to seize property of the plaintiff; he accordingly seized the wagon in controversy, which was worth, perhaps, $65, but which he sold for $55.

On *cross-examination*, the witness stated, that, at the time the defendant gave the directions, the witness had tax bills and a warrant in his hands; that defendant informed witness that the plaintiff had told him he should not pay his tax; and the defendant then told witness to take property if he would not pay the tax. He had what purported to be a warrant and he acted partly under it. Defendant said the warrant was sufficient to indemnify him.

D. D. Stewart, for the plaintiff.

Hutchinson, for the defendant.

The opinion of the Court was drawn up by

APPLETON, J.—It is in proof that the wagon in question, the title to which was in the plaintiff, was seized by one Nickerson, by order of the defendant. If A takes the goods of C, by command of B, it is well settled law that trespass may be maintained against the individual taking them, as well as against the one by whose direction they were so taken.

The taking being proved, it is for the defendant to justify an act which, *prima facie*, is a trespass. Every imprisonment of a man is *prima facie* a trespass; and, "in an action to recover damages therefor," says METCALF, J., in *Bassett* v. *Porter*, 10 Cush., 418, "if the imprisonment is proved or admitted, the burden of justifying it is on the defendant." The same rule holds where property is seized belonging to another. The seizure being proved, it is for the person seizing to show his authority for the act done. For aught that is proved in the case before us, the defendant was a mere stranger. He does not appear, from the proof, to have sustained any official relation to the person by whom the plaintiff's property was taken, which would authorize his interference. "The rule," remarks BIGELOW, J., in *Emery* v. *Hapgood*, 7 Gray, 55, "is, if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification."

There is no proof that the witness, who testifies he seized, by the defendant's direction, the plaintiff's property, was ever chosen a collector of taxes. What taxes may have been assessed, or what warrant for their collection may have been issued, does not appear. If the defendant have a justification, he has studiously avoided disclosing it. Most assuredly, it is not for the Court to presume its existence in the absence of proof. *Defendant defaulted.*

RICE, CUTTING, DAVIS and KENT, JJ,, concurred.

SAMUEL I. LEVETT *& al. versus* WESLEY JONES *& als.*

A poor debtor, *before* commencing his disclosure, delivered to his attorney a sum of money, as a payment in part of the amount he was indebted to him, and also for the payment of the justices' fees, for taking the disclosure; *held*, that the justices were authorized to discharge him, notwithstanding the creditor claimed the money.

This is distinguishable from the case of *Butman* v. *Holbrook*, 27 Maine, 419, the appropriation of the money having been made *before* the disclosure was commenced.

ON REPORT from *Nisi Prius*, TENNEY, C. J., presiding.

Stewart, for the plaintiff.

J. Crosby, for the defendant.

The facts in the case are sufficiently stated in the opinion of the Court, which was drawn up by

RICE, J.—Debt on a poor debtor's bond. The case shows that the principal in the bond, within the time prescribed by law, cited the creditors before two justices of the peace and quorum, was fully examined by astute counsel for the creditors, and was discharged. He disclosed no estate real or personal, not exempt from attachment, unless it was the sum of five dollars and two cents with which he had provided himself to defray the expenses of his disclosure. This sum he placed in the hands of his attorney, before he commenced his disclosure, directing him to pay the justices their fee and to retain the balance for his own services. He also states that the claim of his attorney on him was more than the whole amount thus deposited with him. It also appears, that the debtor's attorney did not pay over the fee of the justices until the disclosure had been commenced. There is no assertion, however, that the disclosure was not a full and fair one, and that, aside from the money already spoken of, the debtor was not entitled to have the oath administered to him.

But, under the authority of *Butman* v. *Holbrook*, 27 Maine, 419, the plaintiffs claim a forfeiture of the bond. In the case cited, the learned Judge, who delivered the opinion, manifestly felt that he was giving the statute a rigid, technical construction, and awarding the pound of flesh without abatement to the plaintiff.

The case at bar, however, does not fall within the rule prescribed in that case. There the money was not appropriated till after the disclosure had been commenced. Here the appropriation was made before it commenced. The distinction is not very broad, it is true, but sufficiently so to permit the defendants to escape the technical trap.

Plaintiffs nonsuit.

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

JACOB BRACKETT *versus* ISRAEL VINING.

If a collector of taxes keeps property, which he has seized on his warrant, beyond the time within which it could be legally sold, he thereby becomes a trespasser *ab initio*; and the owners may replevy it.

TRESPASS. From the report of the evidence, offered at the trial, it appears that the plaintiff was the collector of a school district tax, and, by virtue of his warrant, seized a horse as the property of one *Lord*, who refused to pay his assessed proportion of the tax. The property was taken by the plaintiff on the 27th day of October, 1859; on the day following, he gave public notice for its sale on the third day of November, — on which day, and before the hour appointed for the sale, the defendant, as a deputy sheriff, having a writ of replevin in favor of said Lord, took the horse from the plaintiff's possession; whereupon, this action was commenced.

At *Nisi Prius*, APPLETON, J., presiding, questions were raised by the counsel of the defendant, involving the legality of the tax, and of the proceedings of the plaintiff under his warrant. For the purpose of presenting the questions to the full Court, the presiding Judge overruled the objections, and a verdict was rendered for the plaintiff. The defendant excepted.

At the argument on the exceptions, the counsel of the defendant, *D. D. Stewart*, submitted the case upon the point, that, by the terms of the warrant and by the statute, the property should have been sold at the expiration of four days after its seizure. After that time, the plaintiff could not legally sell. The keeping of the horse seven days, at least, before the day of sale, was an unauthorized act, and the plaintiff thereby became a trespasser *ab initio*.

Hutchinson, for the plaintiff.

GOODENOW, J.—The plaintiff did not comply with the directions of the warrant, by virtue of which he took the property in controversy, nor with the requirements of the statute relating to the sale of the property so taken. The warrant, therefore, is insufficient to protect him. He kept the property too long—beyond the expiration of the time, when it should have been sold—and, by so doing, must be regarded as a trespasser *ab initio*. It is unnecessary to consider the alleged illegality of the proceedings in the assessment of the tax. The exceptions must be sustained, verdict set aside, and *a new trial granted*.

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

JOHN WARE *versus* DANIEL BARKER.

It is essential to the validity of a levy that the officer's return show that the owner of the land levied on chose one of the appraisers, or had the notice provided by law to do so.

When an execution against two debtors is levied upon land of one of them, a return, that "*the debtor*" refused to choose any appraiser, fails to show that the *owner of the land* had the requisite notice to do so, and the levy is therefore void.

ON REPORT.

WRIT OF ENTRY to recover certain land which the demandant claimed by virtue of a levy of an execution thereon, against the tenant and one Bean. The officer in his return stated, that one of the appraisers was chosen by the creditor, one by himself, and the third by himself, "the debtor refusing to choose any person."

Other questions were raised in the case but did not become material in its determination.

Hutchinson, for demandant.

Abbott, for tenant.

The opinion of the Court was drawn up by

TENNEY, C. J. — The tenant claims title in the premises, under a guardian's sale; the demandant, under the levy of an execution against the tenant. The demandant denies the title of the tenant, by reason of defects in the probate proceedings invoked. The tenant insists upon the validity of those proceedings. And, as a further defence, he contends that nothing was obtained by the supposed extent of the demandant's execution upon the land in dispute.

If the levy is in any particular fatally defective, the necessity of a consideration of other points raised in defence is avoided.

The execution, on which the supposed levy was made, was against two debtors, the tenant, and Reuben Bean. The

officer who made the levy states in his return, "and the said Joseph Hight, being appointed by myself, the debtor refusing to choose any person." It was necessary to the validity of the levy that the debtor, whose land is alleged in the return to have been seized, should be notified, or that he should have refused to choose an appraiser.

The case of *Harriman* v. *Cummings*, 45 Maine, 351, is relied upon as decisive of the question in favor of the tenant. The phraseology in the return, in that case, was, in one respect, different from that in this case. The execution in that case, as in this, was against two persons. The land attempted to be set off was represented as the property of Meshack Pike, one of the debtors, exclusively; and one of the appraisers is stated in the return to have been chosen by the debtor within named. This was held to be a defect, on the ground that "every thing stated in the officer's return may be true, and Meshack Pike, not having chosen an appraiser, or have had notice to do so." In this case the tenant is named in the return, as the person whose land was seized on the execution, and the *debtor* is alleged to have refused to choose an appraiser. The word debtor is not named in the return, but is in the execution. By no rule of grammatical construction is the reference to be considered as made to the debtor, whose name is in the return, more than that in the execution. And the refusal by Bean to choose an appraiser is indicated by quite as great a certainty in the return as the refusal of Pike. As in the case referred to, the language of the return may be true, and not obnoxious to the charge of any grammatical impropriety, and the owner of the land in question have had no notice to choose an appraiser. *Plaintiff nonsuit.*

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

THE OVERSEERS OF THE POOR OF FAIRFIELD *versus* DAVID GULLIFER, *Appellant.*

The records of Probate Courts must show their jurisdiction, or their proceedings are void.

To place a citizen under guardianship, the records must show, by distinct allegation, and not by implication or inference, that he falls within one of the classes named in the statute, for whom a guardian may be appointed.

The Judge of Probate has no authority to appoint a guardian for a citizen who is alleged to be "not capable of taking care of himself and property, being now in his dotage."

ON EXCEPTIONS to the rulings of APPLETON, J.

THIS was an appeal from the decree of the Judge of Probate, appointing a guardian for the appellant, upon the petition of the plaintiffs. In this Court the appellant demurred to the petition, the demurrer was joined by the plaintiffs and overruled by the presiding Judge, and the decree of the Judge of Probate affirmed; whereupon the appellant excepted.

The contents of the petition are sufficiently stated in the opinion.

Hutchinson, for the appellant.

Abbott and *Snell*, for the appellees.

The opinion of the Court was drawn up by

RICE, J. — This case comes before this Court on appeal from the Judge of Probate, and is presented on a demurrer to the petition asking the Judge of Probate to appoint a guardian for the appellant. The demurrer admits the truth of the facts set out in the petition. Did these facts, thus admitted by the pleading, give jurisdiction to the Probate Court? The petition contains three allegations; "that David Gullifer, of said town of Fairfield, is a person not capable of taking care of himself and property, being now in his dotage, and having become heir at law to a considerable

property by the death of his son." Striking out as surplusage that part of the allegation referring to the manner in which he became possessed of his property, is there sufficient in this petition to authorize the Judge of Probate to interpose and appoint a guardian?

The authority of the Judge of Probate, in this class of cases, is found in § 4, c. 67, R. S. By this statute he may, on proper application, appoint guardians, *first*, for insane persons, including certain classes of married women; and *second*, for persons who, by excessive drinking, gaming, idleness, or debauchery of any kind, have become incapable of managing their own affairs, or so spend or waste their estate as to expose themselves or families to want or suffering, or their town to expense.

It is not suggested that the appellant falls under the second class. If the Judge of Probate has jurisdiction, it is because he falls within that class denominated "insane persons." The words "insane person" may include an idiotic, non compos, lunatic, or distracted person. R. S., c. 1, § 4, clause 8.

The petition does not allege that Gullifer was either idiotic, non compos, lunatic, nor distracted, but simply affirms that he is a person not capable of taking care of himself and property, *being in his dotage*—the words in italic being used argumentatively. This does not bring him within the language, nor necessarily within the meaning of the statute. The word dotage means simply feebleness or imbecility of mind, loss of understanding, as in old age. Worcester's Dict.

The appointment of a guardian over one as *non compos*, is not warranted by the fact that he was aged and had become wasteful of his property under the influence of profligate children. *Darling* v. *Bennet*, 8 Mass., 129.

Courts of Probate are created by statute and have a special and limited jurisdiction only. The record of the proceedings of such courts must show their jurisdiction. To place a citizen under guardianship, the records of the court must

show that he falls within that class of persons, named in the statute, for whom a guardian may be appointed, and these facts must appear affirmatively, by distinct allegation, and not by implication, nor by way of inference from the facts.

The original petition being insufficient, *the demurrer is sustained and the case dismissed with costs for the appellant.*

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

ISAAC W. ADAMS, *in Equity, versus* TRUEMAN A. STEVENS *& als.*

A deed containing a proviso *without* the usual concluding words "then this deed shall be null and void," or their equivalents, is inoperative as a mortgage.

Where the rights of a defendant in equity, who resides out of the State and has had notice of the suit, but does not appear and answer, will not be prejudiced by the decree, the bill may be taken *pro confesso* as to him.

Where the rights of his co-defendants are not prejudiced by his failure to appear, it will not defeat the action.

It is the general rule that a mistake in an instrument can be reformed in equity only when the litigation is between the original parties to it.

But where one purchases with knowledge of the mistake and the true intent and design of the instrument, he stands in no better position than the original parties.

Where one of the defendants in an equity suit dies, while the suit is pending, and his heirs cannot be prejudiced by the proceedings, they need not be made parties.

The Supreme Judicial Court has jurisdiction in equity to reform a mistake in a deed.

To reform a deed in equity is to make a decree, that it shall be read and construed as it was originally intended by the parties, when an error in fact has been committed.

BILL IN EQUITY to reform an alleged mistake in a deed. The case was heard upon bill, answer and proof.

The facts proved, and questions of law raised by the counsel, are stated in the opinion.

Hutchinson, for the plaintiff.

J. S. Abbott, for defendant Trueman A. Stevens.

The opinion of the Court was drawn up by

RICE, J.—March 10, 1828, Jonathan Stevens conveyed to his son Elisha Stevens, by deed of warranty, certain lands therein described, and on the same day, and obviously as a part of the same transaction, received from the said Elisha a deed of the same estate, with some additional land. The last named deed contains this provision:—

"Provided, nevertheless, that if the said Elisha Stevens, his heirs, executors, or administrators, shall faithfully and decently maintain and support the said Jonathan Stevens and his wife Sarah Stevens, through their natural lives, and supply them with all necessaries to support and make life comfortable, and pay all doctor's bills and funeral charges that may arise, and that their minor children shall have a home and provision during their minority, providing said minors render their services for the use and benefit of said farm, and for the support of said family."

The words usually found at the conclusion of the condition of a mortgage, are not found in this deed. Without such concluding words, the deed is inoperative as a mortgage. *Freeman's Bank* v. *Vose*, 23 Maine, 98.

The bill alleges, and the answer of Jonathan Stevens admits, and the evidence in the case clearly shows, that the parties intended this deed to be a mortgage, and understood such to be its character. The evidence also satisfactorily shows that the words necessary to constitute said deed a mortgage were omitted by mistake.

From Elisha Stevens the record title passed through sundry mesne conveyances to the plaintiff, and at each transfer of the title the existence of the deed from Elisha to Jonathan, above referred to, was recognized as a subsisting and valid mortgage.

These several conveyances were all seasonably recorded.

March 25, 1852, Jonathan Stevens, for the nominal consideration of one dollar, conveyed, by deed of quitclaim, to Trueman A. Stevens, one of the defendants, the land described in the deed from Elisha to Jonathan.

By virtue of this last deed, the defendant Trueman A., claims to hold the land therein described, in fee simple; and, on the 20th of September, 1852, brought his writ of entry to recover possession thereof, which suit is still pending.

From the pleadings and evidence in the case, we are entirely satisfied that Trueman A., at the time he took his deed from Jonathan, not only had knowledge of the existence of the deed from Elisha to Jonathan, dated March 10, 1828, but that he also well knew the purposes for which said deed was given, and that it was originally designed by the parties thereto to be a mortgage, and that such had been understood to be its character by all the intermediate parties through whom the plaintiff claims title from Elisha, and that the said Jonathan had always understood said deed to be a mortgage, and so treated it.

The complainant now prays for a decree by which said deed from Elisha to Jonathan may be reformed by the addition of those words which it is alleged were omitted by mistake, and which are necessary to constitute said deed a mortgage, so as to effectuate what is affirmed to have been the original intention of the parties thereto, and for general relief.

To such a decree several objections are interposed by the defendant Trueman A. Stevens.

First, it is objected that the parties named in the bill are not all legally before the Court.

Elisha Stevens is described in the bill as of Jordan, in the county of Greene, in the State of Wisconsin. This defendant does not appear to have any estate, agent, or attorney in this State.

The Court ordered notice by serving upon him a true and attested copy of the bill, with a copy of the order of Court

thereon. The return, showing service by leaving a true and attested copy of the bill, and order of Court thereon, at the last and usual place of abode of said defendant, purports to be signed by the sheriff of Greene county, Wisconsin.

The statute then in force provided no specific mode in which parties, situated as this defendant then was, should be notified. The evidence, however, is at least *prima facie* that he had actual notice. This would have authorized him to appear and answer to the bill. But he has not so done. If a decree were sought against him, by which his rights were to be prejudiced, the Court might hesitate. But no such decree is sought, and it is not perceived that his rights can be in any way injuriously affected by this proceeding. Nor can the defendant Trueman A. Stevens, be prejudiced by the fact that Elisha does not appear. As against Elisha, therefore, judgment may be entered *pro confesso*.

It is also objected that a decree, reforming a mistake in a deed, can only be entered when the litigation is between the original parties to the instrument. Such is the general rule. But when a purchaser has knowledge of the mistake, and of the true intent and design of the deed, at the time of his purchase, he will stand in no better condition than the original parties to the instrument. *Freeman's Bank* v. *Vose*, 23 Maine, 98.

In this case, as we have already seen, the defendant Trueman A. purchased with full knowledge of all the facts in the case. He paid a nominal consideration only. He is not, therefore, in the condition of an innocent purchaser for value, without notice, but is affected by all existing equities in the same manner as if he were an original party.

The answers of the other defendants admit, as far as they have knowledge, all the material allegations in the bill.

Further objection is made, that Jonathan Stevens, one of the defendants, has died since the suit was commenced, leaving heirs, who should have been made parties to this proceeding.

The evidence shows that Jonathan Stevens died without property, unless he had a remaining interest in the estate covered by the deed referred to; and that no administration has been taken out on his estate.

If the deed in question shall not be reformed, but be permitted to stand as an absolute deed, then his entire estate passed to the defendant Trueman A. Stevens, by the deed of Jonathan dated March 25, 1852. In that event, the heirs of Jonathan would be precluded. If, on the other hand, the deed is reformed, those heirs may, by possibility, have a contingent interest. In the view the Court take of this matter, however, the rights of the heirs cannot be prejudiced by this proceeding. The objection, therefore, that they are not made parties, cannot prevail.

Other objections are made, which are, however, of a technical character, and do not affect the merits of the case.

This Court has jurisdiction in equity, for relief in cases of mistake. R. S. c. 77, § 8, clause fourth.

To reform an instrument in equity, is to make a decree, that a deed, or other agreement, shall be made or construed as it was originally intended by the parties, when an error as to a fact has been committed. *Lumbert* v. *Hill*, 41 Maine, 475.

The complainant is entitled to a decree to have the mistake corrected, by a reform to the deed from Elisha Stevens to Jonathan Stevens, according to the intentions of the original parties; that is, to constitute said deed a mortgage with the conditions therein contained. He is also entitled to his costs against Trueman A. Stevens.

As to the other defendants, neither party will take costs.

Decree accordingly.

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

BENJAMIN P. CHURCH *versus* JOHN ROWELL *& al.*

If a person has a home established in a town in this State, and goes therefrom for a specific purpose, intending to return when that purpose shall be accomplished, without making any other place his home for an indefinite period of time, his residence is not changed.

Otherwise, if he takes up his abode in another place, without any present intention to remove therefrom.

If he acquires a new residence, and leaves there to go to his old home, with the deliberate intention of not returning, and of abandoning his new residence, then goes to the town of his first residence, as to his former established home, and is there on the first day of May, having no intention to go to reside in any other particular place as a home, he is subject to taxation in that town.

But if he leaves in such case with the intention of returning, and not to abandon his new home, and that intention is retained by him on the first day of May, he is not a subject of taxation in that town.

The statement by the presiding Judge, during the progress of a trial, of a proposition, as a rule of law in relation to the admissibility of evidence, though erroneous, is no ground for exception, unless it appears that the party was prejudiced by it.

The declarations of a person, in connection with his departure from a place, are not admissible in his favor, unless accompanied by some act of starting or preparation to start.

ON EXCEPTIONS to an alleged ruling, to the instructions, and to the refusal to give certain requested instructions, by TENNEY, C. J., presiding at *Nisi Prius*.

TRESPASS against the defendants as assessors of the town of Hartland, for causing the defendant to be arrested for a tax assessed upon him by them, for the year 1853, he alleging that he was not a resident of the town of Hartland, or subject to taxation therein.

The alleged ruling, the instructions, and the evidence upon which the same were founded, are given in the opinion.

The counsel for the plaintiff requested the presiding Judge to instruct the jury, that the plaintiff, by residence in California, and the ownership of property there, became an inhabitant of California; and that, if he did not have the design to make Hartland his permanent place of residence on

the first day of May, 1853, he was not liable to taxation in that town.

The Judge declined giving these instructions any further than they were included in those given. The verdict being for the defendants, the plaintiff excepted.

Hutchinson, in support of the exceptions, cited 1 Gray, 441; 1 Met., 242, 250; 17 Pick., 128, 331; 23 Pick., 170; 3 Met., 199.

Folsom, for the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiff was arrested and imprisoned, on account of the omission to pay a tax assessed upon him in the town of Hartland, for the municipal year 1853; and the action is against the assessors, upon the ground that he was not an inhabitant of Hartland on May 1, 1853.

There was no controversy, that the plaintiff lived with his father, in the town of Hartland, till he was seventeen years of age. Having bought his time, he left his father's house, and lived in several different towns, and was at Hartland very little afterwards, excepting that he was there at one time for about three months, attending school and living at his father's. He went to California, in the year 1850, and, while there, he and several others owned a house, in which they lived, and carried on mining operations. In March or April, in the year 1853, he left California and came to Hartland, where he arrived on April 28, 1853. He staid there from three to five days, after which he went to Canaan; and, on the seventh day of May, 1853, he bought in Canaan a farm, stock, farming tools, and furniture, and afterwards took up his permanent abode in that town.

By the agreement of the parties, the only question was, whether the plaintiff was a subject of taxation in the town of Hartland, on May 1, 1853. Evidence was introduced, on which the plaintiff relied, that he had been an inhabitant of California, and that it continued to be his residence till he

took up his permanent home in Canaan. And, from evidence in the case, the defendant contended that he had abandoned California, and left there, with no intention to return.

The jury were instructed as follows: — First, if the plaintiff ever had a home established in the town of Hartland, and if he was in California, or other places, for a specific purpose, intending to return to Hartland, when that purpose should be accomplished, without making either of such places his home for an indefinite period of time, his former residence would not be lost. Otherwise, if he took up his abode in California, or other places, without any present intention to remove therefrom. Second, if he had acquired a home in California, and when he left there to come to Hartland, he departed with the deliberate intention of not returning there, but to abandon it, and he came to Hartland, as to his former established home, and was there on May 1, 1853, having no intention to go to reside in any other particular place as a home, he was subject to taxation in Hartland. If he had acquired a home in California, as before stated, and he left there with the intention of returning, and not to abandon it as a home, and such intention was retained by him on May 1, 1853, he was not a subject of taxation in Hartland, on that day.

Under these instructions, the jury must have found that the plaintiff had not lost his original residence in Hartland; *or*, that having acquired a legal residence in California, he had abandoned it, and intended not to return thereto as a home, and did come to Hartland, as to his former established home, and was there on May 1, 1853, with no intention to make any other particular place his home.

All personal property, whether within or without the State, with certain exceptions, immaterial in this case, as the law was in 1853, were required to be assessed, in the town where the owner was an inhabitant on the first day of May, in each year. Statute of 1845, c. 159, § 9.

The word "inhabitant" may be construed to mean a resident in any place. R. S. of 1841, c. 1, § 3, clause 7. No

reason is perceived for giving a different meaning to the word "resident," when considering a case like the present, from its definition under the statutes, touching the settlement of paupers. The definition of the term "inhabitant," in the statute, is similar to the meaning given in the statute of Mass., of 1836, c. 2, § 6, clause 7, which has had a construction given to it in *Boston* v. *Thorndike*, 1 Met., 242. The first branch of the instructions is fully sustained by this case, in which it is said, in the opinion of the Court,—"It is a maxim that every man must have a domicil somewhere, and, also, that he can have but one." "If the plaintiff went abroad, not for the purpose of travelling, or for any other particular object, intending to return when that object was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live, in the event of his return to the United States, then he ceased to be an inhabitant of Boston." The second branch of the instructions is supported by the same case, and also the case of *Warren* v. *Thomaston*, 43 Maine, 406, in which it is said by the Court,—"To establish a residence within the meaning of the statute, there must be a personal presence, without any present intention to depart, and to break up a residence when once established, there must be a departure with the intention to abandon."

Objections to the ruling of the presiding Judge, at the trial, are relied upon in behalf of the plaintiff, that all declarations of the plaintiff, unless accompanied by some act of starting, or preparation to start, were inadmissible, in connection with his departure from California, in March or April, 1853; at which time he left "there to return to the States, or home, as he expressed it at several times; witnesses testified, that he stated so, many times, up to the day of his departure, and one witness testified that, at the time of his departure, the plaintiff told him he was going to the States to recruit his health, and to return in the fall following." It does not appear that the testimony just quoted

was objected to or excluded. The ruling referred to, must have been the statement of a general principle, without any application to evidence then offered or given, and could not have been to the plaintiff's prejudice. The plaintiff's counsel contend that the principle stated is erroneous and inconsistent with adjudged cases, which are cited from Massachusetts. The ruling is not inconsistent with those cases, but the doctrine is in no respect impugned, that the declaration of a party, unaccompanied with any act, in his own favor, is inadmissible. Certain things done by the party, which things were admissible, were allowed to have character and explanation by what was said or written, as part of the *res gestæ*.

The general instructions to the jury embraced every thing contained in the instructions requested, so far as the plaintiff was entitled thereto. *Exceptions overruled.*

Judgment on the verdict.

RICE, MAY, GOODENOW and DAVIS, JJ., concurred.

KENT, J., dissenting.—I think the first instruction is erroneous, so far as it requires that the new home must be "for an *indefinite* period of time."

When it is claimed that a man, on a given day, was an inhabitant of, or dwelt and had his home in a certain town, although he in fact was not then personally living therein, it is necessary to prove that he had previously had an established home in that town, and that, although absent, he had not *abandoned* it as his home. It may still be his home, if it is shown that he has no other home and is absent temporarily intending to return, and *intending to retain his residence and citizenship*.

The point is, whether he had in fact abandoned the town, as his home, before the day in question. In determining this question, the fact that the party, when he left, intended to return at some future time, may be important. But after all, the question is, had he actually abandoned it as his home for the time in question?

If he has, I do not see how he can be said to still dwell and have his home therein. It seems to me that when a man leaves a town intending to make a home in another town, and he does actually go to such town with his family, and there becomes a resident, he cannot be regarded as still living as an inhabitant of the town he left, because he may have intended, when he left, to return and resume a residence at some future definite period, in the place of his original residence. The question of intention is, did he intend to abandon actually his former home, or did he intend to retain a present and continuing home there, although absent?

If a resident of Bangor should be offered a good salary if he would go to Lewiston and there take charge of a factory for six years, and he accepts the proposition and moves his family and goods, takes a house and lives there as an inhabitant, is taxed, chosen a town officer, makes it his home exactly as Bangor was his home before, is he still a resident of Bangor, because, when he left it, he intended to return to Bangor, and again become a resident at the expiration of the six years? Can he be taxed every year in Bangor? Would he not acquire a settlement after five years of such residence in Lewiston?

Can a man properly be said to dwell and have his home in a town, on a given day, when in fact he does not live there, but has abandoned his residence therein *expressly for and during that time*, and actually lives with his family, as his home, in another town, because he intends at some remote and fixed period to abandon his then present home and return to the former town and begin a new residence? Would it not complicate the matter, if, when he abandoned his second residence to return to the first, he intended to return to the second at the end of a year? A man living to-day in Bangor intends to remove to Brewer on the first of June. Is he not to-day a resident of Bangor?

It seems to me that the question is, not whether he has abandoned for a definite or indefinite period of time, but

whether he has actually abandoned it as his home for the time in question. The determination of this question must depend upon the result to be drawn from the whole evidence on the point. If the party intended to remove for a temporary purpose only, and intended to retain his home and residence in the town during such absence, then he would not lose his residence. But if he intended to make another town his home, and intended to abandon the former town as his home, for a longer or shorter time, for a fixed or for an uncertain time, and actually removes to such new town, and makes it his home, he would lose his former residence during that time.

A man cannot have two homes at the same time, but he may abandon one home before he actually acquires another. This was settled in *Exeter* v. *Brighton*, 15 Maine, 58. The question is—has he actually abandoned his first home? The test is not whether he intends at some future time to become again a citizen, but whether he intends to abandon then and for the time in question, that town as his home, and actually carries that intention into effect. If such is his intention, how can the fact of *definite* or *indefinite* time have any controlling influence? According to the ruling in this case, if a man, going to California, takes his family with him and avows that he intends to abandon the town in which he then resides, and to make his home in California as long as he can find gold; and he does go and make such home, he would lose his former residence, although he intended, and so declared when he left, that he was going for a specific purpose, and intended to return to the town he was leaving, at some indefinite time. But, if he declared the same intention, and does all, as above stated, yet, if he said he intended to dig gold *for three years*, and then to return, he would still be a resident in the eye of the law, notwithstanding the facts of actual residence and a home in California, and his intention to make it his home for three years. I confess I cannot see the soundness of this distinction.

I simply maintain this proposition,—that a man may be said to abandon his residence in a town, although he may intend to come back and commence a new residence at some future fixed time, if all the facts in the case show that he intended to abandon and to fix his home in another town, and that he does so for the period limited. The question is, was his home, during that time, where he intended it to be and where in fact it was, or did it continue, by construction, in the town he had left? Is he a resident of the town where he is with his family, or is he a resident in a town where he is not, because he intends, at some future day, to return and again become a citizen of that town?

I do not see why a man may not as well abandon, for a fixed and limited time, as for an indefinite time. The main question is, had he actually and intentionally abandoned the town as his residence, on the day or time in question. This must be settled on the whole evidence, as to his intentions and acts. I am at a loss to perceive, why the law should insist that a man is a resident of the town on a given day, when he is neither there in person nor has any family or house there, and does not wish or "intend" to be there, but has deliberately removed therefrom, with an intention to live as a citizen of another town, where he does live with his family, exactly as he lived in the former town, simply because he cherishes the intention of doing, at some future day, in the new town, what he did in the old, abandon it as his place of residence.

I do not think that the question is to be decided by the character of the new home, whether for a temporary or specific purpose or not. It can make no difference what the motive or purpose is, except so far as they show the intention to give up or retain a residence. A man may have a home in a town into which he comes for a defined and specific purpose, or for a limited time, as well as one who comes with no particular object and for no particular time. Was it his home for the time? If so, he could have no other home during the same time.

The character of his new residence is not the question in issue, except as evidence. The point on which the case turns is, did the party, when he left his former residence, intend to abandon it as his home, and did he so abandon it, intending that it should no longer be his home, until he resumed by a new act a new residence therein, or did he intend to retain his residence, although, in fact, absent personally?

In determining this question, the fact and character of his residence in the new town will, of course, have a bearing more or less important. But, if it should be clearly proved that a man had actually and absolutely "abandoned" his home, the effect of that abandonment would not be nullified, if it should be shown that he had been ever since a wanderer, without any fixed home. A man cannot have two homes at the same time, but he may, in fact, have no home, on a given day. An old home does not, like an old legal settlement, necessarily continue until a new one is acquired.

JOHN CHASE, *in Equity*, *versus* EDWARD MCLELLAN *& als.*

An agreement in a mortgage "that this deed shall commence to foreclose the day after each note becomes due, provided any one remains unpaid, and shall be foreclosed at the end of three years from said next day after any one of said notes becomes due and remains unpaid," is entirely ineffectual.

In proceeding to foreclose a mortgage by publication, the notice must describe the premises so intelligibly, that those entitled to redeem may know, with reasonable certainty, what premises are intended.

Where the mortgager is the person thus interested, the description, "certain parcels of real estate situated in the towns of B. and S. in said county, and being certain undivided parts of a fulling mill and clothing mill, and house lot situated in S. Island, occupied by said C., [the mortgager,] and G. L. H.; also a certain dwellinghouse and barn, with the land belonging to the same, situated in said S., and now occupied by said C." is sufficient.

A promise by a mortgagee, who has commenced proceedings to foreclose, to give the mortgager six months after the time of redemption would expire in which to redeem, opens the mortgage for that time, not beyond it.

Bill in Equity.

The case, heard on bill, answer and proof, is sufficiently stated in the opinion.

Webster, for plaintiff.

The description of the premises in the notice of foreclosure is defective, and therefore, the proceedings are void. *Spring* v. *Haines*, 21 Maine, 126; *Ford* v. *Erskine*, 45 Maine; *Holbrook & als.* v. *Thomas*, 38 Maine, 256.

2. The foreclosure was waived by McLellan. This may be done by a parol agreement, or it may be inferred from the acts of the mortgagee. 2 Hill. on Mort., 17, 18. *Fisher* v. *Shaw*, 42 Maine, 32, 39; *Basham* v. *McIntire*, 19 Pick., 346.

McLellan admits he waived the foreclosure for six months. But once waived, it is gone forever. 19 N. H., 403, 416.

Abbott, for defendant.

The opinion of the Court was drawn up by

Tenney, C. J.—The complainant prays for a decree that he be allowed to redeem a mortgage given by him to Samuel Soule, on January 22, 1846, of real estate described therein. He alleges, in his bill, that the mortgage was given as security for the sum of $1000, payable in four equal annual instalments, with interest annually, according to his four notes, bearing even date with the mortgage. On August 29, 1850, the complainant gave another mortgage to said Soule, of the same real estate, to secure another note of the date of the second mortgage, for the sum of $132,70, payable in one year with interest. On the same 29th day of August, 1850, the aforenamed mortgages and notes were assigned by the mortgagee to Edward McLellan, one of the defendants, who, on the same day, entered into possession of the premises, but not for the purpose of foreclosure, and has kept the complainant out, since that time.

It is also alleged in the bill, that McLellan, the defendant, on July 1, 1853, conveyed that portion of the premises,

upon Skowhegan Island, and other real estate, to Charles B. Foster, and at the same time took a mortgage of the same as security of the purchase money, and has commenced proceedings to foreclose the mortgage so given by Foster. That the said defendant, on August 18, 1855, conveyed to Stephen Coburn a small portion of the residue of the estate, conveyed by the complainant in mortgage to Soule, situated in Skowhegan, which portion was conveyed by said Coburn to Samuel Searle, and Benjamin F. Lane, by quitclaim deed, and the grantees were the owners thereof at the time of the institution of this suit; that the remainder of the real estate, in the town of Skowhegan, of the premises in the complainant's deed in mortgage to Soule, of Jan. 22, 1846, was conveyed by said McLellan to Wm. M. Lewis, on July 2, 1858, who conveyed the same in mortgage, to said McLellan, to secure the consideration of his deed.

The mortgage from the complainant to Soule, of January 22, 1846, contains the following:—"It is agreed, that this deed shall commence to foreclose the day after each note becomes due, provided any one remains unpaid, and shall be foreclosed at the end of three years from said next day after any one of said notes becomes due and remains unpaid."

It is agreed by the parties, that the notice, of which the following is a true copy, was published in "The People's Press," a public newspaper, printed in the town of Skowhegan, in the county of Somerset, three weeks successively, the paper containing the last publication being dated May 8, 1848, and that a copy of such printed notice, and the name and the date of the newspaper in which it was last published, was caused to be recorded by said Samuel Soule, the mortgagee, in the Registry of Deeds for the county of Somerset, within thirty days after the said last publication. "Whereas John Chase, of Skowhegan, county of Somerset, on the 22nd day of January, A. D., 1846, conveyed to me, by his mortgage deed of that date, certain parcels of real estate, situated in the towns of Bloomfield and Skowhegan, in said county, and being certain undivided parts of a fulling mill

and clothing mill, and house lot, situated on Skowhegan Island, occupied by said Chase and G. L. Hill, also, a certain dwellinghouse and barn, with the land belonging to the same, situated in said Skowhegan, and now occupied by said Chase, a full description of all which premises may be seen on the records of said county Registry, on book 62, page 423, and whereas the condition in the said mortgage has been broken, by reason whereof I claim to foreclose the same. Skowhegan, Feb. 1, 1848. Samuel Soule."

I. The complainant insists, that the evidence contained in the foregoing, is not sufficient to establish the foreclosure of the mortgage, given by the complainant to Samuel Soule, dated January 22, 1846, from and after that, which took place, and which is relied upon by the defendants as being the commencement of the three years within which redemption must take place, to prevent such foreclosure.

The agreement contained in the mortgage deed was entirely ineffectual. It was not any mode provided by the statute, by which a foreclosure can be effected. The second manner in which a foreclosure may take place, according to the statutes of 1841, c. 125, § 3, contemplates an entry by the mortgagee after condition broken, for the purpose of foreclosure, by consent in writing of the mortgager or the person holding under him. No entry was made by the written consent of the complainant.

It is contended on the part of the complainant, that the notice dated February 1, 1848, and recorded on March 9, 1848, was essentially defective, in not describing the mortgaged premises intelligibly. The statute does require that the mortgagee, or any other person, claiming under him, not desirous of taking and holding possession of the premises, may give public notice, &c., of his claim by the mortgage on such real estate, describing such premises intelligibly, and naming the date of the mortgage, and that the condition in the same has been broken, by reason whereof he claims a foreclosure.

The notice in question contains the statement of the mort-

gagee's claim, the date of the mortgage, and the breach of the condition therein. It is not required that the description of the premises shall be given as contained in the deed, any further than is necessary that they may be understood by those who are interested therein. But it should be such that those entitled to redeem should know with reasonable certainty what premises are intended. The party in this case who had the right to redeem, and who now makes the objection, was the mortgager himself, and we cannot doubt that the premises were intelligibly described, even if no reference had been made to the Registry of Deeds, so that he could not fail to understand the premises as perfectly as he would have done if the description of the deed was copied into the notice. No suggestion is made, that he did not in fact fully understand the real estate which was intended by the party giving the notice; but, on the other hand, he treated the notice as sufficient till after the three years from its record had elapsed. The notice is a compliance with the statutes of 1841, c. 125, § 5, first mode.

II. It is contended for the complainant, the right obtained by McLellan, the defendant, under the notice given by Soule, his assignor, was waived, so that the mortgage was open, and the right of redemption has continued till the time when the complainant made his demand for an account, and so exists to the present time.

According to McLellan's deposition, the complainant called on him a short time before the foreclosure under the notice would take place, and informed him that the time in which he could legally redeem the property would expire very soon, and the friend, who he expected would aid him in obtaining the money, would be unable to have it in season; would however furnish it about six months after the right in equity of redeeming would expire; and McLellan informed him that he would not avail himself of his legal rights, but would give him six months after the time when the right of redemption would expire in which to redeem it; thereupon the complainant expressed his gratitude for the

promised indulgence. And it is in evidence that McLellan often said he did not wish to take advantage of the complainant—and this was said before and after the three years, when the notice became effectual to foreclose.

When this evidence is examined, it is manifest that McLellan was influenced by a wish to obtain the payment of his notes, and, to do this, he was not disposed to exact of the complainant his strict legal rights, provided a short delay would enable the complainant to redeem. The extension of the time was definite and fixed, and the mortgage was opened so far, but not beyond it. And there is no evidence in the case that any further indulgence was agreed upon between the parties.

But the fact that the complainant treated the foreclosure as having taken place, which appears by the deposition given by him in this case, and his not only having consented to the conveyances made by McLellan afterwards, but having procured them to be made under the expectation of still deriving some benefit from the property, is conclusive evidence that he made no agreement with McLellan, that the latter should waive his rights, and the complainant should be admitted to redeem, as though no attempt had been made to foreclose the mortgage.

The complainant admits that he treated the mortgage as foreclosed, and he supposed it was so by virtue of the published notice and registry thereof, but it was under a full belief that it was so; and it was only from the conviction that in this belief he fell into an error, as to the law, that he spoke of his right to redeem as being extinguished. As we have decided the notice sufficient, it follows that the complainant did not err in his opinion, and this disposes of his ground that the mortgage was open to redemption by the waiver of the defendant McLellan.

The mortgage having been foreclosed long before the institution of this suit, *the bill must be dismissed.*

Rice, Appleton, May, Goodenow and Kent, JJ., concurred.

DANIEL W. AMES *versus* SAMUEL TAYLOR.

An officer, who has seized property on execution, does not abandon the seizure by leaving it in charge of a keeper, in a building to which the debtor has access, as well as the keeper, though the latter refuses to become responsible for the property if burned or stolen.

An agreement by an officer, not to move property seized by him on execution, and entrusting it to the custody of another, is a sufficient consideration for an agreement by the latter, to keep the property safely, and have it forthcoming at the sale on execution.

For breach of such agreement, the officer may maintain an action.

ON REPORT.

ASSUMPSIT by the plaintiff, as deputy sheriff, against the defendant for breach of an agreement to keep property seized on execution.

The evidence tended to prove that the plaintiff, as deputy sheriff, seized upon execution, against the defendant's father, on the 10th day of November, A. D., 1858, two wagons, of the value of $160; that the plaintiff found the wagons in an old mill, of which the defendant had the key, but in which one Kilgore, who lived a few rods off, had a room for a shop; that the plaintiff did not remove the wagons, but made an arrangement with Kilgore to take charge of them, until other arrangements could be made, and, if any body undertook to meddle with them, to inform such person that they had been seized on execution; but he was not to be responsible if they should be burned or stolen; that, on the next day, the plaintiff returned and saw the defendant, who, after some negotiation, agreed that, if the plaintiff would not move the wagons, he would keep them and have them forthcoming at the time of the sale on the execution, which was fixed for Nov. 15, 1858; that, relying upon this agreement, the plaintiff did not move the wagons; that the debtor was then away from home and did not return until after the plaintiff left, on the eleventh; that the defendant told the debtor, on his return, that the wagons had been taken on execution;

that the debtor then took the defendant's horse and went towards the mill, and the next morning took his horse again, and went towards the mill, and did not return till night; that, on the day of the sale, of which legal notice had been given, the plaintiff went to the mill after the wagons, and found that they had been taken away.

The Court were to render such judgment upon the evidence as the rights of the parties required.

The case was argued, chiefly upon the facts, by

J. S. Abbott, for the plaintiff, and by

Webster, for the defendant.

The opinion of the Court was drawn up by

GOODENOW, J.—In my opinion, it appears from the evidence reported, that the wagons were legally seized by the plaintiff, on execution, and the seizure was not abandoned, nor lost, up to the time when the agreement was made with the defendant; that the agreement alleged in the writ is proved by two witnesses, and is satisfactorily established, notwithstanding the denial of the defendant, whose complicity with the debtor, in the fraudulent secreting of his property may well be suspected; that said agreement is founded on a good and legal consideration; and that the defendant has failed to perform the same.

The wagons are alleged in the writ to have been of the value of one hundred and sixty dollars, and the testimony proves them to have been of that value.

Judgment for the plaintiff.—Damages, $160, *with interest from November* 15, 1858.

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

STATE *versus* GEORGE F. PATTEN *& als.*

One who bids off, at a land sale of State lands, a township of land, but takes no deed, acquires no right to the land, nor to cut any timber thereon.

All timber cut thereon remains the property of the State; and the title of the State to a particular lot is not relinquished by the omission of the Land Agent to seize it, although he seizes a lot cut subsequently.

Trustees, to whom a debtor conveys property in trust for his creditors, stand in no better position than the debtor, in respect to its title.

In trover, a demand and refusal are only *evidence* of conversion. If an actual conversion is proved, there is no necessity to prove a demand in order to sustain the action.

ON REPORT.

TROVER for a quantity of timber. The facts are stated in the opinion.

Coburn & Wyman, for plaintiff.

Bronson, for defendant.

1. There was an implied license to Russell to cut this timber, he having bid off the township at a regular land sale, and having been allowed to operate thereon, without disturbance by the State.

2. If the State had a lien on this timber, it was waived by the seizure of timber cut thereon subsequently, and by the Land Agent's then giving orders not to seize this.

3. The defendants never had any notice of this lien, if one ever existed.

4. No demand upon the defendants for this timber has been proved. The action cannot be sustained without it.

The opinion of the Court was drawn up by

RICE, J.—The title to the land, on which the logs in controversy were cut, was originally in the State. In 1851, at a land sale, one Russell bid off this land, but took no deed, and obtained no title till several years subsequent. In the winter of 1853–4, the logs in question were cut by Russell,

and, in August, 1855, he sold them to Berry & Son. In February, 1857, Berry & Son failed, and conveyed the logs, with other property, to the defendants, in trust, for certain of their creditors. The defendants have sawed and disposed of a portion of the logs.

The title to the land on which the logs grew, being in the State, would carry with it the title to the logs, unless it has been in some way divested. No sale of the timber, or license to cut the same, has been shown. The deed of March 1, 1856, from the State to Russell, does not purport to convey the timber which had been before severed from the soil. Nor does the resolve of the Legislature, of February 26, 1856, transfer any right in the timber to Russell, or relinquish any claim of the State thereto.

It is contended, that the neglect on the part of the State to seize this timber at the time it seized a quantity which had been subsequently cut by Russell on the same land, and sold to Clay and others, was evidence tending to show that it had relinquished its claims to the timber. We do not perceive any legal force in this proposition. The Land Agent may have had reasons for seizing the Clay timber, which did not apply to this. But whether that were so or not is not material.

The defendants were not purchasers for value, and therefore occupy no better position, as to the title, than was occupied by Berry & Son; and, if notice of plaintiff's claim were necessary, the evidence satisfactorily shows that Berry & Son had such notice.

A demand and refusal is only *evidence* of conversion. The case finds the *fact* of conversion irrespective of any demand. This is sufficient on that point.

The defendants must be defaulted, and damages assessed by the Judge presiding at Nisi Prius.

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

INHABITANTS OF NORRIDGEWOCK *versus* INHABITANTS OF SOLON.

It is the duty of overseers of the poor to relieve a person found in their town in distress, although he may have property of his own, not available for his immediate relief.

In such case, the town in which he has his legal settlement is liable to the town furnishing the relief, for the amount furnished.

A person in jail on execution, actually destitute, is entitled to relief, although he refuses to make oath that he is unable to support himself in jail, and has not property sufficient to furnish security for his support.

ON REPORT.

THE case is stated in the opinion.

S. D. Lindsay, for plaintiffs.

A person confined in jail without means of support, unless confined on charge of crime, is a person destitute, found in the town in which the county jail is situated. *Cargill* v. *Wiscasset*, 2 Mass., 547; *Adams* v. *Wiscasset*, 5 Mass., 328; *Paris* v. *Hiram*, 12 Mass., 262; *Taunton* v. *Westport*, 12 Mass., 355; *Sayward* v. *Alfred*, 5 Mass., 246; *Alna* v. *Plummer*, 4 Maine, 262.

J. S. Abbott and *O. R. Bacheller*, for defendants.

[The arguments for defendants did not come into the hands of the Reporter.]

The opinion of the Court was drawn up by

RICE, J.—Section 24 of c. 24, R. S. provides that overseers are to relieve persons destitute, found in their towns, and having no settlement therein, and, in case of decease, decently to bury them.

The alleged pauper, for whose support this action was brought, had surrendered himself to the keeper of the jail, in Norridgewock, to save the condition of a poor debtor's bond, given to procure his release from arrest on an execution, according to the provisions of § 22, c. 113, R. S. Be-

ing thus in jail, he refused to make complaint, stating that he was unable to support himself in jail, and had not property sufficient to furnish security for his support. In that state of things the jailer made application to the overseers of the poor for the town of Norridgewock to furnish relief, on the ground that he was in distress, which relief was duly furnished. There is no dispute as to the amount furnished, nor as to the fact that the alleged pauper had his legal settlement in the defendant town, nor that said town was seasonably and legally notified that supplies were being furnished.

The pauper testified that he notified the overseers of Norridgewock, the first time he saw them after he went into jail, that he would pay for his board and clothing, and would support himself, if they would let him go out of jail and work by the day, and that he would return every night. But this offer was declined by the overseers, on the ground that the opportunities for labor were such that, with the exercise of proper custody over him, he could earn nothing.

The statute, c. 24, § 26, authorizes overseers of a town in which there is a county jail, by their written order to set to work, so far as is necessary for his support, any debtor committed, and then chargeable to any town in the State for his support. The town where he has a settlement is liable to pay the expenses incurred, not so paid by him. Here, it appears, the alleged pauper was so situated that he could contribute nothing by his labor towards his support. But it is contended that he was not, in fact, a pauper; that he had means by which he could have paid for, or secured his own support, and that this sufficiently appears from the fact that he had made two unsuccessful attempts to procure his discharge by disclosure, and, also, that he refused to make oath that he was unable to support himself, though solicited to do so by the jailer. All this may be true, and the overseers may still be liable, under the statute, to furnish relief. The question for the overseers to decide, is, under the statute, is he destitute? or, in the language of prior statutes,

which have been somewhat condensed in the last revision, is he in distress and in need of immediate relief? Upon this point, the language of WESTON, J., in the case of *Alna* v. *Plummer*, 4 Maine, 249, is pertinent. He says, it is made the duty of the overseers of the town, where a person may be found in distress, to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself, but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer while the overseers were deliberating as to the extent of their official duty and the nature of their remedy. The law has not subjected the towns they represent to the necessity of first attempting to enforce the claims against the party himself, before they can call upon the town where he has his settlement. This obligation is imposed where distress exists and relief is necessary for persons found out of the place of their legal settlement.

A similar opinion was expressed in the case of *Paris* v. *Hiram*, 12 Mass., 262, by PARKER, C. J. That case was, in most of its features, like the present. The plaintiffs failed, however, to fix the settlement of the pauper in the defendant town, and therefore failed in their action.

The practical question for the determination of overseers in this class of cases, is, whether the party for whose relief application is made, is then and there actually destitute, and in need of relief. If so, the obligation to furnish such relief at once arises. The relief must be furnished. The question upon whom shall the burden ultimately fall cannot control or affect their obligation to act in the premises. The humanity of the law requires that the destitute be immediately relieved, and then provides appropriate remedies for those who are required in the first instance to furnish such relief. The authorities cited by the plaintiffs fully sustain this doctrine. According to the agreement, *a default must be entered.*

CUTTING, GOODENOW, KENT and WALTON, JJ., concurred. — TENNEY, C. J., took no part in the decision, being an inhabitant of the plaintiff town.

EBENEZER S. COE, *in Equity*, *versus* ISRAEL B. BRADLEY.

Where the Land Agent, being authorized to sell the right to cut timber and grass on lots reserved for public uses in a certain township, to any part owner who should elect to purchase, otherwise to any other person, sold such right to B, who is not proved to have been a part owner, — but with a *parol* understanding that any proprietor might participate in the purchase if he should so elect, — this does not create a trust, either express or implied, for the benefit of the owners of the township, who have not paid or tendered to B any part of the purchase money; and a bill in equity, brought by C, who is a part owner, for a share in the purchase, he offering to pay his proportion, will be denied.

The provisions of the statute of 1850, c. 196, were gratuitous, and neither B nor C has any claim on the State for damages, if conveyance of the right in question is refused by the Land Agent; nor can C have any greater claim against the grantee of the State, than against the State.

BILL IN EQUITY. The bill sets forth, that Samuel A. Bradley, being the owner of township No. 1, range 5, in Somerset county, commonly called "West Middlesex township," conveyed to George Evans, October 19, 1836, 4000 acres in common and undivided; that Evans conveyed the same to the plaintiff, November 24, 1850; that, on petition of the plaintiff, commissioners appointed by the Supreme Court first set off 960 acres, being lots reserved in the original grant for public uses, and then made partition of the township amongst the proprietors, and their report was accepted by the Court; that, on July 30, 1851, the Land Agent conveyed to the defendant the right to cut timber and grass on the reserved lots until the township should be organized as a plantation; that the defendant, as the plaintiff believes, took said conveyance in trust for the benefit of the proprietors of the township; and that the plaintiff is equitably entitled to a proportionate share of said conveyance, he offering to pay his share of the purchase money; but that the defendant neglects to convey to the plaintiff as requested.

The defendant, in his answer, admits the title of the plaintiff to 4000 acres of the land, and the conveyance by

the Land Agent to the defendant of the right to cut timber and grass on the reserved lots; but denies that there was any agreement or understanding at the time of the conveyance, that he should hold it in trust for the proprietors of the township, or that he had any conversation with either of them relative to his purchase. He further states that the purchase was negotiated with the Land Agent by Abner Coburn, Esq., and that Coburn informed him that, by an understanding with the Land Agent, Evans and the other owners were to participate in the purchase, if they should think proper; that the defendant paid Coburn for the purchase, $400 and interest, from his own money; that he, in October or November, 1851, informed Evans of the purchase, and that he was willing to admit him to a participation on his making a proportional payment, but said Evans has never offered or tendered payment, nor demanded conveyance of a proportional share. He admits that, in the summer of 1853, Coe informed him that he claimed a share in the timber purchased, by paying a proportional share of the price paid for it, and, in 1860, he received a letter from Coe's attorney relative to it, to which he made no answer. He claims that, if the plaintiff ever had any claim to a conveyance of a proportional share, it is barred by the lapse of six years since said claim accrued; and alleges that, in 1860, when he received the letter referred to, more than nine years and six months had elapsed since his purchase, during which time, by the growth of the timber, and increase of its market price, the value had been enhanced, &c.

The testimony of George Evans tended to prove that, sometime prior to 1852, he had a conversation with Bradley, in which Bradley informed him of his purchase, and of his willingness to admit him to a proportional share by his making due payment; and that afterwards, when he sold to Coe, he sold him the 4000 acres he owned in the township, with whatever right he had to the timber and grass on the public lots, but without warranting his title to the latter.

J. S. Abbott, for the plaintiff.

Philip Eastman, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—In certain townships of land formerly owned by the State, when sold, there were lots reserved for public use. By c. 196 of the laws of 1850, the Land Agent was authorized to sell the right to cut and carry away the timber and grass from such lots, to the persons owning any township, provided they should elect to purchase; otherwise to any other person.

The plaintiff purchased about one-sixth part of the "West Middlesex township," in the county of Somerset, of George Evans, Nov. 24, 1850. Whether the defendant was an owner of any part, is not alleged. He appears by the proofs to have been a part owner; but of how much, it does not appear.

July 30th, 1851, the defendant purchased of the Land Agent the right to cut and carry away the timber and grass from the reserved lands in said township. His deed was absolute; but there was an understanding, by parol, between him and the Land Agent, that the proprietors of said township should have the benefit of participating in said purchase.

The plaintiff afterwards claimed to participate in the purchase; but he never paid or tendered to the defendant any part of the purchase money. He offers, in the bill before us, to pay his proportion; and he asks the interposition of the Court to compel the defendant to convey such proportion to him.

It is claimed that the defendant took the interest conveyed, in trust, for the benefit of the owners of the township. If so, the trust must have been express, or implied. There was no express trust, unless it was created by the parol understanding between him and the Land Agent. But such trusts cannot be enforced in this State. R. S. c. 73, § 11.

Was there any *implied* trust? The statute of 1850 does not provide for any conveyance in trust. If implied, it

must be by general principles of law, from the rights of the parties, under the circumstances of the case.

Neither the plaintiff nor the defendant had any claim to a conveyance from the State. The offer made by the statute of 1850, was gratuitous. If the Land Agent had refused to convey to either of the parties, neither would have had any claim for damages. The conveyance to the defendant, therefore, did not injure the plaintiff. If it deprived him of anything, it was something to which he had no right.

Whether the Land Agent had any authority to convey to any person not a part owner of the township, until the owners had refused to purchase, is a question which the *State* might raise. Or, if the Land Agent should afterwards convey to such owners, *they* might raise the question as between themselves and the prior grantee. But unless they obtain such a conveyance, they have no interest in the property. And, having no *right* to a conveyance from the State, they have no right to a conveyance from a grantee of the State. If the State treats the conveyance of the Land Agent as valid, other persons have no right to complain.

The plaintiff is a stranger to the title of the property in question. As against the State, he has no claim or right to it in law, or equity. He is not in a position to contest the title of the defendant. There is no implied trust, for there is no right or interest from which such a trust can result.

Bill dismissed.

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

Androscoggin & Kennebec Railroad Company *versus* Androscoggin Railroad Company *& als.*

Where a bill in equity is filed in any county, the Court in that county has jurisdiction of all matters, interlocutory or otherwise, except such as by statute or the rules of Court may be passed upon by a Court in another county, or by a single Judge at chambers or in vacation.

Where a bill has been filed in one county, and afterwards an application is made for an injunction, to a Judge sitting in Court in another county, and the injunction is granted, it may be upheld, although the statute seems to contemplate that the act is to be done by a Judge out of Court, unless by the Court in the county where the bill is pending.

But if done in open Court in another county, it can have no greater power or effect than if done by a Judge at chambers.

After the injunction has been issued, the Judge has exhausted the power vested in him as a Judge out of the Court where the bill is pending.

Contempts of Court are of two kinds. Those committed in the presence of the Court, by insulting language, or acts of violence interrupting the proceedings, may be summarily punished by order of the presiding Judge, after such hearing as he may deem just and necessary.

The other class of contempts, which are in a sense constructive, arising from matters not transpiring in Court, but by refusing or neglecting to comply with orders and decrees of the Court to be performed elsewhere, are equally punishable, but by a different and less summary process.

The 28th rule of the Court "for practice in chancery," authorizing single Judges, in cases of contempt by refusing to obey any order or decree of the Court, to issue a writ of attachment "returnable at the next term," is to be construed as meaning the next term in the county where the bill is pending, and gives no jurisdiction to the Court in any other county, and no special jurisdiction to the Judge who may issue it in chambers, as to any further action upon it.

Where a bill in equity is pending in one county, and an injunction is applied for by the complainant to a Judge or Court in another county, the writ of injunction is properly made returnable to the county where the bill is pending; and a Judge or Court in another county has no jurisdiction of an alleged contempt, by disregarding or refusing to obey the injunction.

In matters of contempt, exceptions may be taken on the question of jurisdiction, where it is distinctly raised and adjudicated upon as matter of law.

The statute concerning nuisances, authorizing the Court, in any county, to issue an injunction, and to make such orders and decrees for enforcing or dissolving it, as justice may require, does not confer any additional powers on the Court in cases where the bill does not charge the acts complained of as a nuisance.

COMPLAINT FOR ALLEGED CONTEMPT OF COURT.

IN September, 1861, the plaintiff corporation applied to the Supreme Judicial Court, then sitting in Somerset county, TENNEY, C. J., presiding, and represented that the defendants, being authorized by their charter to connect their road with that of the plaintiffs, had elected to do so, and had so connected their road, by consent of both corporations, both roads having their rails laid at the same guage of five feet and six inches distance from each other, so that the plaintiffs' engines and cars could readily and conveniently pass upon and be transported over the defendants' road; that by an Act of the Legislature, passed Feb. 15, 1860, the defendants had been authorized to extend their road from a point in Leeds, to connect with the Kennebec and Portland railroad, in Topsham, but subject to the same liabilities with regard to the extension, as with regard to that part of their road already built; that the defendants have nearly completed said extension from Topsham to Leeds, but have laid their rails at a less guage than 5 feet 6 inches, and are proceeding so to lay them, so that the plaintiffs' cars and engines cannot pass or be transported over the defendants' road; and that the plaintiffs are informed and believe that the defendants are intending to break up and destroy the connection established between said two roads; wherefore, they pray for a writ of injunction to restrain the defendants, their officers, agents and servants, from breaking and altering said connection, from taking up or removing their rails, or changing the guage of their road between Leeds Junction and Farmington.

On the foregoing application a hearing was had, and on Sept. 28, 1861, the Court granted the injunction prayed for, returnable at the "next Court where the bill is pending." The bill was originally entered and was pending in the county of Kennebec. Service was made by an officer, as appeared by his return, on Sept. 30, 1861, at 3 o'clock 40 minutes afternoon, on Samuel J. Robinson, one of the directors of the Androscoggin Railroad Company, and, on Oct.

1, at 9 minutes to 11 o'clock in the forenoon, on Daniel Patten, one of the directors, and on Washington Gilbert.

On the 3d day of October, 1861, the plaintiffs filed an application to the Court, then sitting in Somerset county, setting forth the granting of the injunction and the service made as returned; that Oliver Moses, Giddings Lane, Ensign Otis, John B. Jones and John Dyer, were all present and had knowledge of the hearing before said injunction was granted; and that, in contempt of the Court, the Androscoggin Railroad Company, on the 29th day of September, being the Lord's day, removed one of the rails of their road, from a point near Leeds Junction, to Farmington, and placed the said rail so near to the other rail of said road, that said rails are distant from each other but 4 feet 8½ inches, instead of 5 feet 6 inches, as they formerly were, thereby destroying all connection between said road and the plaintiffs' road, and rendering such connection impracticable; and that said Moses, Lane, Otis, Dyer and Jones, acting as officers and agents of the defendants, directed and caused the rails to be removed as stated, in disregard and contempt of the injunction and order of Court. The plaintiffs therefore move that the defendants, after being heard, may be adjudged guilty of contempt of Court, and committed to prison until the Court shall otherwise order, unless they, after notice, show cause why such judgment shall not be passed upon them.

The defendants, having been duly notified, appeared at the same term, and in the same county, on Oct. 8, and by their counsel, prayed that the process might be dismissed, because the matters alleged are insufficient in law to maintain said process, and because the Judge has no jurisdiction of the matter in this form, nor as a Court sitting in the county of Somerset.

The motion was overruled, and the defendants filed their several answers.

Messrs. Moses, Otis, Lane and Dyer, in their answer, deny that they had any knowledge of any order, decree or injunction of Court forbidding any of the acts alleged

against them, at the time when said acts were done, and disclaim any contempt of Court or disobedience to any order thereof.

J. B. Jones declares, in his answer, that he is not a director or officer of the company; that he never knew of the injunction being granted, either by notice served or rumor, until Wednesday afterwards; that he was in Court at the time of hearing, but left before any decision was had, and fully believed and was advised by counsel that, upon the case presented, no injunction would be granted; that he is a contractor on the extension, and that, pursuant to the preparations made long before any of these proceedings, he proceeded on Sunday, Sept. 29, to lay down the track across the plaintiffs' road, taking that day to avoid collision; that no part of the work done by his authority was done on the old track north and west of the plaintiffs' road, and he is advised that what he did was not within the purview of the injunction; and that, if any work was done on the old track by persons in his employ, it was done without any intention of contempt of Court.

The presiding Judge, after hearing, adjudged the defendant corporation, and Otis, Lane and Dyer, to be in contempt.

The defendants filed exceptions, which were allowed.

W. Gilbert, in support of the exceptions.

1. The Court sitting in Somerset county exhausted its functions when the writ of injunction was ordered. R. S., c. 77, § 10.

2. This is a remedial process in favor of the complainants, and the Court had no jurisdiction.

3. The remedy in such a case is provided by the rules in chancery practice. Rule 28.

4. The Court has no jurisdiction over the original bill. R. S., c. 77, § 8.

5. The Court in Somerset had no jurisdiction over the application for the injunction. R. S., c. 77, § 11.

6. The facts show no contempt committed.

Evans, in reply.

1. The Court, though sitting in Somerset county, had jurisdiction to grant the injunction and to punish for contempt. The statute does not prescribe any rule inconsistent with it. *Moore* v. *Veazie*, 31 Maine, 360, and 32 Maine, 343.

2. The injunction took effect from the time the order for it was given. (Saturday in the forenoon.) *McNeil* v. *Garrett*, 1 Craig & Phil., 88. From that moment it is binding upon all parties who have knowledge of it, *in any mode*, though no service be made. Parties who are present during the hearing, though not when the order is made, are bound, *as having knowledge*. *Osborn* v. *Tenant*, *Hearne* v. *Tenant*, 14 Ves., 136; *Jarvis* v. *Downes*, 18 Ves., 522; *Vansander* v. *Rose*, 2 Jac. & Wel., 265; *Scott* v. *Bacher*, 4 Price, 352; *Lewis* v. *Morgan*, 5 Price, 520; 3 Daw. Ch. Pr., pp. 1817, 1908, 1909; 3 Johns. Ch. Cases, 311.

"A party who disposes of property contrary to the terms of an injunction, with notice thereof, though before it has been served upon him, is guilty of a contempt." *Hale* v. *Thomas*, 3 Edw. Ch. R., 236.

In *Kempton* v. *Eve*, 2 Vea. & Bee., 349, a belief, merely, that an order had passed, was held sufficient.

In *People* v. *Sturtevant*, 5 Selden's R., 277, the Court approves these cases, and says,—"In administering the law in respect to the violation of injunctions, the Court of Chancery never lost sight of the principle, that it was the disobedience of the order of the Court which constituted the contempt, and therefore, although it required of the party availing himself of the order, a substantial compliance with the rules of practice upon the subject, it would not usually allow the effect of the order to be wholly lost, when the party, sought to be bound by them, had actual notice or knowledge of their existence, although there might have occurred some slip in the formal manner of bringing it home to him."

It is a contempt of the Court for a person to interfere

with the property of a lunatic, after he is informed of the institution of proceedings to declare his incompetency. *L'Amoureux* v. *Crosby*, 2 Paige, 422.

3. All who are present, aiding and abetting in the breach of the order, are liable. *St. John's College* v. *Carter*, 4 Mylne & Craig, 497.

"An injunction forbidding any corporate act, is violated by every member of the corporate body, by whose assent or coöperation the act is performed; and every such member is guilty of a contempt for which he may be punished." Adams' Eq., 779, note citing *Davis* v. *Mayor of city of New York*, 1 Duer, 451.

4. In a proceeding against a party for contempt, the Court will not look into the merits of the cause in which the injunction issued. *People* v. *Spaulding*, 2 Paige, 326.

Not even where the party charged with contempt had not appeared to oppose the granting of the injunction. *Higbee* v. *Edgerton*, 3 Paige, 253; *Sullivan* v. *Judah*, 4 Paige, 444.

5. Whether or not the respondents, or any of them, had notice of the order, was a question of fact, the decision of which, by the Judge, is not liable to exceptions. The testimony bearing upon it is not before the Court. *Page* v. *Smith*, 25 Maine, 264; *Fletcher* v. *Church*, 29 Maine, 489; *Jackson* v. *Jones*, 38 Maine, 187.

J. S. Abbott argued further for the complainants, contending that the circumstances would have justified a more summary and severe process against the defendants for their disregard of the injunction.

Rule 28 of this Court, if it has not been complied with, does not apply to this case, but is evidently intended to govern proceedings in vacation. It was adopted in 1855, for cases in which "a remedy is not provided by statute." But the subsequent statutes of 1857 authorize the Court to punish contempts, to issue injunctions, and to exercise its jurisdiction "according to the common law, not inconsistent with the constitution or any statute." c. 77, §§ 4, 7, 10.

Thus a remedy is provided by statute, and the rule is superseded.

The Court in Somerset county having issued the injunction, the acts of the defendants were in contempt of that Court, and to that Court they are answerable.

The evidence reported, as well as that not reported, clearly shows that the decision of the Court was correct, and that the defendants were in contempt. While in contempt they should not be heard on the merits of the injunction, but should first be required to place the rails back where they were before.

The opinion of the Court was drawn up by

KENT, J.—The first fact to be considered is, that the complainants filed their bill in the county of Kennebec, and that a subpœna was duly issued from the clerk of that county. The bill having been thus filed in that county, the Court in that county had jurisdiction, and all matters, interlocutory or otherwise, in relation thereto, must be heard and determined there, except such matters as by statute or by the rules of Court may be passed upon by a Court in another county, or by a single Judge at chambers, or in vacation.

The next fact is, that, after the above proceedings, the complainants applied to this Court, then sitting in Somerset county, for an injunction to restrain the respondents from changing the guage of their road, by removing the rails and placing them nearer to each other. After notice and hearing, an injunction was granted by the Chief Justice, then presiding alone in that county. The injunction was issued as having been ordered by the Court, and is signed by the clerk, and bears the teste of the Chief Justice. It is objected that the *Court* in Somerset had no power to act; that the statute contemplates only the action of *a Judge at chambers*, and not the action of a Court in another county. The provision is found in c. 77, § 10 of R. S. It gives power to the Court, generally, to issue "writs of injunction in cases

of equity jurisdiction, and when specially authorized by statute," and it further provides, that "a Justice of the Court may issue them in term time or in vacation." There are other provisions in the statutes authorizing the Court, sitting in any county, to act in reference to cases pending or instituted in any other county—as in libels for divorce, c. 60, § 3; and in petitions for partition, c. 88, § 4. In these cases the power is given to the *Court* sitting in any other county. In cases of nuisance, it is provided that "any Court of record, before which an indictment, complaint, or action for a nuisance is pending, may, *in any county*, issue an injunction to stay or prevent such nuisance, and make such orders and decrees, for enforcing or dissolving it, as justice and equity require."

Although the law, in reference to granting injunctions, seems to contemplate that the act ordinarily will be done by a Justice out of Court, when not done by the Court in session in the county where the case is pending, yet we are not prepared to say, that where it is granted by a Judge, when sitting in Court in another county, and as an act of the Court, it is necessarily void. It is none the less the act of the Judge. It is *that*, with the formal certificate of the clerk, that it was done in open Court. The decree of the Judge, without any other certificate than his own at chambers, would be binding. It may be upheld as his act, although done in Court.

But it is clear that, if done in open Court, in another county, it can have no greater power or effect than if issued by a Judge at chambers. It derives its power and efficacy from its being the act of a Justice of the Court; not from its being an order of a Court in session.

If we regard the injunction in this case as having been duly issued, it follows, that, by this act, the Judge had performed his duty and exhausted the power given him as a Judge out of Court, in relation to issuing an injunction.

But if that injunction is disregarded, and the respondents refuse or neglect to obey it, what is the remedy? Such ne-

glect or refusal may be, and usually is, a contempt of Court, for which the parties may be held and punished. The power in the Court to "punish contempts committed against its authority, by fine and imprisonment, or either," is expressly given by statute, c. 77, § 7.

There are two kinds of contempt recognized by the authorities and by the practice of the courts. Criminal contempts are those committed in the immediate view and presence of the Court, such as insulting language, or acts of violence, which interrupt the regular proceedings in courts. This class of contempts may and should be punished summarily, and by the order of the presiding Judge, or the Court, after such hearing, at once, as the Court may deem just and necessary.

There is another class of contempts, which are in a sense constructive, and arise from matters not transpiring in Court, but in reference to failures to comply with the orders and decrees issued by the Court and to be performed elsewhere. Such refusals or failures are undoubtedly contempts, as actual as those committed in open Court, and liable to be punished under the same law. But the process to bring parties into Court, and the time given for a hearing by our rules, are different from the summary process in case of a criminal contempt before the Court.

The exact question raised on this part of the case is, whether a single Judge presiding in a Court in another county, which has issued an injunction, can, on a motion or rule, setting forth a contempt by refusal or neglect on the part of the respondents, filed with him, or in that Court, after a notice and hearing, proceed to adjudge the parties in contempt, as a final judgment.

The writ of injunction issued in this case was addressed to the sheriffs of the several counties in the State, and the officer serving it was, by the precept, commanded to make return thereof, and of his proceedings, "to our next Court where the bill is pending." The writ was dated September 28, 1861.

On the 3d of October thereafter, the complainants in the original bill made a motion, by filing in writing a rule or application, addressed to this Court then holden at Norridgewock, in and for the county of Somerset, setting forth refusal on the part of the respondents to obey the injunction, and acts on their part in direct violation of the injunction and in contempt of the Court, praying that, after an opportunity to be heard, they may be adjudged by said Court to be guilty of contempt, — and that a writ of attachment may immediately issue to arrest them, and that they be imprisoned until otherwise ordered.

The Court in Somerset ordered notice to be given, and on the day fixed, the parties appeared. The respondents filed a motion to dismiss the process for contempt, on the ground that neither the Judge presiding, nor the Court sitting in the county of Somerset, had jurisdiction of the matter. This motion was overruled. The respondents put in their answers to the charge of contempt, and, after a hearing, the Chief Justice presiding adjudged the corporation and certain of the respondents named, severally, in contempt. No sentence was passed. To all of such rulings, proceedings and adjudications, the respondents except, and these exceptions were duly allowed, so far as they are subject to exceptions.

Whatever doubts may be entertained as to a general right to except to the rulings and adjudications of the Court in matters of contempt, where the jurisdiction is unquestioned, we have no doubt that an exception may be taken on the question of jurisdiction, where it is distinctly raised and adjudicated upon as a matter of law. *Scruton* v. *Moulton*, 45 Maine, 417; R. S., c. 77, § 27.

The writ of injunction having been served, was, we assume, returned according to its precept, to the Court in Kennebec. What provision is to be found in the statutes or rules of Court as to proceedings — in case of a contempt in refusing or neglecting to obey the injunction? This is evidently a new matter, and requiring new action on the part

of the complainants. The rule of the Court, "for practice in chancery," points out plainly the course of proceedings. That rule is this:—

Rule 28.—"Contempts in refusing or neglecting to obey any decree, decision, direction or order of the Court, or of a member of it, when a remedy is not provided by statute, may be punished by an attachment, issued on a rule filed therefor by the counsel of the party injured, and notice thereof given, to which a response may be filed within ten days and notice given. The moving counsel may file a reply, and *transmit copies to a member of the Court for decision*, who may order a writ of attachment, *returnable to the next term*, on which the party will be bailable, and the same proceedings may take place as provided in case of attachment, by Rule 4, and a new writ may issue *in* term time, on which he will not be bailable, but may be imprisoned until he comply, or until the further order of Court."

This rule evidently contemplates that the rule, answer and rejoinders, should all be in the county where the bill is pending. It gives no jurisdiction to the Court in session in any other county. It gives no special jurisdiction to the Judge who may have issued it in chambers, in relation to matters afterwards. As we have seen, when he had issued it his special authority in relation thereto ceased and terminated. The writ was returnable to the county where the bill was pending. If disregarded, the complainant or party aggrieved might move to bring the parties before the Court for a contempt. But the Court might not be in session in that county. The rule, therefore, allows action, (after certain papers are filed,) by a single Judge out of Court—not necessarily the Judge who issued the injunction. What power is given to the Judge to whom the copies are, by the rule, to be transmitted? He is not to determine the question of contempt, or to adjudicate thereon. He may issue a writ of attachment, returnable to the next term, on which the party will be *bailable*. It is simply a process to hold the person to answer before the Court in the county where

the original process is pending, at its next term. The attachment is only a process to bring the party into Court, and is necessary in this class of contempts. *Jackson* v. *Smith*, 5 Johns., 115.

The rule and statute give full power to the Court, "in term time," to proceed against the parties found guilty. "Term time," means during the term of the Court in the county where the case is pending.

It is urged that this rule will not give a remedy sufficiently early to prevent, in some cases, great wrong and mischief. We are not now called upon to express an opinion on this point. It is sufficient that it is the rule of the Court, applicable to the case before us, and we are not at liberty to disregard it.

We have been referred to the statute concerning nuisances, before quoted, as sufficient authority for the Court in Somerset to issue the injunction, and to make orders and decrees for enforcing it.

The bill in this case does not charge that the acts complained of were a nuisance. It in substance alleges that the respondents intended to break up the connection then existing between the railroads, and to alter the guage of their road, whereby an injury would arise to the complainants. This the bill complains of as a violation of the rights of the orators, and in contravention of the agreement between the parties, under the provisions of their respective charters. It is clear that it is not a bill of which the Court could take jurisdiction as "a case of nuisance," and therefore the special statute, before referred to, which is limited to cases of nuisance, cannot apply.

Upon a careful consideration of this case, as it is presented to us, we are unable to find any authority in the Court sitting in Somerset county, or in the Judge who was then presiding in that Court, to determine the question of contempt, and to adjudge that the respondents were in contempt.

The parties may have waived their right to have time al-

lowed them to answer, by answering without claiming the delay given by the rule. But they did object to the jurisdiction before answering.

We, of course, have formed no opinion on the merits of the case, as set forth in the original bill. Nor are we called upon to express any opinion as to the facts, and whether they amount to a contempt or not. The exceptions state that much evidence was introduced which is not reported. Nor are we called upon to determine how far the decision of the Judge on the facts, is conclusive, or open to exceptions, in cases where the jurisdiction is unquestioned.

The entry must be—Exceptions sustained, and the proceedings of the Court in Somerset county, in this case, (after the issue and service of the injunction,) on the matter charging contempt, and the adjudication thereon, that the respondents, the Androscoggin Railroad Company, and Otis, Lane and Dyer, are severally in contempt, were *coram non judice* and void. This without prejudice.

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

STATE *versus* DAVID S. TOZIER *& al.*

It gives the prisoner, on his trial for larceny, no ground for exception, that the attorney for the State was allowed, against objection, to state in his argument, or, that the Court instructed the jury, that it was competent for the prisoner to avail himself of his former good character, if it existed, by proof of the fact; and, if he offered no such testimony, it was not competent for the government to show it was not good—if there was no intimation that an inference prejudicial to the accused should be drawn by the jury, from his omission to offer such testimony.

ON EXCEPTIONS to rulings of GOODENOW, J.

INDICTMENT against the respondents for larceny.

At the trial, the attorney for the State was permitted to argue to the jury, against the objection of the counsel for

the prisoners, that it was competent for them to avail themselves of their former good character, by introducing witnesses to show the fact, if it existed, and stated that it was not competent for the government to introduce witnesses to show that their former character had not been good, unless the prisoners first introduced evidence of their former good character. And the Court took the same view of the case in charging the jury.

The verdict being against the prisoners, they excepted.

Greene, in support of the exceptions, contended, that the presumption of law is, that the character of the accused was good, and that they were deprived of the benefit of this presumption at the trial.

Drummond, *Attorney General*, for the State, argued that the law as stated was undoubtedly correct, and that the question whether there is any presumption as to character was not raised by the exceptions.

Also, that there is no presumption at all, as to character, but if it is alleged to be good, this allegation must be *proved;* and he commented on the cases *State* v. *McAllister*, 24 Maine, 139, and *State* v. *Upham*, 33 Maine, 261.

The opinion of the Court was drawn up by

RICE, J. — The exceptions, as reported, do not bring this case in the line of the conflicting cases of *State* v. *McAllister*, 24 Maine, 139, or *State* v. *Upham*, 38 Maine, 261. The rule of law, as contended for by the attorney for the State, and approved by the Court, is undoubtedly correct. It does not appear that the attorney or the Court desired the jury to draw any inferences prejudicial to the prisoners, from the fact that they did not offer testimony of former good character. We, therefore, have no occasion, at this time, to review the cases above cited.

Exceptions overruled.

Judgment on the verdict.

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

STEPHEN COBURN, *Appellant from decree of the Judge of Probate, versus* GEORGE LOOMIS, *Administrator.*

On the final settlement of an account in the Probate Court, former settlements may be opened, for the purpose of rectifying mistakes.

Where a mistake is made in the settlement of such an account, the course is to apply by petition to the Judge of Probate for its correction, or to state the amount claimed in a new account; unless, when the mistake is discovered, the party has a right of appeal to the Supreme Court.

But where an alleged mistake has been discovered, and the party has petitioned the Judge of Probate for its correction, and, upon a hearing, the Judge has decided that no mistake has been made, and no appeal is taken from his decree, the party is concluded thereby, and cannot again try the question.

ON REPORT.

THE facts are fully stated in the opinion of the Court.

J. S. Abbott, for the appellant.

Hutchinson, for the appellee.

An error in a Probate account may be corrected in the settlement of any subsequent account. *Stetson* v. *Bass*, 9 Pick., 27; *Davis* v. *Cowdin*, 20 Pick., 510; *Longley* v. *Hall*, 11 Pick., 120; *Sturtevant* v. *Tallman*, 27 Maine, 78.

The opinion of the Court was drawn up by

CUTTING, J.—Without repeating what has been reported in *Knight and wife* v. *Loomis*, 30 Maine, 204, we will at once proceed to a consideration of the legal rights of the present parties as disclosed by subsequent transactions. In that case it was decided, that an administrator, with the will annexed, does not succeed to the rights and duties of an original executor, appointed trustee by the will. And the present appellee, who was defendant in that suit, brought by a legatee, prevailed, upon the ground that none but a legal trustee could reach the legacy in his hands; for, say the Court—"If a trustee, duly appointed to take charge of the sum bequeathed to *Samuel Weston*, should call upon the defendant as administrator for the money now in his hands,

and it should appear, by the will and the condition of the affairs of the estate, to be subject to such a call, his duty would require the payment."

Since that decision, the present appellant has been duly appointed such trustee, who now calls for and demands of the appellee the money which, in the former case, was shown to be in his hands as the successor of the executor; for, again, said the Court, in the case before cited, — "By extracts from the probate records, it appears that, in February, 1840, the defendant filed his account in the probate office, in which he charged himself with the sum of $1700, out of which the money that was subsequently in his hands arose."

But since that time, the appellee, possessed of the instinct of a special pleader in the matter of "confessing and avoiding," pretends, and has induced the Probate Court to believe, that no such fund has ever come into his hands. This is denied by the appellant, and thus is presented an issue of fact, to determine which, we must look into the history of this whole transaction, or at least, so much of it as has been disclosed since the former opinion.

It appears that one *Benoice Johnson*, on July 5, 1831, by his will of that date, among other legacies, bequeathed to *Samuel Weston*, the executor, the sum of seventeen hundred dollars — "in trust always — and it shall be the duty of said *Weston* to let out upon interest the said sum of seventeen hundred dollars upon good security, and it shall also be his duty to collect the interest on said sum and to pay the same to my beloved wife Charlotte (the present *cestui que trust*) yearly," &c., and, after her decease, one-half of the principal to the heirs of *Sally Tuttle*, wife of *James Tuttle*, and the other half to the heirs of *George Loomis* (the present appellee.) The testator soon afterwards died, and his will was duly approved on February 7, 1832, and the administration of the estate duly committed to *Samuel Weston*, the executor named in the will, who, on the same day, filed his statute bond in the probate office, with *George Loomis* (the appellee) and one *Benoice Tuttle* his sureties therein. Wes-

ton, after having received the seventeen hundred dollars into his possession, as we have a right to infer, died intestate, as it is said, and subsequently, on Dec. 3d, 1839, the appellee was duly appointed administrator of *Benoice Johnson* with the will annexed, who, in February, 1840, filed in the probate office the following document, viz. ;— *George Loomis*, administrator *de bonis non*, on the estate of *Benoice Johnson*, late of Cornville, deceased, charges himself with the following, viz. :—

"To received of the administrator on the estate of the executor of the last will and testament of said *Johnson*, $1700," which, on the third day of March following, was received by the Probate Judge, "ordered to be put on file and recorded," and so remained as a matter of record, undisturbed until 1846, when the appellee filed his petition to the Probate Court, representing—"That said charge was made to himself as administrator, as aforesaid, through misapprehension or mistake, that in fact said sum of seventeen hundred dollars never came into his hands, to be administered. Wherefore he prays your Honor, that the mistake above mentioned may be corrected." Upon which petition, after due notice to the present *cestui que trust*, and her appearance and a full hearing thereon, it was adjudged by the Court, at an adjourned term, held in March, 1848, "that said petition be denied, and that said Charlotte (the *cestui que trust*) and Henry (her present husband) recover against the said Loomis (the present appellee) their costs, taxed at eight dollars and seventy-five cents, and that execution issue therefor agreeable to the statute in such cases provided."

Upon the foregoing record, *Loomis* (the present appellee) rested apparently satisfied and contented, or at least dormant, until action on the part of the *cestui que trust*, the widow of the testator, who, not having received her annual interest, according to the special bequest of her former husband, cited the appellee to appear before the Probate Court and settle his administration account. He did so appear, and claimed the same deduction, and for the same cause, as

before stated. Whereupon it appears, from the probate records, that "the parties having been fully heard, and the said account having been fully investigated by Court, it is ordered, decreed and adjudged by the Court, that the first item, being seventeen hundred dollars, in said account, claimed by said Loomis, be disallowed, and that he stand charged with the same — diminishing the credit and increasing the charge against him by that sum, so that said Loomis, as administrator aforesaid, is found chargeable, and is hereby charged with the sum of $1786,03, and is allowed $216,50, leaving in his hands, as administrator, $1569,53, besides the interest on said $1700, upon which item (viz., interest,) no adjudication is had."

The next development, in the order of time, is the action of the *cestui que trust* and her husband, in her right, against the present appellee for her annual instalment, it being for the amount of the interest on the sum of $1700, which, before that time, was determined and adjudged by two solemn decisions of the Probate Court to be in the hands of the appellee. The result of that case, (*Knight* v. *Loomis*,) and the reasons therefor, have already been alluded to and explained. Such was the situation of the parties, as apparent by the records, both of the Probate and of this Court, in 1849, when that opinion was delivered, to wit, the funds were in the hands of the appellee, but no trustee was in Court authorized to call them out. But now, in the present process, such a trustee does appear, when the appellee attempts for the *third* time to present to the Probate Court an issue, which, on the two former occasions in the same Court, has been settled against him, and, if the decree from which the present appeal has been taken be correct, he has been successful.

It cannot be controverted, that, on a final settlement of an administrator's account in the Probate Court, former settlements may be opened for the purpose of rectifying mistakes, whether originating in fraud practised on the Court,

or through a misapprehension of a true state of facts by the parties. But the present process embraces no such elements. The final settlement, in fact, was perfected in March, 1848, when nothing remained for the administrator to do, except to pay over to the persons authorized to receive it, the balance then found to be due, of $1569,53, the receipt of which sum, filed in the Probate Court, would have balanced his account. It is true, that the appellee in his petition calls the present process his "second account." But how is it variant from the former? Only in this, he charges, "To paid printer on this acc't, $1,25. To travel and attendance at this Court, $3,00. For this acc't, ,50, and the allowance of the $1700, which was never received by him." The old claim again presented in December, 1857, some nine years after the former decree, with the addition of an anticipated sum of a few dollars, for his current expenses in presenting his petition. He virtually brings before the Court the same subject matter which has twice before been adjudicated upon by the Court, and no appeal taken, under the pretence of fraud or mistake, when, if such pretence was well founded, it was as well known to him in 1848 as in 1857. The true doctrine upon this point is well settled in one of the cases cited by the appellee's counsel, *Stetson* v. *Bass*, 9 Pick., 27, in which the Court say—"In that Court, (Probate Court,) when a mistake is made in a settlement of an account, the course is to apply to the Judge of Probate for the correction of the mistake, by petition, or to state the amount claimed in a new account; unless, when the mistake is discovered, the party has a right of appeal, by which it may be corrected in this Court." And the question may here be asked of the appellee, whether in 1857, when his present petition was presented, a mistake was any more discovered than in 1848, when, upon the same issue, the decree was against him. All the records and proceedings show that the answer must be in the negative, consequently the decree appealed from was erroneous.

But suppose we consider the case as *res non adjudicata*, and revert to the situation of the parties in February, 1840, when the appellee, having been appointed administrator, charged himself with the $1700, as so much money received of the executor. This is done out of respect for, and in justification of the then Judge of Probate, whose official conduct has been adverted to with some degree of censure in advising or permitting the appellee to file and have his account recorded.

We have seen that the appellee was one of Samuel Weston, the executor's, sureties on his official bond; that one half of the legacy, after the decease of the widow, was to revert to this surety's heirs; and that Weston had received the amount in controversy, as such executor, to be accounted for, either as executor or trustee under the provisions of the will. He accepted the trust as executor, but not as trustee, by reason of not procuring the bond specified in the will. He then held the estate as *executor* only, subject to the call of a legal trustee; and for whose default to respond to such call, his sureties were clearly answerable. He subsequently dies, and, perhaps insolvent; but, if so, such fact does not exonerate his bondsmen from their liability. Under such circumstances his surety (the present appellee) is appointed administrator *de bonis non*, with the will annexed; thereby, as a representative of the fund in the hands of his principal on the official bond, he becomes enabled to delay any action thereon. Consequently it was the duty of the Probate Judge to inform him that he must either credit in his account the amount of his legal liability to the legatees, or resign his trust, in order that he might, by some disinterested administrator, be called to answer for his suretiship. And he, at that time, with a full knowledge of all such facts, charged himself with liabilities without suit, which might have been recovered of him on suit. That such was the fact is further apparent from his subsequent conduct in his and his co-surety's filing their claim against

the estate of Weston, as his sureties, and receiving, as such, a dividend.

The decree of the Probate Court is reversed, with costs to appellant. And the appellee is to stand charged for the sum of fifteen hundred and sixty-nine dollars and fifty-three cents.

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

STATE *versus* CHANDLER HALL.

The jurisdiction of justices of the peace depends upon provisions of statute, and cannot be enlarged by presumption or implication.

Under the Revised Statutes of 1841, a justice of the peace, having, on the return day, defaulted an action brought before him, had no authority, on the next day, to take off the default, there having been no continuance of the action.

An indictment for perjury cannot be sustained for false testimony given on the subsequent trial of such case.

On the trial of such indictment, it appearing by the record of the justice that the action was defaulted by him on the return day, and that he took off the default within twenty-four hours thereafter, for good cause, parol evidence is admissible to show that in fact the default was taken off on the day after the return day.

ON EXCEPTIONS to the rulings of APPLETON, J.

INDICTMENT for perjury, alleged to have been committed at a trial before a justice of the peace. The case is stated in the opinion.

Folsom, for the respondent.

Snell, County Attorney, (with whom was *Drummond, Attorney General*,) for the State.

The opinion of the Court was drawn up by

RICE, J.—The jurisdiction of justices of the peace de-

pends wholly upon the provisions of the statute, and cannot be enlarged by presumption nor implication. *State* v. *Hartwell*, 35 Maine, 129; *Hersom's case*, 39 Maine, 476; *Lane* v. *Crosby*, 42 Maine, 327.

The records of justices of the peace as to matters within their jurisdiction, are entitled to the same credit as are the records of higher judicial tribunals. *Paul* v. *Hussey*, 35 Maine, 97.

The defendant in this case is charged with having committed the crime of perjury in the trial of an action in which he was plaintiff and one Levi Leighton defendant. That action was returnable before a magistrate, on the 26th day of July, 1856. The record of the magistrate was amended by leave of Court, so as to show that said action was defaulted by him on the said 26th day of July, 1856; and within twenty-four secular hours thereafter said default was taken off by him, for good cause shown by said Leighton.

The defendant offered to show, by parol proof, that, as matter of fact, the default was entered on Saturday and not taken off until the Monday next succeeding, when it was taken off against his objection, and without his consent. The record does not show any continuance of the action from Saturday to Monday. This proof would not have contradicted or varied the record, and was, therefore, not inadmissible on that ground. *Allen* v. *Portland Stage Co.*, 8 Maine, 207.

If admitted, would this proof have disclosed any want of jurisdiction in the justice who tried the cause, after the default had been taken off?

Section 7 of c. 116 of R. S. of 1841, provides that, if any person, duly served with process, shall not appear and answer thereto, his default shall be recorded, and the charge in the declaration shall be considered as true; and, on such default, and also when the action is on trial maintained, the justice shall enter judgment for such sum, not exceeding twenty dollars, as he shall find due to the plaintiff, with costs, and issue execution.

By § 2 of c. 115, R. S., 1841, as amended, in case of a default in the District Court, or Supreme Judicial Court, at the first term, if the defendant shall appear in Court in person, or by attorney, at any time before the jury are dismissed, and pay to the plaintiff such costs as the Court shall order, the default shall be taken off. This provision does not, however, apply to justices of the peace.

The statute does not designate the time that must elapse before a justice of the peace may issue an execution on a judgment rendered on trial or default, as is the case in the higher courts by c. 115, § 102, stat. of 1841, and c. 82, § 112, of 1857.

But, inasmuch as twenty-four hours, not including Sundays, are allowed for a party aggrieved to enter his appeal, it has been deemed inconsistent for a justice to issue an execution on a judgment rendered by him, while the right of appeal exists.

The issuing of an execution, or entering an appeal, is a merely ministerial act, and may be done out of term time or after the justice has adjourned his court. *Briggs* v. *Wardwell*, 10 Mass., 356.

In the case of *Martin* v. *Fales*, 18 Maine, 23, SHEPLEY, J., in giving the opinion of the Court, uses the following language;—"If the plaintiff shall fail to prosecute his suit, the justice is to award to the party sued his costs. And, if the defendant neglects to appear, the charge in the declaration is to be taken to be true, and the justice is to give judgment against him. The justice is not authorized to perform any other duty in the case, than to grant the writ and issue the subpœnas, at a different time than that set for the trial, either originally or by adjournment."

The failure of a justice to appear within a reasonable time after the appointed hour, or the failure of the plaintiff to appear and prosecute his action, or the continuance of an action of a justice at a time when he is not present, or before the day for trial arrives, will operate as a discontinuance. *Spencer* v. *Perry*, 17 Maine, 413; *McCarty* v. *Mc-*

Pherson, 9 Johnson, 407; *Sprague* v. *Shed*, 9 Johns., 140.

To take off the default, which had been duly entered on the return day, at a day subsequent, in a case where there had been no continuance of the action, would be the same in its practical effect, as to enter the action on the day the default was taken off, instead of the day on which the writ was returnable. There can be found no authority for such practice. The justice, to maintain his jurisdiction for any purpose, except such as are merely ministerial, must act either on the return day or on some day to which the action has been legally continued, otherwise his action will be *coram non judice*.

Nor will the consent of parties give him jurisdiction. *State* v. *Bonney*, 34 Maine, 223; *Montgomery* v. *Anderson*, 21 How. U. S. R., 386.

The excluded testimony was therefore material and should have been admitted. *Exceptions sustained, and a New trial granted*

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

COUNTY OF SAGADAHOC.

JAMES A. CROOKER *& al. versus* CHARLES CROOKER *& al.*

The burden of proof is upon a party alleging the payment of a mortgage, although the mortgagees have not been in possession for more than twenty years after the notes secured thereby became due, if, during that time, the premises are in possession of a tenant for life under a superior title.

ON EXCEPTIONS. PETITION FOR PARTITION.

THE respondents claimed under two mortgages and the notes secured thereby, more than twenty years old. There was no evidence that the mortgagees were ever in possession of the premises for more than twenty years after the notes became due, they having been held in dower by one Hannah Crooker, under a title superior to the mortgage.

The petitioners claimed that the notes had been paid; and the presiding Judge, DAVIS, instructed the jury that the burden of proof was on the petitioners to satisfy them of that fact; and it was for the jury to determine upon the whole evidence whether the notes had been paid or not.

Gilbert, for petitioners.

The jury ought to have been instructed that the presumption of law is, that the mortgage debts had been paid, and that the burden of proof was on the mortgagees to overcome the presumption. *Joy* v. *Adams*, 26 Maine, 330; *Sweetser* v. *Lowell*, 33 Maine, 446.

Whitmore and *Baker*, for respondents.

The opinion of the Court was drawn up by

CUTTING, J. — It has been well settled, that, notwithstanding the production of a mortgage and notes secured thereby by the mortgagee, after the lapse of twenty years from the

time of payment and no possession taken or foreclosure attempted, such continued possession by the mortgager raises the legal presumption of payment, which presumption casts the burden of proof on the party whose duty it is to overcome it. *Joy* v. *Adams*, 26 Maine, 330; *Howland* v. *Shurtliff*, 2 Met., 26.

Had the case at bar been similar to those cited, the ruling in relation to the burden of proof would have been erroneous. But it is not so; for the present case discloses the fact that—"the mortgaged premises had been held in dower by one Hannah Crooker, widow of Jonathan Crooker, from whom both parties derived their titles." Consequently, the mortgagees were not authorized to take possession during the life-estate, and one of the material elements constituting the legal presumption was wanting. Therefore, upon the evidence, as admitted, the instructions to the jury were as favorable to the petitioners as they were legally authorized to expect.

Exceptions overruled, and Judgment on the verdict.

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

MAY and DAVIS, JJ., concurred in the result.

DONALD ROSS, *petitioner for certiorari*, *versus* JEREMIAH ELLSWORTH *& al.*

The writ of *certiorari* can present only the record; nothing *dehors* the record can be shown in order to obtain it.

The Court will not issue a writ of *certiorari* to quash the proceedings of two justices of the peace and of the quorum in taking the disclosure of a poor debtor, if the record does not show that the debtor was admitted to the oath.

Whether the writ can be issued at all in such cases — *quære.*

ON EXCEPTIONS to the rulings of GOODENOW, J.

PETITION for a writ of *certiorari* to quash the proceedings

of the respondents, as justices of the peace and of the quorum in taking the disclosure of Joseph Berry, under the laws for the relief of poor debtors. The presiding Judge granted the writ, and respondents excepted. The case is sufficiently stated in the opinion.

Gilbert, for the petitioner.

Tallman & Larrabee, for the respondents.

The opinion of the Court was drawn up by

TENNEY, C. J.—From the facts stated in the petition, and from a copy of the disclosure, certified by the respondents as justices of the peace and quorum of the county of Sagadahoc, some of the proceedings were quite irregular. But no error of record appears from any document before the Court. No record evidence shows that Joseph Berry, the alleged debtor, was admitted to his oath by the respondents.

The writ prayed for can present only the record of the proceedings of the tribunal. Nothing *dehors* the record can be proved by the petitioner.

It has been doubted whether the writ of *certiorari* can be properly issued in a case of this kind. The statute in relation to poor debtors contains only one provision for a record by justices of the peace and quorum, and that is in §§ 29 and 30 of c. 113, which treats of matters foreign to the case before us. *Pike* v. *Harriman*, 39 Maine, 52.

Exceptions sustained.—Writ denied, without costs.

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

DAVID C. MAGOUN *versus* WILLARD WALKER.

To charge the indorser of a note payable at a bank, it must be shown that the note was *at the bank*, or payment of it was demanded *there* on the day when it fell due.

It is not sufficient to show that payment was demanded of the cashier of the bank.

ON EXCEPTIONS to the rulings of GOODENOW, J.

ASSUMPSIT against the defendant as indorser of a promissory note. The case is stated in the opinion. The verdict being for the plaintiff, the defendant excepted to the refusal of the presiding Judge to give the requested instructions.

Gilbert, for plaintiff.

Tallman and *Smith*, for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—The note in suit was made payable at the Pejepscot Bank, Brunswick, in six months after date. To prove a demand upon the maker, and notice to the indorsers, the plaintiff read the protest of the notary public. In the protest it is stated, that the notary went with the original note to the cashier of the Pejepscot Bank in Brunswick, and demanded payment thereof, the time therein limited for the payment of said note, and the days of grace, being fully elapsed, and the payment of said note was refused, &c.

Several requests for instructions were made by the defendant; the first and second were given as requested; the fifth was given in a modified form; the others were refused.

The counsel for the defendant does not present an argument to sustain the exceptions taken to this refusal, excepting as to the third and fourth instructions requested. These were as follows:—"If the jury are not satisfied, from the evidence in the case, that the note was at the bank, at the close of banking hours, the plaintiff cannot recover. 4th.

That the protest of the notary, that he went to the cashier with the note, is not evidence of the fact of its being then at the bank." We must take the statements of the notary in the protest to be true. But the burden of proof is upon the plaintiff to show that all the steps were taken, necessary to hold the indorser. No step is presumed to have been taken, without some evidence. The law requiring a demand upon the maker of a promissory note, in order to fix the liability of an indorser, is satisfied, if the note was in the bank at which it was made payable, or was demanded there on the day when it fell due, by one having the note and authorized to make demand thereof. At what place the demand was made upon the cashier of the Pejepscot Bank in Brunswick does not appear from the protest; neither does it appear therefrom that the note was ever in that bank; and there is no evidence in the case, from any other source, of either of these facts. The certificate in the protest, upon this point, may be strictly true, and the demand and the note not have been at the bank, at any time when either the note should be there, or the demand made there, to be effectual upon the defendant. It is not improbable that, in another trial, this defect in the proof may be supplied, but, as the case now stands, the exceptions must be sustained. *Seneca County Bank* v. *Neass*, 5 Denio, 329.

From the view presented in the foregoing, it becomes unnecessary to consider the refusal of the presiding Judge to give the third instruction requested.

The other refusals were not erroneous.

Exceptions sustained.—New trial granted.

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

WILLIAM BROWN *& als. versus* GEORGE DONNELL.

An agent of a corporation may have authority to *transfer* a note by indorsement, but no authority to bind the corporation as indorser.

In an action by the indorsee of a note against the maker, the plaintiff is only required to prove an indorsement sufficient to pass the property in the note.

The authority of an agent of a corporation to indorse a note may be shown by other evidence than the by-laws.

An insurance company holding themselves out as solvent are not *conclusively* bound to know whether they are so or not; but if the officers neglect to use due care and diligence to know the condition of the company, and hold it out as solvent, when by use of such care and diligence they *might* know it was insolvent, there would be good reason for holding them guilty of fraud.

In an action against the maker, by the indorsee of a note, given to an insurance company, and by them transferred in payment for bank stock, purchased by them, the defendant cannot controvert the right of the company to purchase the stock.

ON EXCEPTIONS to the rulings of MAY, J., and MOTION to set aside the verdict. No questions of law arose upon the *motion*.

ASSUMPSIT upon a note given by the defendant to the Commercial Mutual Marine Insurance Company, and indorsed "Commercial Mutual Insurance Company, by George H. Folger, Pres't."

There was evidence on the part of the plaintiffs tending to show that Folger was president and treasurer of the company, and had been in the habit of negotiating the notes of the company, and negotiated and indorsed the note in suit before it was payable, with the sanction of the finance committee; and that it was negotiated to them to secure the note of E. H. Barker & Co., given them for bank stock transferred to the company at the time. [The by-laws of the company were put in evidence, but no copy came into the hands of the Reporter.]

The defendant introduced evidence tending to show that, soon after the note was given, the company was found to be insolvent, and that he surrendered his policy and demanded a return of the note; and other evidence, by which he

claimed that it was proved that the company were insolvent when the note was given.

Upon the evidence introduced as above stated, the presiding Judge, among other things, instructed the jury, that they would determine, from the whole evidence in the case, whether the president had or not a general authority to indorse notes held by the company; that, if they should find that Mr. Folger was the acting president and treasurer of the company, and that he indorsed the notes in suit with the consent and sanction of the finance committee, this evidence, taken in connection with all the other evidence in the case relating to the manner in which the notes of the company had usually been indorsed when negotiated, and to the president's authority to indorse notes for the company, if this testimony was believed, would be sufficient to authorize them to find that Mr. Folger, as president and treasurer, had authority to indorse the note in suit; and directed them, that, if they should find that he had such authority, and that the note in suit was properly indorsed by him, then the plaintiffs would be entitled to recover, unless the defendant had shown some general ground of defence.

That, whatever might have been the secret understanding between the president and the company as to his power to indorse notes, still if he had general authority to indorse notes as before stated, and if he did indorse this note to the plaintiffs in the usual course of business, and they were ignorant of any such understanding or restriction, the indorsement was valid, and no restraint which is found in the by-laws of the company upon his authority would affect the validity of the indorsement. That, if the insurance company was insolvent when the note in suit was taken, and the agent of the company who issued the policy and took the note therefor knew that it was insolvent, and did not communicate the fact to the defendant, the omission to do so would be a fraud upon the defendant, and entitle him to avoid his liabilities upon the note, unless it was indorsed before it became due, and came into the hands of the plaintiffs as innocent holders for value; and they would be re-

garded as innocent holders if they took it in the usual course of business, fairly, and without any knowledge of the fraud existing in its original inception, and unattended by any circumstances justly calculated to excite suspicion; and further, that if the note was fraudulent in its inception, or fraudulently obtained from the defendant, the burden of proof was upon the plaintiffs, to satisfy the jury that they came by it in the manner just stated, before it fell due. And, if they failed to do so, such fraud, if it existed, was a defence to this suit.

That if the officers of the company who took the note for the policy did not know that the company was insolvent, but, on the contrary, believed the loss would be paid if any ensued, they would determine whether the issuing of such policy for the note, under such circumstances, was any fraud, though the company was, in fact, then insolvent.

That if the company indorsed the note to the plaintiffs before maturity as collateral to, and for the purpose of securing the due bill given by E. H. Barker & Co. to the plaintiffs, at the same time the due bill was given, and if the plaintiffs thereupon, at the same time, gave up the notes which they held against the company, and which were indorsed by E. H. Barker & Co., then the indorsement of the note may properly be regarded as having been made in the usual course of business and the plaintiffs will be entitled to recover, notwithstanding the note was fraudulently obtained from the defendant, provided the jury are satisfied that the plaintiffs were ignorant of the fraud, and that the indorsement of the note was unattended by any circumstances justly calculated to awaken suspicions and put the plaintiffs on their guard in relation to such fraud.

The defendant, among other things, requested the presiding Judge to instruct the jury — first, that if the insurance company had no funds to be invested and were actually insolvent when they undertook to purchase the bank stock of the plaintiffs, the officers of this company had no authority to make such purchase.

2. If, by reason of insolvency, the company had no funds to be invested, had no just expectation of any surplus funds to be invested, the officers of the company had no authority to make such purchase.

3. If they had no authority to make such purchase, they had no authority afterwards to pledge the note to secure the payment for the purchase.

4. If the company held themselves as solvent, and undertook to do business as a solvent company, they are to be held to know whether they are so or not, and if they were, when this note was received by them, actually insolvent, this matter is to be treated as if they knew they were so. These requests were all refused.

5. If the company were, at the time they obtained the note in suit for the policy issued therefor, and, for a period of years before that time, had been insolvent; the act of procuring the note for the policy was a fraud upon the defendant.

This request was given, with the qualification that it would be so if the officers of the company then knew the company was insolvent.

6. That the president had not by the by-laws general authority to indorse notes.

This was refused.

The verdict was for the plaintiffs, for the amount of the note, and the defendant excepted.

E. H. Davies, for the plaintiffs.

Gilbert & Sewall, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—This is a suit by an indorsee against the maker of a promissory note, given to the Com. M. M. Ins. Company, and indorsed in the name of the company, "by G. H. Folger, President." The principal defence at the trial, was, that Folger had no authority to make the indorsement. The case comes before us on exceptions to the

instructions given to the jury, and refusals to give certain instructions requested by the defendant.

It was not claimed by the plaintiff that the *by-laws* of the corporation conferred a *general* authority upon the president to indorse notes belonging to the company. That the power conferred by the by-laws was a *restricted* one, and that a *general* authority could only be found from other evidence in the case, was in accordance with the instructions given, which we think were correct. There was, therefore, no reason for giving the instruction embraced in the last request. The jury were, in fact, substantially instructed that the by-laws alone conferred no such *general* authority.

It is a point that has often been overlooked in cases like this, that the authority to be proved is not one to bind the corporation by a contract of *indorsement*,—but simply an authority to transfer the property of the company. Though generally, they are not always, the same. The payee of a note may be estopped by his conduct from claiming property in a note, when he would by no means be held liable as an indorser. This more frequently happens when notes are transferred by agents of corporations, with the knowledge and implied assent of the officers and members thereof. But there are cases where the same principle has been applied to individuals. Thus, a note was given to a wife, during coverture. By the *lex loci*, the common law not having been changed by statute, the note belonged to the husband, and could be indorsed only by him. He told the wife she might have the note, and do what she pleased with it. She indorsed it; the indorsee brought a suit thereon in his own name; and it was held that the husband was bound by the indorsement, as made by his consent and authority. *Stevens* v. *Beals*, 10 Cush., 291. It would not have been pretended that he was liable thereon as indorser.

If the indorsement is sufficient to pass the property, so as to protect the maker in paying the note, that is all that is necessary to render him liable to the indorsee. The instruc-

tions in this respect were as favorable to the defendant as he could claim.

It was contended at the trial that the company were insolvent at the time they issued the policy for which the note was given, and that the note was fraudulent in its inception for that reason. And the jury were instructed that if, when the policy was issued, the company were insolvent, and this fact was known to the officers who issued it, and took the note therefor, then the note was obtained by fraud, and was void, except in the hands of innocent indorsees.

The defendant requested the Court to instruct the jury that, "if the company held themselves out as solvent, they are to be held to know whether they are so, or not, and, if insolvent, the matter is to be treated as if they knew they were so."

This request was refused, and, we think, rightly. The officers of a mutual marine insurance company can seldom know absolutely that it is solvent. We think they should be held to use due diligence and care to keep informed in regard to the ability of the company to pay the losses insured against; and if they should be guilty of negligence in this respect, issuing policies when, if doing business as prudent and careful men, they *might* know the standing of the company and that it was insolvent, there would be good reason for holding them guilty of fraud. But no such instruction was requested.

Whether the company has the right to purchase bank stock, and transfer their assets in payment therefor, is a question which their creditors might have raised, in another form. But not having been raised elsewhere, it cannot be controverted by the defendant in this suit.

Exceptions and motion overruled.

Judgment on the verdict.

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

Maria Williams *versus* Edward Buker.

A verdict will not be set aside as being against evidence, unless it so preponderates in favor of the losing party as to authorize the Court to infer that the jury acted under a mistake, or were influenced by improper motives.

Previous to the Revised Statutes of 1841, a mortgage of land of which the mortgager was at the time disseized, or an assignment of a mortgage of lands of which the assignor was at the time disseized, conveyed no title whatever.

Although the mortgagee or assignee should afterwards acquire possession, it would give no effect to his deed.

A refusal of the presiding Judge to instruct the jury, that an actual location made by the parties to the deed, any time after the conveyance, is conclusive, is not erroneous.

On Exceptions and Motion to set aside the verdict, as being against the evidence.

Real Action. The evidence was all reported, but, as no question of law arose on the *motion*, it is not necessary to state it in this report.

The demandant claimed under a mortgage from one Frith to Vaughan, and an assignment thereof to one Parks, in 1821.

The tenant offered evidence tending to show that Frith at the time of this conveyance, and Vaughan at the time of the assignment, were disseized of the premises.

The demandant offered evidence tending to show that Parks, the assignee, entered under the mortgage, and that his heirs entered and conveyed the demanded premises to the demandant.

Upon this branch of the case, the presiding Judge, among other things, instructed the jury that, if there was an outstanding disseizin, and Frith had no possession, when he conveyed to Vaughan, nothing passed by the deed; and, if there was an outstanding disseizin when Vaughan assigned the mortgage, no title to the land passed by the assignment.

The demandant's counsel requested the Judge to instruct the jury that, if Frith was disseized by Buker when he

gave the mortgage to Vaughan, and, if Vaughan was so disseized when he assigned the mortgage, yet, if Vaughan or Parks, his assignee, entered under the mortgage, the boundaries named in the mortgage would define the extent of his claim; and, if Parks had actual possession and his heirs entered and divided the premises among themselves, and the rest of them gave a deed to the demandant, covering the ground in dispute, she is entitled to hold, unless the tenant can show a better title.

This request was refused.

The demandant offered evidence tending to show that sometime after a conveyance, under which she claimed, the parties thereto actually located the premises upon the face of the earth; and the demandant requested the Judge to instruct the jury that an actual location made by the parties, any time after the conveyance, is conclusive, which he declined to give, but instructed the jury, that if the parties, immediately after the conveyances, actually located the lots conveyed, upon the face of the earth, and designated the bounds by monuments, such location would be binding, although it might not agree with courses and distances named in the deeds.

The verdict was for the tenant, and the demandant excepted.

Gilbert & Sewall, for the demandant.

Tallman & Larrabee, for the tenant.

The opinion of the Court was drawn up by

RICE, J.—The evidence in this case is conflicting, and does not so preponderate in favor of the plaintiff as to authorize the Court to infer that the jury acted under a mistake, or were influenced by improper motives.

In relation to the exceptions: it was one of the first principles of the law applicable to real estate, as it stood prior to the revised statute of 1841, that he who was disseized could not, during the continuance of such disseizin,

convey to a third person. If he attempted to convey, nothing passed by the deed. If the supposed grantee entered, he was a trespasser, and, having gained possession by his own tortious acts, he could not avail himself of his deed to render his continuance in possession lawful. *Hathorne* v. *Haines*, 1 Maine, 238.

The plaintiff could not therefore, on the hypothesis in her first request, derive any benefit from the Frith mortgage, or its assignment.

The second request was also properly withheld—the instructions upon that point being as favorable to the plaintiff as the law will authorize.

Motion and exceptions overruled.
Judgment on the verdict.

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

FLAVEL BOWKER *& als. versus* JOHN H. LOWELL *& als.*

A collector of taxes is not justified by his warrant in arresting a person not liable to taxation in the town in which the tax is assessed,

A bond given to obtain a discharge from an unlawful imprisonment is obtained by duress, and is void.

ON REPORT.

DEBT upon a bond given to the plaintiffs as assessors of the town of Phipsburg, to obtain the discharge of Lowell from arrest on a warrant for the collection of taxes.

The defendants offered to show that, during the year in which the tax was assessed, Lowell was not an inhabitant of Phipsburg, nor liable to taxation therein, but the presiding Judge excluded the testimony. The case was thereupon withdrawn from the jury and reported to the full Court, with the agreement that, if the evidence was admissible and

constituted a defence, the action should stand for trial; otherwise, the defendants should be defaulted.

Bronson & Sewall, for plaintiffs.

The case is not distinguishable from *Athens* v. *Ware*, 39 Maine, 345.

The defendants did not offer to prove *duress*. For aught that appears in the case, or that the defendants offered to prove, the bond was given voluntarily. If so, it cannot be avoided. *Fellows* v. *School District in Fayette*, 39 Maine, 559.

The arrest did not constitute duress. *Crowell* v. *Gleason*, 10 Maine, 325; *Eddy* v. *Herrin*, 17 Maine, 338.

Gilbert, for defendants.

The opinion of the Court was drawn up by

GOODENOW, J.—It is well settled, that a warrant issuing from a court or magistrate having *no jurisdiction* of the case, confers no authority on the officer who executes it. The defence set up is not that the defendant had been overtaxed, but that he was not liable to be taxed at all; that he was not an inhabitant. "The distinction is obvious;" says SHAW, C. J., in *Preston* v. *Boston*, 12 Pick., 12, "resident citizens, being in other respects qualified, have a voice in assessing taxes, in electing assessors and other officers, and, by means of their powers and immunities, have a security against over-valuation and excessive taxation. But what is more directly to the point is, that one not liable, not domiciled, is not within the *jurisdiction* of the assessors any more than a stranger from another State, who should happen to be lodging at a hotel when the tax was assessed. The whole proceeding, therefore, in regard to him, is without authority *ab initio*." The officer was not justified in making the arrest if the assessors had no jurisdiction of either person or property. There can be no greater sanctity given to their warrant than is allowed to that of a magistrate or court having no jurisdiction, which is none at all.

The only remaining question is, whether the bond was given voluntarily or under duress.

"What shall constitute duress is often made a question. Threat of duress for rent is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. *Knibbs* v. *Hall*, 1 Esp. Rep., 84. Threats of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. *Brown* v. *McKinley*, 1 Esp. Rep., 279. But the warrant to a collector, under our statute, for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of a party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation, is called on peremptorily to pay upon such warrant, and he can save himself and his 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. *Amesbury W. & C. Manufacturing Co.* v. *Amesbury*, 17 Mass., 461."

A fortiori, if the bond was given to obtain a discharge from unlawful imprisonment, it was obtained by duress.

In *Athens* v. *Ware*, 39 Maine, 345, the assessors had jurisdiction. Ware resided in Athens. There is nothing stated in the case to show that the tax against him was illegal, and to show that the giving the bond was not a voluntary act.

The defendants offered to prove a legal defence, and *the action must stand for trial.*

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

JOHN HARRIS *versus* WINSLOW MORSE *& al.*

A receipt for goods attached, signed on Sunday, but not delivered until Monday, is a valid contract.

Receipters are liable for the property described in the receipt, if attached upon the writ, although not the property of the debtor.

The objection that such a receipt, under seal, cannot be the foundation of an action of assumpsit, is waived, if the defendant fails to notice it in his specifications of defence, and does not object to its introduction, when offered in evidence.

ON REPORT.

ASSUMPSIT upon a receipt taken by the plaintiff as deputy sheriff, for goods attached by him.

The case is stated in the opinion.

N. M. Whitmore, for plaintiff.

F. D. Sewall, for defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—This is an action of assumpsit upon a receipt, alleged to have been given by the defendants, for property attached by the plaintiff, as deputy sheriff, on a writ in favor of Lorenzo Matthews, against Joseph M. Frost. The report of the case shows that the general issue was pleaded with specifications of defence, alleging that the property attached on the original writ was not the property of Frost. No copies of the writ, pleadings, specifications of defence, and receipt upon which the action was brought, and which was presented in evidence, have been furnished, but we are relieved from embarrassment by this omission, as we infer from the statements of counsel in argument on both sides, that in addition to the ground of defence, that the property attached was not that of Frost, the defendants put into their specifications, that the demand of the property by the plaintiff was denied; and that it was alleged that the receipt was given on the Lord's day.

It was asserted by the defendant's counsel, and not denied on the part of the plaintiff, that a seal was affixed to the signatures of each of the defendants, but the specifications did not make this a ground of defence.

After the evidence had all been introduced by the agreement of the parties, a nonsuit was entered, and the case was to be submitted to the whole Court, on a report, with the authority to draw such inferences from the evidence as a jury might do, and the nonsuit to stand, or be discharged, and a default entered as the Court should find the facts and apply the law.

The demand of the property was properly made, and on this ground there is no impediment to the plaintiff's recovery. No attempt appears, from the case, to have been made to prove that any of the property described in the receipt was not that of Frost.

One of the defendants executed the receipt in the forenoon, and the other about noon, on Sunday. But it satisfactorily appears, from the evidence, that the plaintiff on Saturday wrote the receipt and gave it to Frost for the purpose of obtaining signatures thereto; and, on Monday, next following, it was brought to him by Frost, executed, and the plaintiff had no knowledge at what particular time the signatures were made.

The receipt was not a contract of binding validity until its delivery to the plaintiff, after its execution. *Hilton* v. *Houghton*, 35 Maine, 143. This objection fails.

The plaintiff testified that the doors, sashes and blinds, referred to in the receipt, were not attached by him, Frost saying that they were not his property. But, when the receipt was written, he testified that they were put into the receipt at the request of Frost. Whether they were returned on the writ as attached, we are not informed. If they were so returned, being a part of the property represented in the receipt as attached, the defendants are liable therefor, as for the other property described therein. *Jewett* v. *Torrey*, 11 Mass., 219.

The defendants are presumed to have known the form of the action and of every allegation in the writ, before they filed their specifications; and they are supposed to have known the character of the instrument declared upon ever after they executed it. They not only omitted to notify the plaintiff, in their specifications, of this ground of defence, but they made no objection to the receipt, when it was offered in evidence in support of the declaration. They made at that time no suggestion, that they were surprised, that the receipt was in form a deed, nor did they ask for leave to amend their specifications; they intimated no reliance upon any irregularity in the form of the action, nor did they deny that it could be maintained upon the receipt adduced. This ground of defence must be treated as waived before and at the trial. *Hart* v. *Hardy*, 42 Maine, 196.

Nonsuit discharged. — Defendants defaulted.

RICE, MAY, GOODENOW and KENT, JJ., concurred.

DONALD ROSS *versus* JOSEPH BERRY *& als.*

When the two justices, selected to take the disclosure of a poor debtor, who has given the bond provided by statute, for his release from arrest on execution, shall, at any stage of the proceeding, disagree upon any point or question, which must be decided before the case can proceed, the occasion has arisen contemplated by the statute, for calling in a third justice.

The three justices constitute the tribunal, after the third has been called in; and, although the concurrence of two only is required, all must act, in determining any question that may arise, until a final decision of the case is made.

Where the officer, who took the bond of an execution debtor, included in it a sum for "dollarage," as an item of his fees, it was thereby rendered invalid as a statute bond. — DAVIS, J., *dissenting.*

And it does not alter the case that the officer intended to make the bond conformable to the statute, and supposed his charge a legal one. The error was not "by mistake or accident," contemplated by sec. 44, c. 113 of R. S.

Ross *v.* Berry.

If the bond be valid only at common law, because of error in the penal sum, its condition will be performed, if the debtor cite, submit himself to examination and take the oath, although the proceedings are not according to the requirements of the statute. — DAVIS, J., *dissenting*.

REPORTED from *Nisi Prius*, MAY, J., presiding.

THIS was an action of DEBT on a poor debtor's bond for release from arrest on execution.

To prove the performance of one of the alternative conditions of the bond, the defendants offered in evidence the certificate of two justices of the peace and quorum that they had administered to the principal defendant the oath prescribed by the statute; also, the execution by virtue of which the debtor was arrested, and the officer's return thereon, from which it appeared that he included among his fees, on said execution, this item, "dollarage $9,27"; which sum made a part of the amount for which the bond was given.

The officer testified that he "included 'dollarage' in the bond, supposing he had a right to do so. He intended to make the bond conform to the statute."

The facts relating to the organization of the justices' court, and their proceedings, as disclosed by the evidence in the case, are sufficiently indicated in the opinion.

Gilbert & Sewall, for plaintiff.

The fact that the officer included dollarage does not, necessarily, make the bond valid only at common law. The testimony of the officer is, that the penalty of the bond was made too much by his accident or mistake. It is still valid as a statute bond. R. S., c. 113, § 44; *Lambard* v. *Rogers*, 31 Maine, 350.

The defendants claim that one of its alternative conditions has been performed; that the principal seasonably took the oath. Has he done so according to the requirements of the statute?

The justices who administered the oath had no jurisdiction. The third justice was improperly there; he never

had any jurisdiction. The occasion had not arisen for his selection. The refusal of the debtor to answer the interrogatory propounded, was not a matter to be submitted to the consideration of a third justice. If the debtor refused to answer pertinent questions, the oath should not have been administered.

After the withdrawal of one of the justices, the proceedings were all *coram non judice*. All the justices should have been present and adjudicated upon the disclosure.

It cannot affect the rights of the creditor, that one of the justices saw fit to withdraw. If the debtor has thereby suffered, his remedy is against the magistrate. It furnishes no defence to an action on the bond.

Tallman & Larrabee, for the defendants.

The opinion of the Court was drawn up by

KENT, J.—The action is upon a poor debtor's bond, one condition of which is, that the debtor shall, within six months after date, cite the creditor before two justices of the peace and quorum, and submit himself to examination, and take the oath prescribed in the twenty-eighth section of chapter 113, of R. S. The defendants affirm that this condition has been legally complied with. If this is a statute bond, no question is raised as to the preliminary proceedings in issuing the citation and notice thereon. It appears that on the day named two justices, legally qualified to act, one chosen by the debtor and one by the creditor, organized properly the tribunal contemplated by the statute. They proceeded regularly in taking the disclosure until a question arose whether the debtor was bound to answer a certain interrogatory put to him by the creditor. One of the justices decided that he was bound to answer, and the other decided that he was not bound to answer it. In this stage of the proceedings, the two justices determined that they did not agree in opinion and that they could not agree upon a third justice. Therefore, an officer, legally qualified, chose such third justice, who appeared and acted with the others.

The court thus constituted proceeded with the disclosure, but, before it was concluded, the justice selected by the creditor refused to act any further and withdrew. The creditor also withdrew, leaving a protest. The two remaining justices finished the examination—adjudicated upon it, and administered the oath required in the 28th section, and gave a certificate to the debtor.

The first question that arises, is, whether the Court was legally constituted, so as to give jurisdiction under the statute. It is contended, that the third justice was called in prematurely—that the statute does not contemplate such an appointment until the disclosure is finished and there is a disagreement as to the final adjudication thereon, and on the question whether the debtor is entitled to have the oath administered to him.

The words of the statute on this subject are,—"If the justices do not agree, they may choose a third, and if they cannot agree on a third, such officer may choose him; and a majority may decide." It is evident that the Legislature intended to make such provision that the case might proceed to a final adjudication. A disagreement as to citation, notice, or other preliminary matters would necessarily end the proceedings, if the third justice could not be called in at that stage. We think that whenever there is a disagreement on any point or question, which must be decided before the case can proceed, the third justice may be called in. The statute does not in terms limit it to the time of final adjudication. Indeed, such time could never arrive, if the questions anterior could not be decided when there was a disagreement. This is the view taken of this provision in *Moody* v. *Clark*, 27 Maine, 551. The disagreement in that case, was upon the sufficiency of the notification to the creditor. A third justice was called in at that stage, and it was held that the proceeding was regular.

2. It is further contended, that if the court was rightfully enlarged, that it must continue to be composed of the same magistrates until a final adjudication, and that the

action of two, in the absence of the third, was unauthorized and void. It is decided in the case last referred to, that after the new justice is called in, he must act in all questions, until a *final* decision. The court thus constituted of three, is the same court, with the same powers, and to act in the same manner as the first organization with two members, except that "a majority may decide."

What is the effect of the voluntary withdrawal of one of the members before the conclusion of the disclosure, and before any adjudication? The general rule is well established, that whenever a tribunal is constituted of three or more individuals, with authority in a majority to decide, all the members must sit at the hearing; and in the determination of the questions arising. The reason given, is, that the reasonings and suggestions of the minority may change the views at first entertained by the majority—that the intendment of the law is, that the parties shall have the benefit of the opinions and of all in consultation, although they must be bound by the final decision of a majority, after such comparison of views and arguments.

After the addition of a new member, therefore, the concurrence of two only is required, but it also is required that the proceedings shall be on the hearing, and upon the action of the whole board, until a final decision.

This is the rule that has been often applied to reports of referees, where a majority were authorized to decide. *Cumberland* v. *North Yarmouth*, 4 Maine, 459; *Peterson* v. *Loring*, 1 Maine, 64.

It would seem very clear that, if but one justice should attend at the time and place named in the citation, he could not proceed to act. If, after commencing the examination, one of two justices should refuse to act and leave, could the other go on alone, and adjudicate and administer the oath? No one would probably answer this question in the affirmative. The new court of three members, is like the court of two in every respect, except the requirement of the action of a majority, instead of unanimity. If one of the

three withdraws, he leaves the court as imperfect and deficient as when one of two retires and refuses to act.

The tribunal is created by the statute and must conform in its constitution, as well as action, to the requirements of the statute. The debtor, before he can be relieved from the penalty, on the plea of performance in this particular, in case of a statute bond, must show that he has been admitted to take the oath by a legally constituted tribunal, acting throughout in accordance with the law. If he fails, it may be his misfortune rather than his fault, and he may, perhaps, have a remedy against wilful, corrupt or inexcusable refusal of a justice to act after he has assumed jurisdiction in his case. This Court might compel him in such case to act, by mandamus or attachment. 4 Maine, 460, before cited. However this may be, we cannot view the facts in this case as showing a legal performance of the condition of this bond, *if it is a statute bond.*

But is it a statute bond? A statute bond must be exactly double the sum for which the debtor is arrested. *Clark* v. *Metcalf*, 38 Maine, 122. A bond that is *less* than the amount due, and which does not include the interest on the judgment, is not a statute bond. *A fortiori*, a bond which includes an illegal charge is not such bond. *Ibid; Howard* v. *Brown*, 21 Maine, 385; *Barrows* v. *Bridge*, 21 Maine, 398; *Clark* v. *Metcalf*, 38 Maine, 122.

In this case, it appears that the officer included in the fees nine dollars and twenty-seven cents *dollarage*, as it is called. This was clearly an illegal charge, by the express words of the statute, c. 116, § 5. The language of that statute is, "no dollarage or commission shall be allowed to the officer for an arrest or commitment upon execution or mesne process." The penalty of the bond, therefore, varied from the sum required by law. But the plaintiff invokes the provision found in c. 113, § 44, that where this variation is caused "by mistake or accident" the bond shall still be valid. It is claimed that the error in this case was thus caused.

It is very evident that these words were not intended to

cover every mistake by which the bond was made in a wrong sum. Nor is it enough to show only that the officer intended to take the bond according to the statute and verily supposed that his charges were legal and correct. The original statute, c. 148, R. S. of 1841, § 43, contained the words, "from mistake, accident, or *misapprehension*." This latter word is not found in the present statute.

In the case of *Lombard* v. *Rogers*, 31 Maine, 350, a bond was held to be a statute bond where dollarage had been charged. That, however, was an oral opinion, and, according to the report, the Court intimates a doubt whether dollarage might not be legally charged, and adds, that if not, it might be considered a "*misapprehension*." This case is imperfectly reported, and, at best, rests upon the word which has been intentionally omitted in the revision.

It is not difficult to suggest cases which clearly come within the words of the statute, — such as a mistake in casting the interest due after judgment; a mistake in addition or multiplication; or in stating the columns or sums; or any mere matters of calculation where the intent and effort was to make a statute bond. But the question here, is, whether a charge deliberately and purposely made of an item of fees, wholly unauthorized and illegal, and so made by the very section of the statute that gives the officer the right to tax any fees on the execution, can be regarded as an "accident or mistake," such as this law contemplates.

The officer, in his testimony, does not deny that he put in this charge *intentionally*, supposing it was a legal charge. He says he intended to make it a statute bond. The law does not regard such ignorance of the plain words of the statute, regulating officers' fees, as entitled to protection. We do not say that an unintentional omission of a legal item in the calculation, the officer supposing that it was included, would not be within the saving words of the statute, and the same may be true of an illegal item included, if it was so included by mistake and unintentionally. But we cannot spread this mantle of charity and protection over a

case, where an officer intentionally foists into his charges an item *wholly* and unquestionably illegal, no part of which is rightfully there, however confidently he may assert that he supposed it legal. Mere ignorance of the law is no excuse in such a case.

We may add that, perhaps, a mistake in the items or amount of a charge, in itself legal, might come within the protection of the statute, if the error was shown to have arisen from accident or mistake. We, however, only decide upon the facts in this case. Other cases must be determined upon their own facts. The bond is not a statute bond, but it is a bond at common law, and the defendants must show a compliance with some one of the conditions stated. But the bond, having no validity as a statute bond, the provisions of the statute as to proceedings to obtain a discharge from its obligations are not to be regarded, except as named expressly in the bond itself. *Clark* v. *Metcalf*, 38 Maine, 132.

A compliance with the condition, although it is not in accordance with the requirements of the statute, is sufficient. Where the statute required that the condition of the bond should be "an examination and oath before two justices of the peace and quorum," and the bond in question was "before two justices of the peace quorum *unus*," it was held that it was not a statute bond, but good at common law. It was further held that the examination and oath, before two justices, only one of whom was of the *quorum*, was a compliance with that part of the condition. *Fales* v. *Dow*, 24 Maine, 211.

Where the statute required a nine months bond, and the one given was six months, it was held not to be a statute bond, and that the fact that the oath was taken within nine months, as required by the statute, did not show a compliance with the terms of the bond. *Hathaway* v. *Crosby*, 17 Maine, 448; *Ware* v. *Jackson*, 24 Maine, 166.

In the case before us, the condition, which the defendants contend has been complied with, is this,—"If said Berry

shall, within six months thereafter, cite the creditor before two justices of the peace and of the quorum, and submit himself to examination, and take the oath prescribed in the 113th chapter, section 28, of the Revised Statutes, then this obligation to be void."

It is admitted, as the case finds, that the oath named in the bond, as prescribed in the 28th section, was administered to the said Joseph Berry, the debtor in this execution and bond, within the six months. It is also admitted that Jeremiah Ellsworth and Elisha Clark, who administered the oath, were at the time justices of the peace and quorum for the county of Sagadahoc, and legally competent to act in the matter. This would seem to be a full compliance with the requirement as to taking the oath.

The first stipulation is, that he will within six months cite the creditor before two justices. No question seems to have been made as to this fact of citation. The justices who administered the oath certify that the creditor was duly notified. Mr. Adams, the retiring justice, in his testimony, offered by the plaintiff, says that, at the first meeting, he and the other justice did decide that the citation was legal and duly served. In the disclosure of the debtor, introduced by plaintiff, he states, in answer to plaintiff's question (2,) that he did cite creditor for this hearing. A copy of the citation is also annexed to his disclosure. We think that there is sufficient evidence that the debtor did "cite the creditor."

Did he submit himself to examination? It appears from the certificate, the testimony and the written examination, that the debtor did appear, and submitted himself to such an examination as is set forth. He did not refuse to answer any question which the justices determined he was bound to answer. He finished the disclosure and signed it.

If this had been a disclosure under a statute bond, and the case had been before us on a *certiorari*, it might have presented some serious questions in relation to the pertinency of the questions and the action of the magistrates in reference to them. But, in this case, on this point the statute re-

quirements are out of the question. The simple condition of the common law bond is, that he will submit himself to examination. There is no express designation of the persons who are to conduct the examination. We have no doubt, however, that it must be an examination conducted by the justices of peace and quorum, touching the debtor's estate and ability to pay, and must be satisfactory to them, the creditors being allowed to put questions which the justices may deem pertinent and proper. Such an examination appears to have been had in this case.

It is objected that the two justices who administered the oath were not the two who commenced the examination, and that the court finally consisted of three members. We have considered the effect of this, if the bond had been within the statute. The common law condition, however, is, that the proceedings shall be before two justices of the peace and quorum. It was decided in *Flowers* v. *Flowers*, 45 Maine, 459, that, although the justices who administered the oath, in case of a common law bond, would have had no jurisdiction in case of a statute bond, not being of the county in which the arrest was made, yet it was a compliance with the terms of the bond, which did not specify in what county the justices must reside. It seems to be enough if two justices of any county act. *Clark* v. *Metcalf*, before cited.

In Massachusetts, where the statute authorized the debtor to select the two justices who were to take the examination and give the certificate, &c., it appeared that two such justices were selected and commenced the proceedings, and adjourned, and at the adjournment one of the justices was absent, and the debtor selected a third in his place, and it was held a sufficient compliance with the law, which required the action of two justices. *Brown* v. *Lakeman*, 5 Met., 347.

The statute provision, giving a creditor a right to select one of the magistrates, does not apply to this case. The debtor is by this bond to cite and submit to examination,

and take the oath before two justices of the peace and quorum. This he has done, and has thus fulfilled one of the conditions of this common law bond.

According to the agreement of the parties, the default is to be taken off and a nonsuit to be entered.

Plaintiff nonsuit.

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

APPLETON and DAVIS, JJ., non-concurred.

DAVIS, J., dissenting.—I concur in the opinion that the justices who administered the oath to the debtor, had no jurisdiction of the matter, under the statute, after their associate had refused to act. This raises the question whether the bond was a statute bond.

The bond did not differ from the requirements of the statute in any particular, unless the penal sum was too large. As the obligors would in no event be liable for the whole penal sum, the question is purely a technical one.

The bond was in double the sum due on the execution, with the officer's fees, including his dollarage, or fees for collecting. It is urged that he had no right to include such fees.

"For services under the provisions of law for the relief of poor debtors," the officer has no right to charge the *creditor* any dollarage, or commission, in case of an arrest of the debtor, "except upon the money actually collected." R. S., c. 116, § 5. He charges the *debtor* nothing, unless he pays the execution, in which case, he is entitled to dollarage. Unless he has the right to reckon this fee in his return, as a contingent one, to be paid to him if the debtor performs the condition of *payment* in the bond, the debtor might always avoid the payment of dollarage by giving a bond, and then immediately tendering payment. The provision of statute, that the officer, *in these very cases, shall* be allowed dollarage "on the money actually collected," seems to imply that he may charge it as a contingent claim, and

be entitled to it, if the debtor pays the execution upon the bond.

But the officer finds his directions for taking the bond in an entirely different statute. In that, the debtor is required to give a bond to the creditor, "*in double the sum for which he is arrested.*" R. S., c. 113, § 22. For what sum is the debtor arrested? Is it not for the sum which the officer has a right to demand?

The officer is directed by his precept to collect the amount of the judgment for debt, and cost, with interest thereon, &c., together with his own fees, and for want of property "to satisfy the sums aforesaid," to arrest the debtor. The "sums aforesaid," if paid, would clearly embrace fees for collecting, or dollarage. Is he not arrested for them,—that is, in default of paying them?

If the debtor should offer to pay all except the dollarage, but, refusing to pay that, the officer should arrest him, as he rightfully might, would he not be arrested for the whole amount, including dollarage? And if so, ought not the bond to be in double the whole amount, as in the case before us?

But if it is conceded that the bond in this case is valid only at common law, I cannot come to the conclusion that there has been a performance. If it varies from the statute, it is not in the *conditions to be performed*, but in the *penal sum* only. The conditions are *precisely the same* as in a statute bond. How, then, can any acts constitute a performance in one case, which would not in the other?

When the *conditions* of the bond are different from those required by the statute, as to the *time* of performance, or in regard to the *justices* who may act, the debtor must perform the conditions of the *bond*, and not of the *statute*. There are many cases of this kind. And this Court may have inadvertently held that to be a performance of a common law bond, which would not have been a performance of a statute bond, *when the conditions were the same*. If so, the sooner such an error is corrected, the better.

In the bond now under consideration, the debtor covenants to "submit himself to examination and take the oath prescribed by chapter 113, section 28, of the Revised Statutes." The conditions to be performed are literally the same as in a statute bond. The statute is expressly referred to in the bond; and, by a well settled rule of construction, we must resort to the statute to ascertain the intention of the parties. And submitting to an examination, and taking the oath prescribed by the statute, requires that the proceedings should be according to the statute. So it was expressly held by this Court, in the case of *Hovey* v. *Hamilton*, 24 Maine, 451; and, upon a common law bond, the certificate of discharge was, in that case, pronounced void, because one of the justices who administered the oath made an adjournment not provided for by the statute.

The decision in this case is, that upon such a bond, the debtor may cite the creditor before one tribunal, and then take the oath before another, which has no jurisdiction, and the discharge be valid. I cannot concur in such a decision.

WILLIAM H. STURTEVANT, *petitioner for review, versus* HATHERLY RANDALL.

Upon a petition for review under c. 94 of the laws of 1859, the finding of the Judge at *Nisi Prius*, on the questions of fact, is conclusive, and cannot be revised on exceptions.

ON EXCEPTIONS.

PETITION FOR REVIEW of an action under c. 94 of the laws of 1859. The petition alleged that, upon the trial of the original action, Randall testified falsely to material facts.

Upon the hearing, at *Nisi Prius*, the presiding Judge finding, as matter of fact, that he was not satisfied that the

testimony referred to was false, denied the writ, and the petitioner excepted.

Tallman and *Gilbert*, for the petitioner.

N. M. Whitmore, for the respondent.

The opinion of the Court was drawn up by

DAVIS, J. — By the statute of 1859, c. 94, a person is entitled to a review, as a matter of right, upon proof of three things; — (1,) that, upon the original trial, a witness testified falsely against him to material facts; (2,) that he was thereby taken by surprise, so that he was unable then to produce evidence that it was false; (3,) that such witness has been convicted of perjury in such testimony, or that the petitioner has discovered sufficient proof of its falsehood, in the opinion of the Court.

Whether these things appear, upon the evidence in support of the petition, must be determined by the presiding Judge. If he should find them proved by the evidence, and should then refuse to grant a review, the petitioner would have a remedy by exceptions. But, in the case at bar, the certificate of the presiding Judge does not show that he found either of the facts specified by the statute; and one of them he distinctly negatives. *Exceptions dismissed.*

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

MAINE MUTUAL MARINE INSURANCE COMPANY *versus* JOHN B. SWANTON *& als.*

The by-laws of a mutual insurance company provided that any person giving an "advance note" should become a member thereof; and that the directors may give up any or all of the advance notes, whenever they should deem it for the interest of the company to do so. The defendants gave the company an advance note, specifying that it should be subject to assessments "at an equal per cent. with *all other* advance notes." — *Held* —

1. That the assessment is to be made upon all the advance notes remaining uncancelled at the time it was made.

2. That the signers of advance notes are liable for the full amount thereof, if required to pay the debts of the company.

ON REPORT.

ASSUMPSIT for assessments upon a note given to the plaintiffs by the defendants by their firm name, "Z. Hyde & Co." The defendants claimed that the assessments were void because "advance notes" had been cancelled before these assessments were made. The case is stated in the opinion.

Shepley & Dana, for plaintiffs.

Gilbert, for defendants.

The opinion of the Court was drawn up by

GOODENOW, J. — This action is assumpsit, founded on a note given by the defendants to the company, dated Feb. 27th, 1856, by which note, for value received, they promise to pay the plaintiff company, or order, fifteen hundred dollars, in two months after demand, with interest after payable. On this note there are two indorsements of payments. It is admitted that a demand on the defendants was duly made by the plaintiffs, previous to the commencement of the suit, and that the defendants constituted the firm of "Z. Hyde & Co.," when the note was given. Upon the giving of this "advance note," the defendants became members of the corporation and subject to the provisions of its by-laws. The fifth section of the by-laws gives authority to the direc-

tors to cancel and give up any or all of the advance notes whenever they shall deem it for the interest of the company to do so. The receipt given by the plaintiffs to the defendants, Feb. 27, 1856, states that the note shall be subject to assessments "at an equal per cent. with *all* other advance notes." This must be taken in connection with the authority given to the directors to cancel and surrender advance notes when they should deem it for the interest of the company to do so. "*All* other advance notes" must be construed to mean *all* other notes remaining uncancelled at the time of the assessment. The undertaking of the makers of these advance notes was, that each would pay the full amount of the note signed by him, if required to meet the losses and legal claims against the company.

By section 4 of the by-laws, all the corporate powers of the company were vested in a board of directors.

There must be *judgment for the plaintiffs.*

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

WILLIAM D. CROOKER *versus* DANIEL F. BAKER *& al.*

When, as between two judgment debtors, one of them is bound to pay the entire judgment, the other may procure the creditor to levy the execution upon the property of the former, or in default of property, to arrest him, without impairing the validity of the execution.

ON REPORT.

AUDITA QUERELA. The case with the facts, which the Court found were proved by the evidence, are stated in the opinion.

Tallman & Larrabee, for plaintiff.

Whitmore, for the defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.—The arrest of the plaintiff was made upon an execution issued upon a judgment, recovered by the defendants, as executors of the last will and testament of Luke Lambert, deceased, against the plaintiff and Samuel Swanton, 2d, on January 2, 1858, upon the balance of claims of the testator against them, after deducting from the whole amount one half thereof, which had been paid by Swanton, before the institution of the original suit.

No question is made that, as between the judgment debtors, Crooker was bound to pay the entire amount of the judgment. If Swanton had paid it, the execution was discharged, and could not be enforced against either; but Swanton's legal remedy would be an action against Crooker to recover the amount so paid. It was, however, the privilege of the former, to induce the creditors in the judgment, or its owners, to take property of Crooker or to arrest his body, instead of paying the amount himself, which would relieve him from the payment, if the execution should be satisfied by Crooker.

The fact, which the plaintiff insists that he establishes by the evidence, is, that Swanton had paid the execution before the arrest complained of.

The Court is satisfied from the evidence reported that, on Aug. 6, 1857, nearly five months before the recovery of the judgment by the defendants, Z. Hyde & Co., having assumed liabilities for Samuel Swanton, 2d, to a considerable amount, which have not been discharged, took a bill of sale of one-eighth part of the ship Charlotte Reed, as security; that, on Jan. 29, 1858, Z. Hyde & Co. conveyed this part of said ship to the defendants, in consideration of the transfer of said judgment and execution against Crooker and Swanton, to John B. Swanton, the senior partner of the firm, and who acted for the firm in the matter, and the sum of about three hundred dollars in cash. This transaction was done through the agency of Samuel Swanton, 2d, who received the cash payment as the estimated excess of the

value of the eighth part of the ship over that of the judgment.

It was agreed by Z. Hyde & Co. and Samuel Swanton, 2d, that the former should hold the judgment and execution for the security of their liabilities, in the same manner as they had previously held the eighth part of the ship.

Z. Hyde & Co. had in themselves the legal title of the portion of the ship conveyed to the defendants. No legal objection existed to the conveyance thereof by them. Consequently, the consideration for the transfer of the judgment and execution moved wholly from them, and not from their vendor. The transfer of the judgment and execution was alike legal, from the creditors on the record. Unless there was a fraud in the transaction to the injury of Crooker, the judgment and execution became the property of Z. Hyde & Co. by the exchange, and remained as valid afterwards as before. Samuel Swanton parted with no property in the procurement of this exchange. No evidence in the case satisfies us that any fraud was perpetrated upon Crooker. He was equally exposed to arrest on the execution before and after the transfer.

Samuel Swanton, 2d, appears to have been desirous to accomplish the exchange, in order to make more certain the arrest of Crooker, without the payment on his part of the execution, and thereby to secure the satisfaction of the same from the debtor who justly owed it. His receipt of the cash payment for the excess of the value of the part of the vessel sold, over that of the judgment and the payment of the board of Crooker in jail, do not show that he paid the execution, but it is evidence of a wish that payment should be made by Crooker, in order to obtain his release from prison.

The judgment may be enforced against Samuel Swanton, 2d, till it shall be paid. *Plaintiff nonsuit.*

RICE, MAY, GOODENOW and KENT, JJ., concurred.

HIRAM G. CALL *versus* CHARLES B. FOSTER *& al.*

If an officer intentionally include in the penal sum of the bond of an execution debtor an illegal item of fees, the bond will be valid only at the common law, notwithstanding the officer designed to take a bond as provided by the statute,—the error in such case arises merely from the officer's ignorance of the law and his duty; and was not caused by "mistake or accident," within the meaning of the statute.

In a suit on such bond, the creditor will be entitled only to the actual damage he has sustained, where there has been no attempt to perform either of its alternative conditions.

When a case has been reported to the full Court, if the plaintiff subsequently discharge the suit, and the validity of the discharge is controverted, that Court may properly remit the case to the county court, to enable the parties to plead and to try the issue raised on the pleadings.

REPORTED from *Nisi Prius*, GOODENOW, J., presiding.

THIS was an action of DEBT upon a poor debtor's bond.

J. S. Abbott, for the plaintiff.

Tallman & Larrabee, for the defendants.

The facts sufficiently appear from the opinion of the Court, which was drawn up by

KENT, J.—The question which the parties seem to have submitted to the Court, in the report of the case is, whether the poor debtor's bond in suit was a statute or common law bond. It seems to be according to the statute, except in the penal sum. The bond is in the case, and in the condition the various items are stated, which make up the sum on which the penalty is based. One of the items is, "officer's fees taxed at seven dollars and fourteen cents." On the margin all the items are separately stated, viz., debt, interest, execution, service, dollarage and travel; and these sums are added together and the total multiplied by two, and that sum is the sum named as the penalty. This sufficiently shows that the sum named in the body of the bond as officer's fees, was made up of the three charges on the

margin, viz., service, ,50, travel, 1,00, and dollarage, 5,64. Total, $7,14.

The charge for "dollarage," or commission, was clearly illegal and unauthorized. R. S., c. 114, § 5. The penal sum was not double the legal claim.

The bond is not therefore, on these facts, a statute bond. *Ross* v. *Berry*, *ante*, p. 434. The evidence offered by the plaintiff, to show that the error was occasioned by "accident or mistake," is contained in the deposition of the officer who took the bond. He states that he *intended* to take the bond in double the amount for which the debtor was arrested, and that *if* there is any variance or error in this respect, it was wholly owing to accident and unintentional mistake. The evidence we do not deem sufficient. Mere ignorance of the law and his duty is not enough. If it were, then all possible errors might be covered. The testimony is too general, and amounts only to this—that, *if* there is an error, he did not intend to commit it. We think that where the charge is intentionally made of an illegal item, there should be definite proof, as to that item, of facts or circumstances which clearly show that it was made unintentionally, or by some mistake of fact, or miscalculation—as decided in *Ross* v. *Berry*, *ante*, p. 434, before referred to.

This is not then a statute bond, but is good at common law, and subject to chancery. We have no evidence on the question of damages from either party. We judge, from the report of the case, that it was the intention of the parties to submit the case to the law Court on the question of law stated, and for that Court to give the usual direction as to the ascertainment of damages. It is desirable that counsel should be particular in the statement of their agreements as to the action of the Court on the case. This case as stated is, that the action was on a poor debtor's bond; that the defence is, "that the bond is not a statute bond, and, if valid, is good only as a common law bond." The deposition of the officer who took the bond is the only evidence alluded to. The parties agree to submit the case upon the

foregoing statement, to the decision of the law Court. We must conclude that it was in the contemplation of the parties that a hearing should be had on the question of actual damages, if the law Court should determine that the bond was only good at the common law, as there is no evidence before us except that in relation to the execution of the bond.

The defendants have furnished the law Court what purports to be a copy of a discharge of the original judgment and execution, given by the plaintiff on the record, since the case was reported to the law Court. The plaintiff has also furnished us with a paper purporting to be a copy of an assignment by the plaintiff, made prior to the trial at *Nisi Prius*, with the affidavit of the plaintiff in relation to giving the discharge to defendants. There is also the denial of the execution of the discharge; and that, if given, it is a qualified release; and that defendants knew of the former assignment. These papers present no issue or matter for the action or determination of the law Court.

But, whenever a discharge or release is given, after the case is carried to the law Court, it may be proper to present the *prima facie* evidence to that Court. If the discharge or release is denied, or its validity disputed, it may be proper, in the discretion of the Court, to send the case back to the county court, to enable the parties to plead, and to try the issue raised on the pleadings.

This case must be remitted to the county court, with leave for the defendants (if they see fit) to plead a release or discharge. If they do not, defendants to be defaulted and judgment to be rendered, as on a common law bond, for such damages as the Judge at *Nisi Prius* shall determine.

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

JOHN B. SWANTON *& al., pet'rs for partition, versus* JAMES A. CROOKER.

Where an entire estate was appraised, set out by metes and bounds, and levied upon as the property of the debtor in an execution, who was owner of only an undivided portion of it, the levy was held valid to transfer the debtor's title to his undivided part, it being a less estate than that mentioned by the appraisers.

EXCEPTIONS from the ruling of MAY, J., at *Nisi Prius.*

THIS was a PETITION FOR PARTITION of certain premises in West Bath. In the petition, Charles Crooker and persons unknown were named as co-tenants. The respondent, James A. Crooker, claiming to be sole seized of the premises, subsequently appeared and was allowed to defend.

The presiding Judge instructed the jury "that, upon the paper evidence in the case, the petitioners appeared to be seized in fee of an undivided half part of the premises described in their petition, and, there being no other evidence in the case, they would be warranted in finding that the petitioners were so seized."

The verdict was for the petitioners; and the respondent excepted.

Tallman and *J. Smith*, for the petitioners.

Gilbert, for the respondent.

Wilder, the execution debtor, held an undivided half of the estate, as appears by the deeds of Woodbury to Charles and Wm. D. Crooker, and of Charles Crooker to the debtor.

The petitioners levied upon the whole by metes and bounds, as the debtor's estate. This is bad. R. S., c. 76, § 7; *Stanniford* v. *Fullerton*, 18 Maine, 229; *Merrill* v. *Burbank*, 23 Maine, 538; *Rawson* v. *Lowell*, 34 Maine, 201; *Howe* v. *Wildes*, 34 Maine, 566.

The opinion of the Court was drawn up by

RICE, J.—The petitioners claim to be seized in fee of one

undivided half of the estate described in their petition, by virtue of a levy against one Thomas D. Wilder. It is conceded that, at the date of the original attachment on the writ, on which judgment was obtained by the petitioners against Wilder, the title to that portion of the estate which they now desire to have assigned to them in severalty, was in him. Nor is it denied that the attachment was preserved until the levy was made.

The title of the tenant to the other half of the estate is not contested.

The levy was made upon the whole estate, as the sole property of Wilder, and not on one undivided portion thereof.

The practical question presented for decision is, whether a levy thus made upon an entire estate, can be sustained as valid to transfer the debtor's title to an undivided portion thereof.

Section 3 of c. 76, R. S., provides that the appraisers are, in a return made and signed by them on the back of the execution, to state the nature of the estate and its value, and whether it is in severalty or in common, a fee simple or a less estate, in possession, reversion, or remainder, and describe it by metes and bounds, or in such other manner that it may be distinctly known and identified.

Section 7, of the same chapter, provides that the whole or a part of an estate held in joint tenancy or in common, may be taken and held in common, but the whole estate must be described, and the share of it owned by the debtor must be stated.

The 6th section provides that estates tail are to be taken, appraised and held as estates in fee simple. All the debtor's interest in the premises will pass by a levy, unless it is larger than the estate mentioned in the appraisers' return.

The estate levied upon was described in the certificate of the appraisers "as the property of Thomas D. Wilder, the debtor, and held by him in fee simple." It was appraised and set out by metes and bounds.

The *interest* of the debtor in the estate is thus manifestly inaccurately described, he having title to an undivided half only, and not to the whole.

It has been decided that a levy, setting out by metes and bounds a part of a tract of land, holden by the debtor as tenant in common with others, is void as against a co-tenant and his grantor. *Stanniford* v. *Fullerton*, 18 Maine, 229; *Rawson* v. *Lowell*, 34 Maine, 201.

So, too, when the debtor is sole owner of a parcel of land, a levy on an undivided portion thereof is irregular and void. *Merrill* v. *Burbank*, 23 Maine, 538.

But the case at bar differs from both of the above. The creditor levied upon the entire estate as the sole property of the debtor, when in fact the debtor was seized of one undivided half only. He does not take less than the debtor's interest in the land, nor carve out, from an estate held in common, a particular portion to be held in severalty, but includes in his levy *all* of the debtor's interest, together with the interest of his co-tenant.

In the case of *Atkins* v. *Bean & al.*, 14 Mass., 403, which, in principle, is like the one at bar, the Court says,— "The levy upon the debtor's undivided estate in common is good and the estate sufficiently described. The error in the proportion owned by the debtor produces no mischief, as it comprehends the whole of his interest. The levy is good for an eighth, although it purports to be of a seventh. The mistake prejudiced no one but the creditor; and, perhaps, he would have his remedy by showing that part of his set-off did not belong to his debtor. If one conveys by deed more land than he owns, the deed is good for what he does own. So, if an execution be levied upon one hundred acres, and the debtor have a title but to fifty, the levy is good for the fifty, and the same reason applies where a similar mistake occurs in levying upon the estate of a tenant in common. The cases cited only show that the debtor's interest in an estate, holden jointly or in common with others, cannot be

set off in any particular part of the common estate. Here more than his interest in the whole was set off."

The reasoning in the above case is sound and should prevail unless the provisions of our statute preclude it. Must the creditor see to it that the appraisers describe the debtor's interest in the estate with entire accuracy, on peril of loss of his levy, if there be the slightest error in the description? Or, if the interest described by the appraisers, and taken by the levy, is greater than the debtor's true interest in the estate, is the creditor protected by the provisions of § 6, c. 76, cited above?

In the case of *Howe* v. *Wildes*, 34 Maine, 566, the levy was upon the entire estate, such being the debtor's apparent interest in the land as it appeared on the record. But, in truth, his interest was only a life estate in seven-twelfths thereof, being less both in quantity and quality than described by the appraisers.

The Court, in their opinion in that case, say,—"The provisions of § 11, c. 94, R. S., (1841,) apply when the debtor's apparent or known title extends only to an undivided part or portion of the estate. In such case it is necessary that the whole estate should be described by the appraisers and the debtor's share or part thereof stated by them."

The implication is very strong, that the levy in that case would have been held bad if the record had disclosed the debtor's true title. That case was undoubtedly decided correctly. But, on further consideration, we have come to the conclusion that the implication which the language used would authorize, if not require, and which was unnecessary for the decision of that case, should not be sustained. On the contrary, that the language in the 6th section ("all the debtor's interest in the premises will pass by the levy, unless it is larger than the estate mentioned in the appraisers' return,") must apply in all cases where the "nature of the estate" is stated by the appraisers in their return, unless the estate taken is greater than that mentioned in their certificate, or the levy is so made as to be prejudicial to the rights

of the co-tenants. Here the debtor's interest in the premises is less than the interest described by the appraisers; the debtor, therefore, has no cause of complaint. It does not injuriously affect the rights of the co-tenant, but leaves him a tenant in common in the whole estate with the petitioners instead of the debtor. The only party who has suffered, by the mistake of the appraisers in describing the "nature of the estate" taken, are the petitioners. Whether they can obtain relief for a loss of that portion of the estate "taken" by the levy which was not the property of the debtor, and to which they acquire no title by the levy, it is not now necessary to inquire.

If it should be contended that the latter clause of § 6 refers only to cases referred to in the first clause of the same section, the answer is, that such construction is too limited. The word *premises* must be construed to apply to the estate taken, whatever may be its nature; and it will pass by the levy, that being correct in other respects, unless it is larger than the estate mentioned in the appraisers' return. The estate in this case having been substantially described as the sole property of the debtor, his interest therein passed by the levy, that interest being less than that mentioned by the appraisers. *Exceptions overruled.*

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

OTIS BUBIER *& ux. versus* NATHANIEL ROBERTS.

A deed of lands made by a husband to his wife, during the coverture, the consideration named being "love and esteem," does not bar her of dower in his remaining lands, unless his intention to do so is expressed in the deed.

Facts outside of the deed, proved by parol evidence, are insufficient to bar the wife of her dower, unless there is proof of a direct and explicit declaration, or its equivalent, by the husband, at the time of the execution and delivery of the deed, that, if received and retained, it should be in lieu of dower.

But, *it seems*, if it is clearly shown that the husband in his life time made a jointure or pecuniary provision for his wife in lieu of dower, and that she had full knowledge of it, although she did not accept it at the time in satisfaction of her right of dower, she will be bound thereby, unless, within six months after her husband's decease, she elects not to do so, and files a certificate of her election in writing in the probate office.

THIS was an ACTION OF DOWER in behalf of Jane Bubier, the present wife of Otis Bubier, as the widow of Thomas Grover, deceased, to recover her dower in lands held by the defendant.

It appears that Thomas Grover, a few days before his death, in January, 1858, conveyed to his wife Jane all his personal property, and fifty acres from the east end of his farm, by deed drawn by one Coombs, in consideration of "love and esteem," &c.; and at the same time conveyed another lot of land to his only daughter, Eliza, and a third lot to his adopted son, Henry Grover. Henry Grover conveyed to the defendant by deed dated April 10, 1858.

The defendant pleaded that the deceased, in his life time, made a jointure and pecuniary provision for his wife Jane, in lieu of dower, and that she did not, within six months after the death of her husband, elect to waive the said provision or jointure and claim her dower.

The testimony of Coombs and other witnesses tended to prove that the wife was present when the deed and other papers were made, and said "she was satisfied with it, if it would stand law, but should not put her name to it."

Jane Bubier, one of the plaintiffs, testified that she was

told, at the time the papers were made, that she could hold her dower in the remaining land, and that she made no agreement to accept the property conveyed in lieu of dower.

MAY, J., presiding, instructed the jury, that if they were convinced that the deceased intended the property conveyed to his wife to be in lieu of her dower in the lands now held by the defendant, and in full satisfaction therefor, and that the wife had full knowledge thereof, and accepted it as such, and did not, within six months after her husband's decease waive the provision thus made for her, by writing filed in the Probate Court, she would not be entitled to recover.

The jury rendered a verdict "that the husband of the demandant, (Thomas Grover,) died seized in fee simple of the premises described in the plaintiff's writ;" and "that the said demandant did not receive the premises and personal property described in the defendant's plea in bar, in lieu of dower in the premises described in the plaintiff's writ and declaration." The jury, in answer to a question put to them by the Court, further returned, that they could not agree whether Thomas Grover intended to convey the described property to his wife in lieu of dower, but found that she did not so accept it.

The defendant filed exceptions to the ruling of the Court, and a motion that the action be dismissed, because Bubier, the present husband, could not join in it with his wife in demanding her dower in lands of her former husband.

Tallman & Larrabee, in support of the exceptions, argued, that the evidence clearly proved the intention of the deceased to be, that the property conveyed to his wife should be in lieu of dower in his remaining estate. And, if so, it is of no consequence whether she accepted it as such or not, if she has not, within six months after her husband's death, elected to waive the provision made for her, and filed it in the Probate Court. R. S., c. 103, § 11.

It is not necessary that the provision made should be expressly stated to be in bar to dower; it is sufficient if it can be collected from the instrument that such was the intention.

Greenl. Cruise, title Jointure, c. 1, § 29. Or, if it can be fairly collected from the circumstances. Ib., § 18, note 1. This refers to a jointure made before marriage, under the statute of 27 Henry 8, c. 10, which is in force here. By the same statute, in case of provision made after marriage, the wife may, after her husband's death, refuse the jointure and demand dower. Ib., c. 1, § 21.

Our statute changes the rule, the old statute making the provision a bar to dower if the widow accepted it; but now it is a bar unless she expressly rejects it.

The jury were misled by the instructions of the Judge, which were erroneous in making it necessary, in order to bar the right of dower, for the wife to *accept* the provision made; whereas, by our statute, it is a bar unless she *rejects* it within the time limited.

N. Cleaves, for the plaintiff.

The opinion of the Court was drawn up by

KENT, J.—The plaintiff is entitled to dower in the premises described in her writ and declaration, unless she is barred by the acceptance of the deed from her husband, of the 5th of January, 1858. This deed was executed a few days before the death of the husband, and on the same day that he conveyed all the remainder of his estate to his children.

The consideration named in the deed to the plaintiff, is "love and esteem to my dear wife." It conveys fifty acres of land and all the personal property on the farm, but it contains no declaration of any intent on the part of the husband that the conveyance was, or should be in lieu of dower, or operate as a jointure or provision for the wife, to bar her of her dower.

The defendant, by his plea in bar, alleges that this deed was executed and delivered "as a jointure and pecuniary provision to bar her dower, and in lieu of dower in all his real estate." This is denied in the replication, and reaffirmed in the rejoinder, and on this point issue is joined.

Before the enactment of the R. S. of 1841, no jointure, in this State, would prevent the widow from claiming dower, unless it was made *before* marriage and with the consent of the intended wife. *Vance* v. *Vance*, 21 Maine, 364.

Since that decision several other provisions have been incorporated into the statute in relation to dower. c. 95, R. S. of 1841; c. 103, R. S. of 1857.

A woman may be barred of her dower by a jointure, settled on her with her consent before marriage — such jointure to consist of a freehold estate in lands for the life of the wife, at least, to take effect immediately on the husband's death.

This deed cannot be regarded as a jointure, within this section, for it was made *after* marriage.

Another provision of the statute is, that a pecuniary provision, made for the benefit of an *intended* wife, consented to by her, as in the case of jointure, shall bar her right of dower in her husband's land. This case is not within that provision.

Another section (§ 11) enacts, "that if such jointure or pecuniary provision is made before marriage, without the consent of the intended wife, or, *if made after marriage*, it shall bar her dower, unless, within six months after the husband's death, she makes her election to waive such provision, and files the same in writing in the Probate Court.

It is claimed that the deed to the wife, and the transactions at the time of its execution and delivery, bring it within the terms and intentions of this provision, and thus make it a bar to dower in the other lands of the husband.

The next section (§ 12) is as follows: — "When a specific provision is made in her husband's *will* for the widow, within six months after probate thereof, she shall make her election, whether to accept it or claim her dower; but shall not be entitled to both, unless it appears by the will that the testator plainly so intended."

If the husband had made the same disposition of his property in and *by a will* (as was first proposed on the 5th of Jan-

uary,) that he did make by the several deeds which he gave on that day to his wife and children, it is very clear that the wife would have been put to her election whether to accept the provision in the will or to claim dower. It is not necessary that there should be a distinct declaration in a will that the provision is in lieu of dower. The rule of the common law is, that a devise or bequest to a widow is presumed to be in *addition* to her dower, unless it *clearly* appears that it was the intention of the testator that it should be in lieu of dower. Our statute has essentially changed the rule in this, that the provision in favor of the wife, in the will, will be regarded as a bar to dower, if not refused, unless it *plainly* appears that the testator intended that she should have both. *Reed* v. *Dickerman*, 12 Pick., 145; *Hastings* v. *Clifford*, 32 Maine, 132. But the intention in both cases may be gathered from the will and its provisions, without any formal language expressing the intention.

This is not the case of a will. But, it may be asked, if the same rule is not to apply where it can be satisfactorily proved that *deeds* were made instead of a *will*, and that it was the grantor's intention to make a disposition of his whole estate, and to give a part to each, and that this intention was understood by the wife when she accepted her deed?

It is evident that under § 11 a jointure or pecuniary provision may be made *after* marriage, which will be a bar unless rejected by the widow within six months after the death of the husband. This conveyance to the wife cannot be termed a "*pecuniary* provision," within the meaning of the statute. It is not a grant of an annuity, or rent, or a provision for the payment of money, at any time. It is a conveyance, in fee simple, of a lot of land, without condition or limitation, and an absolute gift of certain personal property. It is not a "provision" for the future support, in whole or in part, of the wife or widow; for she might have disposed of the whole the next day by gift. It is not "pecuniary," for it has no reference to money.

Can it be regarded as a jointure settled on the wife after

marriage. It is of a freehold estate in lands, for the life of the wife, at least. It took effect as early as "on the husband's death." These are the requirements as to the nature of the estate by which a jointure is settled on a wife, according to § 9.

But was this estate, thus settled, a "jointure?" For it is only a "jointure" or pecuniary provision that will bar the claim for dower under this section. The term "jointure" has been long known in the law, and has had a distinct and well understood meaning since the enactment of the statute, 27 Henry 8, c. 10. It is thus defined in Jacobs' Law Dict.:—"Jointure, is a settlement of lands and tenements made to a woman in consideration of marriage, or it is a covenant whereby the husband, or some friend of his, assureth to the wife lands or tenements for the term of her life." The several things to be observed are thus indicated:—1, Must be for life of wife, at least; 2, Must commence presently after the decease of the husband; 3, Must be for herself and to no one in trust for her; 4, *It is to be expressed to be in satisfaction of her whole dower and not a part of it*; 5, It may be made before or after marriage.

The deed in this case is a common deed of warranty. The only consideration expressed, is "love and esteem." It is simply a deed of gift, without limitation or condition. Our recent statute gives effect to such a deed from a husband directly to his wife, as has been decided in *Johnson* v. *Stillings*, 35 Maine, 427, and other cases.

A gift, donation or gratuity from husband to wife, during the life of both, cannot operate as a bar to dower, unless given with a condition to that effect, or granted as a jointure. *Reed* v. *Dickerman*, 12 Pick., 148.

There is no declaration in this deed, of any purpose or intent in relation to dower. Nothing is found in it, from which can be inferred that it was intended as a jointure or pecuniary provision in lieu of dower.

If it be granted that it is not absolutely necessary that the provision should be expressly stated to be in lieu or bar

of dower; yet the authorities seem to require that the intention of the provision must be collected from the terms of the instrument. There are several cases, where, by provision of the husband, a wife may be barred of dower, where the old common law would not bar her; as by personal estate, where the instrument is so framed as to import a jointure, or, what is a bar in the nature of jointure, whether directly expressed or not. *Walker* v. *Walker*, Betts' Supp. to Vesey, Sen., 43. But a bare devise of land, without more, will not be held as such bar. *Ibid.*

The case of *Tinney* v. *Tinney*, 3 Atk., 8, was where the heir insisted that a bond in a penalty, in trust to secure to the wife of the obligors £400, in case she survived her husband, was intended at the time in lieu of dower, and that she acknowledged it to be so, and he offered to read evidence of her acknowledgment. The Lord Chancellor said, "I am of opinion that parol evidence cannot be allowed, being within the statute of frauds. A general provision for a wife is not a bar to dower, unless expressed to be so." 2 Eden, 60.

It is unnecessary to determine in this case whether any facts outside of the deed itself could be admitted to show that the same was intended as a jointure or provision in lieu of dower. It is quite certain that nothing less than a direct and explicit declaration, or its equivalent, at the time of the execution and delivery, made to the wife, that the deed was intended to be in lieu of dower, or that it was delivered on condition that, if received and retained, it should be a bar of her dower, could have that effect.

This is evident, from the language of this section of the statute, which makes the jointure or provision an absolute bar of dower, unless the widow, within six months after the death of the husband, makes her election to waive such provision, and files the same in writing in the Probate Court.

The jointure or provision must be so declared or manifested, that the widow may know what is the provision in lieu of her dower, on which her election is to be made. It

must not rest in a probable or possible intention, to be gathered from circumstances and extrinsic facts alone, whilst the deed or instrument is entirely silent on the subject, and contains no language from which such provision could be inferred. The time is short and the condition absolute. The wife must, in common justice, know that the provision is made in lieu of dower, before she can be called upon to elect between it and her legal dower. A husband might, otherwise, give his wife a deed, as a gift, of a small parcel of his land, without any allusion by him of his intent to have it regarded as a bar to dower, and the wife might accept it regarding it as a simple gift, and yet, after his death, it might be set up as a jointure or provision in lieu of dower, when six months had elapsed from the death of the husband, and the wife thus be deprived of her dower in a large and valuable estate.

The statute evidently intends that the jointure or provision shall be clearly declared and defined, so that there can be no mistake that the husband intended the provision to be *in lieu* of dower, and that the wife had notice and fully understood the nature and condition of the conveyance, and that, if she did not waive it within six months after her husband's death, it would bar her dower.

His intention, without her knowledge, or means of knowledge which she was bound to use, would not be sufficient.

In equity, a bar cannot be set up, unless it is shown that the provision "was designed and accepted in lieu of, or as an equivalent for dower." *O'Brien* v. *Elliot*, 15 Maine, 127.

In the case at bar, even if we go so far as to disregard the doctrine that the deed itself, and alone, is to control, we find nothing in the evidence (the whole of which is reported) which would justify a Court or jury in finding that the transactions, at the time of giving the deed or since, amounted to a jointure or pecuniary provision in lieu or in bar of dower, within the rules and principles before stated.

It is unnecessary to examine particularly the rulings of the Judge, as it is evident that they were at least as favora-

ble to the defendant as the law would justify, on the point in reference to the intention of the husband.

If the case had shown clearly that the husband *had* made a jointure or pecuniary provision for his wife, in his life time, and that the wife had full knowledge of it, she might have been bound thereby, although she did not at the time accept the same in full satisfaction for her dower, if she did not, within six months after her husband's death, file her election in the Probate Court. Her knowledge and refusal or neglect to file her rejection of the provision are in themselves an acceptance, without any other act or declaration. *Hastings* v. *Clifford*, 32 Maine, 132.

But, as before stated, the evidence fails to establish the existence, and knowledge by the wife, of any such jointure or provision in *lieu* of dower, and therefore the ruling on this point becomes immaterial.

Exceptions and motion overruled.

RICE, APPLETON, CUTTING and WALTON, JJ., concurred.

ALFRED S. PERKINS *versus* RUFUS HITCHCOCK.

The assignees in an assignment under our statute, having received the property of the debtor into their possession, are liable for it; to the debtor, if the assignment is invalid, and to the creditors becoming parties thereto, if it is valid.

Being liable, each for the other, either may secure the other against such liability in any mode not repugnant to law.

Where one assignee, having collected money for the estate, in compliance with a previous agreement with his co-assignee conveys property to a third person, upon the condition that the latter shall pay the co-assignee the sum collected, and such person afterwards promises the co-assignee to pay it to him, such promise is founded upon a sufficient consideration, and is not within the statute of frauds.

And such conveyance is valid, although the vendor subsequently thereto, and before the vendee makes the promise to the co-assignee, himself makes an assignment.

And the co-assignee may maintain an action on such promise, without procuring a discharge of the other assignee from liability under the assignment.

Nor will the fact that the defendant is surety upon the bond of the plaintiff as assignee, and remains liable thereon, be any defence to such an action.

A party is not injured by a refusal to give requested instructions based upon alleged facts, which the jury find are not proved.

When one party to a suit testifies to alleged facts equally within the knowledge of the other party, and the latter does not offer himself as a witness, and no reason is given why he is not called, the jury may take the failure to testify into consideration in determining what credit they ought to give to the party who has testified.

ON EXCEPTIONS to the rulings of KENT, J., presiding.

ASSUMPSIT to recover the sum of $928, put into the hands of the defendant by one Hall, to be paid to the plaintiff.

The evidence of the plaintiff tended to show that he and one Hall were the assignees, in an assignment, under the statute, of Elmes & Tebbetts; that Hall, or the firm of which he was a member, collected the sum of $928, of the assets of Elmes & Tebbetts, and, in order to secure the plaintiff for his liability for this sum, Hall, or his firm, in compliance with a previous agreement with the plaintiff, put certain property into the hands of the defendant for the purpose of paying this sum to the plaintiff; and that the defendant afterwards promised the plaintiff to pay him this sum; that Hall also became insolvent and made an assignment, but that this property was put into hands of the defendant before Hall's assignment was made.

The defendant's evidence contradicted in some points that of the plaintiff, and tended to show that the assignment of Elmes & Tebbetts was not valid in law; that the property was put into the hands of the defendant to secure him for liabilities he had incurred; and that any interest Hall had in it passed to *his* assignees before the defendant made the promise relied on.

It appeared, also, that the defendant was surety upon the bond of the plaintiff, as assignee, and that the plaintiff, at the time of the trial, had not paid over to the creditors the whole amount which had come into the hands of the as-

signees, and been ordered by the Judge of Probate to be paid to the creditors.

The counsel for defendant contended that the action could not be maintained, and requested the presiding Judge to instruct the jury that, if the defendant, supposing that property sufficient to pay said sum had been placed in his hands by Hall, made said promise, which property proved entirely insufficient therefor, he is not bound thereby; that, if the plaintiff and Hall were joint assignees of Elmes & Tebbetts, and that Hall, as one of said assignees, had received from the assets of said firm the said sum of $928, which sum he had placed in the hands of defendant to be paid to plaintiff as assignee aforesaid, and said defendant promised plaintiff then to pay him, the defendant would not be legally bound to pay it unless Hall was discharged from his liability to the creditors of Elmes & Tebbetts for that amount; that, unless Hall was released from his liability as assignee, the agreement of defendant to pay, (if made,) is without consideration and void; that, if Hall, Snow & Co. made an assignment of their property before the plaintiff assented to the placing of the property in the hands of the defendant, such property would pass by said assignment, and the defendant would not be liable on his promise to pay plaintiff, if such promise was made.

All of which were refused, except as given in the general instructions, which were as follows:—

That, if the jury were satisfied that Hall, one of the assignees, or the firm of which he was a member, had in his or their hands $928, collected for, and belonging to the assignees of Elmes & Tebbetts, and that he or the firm did put into the defendant's hands property sufficient to secure the payment of this sum, and with the condition that he, Hitchcock, was to pay it to the plaintiff, the other assignee, and the defendant assented to this, and received the property for that purpose, and if, afterwards, he promised the plaintiff, to pay him that amount, and did, at the time of the promise and as a part of it, request plaintiff to wait for a

short time for payment, which was assented to by plaintiff, and he did wait, that this would be a binding contract on sufficient consideration; that, if Hall told plaintiff that he would put property into defendant's hands to pay plaintiff this debt, and plaintiff assented to the proposition before the assignment of Hall, Snow & Co., and, if the property was put into his hands accordingly, before the assignment, and defendant agreed at the time of taking it to pay this debt to plaintiff, and afterwards promised plaintiff to pay, as before stated, which plaintiff assented to, that defendant could not avoid his liability on the ground that the property would pass to the assignees of Hall, Snow & Co., notwithstanding the transfer to defendant, it not appearing that the assignees had ever made an inventory of, or any claim for the property.

The defendant's counsel also requested the presiding Judge to instruct the jury, that this action cannot be maintained as long as the defendant remains liable on the bond for the acts or omissions of the plaintiff, as assignee of Elmes & Tebbetts.

This request was acceded to and the instruction given with the following qualifications:—"If the transfer to defendant was only to secure him on the bond to the Judge of Probate, but if it was, that he was to pay it over to plaintiff, and he promised, as before stated, it could be, so far as this point was concerned."

The defendant did not offer himself as a witness, and there was no evidence offered where he was, or of any reason why he was not called as a witness. The fact that he did not testify in the case was commented upon by the counsel for the plaintiff, in his argument to the jury; and the presiding Judge, in his charge to the jury, remarked upon this, and charged them, that it was the privilege of parties to testify in their cases, and it was optional with them to do so; and the fact that the defendant had not testified in this case might properly be considered by them.

The verdict was for the plaintiff, and the defendant ex-

cepted. He also filed a motion to set aside the verdict as being against evidence, but no question of law was raised in discussing it.

F. D. Sewall, for defendant.

1. The promise, if made, was a conditional one, to pay the plaintiff if there was any property left after the defendant's liabilities were paid.

2. There was no consideration for the promise, unless Hall was released from his liability as assignee. If Hall still continues liable, he is in no better condition, than if this sum should not be paid.

If this amount had been paid to the plaintiff and he had failed to pay it to the creditors, Hall would still be equally liable.

3. The property in defendant's hands passed to the assignees of Hall, inasmuch as the evidence shows that the defendant made no promise to the plaintiff, until *after* that assignment.

4. The remarks of the Judge in relation to the defendant's not testifying tended to mislead the jury. The plaintiff could have called him, but the jury must have understood that the defendant could not be compelled to testify.

Gilbert, for plaintiff.

1. There was privity between plaintiff and defendant. *Arnold* v. *Lyman*, 17 Mass., 400; *Hall* v. *Marston*, 17 Mass., 505; *Dearborn* v. *Parks*, 5 Maine, 81, and cases cited.

2. The consideration was sufficient and the promise is not within the statute of frauds. *Dearborn* v. *Parks*, cited above; *Brown* v. *Atwood*, 7 Maine, 356; *Hilton* v. *Dinsmore*, 21 Maine, 410; *Todd* v. *Tobey*, 29 Maine, 219; *Maxwell* v. *Haynes*, 4 Maine, 559.

3. The first requested instruction was substantially given.

4. The plaintiff assented to placing the property in the hands of the defendant, before Hall made his assignment.

The opinion of the Court was drawn up by

MAY, J. — That the plaintiff, and one Willard Hall, became the assignees of Elmes & Tebbets, under an assignment made for the benefit of their creditors, June 3, 1857, is not denied. They also received the assets of said firm, and gave their joint bond with sureties to the Judge of Probate as the statute requires. It is now contended that said assignment was invalid, because the evidence in this case does not show a subsequent compliance with the provisions of the statute in relation thereto, passed March 21, 1844, c. 122, § 3, and that, the assignment being void, the plaintiff cannot maintain this action upon the promise alleged in his writ. How the invalidity of the assignment, and the proceedings under the same, can possibly invalidate such promise, if otherwise binding, we fail to perceive. The plaintiff and Hall having received the property upon which the assignment was intended to act, they became jointly liable in some mode and to somebody therefor; and equally so whether the assignment should prove to be valid or invalid. If invalid, their joint liability for the assets received would be to Elmes & Tebbetts, and, if valid, to such of their creditors as became parties thereto. The plaintiff and Hall being therefore liable, each for the other, in any event, it was lawful for either to secure the other against such liability, in any mode not in conflict with the principles and requirements of the law.

In this case the jury must have found that Hall, having received a certain amount of money from the assets of Elmes & Tebbetts, and the same being held by him or by the firm of Hall, Snow & Co., of which he was a member, he being insolvent, undertook to secure the plaintiff against loss on account of the same; and that, for this purpose, he, and the firm of Hall, Snow & Co., put into the hands of the defendant property *sufficient* to secure the plaintiff against such loss, with the condition that the defendant was to pay the amount which Hall had received, to the plaintiff, that he might thereby be secured against his joint liability with

Hall therefor; and, further, that the defendant afterwards promised the plaintiff to pay him that amount. The presiding Judge instructed the jury that, if they were satisfied of these facts, and that the defendant, at the time of the promise and as a part of it, requested the plaintiff to wait a short time for payment, and he assented thereto, and did wait, this would be a binding contract on sufficient consideration; and further, that, if Hall told the plaintiff that he would put property into defendant's hands, and the plaintiff assented to the proposition, *before* the assignment of Hall, Snow & Co., and the property was put into his hands accordingly, *before* the assignment, and Hitchcock agreed, at the time of taking it, to pay this debt to the plaintiff, and afterwards promised to pay the plaintiff, as before stated, which the plaintiff assented to, the defendant could not avoid his liability on the ground that the property would pass to the assignees of Hall, Snow & Co., notwithstanding the transfer to the defendant, it not appearing that the assignees had ever made an inventory of, or any claim for the property.

These instructions are sufficiently favorable to the defendant, when considered in the light of the facts alone upon which they are based, and which are referred to therein. The law is now well settled "that where money has been paid by one person to a second, for the benefit of a third, the latter may maintain an action against the second for the money." *Bohanan* v. *Pope & al.*, 42 Maine, 93, and cases there cited. It is also said in the same case that "where a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some other act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement," and several cases are there cited from both this State and Massachusetts which sustain the proposition. So, too, the cases cited by the plaintiff clearly show that when one person sells

property to another, and the purchaser agrees to pay certain bills of the vendor to third persons, as part of the consideration, and afterwards promises such third persons to pay the same, he makes himself thereby liable, and his promise is not within the statute of frauds. *Maxwell & al.* v. *Haynes & al.*, 41 Maine, 559. The consideration is sufficient, though moving from a third person. The instructions are in harmony with these principles, and were properly given, unless the case discloses other facts than those referred to by the presiding Judge, as the legal basis thereof.

The question then arises whether the case discloses any facts which called for different instructions, or which would warrant those which were called for by the counsel in defence. The first requested instruction appears to be contained, so far as it could properly have been given, in the instructions which were given. The second and third requested instructions, which were based upon the idea that Hall was to be discharged from his liability, before the plaintiff would have the right to recover the money as security for the payment thereof, and that the defendant's promise would be without consideration without such discharge, are manifestly erroneous. There are no facts in the case tending to show that such was the intention of any of the parties connected with the transaction. It is much more reasonable to suppose that the parties intended that the money should be paid for the very purpose of enabling the plaintiff to discharge such liability.

But the presiding Judge was further requested to instruct the jury that, if Hall, Snow & Co. made an assignment of their property *before* the plaintiff assented to the placing of the property in the hands of the defendant, such property would pass by said assignment, and the defendant would not be liable on his promise, if such promise was made. The case shows that the assignment of Hall, Snow & Co. was made April 14, 1858, and that the conveyance to the defendant, which consisted partly of their partnership property, and partly of the individual property of Hall, was made

on the day preceding the assignment, and there was testimony tending to show that the plaintiff consented to such conveyance for his security, before it was made. There is no evidence in the case, that either the plaintiff or defendant then knew that Hall, Snow & Co., or that Hall himself was then contemplating an assignment of their property for the benefit of their creditors. So far as the case shows, they acted in good faith, for the sole purpose of obtaining security for their liabilities. Nor does it appear that the assignees of Hall, Snow & Co., or of either of them, have in any way made claim to the property conveyed to the defendant. It does not appear that the plaintiff had any knowledge of the conveyance to the defendant, at the precise time when it was made; but, in view of the previous arrangement between him and Hall, as testified to by him, and the fact that it was for his benefit, the jury might well find that he assented to it as soon as it was made; and the fact that the jury were instructed that, if Hall told the plaintiff that he would put property into the hands of the defendant to pay the plaintiff this debt, and *the plaintiff assented to this proposition before the assignment of Hall, Snow & Co.*, and the property was put into his hands accordingly, before the assignment, and Hitchcock agreed, at the time of taking it, to pay this debt to the plaintiff, and afterwards promised the plaintiff to pay it, to which he assented, the defendant could not avoid his liability on the ground that the property would pass to the assignees of Hall, Snow & Co. notwithstanding the conveyance, sufficiently shows that the jury must have found that the plaintiff assented to the placing of the property in the hands of the defendant prior to said assignment, and such fact being found, the basis of this last requested instruction wholly fails, and the defendant cannot have been injured by its being withheld. No question appears to have been raised at the trial, that this conveyance to the defendant was a fraud upon the law, or upon creditors, and no such question is now open to the defendant upon these exceptions.

The requested instruction, that this action cannot be maintained as long as the defendant remains liable upon the bond for the acts or omissions of the plaintiff, as assignee of Elmes & Tebbetts, might properly have been withheld. It is not perceived how his liability upon such bond, in the absence of all proof of any agreement to that effect, could justify the defendant in refusing to perform the binding contract or promise he had made. That the defendant's request was in fact complied with, subject to the qualification stated by the presiding Judge, affords no ground of complaint.

It further appears that the defendant did not offer himself as a witness, and no evidence was offered to show where he was, nor any reason given why he was not called; which fact was commented upon by the counsel for the plaintiff in his argument to the jury, and, so far as appears, without objection. The presiding Judge, in his charge, remarked to the jury, that it was the privilege of parties to testify in their cases, and it was optional with them to do so; but the fact that the defendant had not testified in the case might properly be considered by them. Objection is now made to this remark, the same having been excepted to at the trial.

It is true that jurors are sworn to decide civil cases according to the evidence given them; but they are at liberty to consider the circumstances under which it is given. The weight which they are to give to testimony often depends very much upon the intelligence and appearance, or feeling, manifested by the witness. Often, too, the degree of credit which shall be given to a witness who undertakes to state the contents of some paper which the defendant is shown to have in his possession, and, upon notice, has refused to produce, will be much affected by its non-production. In view of such fact, the jury may well conclude, that if the witness has not stated truly, the defendant would produce the paper to contradict him. To permit jurors to draw such inferences as they might deem proper from circumstances of this kind, has almost, if not universally, been held as allowable by the law; and no reason is apparent, where, in a case like

the present, it appears that one party has testified to facts equally within the knowledge of the other, and the other party does not choose to contradict what has been testified to prejudicial to his case, why the circumstance of his absence or neglect to testify differently, unexplained, may not be considered by the jury in determining what credit they ought to give to the party who has testified; or, in other words, why they may not consider the testimony before them in the light of the circumstance that it is uncontradicted by the other party, who knows whether it is true or false, and who, if it is false, is legally admissible to contradict it. Where a witness testifies to facts as having occurred in the presence of other witnesses, or where a witness is attempted to be impeached by showing his general character for truth to be bad, and the party who is to be affected in such case, have had full opportunity to call in the other witnesses who were present when the alleged facts occurred, in the one case, or the friends and neighbors who know the general character of the witness for truth, in the other case, may not the jury consider the evidence in the light of the fact that it is uncontradicted, when it might be easily contradicted by the other party, if it were not true in fact? We think the remarks of the Judge, which were excepted to in this particular, were legally unexceptionable.

In regard to the motion to set aside the verdict, as against the weight of evidence, we see no such preponderance in favor of the defendant as satisfies us that the jury have acted under any gross mistake, or under any passion, bias, or prejudice; and the result is that both the exceptions and motion must be overruled.

Exceptions and motion overruled, and judgment on the verdict.

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

DAVIS, J., concurred in the result.

WARREN BROOKINGS *versus* EDWARD B. WHITE.

By the provisions of c. 277 of laws of 1852, (R. S., c. 61, § 1,) a married woman may execute a deed of mortgage of her separate estate, which will be valid, notwithstanding her promissory notes secured thereby cannot, *in law*, be enforced against her.

A mortgage to secure the payment of a sum of money may be upheld, although there is connected with it no other obligation or contract of the mortgager, or of any other person, to pay the same.

The case of *Dunning* v. *Pike*, 46 Maine, 461, overruled.

REPORTED from *Nisi Prius*, MAY, J., presiding.

THIS was a process of FORCIBLE ENTRY AND DETAINER, commenced before the Judge of the Municipal Court for the city of Bath. The respondent pleaded the general issue, with a brief statement alleging title in Nancy White, under whom he justified as her tenant and servant. The case was thereupon brought into this Court, as the statute provides.

The complainant claimed under the deed of John Brookings to himself of the premises demanded, dated April 13, 1860; the respondent, under a deed from the same grantor to said Nancy White, his wife, of a prior date.

All the facts in the case necessary to an understanding of the questions of law considered, are stated in the opinion of the Court.

Gilbert & Sewall, for the complainant.

The history of the transaction is this:—

On the 31st of October, 1857, John Brookings sold the premises in dispute to Mrs. White, and on that day had his deed made and executed; but it was not delivered. At a later day, on Nov. 5th, 1857, the parties met to consummate the bargain and Brookings delivered his deed and received in payment therefor a deed of certain premises in Richmond, which were valued at six hundred dollars, and for the balance of the purchase, which was six hundred dollars, the note of Mrs. White, secured by a mortgage of the

premises, in Woolwich, conveyed to her, were given to Brookings.

These notes, though dated the 31st day of October, are admitted to be notes secured by and described in the mortgage, and that the deeds of October 31st, and November 5th, are all a part of one and the same transaction.

The deed and mortgage constituted one contract, and the notes of a married woman being void, which has been well settled in this State, the mortgage was of no effect. *Howe* v. *Wildes & ux.*, 34 Maine, 556; *Roach & ux.* v. *Randall*, 45 Maine, 438.

The mortgage being of no effect and the notes void, the deed from Brookings to Mrs. White, was inoperative, and passed no title.

The same question has been presented and decided by this Court in *Newbegin* v. *Langley*, 39 Maine, 200.

The deed of the premises in Richmond was not a sufficient consideration for this deed. We contend that John Brookings took no title by that deed. That deed, the mortgage and notes secured by the mortgage and the deed from Brookings to Mrs. White, constitute but one contract, and they must stand or fall together. If the proposition of law in *Newbegin* v. *Langley*, just cited, is a sound one, that "the deed and the mortgage are but one contract, and they cannot be void in part and good in part," then nothing passed by that deed. It was void at the time of its delivery.

Tallman & Larrabee argued for the respondent.

Separate opinions were drawn up by RICE and DAVIS, JJ.

RICE, J.—This is a process of forcible entry and detainer. The defendant justifies under the title of Nancy White, and the case must be determined on the validity of that title. Both parties derive their title from one John Brookings, who, on the 31st day of October, 1857, executed a deed of the premises to said Nancy White, who is the wife of the defendant. In payment for the estate thus conveyed she gave her promissory notes for six hundred dollars, which sum

was secured by mortgage on the premises; and also conveyed another parcel of real estate, which she held in her own right, to Sarah Brookings, wife of said John, by deed dated November 5, 1857.

It is admitted that the above named deeds, notes, and mortgage, were all delivered at one time and constituted one transaction.

The complainant derives his title from the same John Brookings, by deed dated April 13, 1860.

The ground assumed by the complainant, is, that the transaction between John Brookings and the said Nancy was wholly invalid, from want of capacity on her part to convey real estate, which she held in her own right, or to execute a mortgage thereof, by which her title should pass, without the concurrence of her husband.

To what extent the acts of married women, with reference to their separate estate, real or personal, will be deemed obligatory, in equity, is not very clearly defined in the adjudged cases. Nor does it become material to determine under what circumstances courts of equity will enforce the contracts or uphold the deeds of such persons.

At common law a married woman could neither bind her person by contract, nor her estate by deed. Has she acquired such power by force of existing statutes? It was decided by this Court, in the case of *Swift* v. *Luce*, 27 Maine, 285, that although she could, under statutes then existing, *hold* and *possess* estate both real and personal in her own right and as her separate property, exempt from any liability for the debts or contracts of the husband, yet she could not sell or convey the same without the consent of the husband.

It was also decided, in the case of *Howe* v. *Wildes & ux.*, 34 Maine, 566, that the promissory notes of a married woman were void. This decision has been affirmed by several subsequent decisions of this Court.

In *Newbegin* v. *Langley*, 39 Maine, 200, it was decided that the deeds of married women were void. Such was the

condition of the law in this State prior to the year 1852. Before that time, the Legislature had passed several Acts designed to secure to married women, more fully than at common law, their rights in their property. These Acts, however, being in derogation of the rules and principles of the common law, had been strictly construed by the Court.

In 1852, a most important step was taken by the Legislature towards the absolute enfranchisement of married women. By c. 227 of the laws of that year, it was provided that any married woman who is or may be seized and possessed of property, real or personal, as provided for in the Acts to which this is additional, shall have power to lease, sell, convey and dispose of the same, and to execute all papers necessary thereto, in her own name as if she were unmarried.

This provision is in substance reënacted in the Revised Statutes, c. 61, § 1.

The power thus conferred upon married women to control, sell and convey their estate, real and personal, is full and absolute. It cannot be made more complete. They may, under its provisions, bind their estates as effectually as any other citizen. Thus far the law extends the rights of women under coverture. But they still remain under the common law disabilities as to personal contracts. Being personally subject to the control of their husbands, under the general law, they are not permitted to enter into contracts of a personal character, by which that control may be interrupted. She may execute a lease or deed by which her estate may be bound; but she cannot make a promissory note by which she will be personally bound. This is the general rule, the exceptions to which, if any, do not apply in this case.

In the transaction under consideration, it follows from the principles already stated, that the promissory notes of Nancy White were invalid, as personal security, against her.

This, then, presents the question, whether personal security is essential as a basis for a valid mortgage of real estate. The law on this point is well settled.

The deed (mortgage) only contains a proviso, that if the money be paid at such a day, then the deed, as also the obligation describing it, shall both be void. Sometimes, however, no separate security is taken, and, of course, none mentioned in the deed; but the proviso is merely, that if such a sum is paid by such a day, the deed shall be void. It is clear that the absence of the bond, or other express obligation to pay the money, will not make the instrument less effectual as a mortgage, if the mortgagee have the money. 2 Greenl. Cruise, 82, and cases cited.

A mortgage is a conditional conveyance of land, designed as security for the payment of money, or performance of some other act, and to be void upon payment or performance. 1 Hill. on Mort., 2.

A mortgage is a conditional sale. The absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage. 4 Kent's Com., 145–147. It is not the less a mortgage because there was no collateral personal security for the debt taken at the time. *Rice* v. *Rice*, 4 Pick., 349; *Smith* v. *People's Bank*, 24 Maine, 185.

But it has been suggested, by way of argument, that no case can be found in which a mortgage has been upheld when the notes it was given to secure were void; and, therefore, such a mortgage must be invalid. No case, probably, can be found where a mortgage has been upheld which was given to secure the payment of a note which was invalid for want of consideration. But, as we have seen, cases are numerous in which mortgages have been held valid without the existence of personal security, or where the mortgager whose estate is pledged is not a party to the personal contract thereby secured. The office of a mortgage is to furnish security for the payment of the money loaned, or the performance of some other act. Notes ordinarily afford evidence of the amount of money loaned and the times of payment, and also give the additional personal security of the makers, but are not necessary to the validity of the mortgage itself.

A married woman may, at common law, by joining with her husband, make a valid mortgage of her separate estate to secure his debt, or that of a third person. *Dumerest* v. *Winkoop*, 3 Johns. Ch. R., 127; *Fowler* v. *Sherman*, 7 Mass., 14.

Now it is not denied, that under our statute a *feme covert* may actually sell and convey real estate held in her own right, on sufficient consideration, without joining with her husband, by deed absolute and irrevocable. Such being the law, it would be illogical, not to say absurd, to determine that she may not, on like consideration, make a conditional sale and conveyance of the same estate, reserving for her own benefit the right to defeat such sale by the re-payment of the consideration, or the performance of a stipulated act within a given time. The fact that she has by the statute the right to convey absolutely all her interest in her estate, carries with it, by necessary implication, the right to make a conditional sale. The one is the logical sequence of the other.

That Nancy White received a valuable and full consideration for the mortgage executed by her is not denied.

The case of *Dunning* v. *Pike*, 46 Maine, 461, is supposed to be in conflict with the views herein expressed. This may be so. That case was decided upon a state of facts which transpired subsequent to the Act of 1852, c. 227. That Act, however, was not alluded to by counsel at the argument, nor by the Court in their opinion. It undoubtedly escaped the attention of both Court and counsel, and was decided upon the law as it existed prior to 1852, and following former decisions of the Court. Having thus been decided upon a misapprehension as to the existence of the Act of 1852, it cannot be deemed an authority in this case.

As the law now stands, the transaction between John Brookings and Nancy White must be deemed valid and obligatory upon the parties thereto, so far as the deeds and mortgage then executed are concerned.

The only effect of the deed, from John Brookings to the complainant, was to assign to the latter the mortgage which

he had received from Nancy White. But thus standing in the place of the original mortgagee will not enable him to maintain this process. *Reed* v. *Elwell*, 46 Maine, 270.

According to the agreement there must be judgment for the defendant.

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

DAVIS, J.—The defendant claims to hold possession of the premises in controversy by virtue of the title of his wife, Nancy White. She purchased the property during her coverture, and paid therefor, in part, by her own promissory notes, secured by a mortgage, dated Nov. 5, 1857. It is contended that her notes were void, and that consequently the deed to her, and her mortgage, were also void. Several cases are relied upon as decisive of the question. *Howe* v. *Wildes*, 34 Maine, 566; *Langley* v. *Newbegin*, 39 Maine, 200; *Roach* v. *Randall*, 45 Maine, 438; *Dunning* v. *Pike*, 46 Maine, 461.

How far the contracts of a *feme covert* are valid, is a question upon which there has always been much difference of opinion. Though regarded void, in the sense that there could be no remedy upon them *at law*, many of them have always been held valid *in equity*. But what contracts should be held absolutely void, and what should be sustained in equity, cannot be easily determined from the decisions.

Nor has the special legislation of the last twenty years tended to remove the difficulty. A partial enfranchisement of the wife, while the common law relations between her and the husband remain unchanged, is an innovation that unsettles the past without settling the future. The status of the *feme covert*, instead of being fixed by such legislation, becomes a difficult question for the judiciary. It imposes the task of adjusting new rights and powers to old and still existing disabilities. It is not strange that there should be, for a time, some oscillation of opinion, resulting in conflicting decisions.

Was the mortgage given by Nancy White, to secure her own promissory notes, valid?

If there had been no evidence of the debt but the mortgage itself, the question would have been the same. If the promissory note of a *feme covert* is void, it is not because of the *form* of the contract, but because *any promise* to pay money, whether written or verbal, is not binding upon her. *Bates* v. *Enright*, 42 Maine, 105.

A mortgage may contain an admission of a debt, on which a personal action will lie against the mortgager, when no promissory note or other collateral promise is given. *Elder* v. *Rouse*, 15 Wend., 218. But, if there is no such admission, and no collateral promise, the mortgagee has no claim upon the *person* of the mortgager. *Weed* v. *Covill*, 14 Barb., 242. His only remedy is against the property itself. *Rice* v. *Rice*, 4 Pick., 349; *Russel* v. *Southard*, 12 How. U. S., 139, 152.

The case at bar involves several questions. Is a valid debt essential to the validity of a mortgage? Can a married woman contract such a debt? Has she the legal capacity to make such a conveyance?

1. A debt or obligation is necessary to sustain a mortgage. There may be no promise, either collateral or in the mortgage; but there must be an obligation of some kind, to secure the performance of which the mortgage is given. "A mortgage," says Hilliard, "is a conditional conveyance, designed as security for the payment of money, or the performance of some other act, and to be void upon such payment or performance." *Mitchell* v. *Burnham*, 44 Maine, 286. The obligation, though not always for the payment of money, is usually called the "debt;" and this, being the foundation of the mortgage, "is the principal thing." In the language of Chancellor KENT, in equity, "the mortgage is merely security for the debt;"—"a mere incident attached to the debt." 1 Hilliard, 163; *Smith* v. *People's Bank*, 24 Maine, 185.

The debt or obligation must therefore be a *valid* one, or the mortgage will be void. Thus, in those States in which a usurious note is valid, for any part, a mortgage to secure such a note will be upheld. *Turner* v. *Calvert*, 12 S. & R.,

46. But, where such a note is wholly void, as formerly in this State, a mortgage to secure such a note is also void. 1 Hilliard, 370; *Richardson* v. *Field*, 6 Maine, 35; *Miller* v. *Hull*, 4 Denio, 104. So is the mortgage void if the note is void for any other reason. *Ellsworth* v. *Mitchell*, 31 Maine, 237.

It is not essential that the debt should be that of the mortgager. One may mortgage his property to secure the debt of another. So a *feme covert* may mortgage her estate to secure the debt of her husband. *Gahn* v. *Neimcewicz*, 11 Wend., 312; S. C., 3 Paige, 614; *Hawley* v. *Bradford*, 9 Paige, 200; *Van Horn* v. *Emerson*, 13 Barb., 526; *Swan* v. *Wiswall*, 15 Pick., 125; *Nash* v. *Spofford*, 10 Met., 193. But it is assumed in all these cases, and numerous others that might be cited, that a valid obligation, for which the mortgage is merely security, is essential to the validity of the mortgage. *Bartlett* v. *Bartlett & ux.*, 4 Allen, 440.

2. Can a married woman, in this State, give such an obligation?

At common law, a *feme covert* was not *personally* liable upon her contract, even for necessaries, though living separately from her husband, and having property in her own right. *Shaw* v. *Thompson*, 16 Pick., 198.

In many of the States, she is now enabled, by statute, to trade in her own name, upon her own account. In most of the States she can own property in her own right, for her separate use, and make contracts respecting it. In such case, she may purchase real estate, and is bound personally upon her promissory notes given therefor. *Ames* v. *Foster*, 3 Allen, 541.

But in this State, with some exceptions not applicable to the case before us, her power to make contracts remains as at common law. The statute giving her power to take and *hold* property, to her separate use, gave her no power to *convey* it. *Swift* v. *Luce*, 27 Maine, 285. Nor has any subsequent statute given her general power to make contracts, even respecting her property. So that the validity of the

notes, given by the defendant's wife, is to be determined without regard to any statute.

Some contracts of married women, though not binding upon their *persons*, have always been valid against their *property*. "Her separate estate," says Judge STORY, "will, in equity, be held liable for all the debts, charges and incumbrances which she does expressly, or by implication, charge thereon." 2 Story's Eq., § 1399.

The English cases on this subject are very numerous. Contracts of married women, of great variety, have been enforced against their separate property. The reasons given are various, and inconsistent with each other. Though no Court would hold that the property of one not under coverture could be specifically charged, except by an express contract therefor, the property of married women has been subjected to such charges without any contract therefor, upon proof *aliunde* of an "implied intention." Sometimes it has been held necessary that the contract should be in writing; and in other cases this doctrine has been denied. Sometimes every contract of a *feme covert*, made *for the benefit* of herself, or of her separate estate, has been held an implied "appointment" of enough of such estate to secure its performance. But as this would make successive charges, with priority of right, after her decease, this doctrine was repudiated; and all such creditors were made to share alike. The original doctrine seemed to be, that a married woman, so far as she had the power to dispose of her separate property, was to be deemed a *feme sole* in regard to it; and that her contracts, though not binding upon her *person*, could be enforced in *equity* against such property. *Hulme* v. *Tenant*, 1 Bro. C. C., 16. And to this, very nearly, the English courts have now returned. In *Owens* v. *Dickenson*, 1 Craig & Phillips, 48, it is said,—"Inasmuch as her creditors have not the means *at law*, of compelling payment of her debts, a court of equity takes upon itself to give effect to them, not as *personal* liabilities, but by laying hold of the *separate property*, as the only means by which they can

be satisfied." And, in a later case, it is said, that a court of equity "gives execution against her property, just as a court of law gives execution against the property of other debtors." *Johnson* v. *Gallagher*, London Jur. Mar., 1861.

In this country, the courts have not gone so far. The earlier cases are collected in Leading Cases in Equity, 330, Hare & Wallace's Am. notes. Many of the later cases are based upon the statutes enlarging the rights and powers of married women. There is a considerable diversity, if not actual conflict of opinion. Their power, irrespective of any statute, to create incumbrances upon their separate property, is conceded by all the courts. And though, in some States, this has been carried nearly to the extent of the English doctrine, in others the rule is essentially modified. But the most cautious go at least to this extent,—that a *feme covert*, in any way by which she has the legal capacity to act, may bind her separate property *by any express contract therefor*, made for her own benefit, or for the benefit of her estate. *Conway* v. *Smith*, 13 Wis.; *Am. Coal Co.* v. *Dyett*, 7 Paige, 9; *Yale* v. *Dederer*, 18 N. Y., 265; S. C., 22 N. Y., 540; *Willard* v. *Eastham*, 15 Gray; *Pentz* v. *Simonton*, 2 Beasley, N. J.; *Glass* v. *Warwick*, 39 Penn., (4 Wright.)

If the doctrine were carried no further, it would cover the case at bar. The notes were given by Nancy White for her own benefit, for property deeded to her in her own right. Though not binding upon her *person*, they were so far valid that she could make them a charge upon her *property*, by any express contract therefor which she had the legal capacity to enter into.

4. Had she power to make the mortgage which she gave to secure the notes?

Courts of equity often hold that to be done which is agreed to be done. Therefore, though the deed of a *feme covert* was void at common law, her agreement to make a debt a charge upon her separate estate, has been treated, in equity, as an actual incumbrance. But this rule was applied to estates in which she had only an equitable interest, the legal

title being in some other person, in trust for her. When the power was conferred upon her, by statute, to hold the *legal title*, in her own name, she was still incapable of conveying, or making a *legal* charge upon it, until empowered to do that also by statute. *Yale* v. *Dederer*, before cited.

By chapter 227, of the laws of 1852, it was provided "that any married woman who is or may be seized and possessed of property, real or personal, shall have power to lease, sell, convey and dispose of the same, and to execute all papers necessary thereto, in her own name, as if she were unmarried." This clearly gives her the power to mortgage her property to secure any valid debt or obligation. And, as she could formerly make her own debt, though not *personally* bound by it, a charge upon her estate *in equity*, now she may make it a charge, *in law*, by giving a mortgage of specific property as security for its payment.

I am aware that the views here expressed are not in harmony with the decision in *Dunning* v. *Pike*, 46 Maine, 461. The previous cases, except that of *Howe* v. *Wildes*, were decided on the ground that the *deeds* were void because the *notes* were void. As the statute of 1852 did not confer any power upon married women to give promissory notes, its bearing upon the case was overlooked. It was assumed that the notes had no validity whatever; and the invalidity of the mortgage was a logical deduction.

The power of a *feme covert* to create an incumbrance upon her separate estate has seldom been discussed before the Courts of this State. The exercise of this power has become frequent, since the statutes have enabled married women to purchase and hold property in their own right, and to convey it, as if unmarried. And it cannot be doubted that now, in law, as well as in equity, such incumbrances can be sustained according to the intention of the parties.

Judgment for the defendant.

KENT, J., concurred.

COUNTY OF KENNEBEC

ALFRED BATES *versus* THE ANDROSCOGGIN & KENNEBEC RAILROAD COMPANY.

A railroad corporation voted to issue preferred stock on the following condition, viz.: —

"So much of the net earnings of the road as may be necessary, after paying interest to the bondholders, shall be applied to the payment of twelve *per cent.*, in semi-annual dividends of six *per cent.* each, to the holders of stock thereby created, until the net earnings shall be sufficient to pay an interest of six per cent. on the stock, and all the bonds issued of the first and second loans." Thereupon the directors issued certificates of stock in common form, with the following certificate upon the back, signed by the president and treasurer: — "*Preferred Stock.* This certificate is for preferred stock created July 10, 1849, and entitles the holder, from the net earnings of the road, to the payment of six dollars per share semi-annually, until the net earnings of the road shall be sufficient to pay an interest of six *per cent. per annum* on all the stock issued, and all the bonds issued for the first and second loans:"—*Held*—

1. That the corporation, as a consideration for taking the stock, agreed to pay thereon twelve per cent. in semi-annual dividends of six per cent.

2. That the term "semi-annual dividends" was not used in a technical sense, but as equivalent to semi-annual payments.

3. That these payments depended on no contingency, except that the net earnings of the road, after paying interest to the bondholders, should be sufficient for paying them.

4. That *an entire year* must be taken as the period during which the net earnings should be sufficient to pay six per cent. on the bonds and all the stock, to determine when this contract was to cease.

5. That in an action upon this contract, the fact that the plaintiff was a holder of the shares may be proved by other evidence than the certificates of stock.

6. That the certificates of stock are not the basis of an action for the dividends, but merely evidence of the ownership of the shares.

7. That these certificates are not, in such an action, the *substance of the issue*, nor matters of essential description, and therefore, although the plaintiff professes to set them out in his declaration, *according to their tenor*, the law does not require their exclusion as evidence, in consequence of verbal inaccuracies or omissions.

8. That in such an action for several dividends, it is not sufficient to allege that the plaintiff took and paid for the stock, and at the commencement of the action was the holder thereof, but the declaration must show that he continued to be the holder during the time covered by the action.

9. That no question as to the sufficiency of the declaration having arisen upon the pleadings, and it not appearing that the defendants had suffered any inconvenience on account of the defect, the plaintiff should be permitted *by the law Court* to amend without terms.

10. That, after the plaintiff had transferred the stock by an assignment upon the back of the certificates, no action can be maintained in his name for dividends subsequently accruing, although such transfer has never been recorded.

11. But that he may recover such portion of the semi-annual dividend as the time, he was the holder of the stock, is of six months.

12. That the plaintiff cannot recover for the last six months of the year, at the end of which the contract ceases.

13. And that the corporation are estopped from denying that the meetings, at which these votes were passed, were legally called.

On Report.

Debt to recover ten semi-annual dividends on ten shares of preferred stock, at the rate of six dollars per share, amounting in the whole to six hundred dollars, from January 1, 1852, to January 1, 1857.

Plea *nil debet*.

The declaration was made a part of the case, but it is sufficiently stated in the opinion to show the questions raised upon it.

The plaintiff offered in evidence two certificates of stock, in the defendant corporation. It was admitted by defendants that the certificates were under the seal of the corporation, and by plaintiffs that the transfer on the back was executed when dated, and that they were then delivered to Eaton and Parker.

The plaintiff put in evidence the records of the directors of the company, by which it appeared that Timothy Boutelle was president and Samuel P. Benson treasurer of the company, on the 5th day of April, 1850, and Samuel Taylor, Jr., president, and Isaac Redington treasurer, on the 13th day of October, 1851.

The plaintiff offered in evidence certain portions of the

records of the corporation; of a meeting held on the 3d of July, 1849, and of another meeting on the 21st of August, 1849, and the calls for these meetings, and certain portions of the records of the directors, of meetings held on the 10th of July, and August 22, 1849, and of January 31, 1850.

The plaintiff also put in evidence a book produced by the defendants on notice therefor, showing "interest made up on preferred stock to January 1, 1852," and also proved that no dividends on preferred stock have been made up since January 1, 1852.

It was admitted by the defendants that the name of the plaintiff was borne on the stock ledger as owner of ten shares of the preferred stock of the company at the time said certificates were issued.

It was agreed by the parties that the whole amount of preferred stock, issued by the company, was 2,620 shares, amounting to $262,000, and that the whole amount of the first and second issue of bonds was $550,000.

The plaintiff then put in evidence the printed reports of the directors and treasurer of the company, for each year, from 1849 to 1857, inclusive, notice having been given to defendants to produce the originals, but which were not produced, and the clerk of the company having testified that the original written reports had not been preserved and were not recorded, nor returned by the printer to whom they had been given for publication. It was admitted by defendants that the printed copies offered were true and accurate copies of the originals.

From these reports it appeared that the net earnings of the company were as follows, viz.: —

For the year ending June 1, 1851,	$39,097,86
" " " 1852,	67,579,76
" " " 1853,	79,953,43
" " " 1854,	93,370,42

The whole amount of capital stock, original and preferred,

as appears by the reports, was, in June 1853, $812,478,47; in June 1852, $789,988,22; and in June 1854, $687,276,64.

It was admitted by the defendants, that S. Heath, Esq., in behalf of the holder of the certificates, the same having been delivered to him by Joseph Eaton for that purpose, in January, 1857, prior to the bringing of this action, demanded of the treasurer of the company payment of the several dividends sued for; but the payment of the same was refused; and that none have ever been made, except those accruing prior to January 1, 1852.

The defendants then put in evidence tending to show that, for the six months preceding January 1, 1852, the net earnings of the road were sufficient to pay an interest of six per cent. on the stock, and all the bonds issued for the first and second loans; but in the view of the case taken by the Court, it did not become material.

The case was thereupon taken from the jury by consent, and submitted to the full Court upon the evidence legally admissible, the whole having been received by agreement, subject to all legal objections, to render judgment by nonsuit or default.

Copy of certificates introduced in evidence by plaintiff.

"Androscoggin and Kennebec Railroad Company.

"No. 487. 8 shares.

"Be it known, that Alfred Bates, of Thomsonville, Connecticut, is proprietor of eight shares in the capital stock of the Androscoggin and Kennebec Railroad Company, subject to the provisions of the charter and the by-laws of the corporation, the same being transferable by an assignment thereof in the books of said corporation, or by a conveyance in writing recorded in said books. And when a transfer shall be made or recorded in the books of the corporation, and this certificate surrendered, a new certificate or new certificates will be issued.

"Dated at Waterville, this fifth day of April, A. D. 1850.

[L. S.] "T. Boutelle, President,

"Samuel P. Benson, Treasurer."

On the back of said certificate is the following:—

"Preferred Stock. This certificate is for preferred stock, created July 10, 1849, and entitles the holder, from the net earnings of the road, to the payment of six dollars per share, semi-annually, until the net earnings of the road shall be sufficient to pay an interest of six per cent. per annum on all the stock issued, and all the bonds issued for the first and second loans. "T. Boutelle, President,

"Samuel P. Benson, Treasurer."

"Shares. Androscoggin & Kennebec Railroad Company.

"For value received, I hereby transfer to Joseph Eaton and S. S. Parker, of Winslow and Waterville, eight shares of the capital stock of the Androscoggin & Kennebec Railroad Company, subject to all the assessments and to the provisions of the charter and to the by-laws of the corporation.

"Dated at Waterville, this 19th day of March, A. D. 1852. Alfred Bates.

"Witness:—James Stackpole, Jr."

Also a certificate issued to plaintiff in all respects similar to the preceding with these exceptions—"No. 815, for two shares, dated October 13, 1851, and signed Samuel Taylor, Jr., president, Isaac Redington, treasurer."

On the back was the same as the preceding with the exception of the signatures.* The second was signed in this manner:— "———, president, I. Redington, treasurer."

Extract from the stockholders' records of July 3, 1849.

"Mr. Moor presented a plan for increasing the subscription to the capital stock of the company.

"Judge Ware presented a plan for the same purpose, which was amended on motion of Mr. Anderson—which were severally discussed at length, and

" *Voted*, That the plans aforesaid be severally referred to the board of directors, with power to adopt either, with such modifications as they may think proper, to increase the cap-

* The Court understood this as not referring to the assignment upon the first certificate.

ital stock of the company, and to raise the necessary funds to complete and equip the road."

Extract from directors' records of July 10, 1849.

"The plans presented at the annual meeting of the stockholders, held July 3, 1849, for obtaining funds to complete and equip the road, having been considered,

Voted, That the following terms of subscription to the capital stock of the company be adopted by the board, viz.:

"Androscoggin and Kennebec Railroad Company. We, the undersigned, stockholders in the Androscoggin and Kennebec Railroad Company, and others, agree to take and pay for the number of shares set to our names, at $100 a share, by paying the money therefor, or giving our notes payable in four, eight and ten months, on the following conditions, viz.:—

"So much of the net earnings of the road as may be necessary, after paying interest to the bondholders, shall be applied to the payment of twelve per cent., in semi-annual dividends of six per cent. each, to the holders of stock hereby created, until the net earnings of the road shall be sufficient to pay an interest of six per cent. on the stock and all the bonds issued for the first and second loans."

Extract from the records of a meeting of stockholders, holden by adjournment, August 21, 1849.

" *Voted*, That the plan adopted by the board of directors in creating three thousand shares of preferred stock, at their meeting July 10, 1849, be ratified and confirmed by the stockholders."

Extract from directors' records of August 22, 1849.

" *Voted*, That the certificates for the stock created July 10, 1849, in addition to the form prescribed by the by-laws, bear upon the back the following words, subscribed by the president and treasurer, viz.:—

"Preferred Stock. This certificate is for preferred stock, created July 10, 1849, and entitles the holder, from the net earnings of the road, to the payment of six dollars per share, semi-annually, until the net earnings of the road shall be

sufficient to pay an interest of six per cent. per annum on all the stock issued, and all the bonds issued for the first and second loans. "President.

"Treasurer."

Extract from Directors' records of January 31, 1850.

"*Voted*, That the interest on the preferred stock be made up on the first days of June and December, annually, as said stock shall stand on the books of the corporation on those days."

W. S. Heath, for plaintiff.

I. The contract declared on is binding on the corporation. Redfield on Railways, p. 593, and cases cited in notes pp. 564, 575.

II. By that contract the plaintiff should recover.

1. By that contract he should have received a payment of $12 annually upon each share of *preferred* stock until he should receive a dividend of six per cent. upon the same as *original* stock.

2. At least the contingency contemplated in the contract could not happen until the net earnings of the company were enough for an *annual*, not a *semi-annual* dividend.

3. By either construction the company ceased to make the stipulated payment before the contract terminated.

Drummond, (with whom was *J. S. Abbott*,) for defendants.

I. The plaintiff cannot recover because he was not the holder of the stock during the time the dividends sued for were accruing. They were payable semi-annually to the holder of the stock *at the time they were due*. They were not *divisible*. If one man was the holder of the stock for the first quarter of the year and then transfers it, he cannot recover at all. If so, then the absurdity would follow, that if the stock should be transferred on every day of the six months, the defendants would be liable to as many actions as there are days in that time! If it can be appor-

tioned into halves, it may be into hundredths. But this cannot be done.

The plaintiff transferred the stock on March 19, 1852, to Eaton and Parker, before one dividend became due. They were the holders of the stock July 1, 1852, when the dividend became due, and they alone can sue for it.

The transfer without record changed the title to all except subsequent purchasers or attaching creditors. c. 81, § 22, R. S., 1841; 2 Greenl. Cruise, 487, and cases cited.

It is said that the certificates are *choses in action*. But they are only evidence of title, and not conclusive evidence. One may be the owner of the shares, and another hold the certificate. *Agricultural Bank* v. *Burr*, 24 Maine, 256; *same* v. *Wilson*, 24 Maine, 573.

Dividends follow the title at the time they are made. The plaintiff not having the title at that time cannot recover.

II. The plaintiff cannot recover, on the ground of variances between the contract declared on and the one attempted to be proved.

1. The certificates are declared on according to their "tenor." This requires an exact copy to be set out, and must be strictly and literally proved. 1 Greenl. Evidence, § 69.

The certificates declared on are not under seal; those offered in evidence are; and other differences are apparent.

2. There is a more important variance. The declaration sets out the contract according to the memorandum on the back of the certificate. This memorandum has never been adopted by the corporation. The vote of the corporation creating this stock is essentially different. The memorandum pledges the *whole of the net earnings* to the payment of these dividends; the vote, *only the surplus after paying bondholders*. If the net earnings were just twelve per cent. of the preferred stock, by the contract *declared on*, the preferred stockholders would be entitled to it all; by the contract *proved*, to none of it.

III. No action *at law* can be maintained for these dividends. Until dividends are declared the fund is *joint*.

When dividends have been declared and demanded, an action for money had and received will lie to recover them, because, in equity and good conscience, they belong to the stockholder. *Kane* v. *Bloodgood*, 7 Johns. Ch. R., 108, 129–132; *Ellis* v. *Merrimac Bridge*, 2 Pick., 243, 248.

The dividends are not made certain. The fund to be divided is the surplus of the net earnings after paying the interest to bondholders. It is a joint fund of which the plaintiff is entitled to his *pro rata* share. The amount of it is a question of fact for the jury to find. All the stockholders are interested in the question. They should be parties to the suit. Otherwise the fund may be exhausted before all are paid. Or they may be paid in different proportions.

IV. Another difficulty arises. The holders of this preferred stock are not *creditors* of the corporation. They are merely *stockholders*. They have a preferred claim to the dividends. But they have no claim unless there are dividends. There cannot legally be a dividend until there are profits and the floating debts are paid. The net earnings belong to the *creditors* and not to the *stockholders*, whether preferred or otherwise. Redfield on Railways, 597, 598.

V. The plaintiff is not entitled to recover, because the contingency which was to terminate his dividends, occurred January 1, 1852, before any dividends now sued for are alleged to have accrued.

That contingency was to happen when the net earnings should become sufficient to pay six per cent. on the stock, and the bonds of the first and second loan.

By "the stock," the parties must mean the stock outstanding at any given time.

It appears that, for the six months prior to January 1, 1852, the net earnings were sufficient to pay at the rate of six per cent. per annum on the stock then outstanding, and all the bonds. This, the plaintiff does not dispute, but claims that the contingency cannot happen until six per cent. is actually paid on all the stock—or, at any rate, that *one year* must be taken as the test instead of six months.

But dividends are universally declared semi-annually. All these votes, &c., provide for semi-annual payments.

Again, the contingency happens at the *beginning* of the period taken as a test, whether it is six months or a year. If, at the end of a year, it appears that the net earnings have been sufficient to pay six per cent. on the stock and bonds, the surplus, after paying bondholders, belongs to *all* the stockholders. The preferred stockholders cannot claim it. But one dividend, (if a year is assumed as the basis) has been paid to them during the year to which they are not entitled. A construction that leads to this result cannot be allowed. Assuming six months as the basis, it can be determined whether the earnings have been sufficient to pay at the rate of six per cent. on the stock and bonds. If they have not, the preferred stockholders are entitled to them. If they have, the contingency has happened and the twelve per cent. dividends cease.

VI. The tables show, that for the year ending July 1, 1854, the net earnings were sufficient to pay six per cent. on all the stock and all the bonds for first and second loans. At all events, this answers the condition. At the worst, the plaintiff can recover only to and including July 1, 1853, for the net earnings of the subsequent year belong, as above shown, to all the stockholders.

Evans, for plaintiff, in reply.

The opinion of the Court was drawn up by

Rice, J. — An examination of the terms of the contract between the parties upon which the action is based, in the light of the surrounding circumstances, will leave no doubt as to its construction, nor as to the intention of the parties at the time of its inception. The defendants are a corporation, and were, at the time the contract originated, engaged in the prosecution of a great public enterprise — the construction of a railroad from Danville to Waterville. This enterprise, which was then of a character comparatively new in this State, and involved the expenditure of large

sums of money, had, manifestly, been commenced by the corporation without accurately estimating the cost necessary for its completion. The law contemplated that a sufficient amount of stock should be subscribed, to furnish funds to enable the company to construct and equip their road. The charter was sufficiently broad and liberal in its terms to admit of the accomplishment of this object. But when a subscription to its stock, sufficient only to meet a portion of the cost of the construction of the road, had been obtained, the work of construction was commenced, and a result which ordinary sagacity could not have failed to foresee, was speedily reached. The available proceeds of the stock subscription were exhausted, debts without means to pay contracted, and the road not completed.

In this condition of things the financial skill or ingenuity of those interested in carrying forward the enterprise and completing the construction of the road, was put in requisition. Bonds for a first and second loan, amounting to more than half a million of dollars, appear to have been issued and sold in the market, and yet there was a large deficiency of funds to meet *liabilities* already incurred, and the pros pective necessities of the corporation to finish their road. It was apparent that further sales of stock could not be effected on the intrinsic value of the stock itself.

In this exigency, "plans" were devised to induce existing stockholders, and others, to make additional subscriptions to the capital stock of the corporation.

These *plans* were referred to the directors, who, at a meeting of their board, held July 10, 1849, matured therefrom the following terms of subscription :—

"We, the undersigned, stockholders in the Androscoggin and Kennebec Rail Road Company, and others, agree to take and pay for the number of shares set to our names, at $100 a share, by paying the money therefor, or, giving our notes, payable in four, eight, and ten months, on the following conditions, viz. :—

"1. So much of the net earnings of the road as may be

necessary, after paying interest to the bondholders, shall be applied to the payment of twelve per cent. in semi-annual dividends of six per cent. each, to the holders of stock hereby created, until the net earnings of the road shall be sufficient to pay an interest of six per cent. on the stock, and all the bonds issued of the first and second loans."

The other conditions are not deemed material in determining the point before us.

This proposition was presented to and ratified and adopted by the stockholders of the company, at a meeting held August 21, 1849. The stock thus provided for constitutes what is denominated the "preferred stock" of the corporation, though the certificates issued therefor were in the form of the ordinary stock certificates of the company, and were only distinguishable from the ordinary stock certificates by an indorsement made upon the back thereof by the order of the directors.

This certificate was in form as follows:—

"Preferred Stock. This certificate is for preferred stock created July 10, 1849, and entitles the holder, from the net earnings of the road, to the payment of six dollars per share, semi-annually, until the net earnings of the road shall be sufficient to pay an interest of six per cent. per annum on all the stock issued, and all the bonds issued for the first and second loans," and signed by the president and treasurer.

The manifest design of this proposition for subscription was, to offer an inducement first, to the stockholders, and then to others, to take the additional stock then created, and thereby to provide the funds and money to meet the existing liabilities of the company, and to complete the construction of their road. Such is the fair import of the *plan* then adopted, and so the directors understood it, and so held it out to the world, as fully appears from the certificate by them directed to be placed upon the stock certificates, as cited above. That is, the corporation say, in substance and effect, by their *plan* for subscription, first, to their own

stockholders and then to the world, in consideration that you will subscribe for the stock now created and proposed to be issued, we will pay you twelve per cent. in semi-annual dividends of six per cent. each, until the net earnings of the road shall be sufficient to pay an interest of six per cent. on the stock and all the bonds issued for the first and second loans. This twelve per cent. was simply the consideration offered to induce parties to take the new stock, and may have been offered first, to existing stockholders, to enable them, by duplicating their subscriptions, to obtain six per cent. on their whole investment in the stock of the road.

It is evident, from an examination of the whole transaction, that the words "in semi-annual dividends," were not used in a technical sense, but were intended to mean nothing different from semi-annual payments, which payments depended upon no contingency except that the net earnings of the road, after paying interest to the bondholders, should be sufficient to meet this obligation.

The next question of substance is, when did this contract, by its terms, terminate? The *plan* contains within itself an explicit answer to this question; "when the net earnings of the road shall be sufficient to pay an interest of six per cent. on the stock and all the bonds issued for the first and second loan." This manifestly has reference to the annual operations of the road, and, when the earnings of the road should be sufficient to enable the company to pay an interest of six per cent. annually upon its stock and all the bonds of the first and second loans, the twelve per cent. interest promised, as a consideration for the subscription to the new stock, was to cease, and the preferred stockholders would thereafter have no rights superior to the holders of old stock; it evidently then being anticipated, that from and after such time the company would be able to pay six per cent. on its whole investment in the construction of their road. It would require the operation of an entire year, including the unfavorable as well as the favorable months for business, to test its capacity to pay six per cent. As well might that

capacity be tested by selecting the most favorable month, week, or day, even, as the six most favorable months in the year for that purpose.

As to the policy of obtaining stock subscriptions in this way, we express no opinion, nor do we herein intend to express any opinion as to the legal rights of the holders of original and preferred stock, as between themselves.

Such being the nature of the contract and the rights of the parties under it, the only remaining questions to be decided are, whether the technical objections raised are such as will defeat this action.

The action, as we have already seen, is not upon the stock, *per se*, nor technically for dividends declared upon the stock of the company, but upon a contract by which the defendants obligated themselves to pay certain specified sums, at certain times, in consideration that the plaintiff had taken stock of the company. Those payments, by the terms of the contract, are to be made to the holders of the stock. The certificates of the stock do not therefore form the basis on which the action is founded, but are only evidence tending to show, that the plaintiff was the holder of stock, out of the subscription and payment for which the contract, on which the action was brought, originated. The fact that the plaintiff took or holds stock may be proved by other competent evidence, as well as by the certificates; and the fact that the plaintiff, in his declaration, has preferred to set out these stock certificates according to their tenor, will not require their exclusion, on the ground of variance, in consequence of verbal inaccuracies or omissions, because they do not constitute the *substance of the issue*, nor are they matters of essential description. 1 Greenl. Ev., § 56. The substance of the issue before us is the agreement to pay certain sums of money to the holders of a certain issue, as capital stock in the defendant company. The certificates are introduced as evidence tending to establish the fact that the plaintiff is the holder of such stock. Evidence tending to establish the same fact is found in the express admission

of the defendants, that the name of the plaintiff was borne upon the stock book of the company, as the owner of ten shares of the preferred stock of the company, at the time the certificates were issued.

The next inquiry is, when and how long did he hold said stock.

The declaration alleges, with sufficient distinctness, that the plaintiff had taken and paid for the number of shares specified as a consideration of the promise declared on. But there is an informality in that part of both counts of the declaration, which sets out the time during which the plaintiff was the holder of such stock. After setting out the fact that he had taken and paid for stock, &c., the declaration in both counts proceeds thus, "and the plaintiff avers that he is the legal holder of said certificates." This is not a distinct affirmation, that he is and has been at all times, since the date of the certificates, or since the alleged cause of action accrued, the holder of the *stock* referred to in said certificates. But, though thus defective in technical accuracy and form, there is sufficient in the whole declaration to enable the Court rightly to understand the case, and it is therefore amendable. And, as no questions have been raised in the pleadings, as to the sufficiency of the declaration, and it not appearing that any inconvenience has been suffered by the defendants from this informality, the plaintiff may have leave to amend without terms.

The defendants, as already remarked, admit that the plaintiff was the owner of ten shares of the stock at the date of his respective certificates. The certificate for eight shares is dated April 5, 1850, and the proof is, that no payments of interest have been made since January 1, 1852. It also appears, by the transfer on that certificate, in evidence by the plaintiff, that, on the 19th day of March, 1852, he transferred to Eaton and Parker eight shares in the capital stock of the defendants' company. The fact that this written transfer, or assignment, is upon the back of the certificate issued for the stock in question, and the further fact that,

prior to the commencement of this action, Mr. Heath received the certificate from Mr. Eaton, authorizes the inference that Eaton and Parker continued to hold these eight shares of stock from the time of the transfer to them until the date of the plaintiff's writ.

Should it be objected that the transfer of the stock was incomplete, until it was entered upon the books of the company, the answer is that, as between the parties to the transfer, neither the certificate nor the statute, c. 81, § 22, required such transfer to be entered upon the books of the company to make it effectual. If so entered, a new certificate might have been issued to the transferees on the surrender of the old certificate, and their right to the stock protected against the acts of the original owner or his creditors. The plaintiff, from and after the transfer of this stock, ceased to be the holder thereof, and the defendants only promised to pay twelve per cent. to the holder. The result is, that the plaintiff is entitled to recover on his first count at the rate of twelve per cent. per annum, on eight hundred dollars, from the first day of January, 1852, to the 19th day of March in the same year.

As to the second count, there is no evidence of transfer, and the inference is authorized that the plaintiff has continued to hold it from the time the certificate was issued until the date of his writ. He is therefore entitled to recover upon that count from the first day of January, 1852, the time to which interest had been paid, until the happening of the contingency contemplated in the contract, at the same rate per cent. as in the first count. The reports do not show that this contingency occurred until July 1, 1854, and, at that time, the defendants show that the net earnings of the road, for the year then ended, had been sufficient to pay six per cent. on the stock and all the bonds issued for the first and second loans. The plaintiff was entitled to his interest semi-annually until that contingency happened. Judgment must therefore be entered for plaintiff, under the second count, for the amount of interest, at twelve per cent. per

annum, on two hundred dollars, from January 1, 1852, to January 1, 1854.

Objection was also taken that the extracts from the records of the company do not show that the meeting of the stockholders, of July 3d, was legally called, or that it was regularly adjourned to August 21, 1849, when the vote of ratification was passed. We perceive no legal objection to the introduction of those extracts from the records, and are of opinion that, from such portion of the records as are before us, and in the absence of all evidence to the contrary, the presumption is, that the proceedings were regular. At all events, in view of the whole transaction, and all the acts of the defendants in relation to the subject matter, it is not now competent for them to take this objection.

Defendants defaulted.

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

AUGUSTA BANK *versus* THE CITY OF AUGUSTA.

The Act, (c. 379, special laws of 1850,) authorizing certain cities and towns to grant aid in the construction and completion of the Kennebec and Portland Railroad, is constitutional.

It was the duty of the treasurer of the respective cities and towns to determine whether his town or city had duly accepted the Act, and whether all the preliminaries requisite to give validity to the scrip had been complied with, before he issued it; and his determination is conclusive.

These questions cannot be raised on the trial of an action brought upon the scrip.

A *coupon* not payable to order or bearer, nor containing other equivalent words, is not negotiable.

A *coupon*, to be negotiable, must be so upon its face, without reference to any other paper.

A *coupon*, not negotiable on its face, will not be held to be so, upon proof that similar *coupons* have been passed from hand to hand as if negotiable.

Augusta Bank *v.* Augusta.

The Act of 1856, (c. 24, §§ 1, 2,) authorizing the *bona fide* holder of *coupons* to maintain an action thereon in his own name, does not impair the obligation of the contracts in bonds already issued, but relates wholly to the remedy, and is constitutional.

This Act is not limited in its operation to bonds under seal, but applies to the scrip issued under the Act of 1850 authorizing certain cities and towns to grant aid in the construction and completion of the Kennebec and Portland Railroad.

This Act was continued in force, by the second section of the repealing Act in the Revised Statutes of 1857, as to coupons then in possession of any person for a valuable consideration.

On Report.

Assumpsit in which the plaintiffs claim to recover the amount of certain coupons specified in the writ, which were attached to sundry certificates of debt, purporting to have been issued by the defendants, in aid of the Kennebec and Portland Railroad Company, under the Act of August 17, 1850.

Plea, the general issue, with a brief statement alleging payment. The defendants also filed specifications of defence, upon which, however, no question arose.

The plaintiffs introduced the proceedings of the defendants in petitioning the Legislature for authority to aid in the construction of the railroad; the Act of August 17, 1850; the records of the railroad company, showing their acceptance of the Act; and evidence tending to show that the Act had been duly accepted by the defendants; that all the requirements of the Act had been complied with; that the scrip was issued by the treasurer of the defendants; that the coupons in suit were genuine; that they were taken by the plaintiffs from various holders of the scrip for a valuable consideration, after they became due, at the request of Reuel Williams, who had since paid the plaintiffs the amount of them; that this suit was ordered by a vote of the directors of plaintiffs; and that coupons similar in form to those in suit had, for several years, in different parts of the State, passed from hand to hand as if negotiable. A copy of the scrip and of a coupon are given in the opinion.

After the plaintiffs' evidence was introduced, a nonsuit was entered by consent, with the agreement that the evidence should be reported to the law Court, and, if upon so much of the evidence as was legally admissible the action could be maintained, it should stand for trial, otherwise judgment should be rendered for the defendants on the nonsuit.

Williams and *Cutler*, (with whom was *P. Barnes*,) for plaintiffs.

I. The Act of August 17, 1850, is constitutional. 15 Conn., 471; 21 Penn., 147, and cases there cited; 18 New York R., 38; 9 Humph., 252; 1 Ohio State R., 77; 7 Am. Law Reg., 92, 747; 8 Am. Law Reg., 286; 2 Railway Cases, 63; Redfield on Railways, 533; 31 Maine, 285.

II. The issue of the scrip was valid, and the proceedings under the Act were regular.

Of the performance of these conditions the treasurer of the city was made the judge, and his decision was conclusive. *Knox Co. Com.* v. *Aspinwall & al.*, 21 Howard 545.

III. This action is maintainable, under § 34, c. 51 of the R. S.

1. The term "bonds" includes scrip. This is established by reference to the Act of 1856, from which this provision is taken.

2. This scrip is in legal effect "issued by a railroad corporation."

3. The term "*such* bonds," in § 34, refers to all bonds issued in aid of a railroad company. The action is given not against the corporation technically "issuing" them, but against the corporation *engaging to pay them.*

IV. If this action is not within the terms of the R. S., it is maintainable under the Act of 1856, and the saving clause of the R. S.

This Act has not been repealed so far "as any rights and their remedies existed by virtue" of its provisions. The plaintiffs held these coupons, January 1, 1858, and then

could have maintained this action upon them. That remedy is preserved by the saving clause referred to.

V. The coupons in suit, rightfully interpreted, contain a promise to pay the stipulated sum to the bearer. Their construction depends upon the circumstances under which they are issued and received.

As in case of a guaranty, not addressed to any particular person; or a promise to accept bills; or offer of rewards, &c.

VI. The evidence of usage was admissible to show that the parties contracted with reference to it. 3 Maine, 276; 18 Maine, 351; 38 Maine, 414; 9 Wheaton, 582; 21 Howard, 539, 576.

Joseph Baker, (with whom was *H. W. Paine*,) for the defendants.

I. The loan Act never became a law binding on the city of Augusta.

1. The Legislature itself did not pass the Act, but delegated legislative power to the directors of the railroad, and to the cities and towns, and therefore all the proceedings are void. Loan Act, § 2; Const., art. 4, p. 1, § 1; *Barto* v. *Himrod*, 4 Selden, (N. Y.,) 483; *Bank of Rome* v. *City of Rome*, 18 N. Y., and 4 Smith, 38.

2. Because the purposes of the Act are so entirely inconsistent with the purposes for which the defendants were incorporated, that the acceptance by a majority, even in a legal form, would not bind the minority or the corporation. R. S., c. 3, § 26; City Charter, § 2; *Hooper* v. *Emery & al.*, 14 Maine, 375, and cases; *Bussy* v. *Gilmore*, 3 Maine, 191; *Norton* v. *Mansfield*, 16 Mass., 48; *Parsons* v. *Goshen*, 11 Pick., 396; *Anthony* v. *Adams*, 1 Met., 284–6.

3. But the Legislature did not undertake to make this Act effectual itself, but only to provide the mode or process by which it might take effect. Loan Act, §§ 1, 2, 21. Granting, for the sake of the argument, that it was competent for the Legislature to do so, we hold that that process must

be strictly and punctiliously pursued, or the Act has not the force of law.

II. The scrip was not legally issued. In considering this proposition, we must bear in mind that the defendants, as a corporation, are sued here for the acts of their agent, the treasurer, a public officer, and not for their own acts in their corporate capacity; and must keep before us the familiar principle of law applicable to such agencies, that if the limitations of the agent's authority are public in their nature, or are made known to the party dealing with him, the principal will not be bound if those limitations are exceeded or violated. *Bryant* v. *Moore*, 26 Maine, 84.

In this case, all the authority of the treasurer was derived from the public loan act, the public city charter, and the public records of the city, and were open to the knowledge and inspection of all parties, and the plaintiffs were bound to know, and legally and conclusively presumed to know, the extent and limitation of his authority.

The agent did not comply with the statute and vote of the city in various particulars.

III. Estoppel.

1. We are not estopped to deny the validity of the meeting for the acceptance of the Act, because this is a part of the process provided by the Act itself, by which it was to become a law.

2. We are not estopped to deny the legality of the issue of scrip, because the treasurer only undertook to act as agent, with known limitations of authority, one of which was taking the securities required by the Act, as a condition precedent to the issue of scrip. He was not in the ordinary exercise of his official functions, but exercising a most extraordinary power, to create a city debt of $200,000, and bearing on the very face of the scrip a reference to the law which declares the extraordinary purpose. "*Ignorantia legis neminem excusat.*" Every person dealing with him under such circumstances is put on his inquiry and bound to know the extent and qualifications of his authority.

3. But the plaintiffs are not in a position to claim an estoppel on the defendants.

a. Because they were not induced to part with their money on the strength and credit of the conduct of defendants. Before they paid out one dollar, they had the ample written security of Mr. Williams, legal and available. They acted as his agent.

b. If they did not take them exclusively on the credit of Mr. Williams, they did take and hold them as collateral security for his agreement; and such holders are never deemed innocent holders for a valuable consideration, so as to be entitled to set up an estoppel or shut out a defence. *Holmes* v. *Smith*, 16 Maine, 177–180; *Lee* v. *Kimball*, 45 Maine, 172–175.

c. They are not such holders, because they took the coupons when overdue and dishonored.

IV. The coupons are not negotiable.

1. Because they are an incident, a mere cast of interest, and a part and parcel of the scrip, and no contract in and of themselves. The scrip contains a promise to pay the interest according to the coupons, and the repetition of the promise in the coupons is mere surplusage, and may be rejected.

2. But certainly they are not payable to the plaintiffs. They were not issued to them, and are not negotiable, as they contain no apt words of negotiability. Story on Bills, 19, 20, 220, 221; do. on Notes, 13; Byles on Bills, 60, 61, 130; *Myers* v. *Y. & C. R. R. Co.*, 43 Maine, 232; *Jackson* v. *same*, 48 Maine, 147.

3. But, it is said, if not negotiable on their face, *custom* has made them so by the proof offered. This we deny.

The plaintiffs did not offer to prove the law merchant, but the custom in certain localities. Such custom is only the incipient stages of a process which may, in the course of time, ripen into the law merchant.

4. The coupons are not made negotiable by the Act of 1856.

a. The Legislature has no power to make an unnegotia-

ble contract negotiable, as it would be impairing the obligation of the contract.

b. But if that statute could confer any rights, its repeal could take them away. They were created by the statute, existed by it, and, when it was repealed, they died. It was left out of the revision, 1857, long before this action was commenced, and repealed by the repealing Act, R. S., c. 51, §§ 33, 34; Repealing Act, § 1; 36 Maine, 361; *Bank* v. *Freeze*, 18 Maine, 109–112; *Coffin* v. *Rich*, 45 Maine, 507–511; *People* v. *Livingston*, 6 Wend., 526.

Nor was any right saved to plaintiffs by the saving clause of the repealing Act, § 2. That clause saves "rights and *their* remedies." If the statute of 1856 attempted to create or confer any "*rights*," it is void, as impairing the obligation of contracts. If it only attempted to confer a remedy, the repeal of the law would defeat it, and the saving clause preserves no "remedy" except those attached to some preserved "right."

c. That statute does not apply to these coupons, because it is expressly limited to coupons originally attached to "*bonds*," and these were not. The word "bond" has a well defined, technical meaning, and, according to Rule 1, R. S. 1841, c. 1, § 3, that meaning must be applied here, and that excludes these coupons.

Other questions were discussed by the counsel, but they do not become material in the view of the case taken by the Court.

The opinion of the Court was drawn up by

TENNEY, C. J.—This suit is for the recovery of an amount of coupons originally attached to city scrip, for payment of interest thereon, but cut from the same, and passed by the holders of the scrip to other parties, the scrip with the coupons purporting to have been issued by the city of Augusta, as a loan of its security, under an Act of the Legislature, authorizing certain cities and towns to grant aid in the con-

struction and completion of the Kennebec and Portland Railroad. Special laws of 1850, c. 379.

A portion of the coupons in suit, upon their face, were payable on November 1, 1854, and a portion on May 1, 1855, and the plaintiffs soon after became possessed thereof, having received them from many individuals for a full and valuable consideration, by the written request to their cashier, of Reuel Williams, who afterwards paid to them the amount thereof, as the evidence in the case tended to show. Whether they were taken by the plaintiffs as continuing evidence of the liability of the city as they were before they were so taken, or whether the payment thus procured by Mr. Williams, and made by the plaintiffs, was for the purpose of cancelling the instruments, was a question of fact in the case, which must be settled as such by a jury, in another trial.

After the evidence of the plaintiffs had been adduced, a nonsuit was entered, and the case reported to the law Court, in order that certain legal questions should be settled.

The first question presented to the whole Court is, whether the Legislature had the constitutional power to pass the Act. No reason has been offered in the argument of the counsel for the city, sufficient to lead us to doubt the existence of this power in the Legislature. Upon its acceptance by the city of Augusta, and by the Kennebec and Portland Railroad Company, it was to be treated as binding upon both parties, so far as to make their subsequent acts, touching the scrip, &c., if according to its provisions, effectual.

It is denied on the part of the city, that it ever accepted the Act, and that the scrip was ever issued, so that it is under any obligation to make payment thereof, or of the coupons severally attached to each piece of the same. Who is to determine the question, whether the city accepted the Act? And how is it to be settled, whether the scrip and the coupons are legally binding upon the corporation whose treasurer has issued them? In section 2, it is enacted, upon the acceptance of the Act as aforesaid, by any or all of the

aforesaid cities or towns, the treasurer of each city or town, which shall have accepted the Act, is hereby authorized to make and issue from time to time, for the purposes contemplated in this Act, the scrip of such city or town for the amount granted by such city or town respectively, in convenient and suitable sums, payable to the holder thereof on a term of time, not less than twenty, nor more than thirty years, with coupons for interest, attached, payable annually or semi-annually, and to deliver the same to the directors of said railroad company from time to time, as may be required, subject to the several provisions of this Act. In all cases, the scrip shall bear date at the delivery thereof, and the proceeds of the same shall be applied by the directors of the company exclusively to the construction and completion of the Kennebec and Portland Railroad, and to the payment of the debts incurred for that object."

In the above provision, an important trust is lodged with the several treasurers of the cities and towns upon the acceptance of the Act. Until this acceptance, he has no power to issue the scrip. Upon its acceptance, and the compliance with the statute in every respect required for the purpose, the treasurer has the most ample power to issue the scrip and deliver the same to the directors of the railroad, to be by them applied in furtherance of the great object named in the title of the Act. The Act provides in no express terms for any tribunal which shall adjudge whether these various steps have been taken. It could not have been intended by the Legislature, that this scrip should be issued, delivered to the directors of the railroad, who should receive the amount of the same, and expend it in the construction and completion of the railroad, and the question be open to be presented on the trial of any action brought upon any piece of scrip, whether the Act was duly accepted, and the scrip had been issued, and sent into the world for a full consideration, after a compliance with every requirement of that Act.

The duty of deciding these questions was imposed upon

the treasurer of each city and town. He could not issue the scrip till the Act was accepted; he could not deliver the scrip to the directors till every necessary step had been taken to render the delivery proper. It was his province to see that every legal requirement was fulfilled as a condition of carrying out the great object of the Act. It was, under the Act, a matter of absolute necessity that he should be the judge in these matters, or he could not act at all in the premises.

This power of the treasurer is inferrable from decisions of cases which are analagous to the one before us. In the case of *Spofford* v. *Hobbs*, 29 Maine, 148, where a power of attorney authorized the attorney to sell certain lands, "for the purpose of making actual settlement thereon," and to sign, and to seal, and deliver "legal and sufficient deeds, with the several covenants and a general warranty," to convey such lands, "in fee simple," *it was held*, that the attorney was clothed with discretion to judge whether the purchaser intended to purchase for purposes of settlement, and, there being no evidence of fraud on the part of the purchaser, or of the attorney, a conveyance made under the power was valid, although it appeared afterwards that the land was not purchased for actual settlement, but on speculation.

The case of *Commissioners of Knox County* v. *Aspinwall & al.*, 21 Howard's U. S. Rep., 539, cited for the plaintiffs, is in point and decisive of the case, upon this question, which is fully sustained by the principle and the authorities cited, and numerous others in favor of the plaintiffs.

The action is sought to be maintained on three distinct grounds;—first, that the coupons are of themselves, or taken in connection with the scrip, negotiable paper; second, that they had become so by custom in the mercantile community; and third, by virtue of the Acts of 1856, c. 248, § 1, and R. S., c. 51, §§ 33 and 34.

The following is a copy of one piece of the scrip, which varies from others in number and amount only.

"No. 149. United States of America. *A.*
"$1000. State of Maine. $1000.
"City of Augusta.
"Loan.

"Be it known, that the city of Augusta will pay in Boston, to the holder of this bond, the sum of one thousand dollars, in twenty years from the date hereof, and will also pay at the same place, the semi-annual coupons hereto annexed, as the same shall severally become due, value received.

"In testimony whereof, I, the Treasurer, in the name and in behalf of said city, in conformity with the Act of the Legislature of the State of Maine, passed August 17th, A. D., eighteen hundred and fifty, vesting in me authority for this purpose, have hereunto set my hand.

"Dated at said Augusta, this first day of November, A. D., 1850. "John A. Pettengill, *Treasurer.*"

Countersigned:— "Alfred Redington, *Mayor.*

"Attest:— Daniel C. Stanwood, *Clerk.*"

The form of the coupons, varying in number and amount, as in the scrip, is as follows:—

"City of Augusta.

"Bond No. 149. Coupon No. 40.

"The city of Augusta will pay thirty dollars on this coupon, the first of Nov. 1870, in Boston.

"$30. John A. Pettengill, *Treasurer.*"

1. It is essential to the negotiability of a bill of exchange or promissory note, between all persons, excepting the king or government, that it should be payable to order or to bearer, or that some other equivalent words should be used, authorizing the payee to assign or transfer the same to third persons. Story on Bills of Exchange, § 60.

It is said, in Chitty on Bills, 181, the modes of making a bill transferrable, are by drawing it either payable to A B, or order, or to A B, or bearer, or to the drawer's own order, or to bearer generally. But any terms, expressing the intent, will render the bill negotiable. Ibid., 218–220.

A promissory note is a promise or engagement in writing to pay a specified sum, &c., to a person therein named, or order, or to the bearer. These notes were attempted to be introduced by goldsmiths several years before the statute of 3 and 4 of Anne, c. 9, and were generally esteemed by merchants as negotiable, but Lord HOLT as strenuously opposed their negotiability, as he did that of common promissory notes; and they were not generally settled to be negotiable till the statute of Anne, just referred to, was passed, which relates to them as well as to common promissory notes. Ibid., 554. This statute places promissory notes on the same footing as bills of exchange, and consequently the decisions and rules relating to one are, in general, applicable to the other. Ibid. 552.

There are other prerequisites essential to the character of negotiability of bills of exchange and promissory notes, some of which may be more fully adverted to hereafter; one of which is, that the payment must be free from any contingency, and payable in money.

It cannot be contended, in behalf of the plaintiffs, that the coupons, referred to in the declaration of the writ, are embraced within the principles which have been treated as well settled, as they appear when detached from the scrip. But it is insisted for the plaintiffs, in a very able and ingenious argument, that the coupons in this case have that upon their face, which shows an intimate relation between them and the pieces of scrip from which they were severally detached; and, by an examination of the principal obligation, it will be seen at once that the latter is negotiable paper, having the characteristics of a promissory note payable to the holder, and that the coupon is for the interest incident to the scrip.

In looking at the history of negotiable paper, the object of it cannot be mistaken. It is true that a bill of exchange, or a promissory note, is a chose in action, yet it may be assigned so as to vest the legal as well as the equitable interest therein in the indorsee or assignee, and to entitle him to in-

stitute a suit thereon, in his own name. Though such paper is merely a simple contract, yet a sufficient consideration is implied from the nature of the instrument, and its existence in fact is rarely necessary to be proved, and, in the hands of a *bona fide* holder, is indisputable.

The privileges thus secured by such paper to the holder, who took it in the regular course of business, are important. In a bill of exchange, a release by the drawer to the acceptor, or a set-off, or a cross demand, due from the former to the latter, cannot affect the right of action by the payee or indorsee; because the legal and not the equitable interest is vested in such payee or indorsee, and the action is sustainable in his own name.

Again, an action generally cannot be supported on a contract, not under seal, without the plaintiff alleges in pleading and proves on trial, in the first instance, that the contract was made for a sufficient consideration. But, in case of bills of exchange and promissory notes, a sufficient consideration is presumed, and the validity of the paper cannot be disputed on account of a want of sufficient consideration, when it is in the hands of a *bona fide* holder, who has given value for it.

Suits upon bonds, and most other choses in action, must be in the name of the original obligee, and, though it is apparent that he sues merely as trustee for another, to whom he has assigned his interest, yet, a release from him, or set-off due from him to the obligor, may be an effectual bar, unless the release or set-off is subsequent to the assignment. Chitty on Bills, 6.

It has been already remarked, that an essential element in negotiable paper, so that an action can be sustained in the name of any holder is, that the paper shall be paid absolutely in money, according to its terms, and cannot be subject to any contingency. Though the coupons in question are payable in money, yet being separate from the scrip, to which they were originally attached, they do not contain enough to enable a holder certainly to recover in his own name, beyond a contingency.

The manifest reason for the necessity that negotiable instruments should possess these properties is, that it should have currency as independent paper. *Myers* v. *Y. & C. R. R. Co.*, 43 Maine, 232. If the payment is to be made upon an event which is not absolutely certain to take place, the paper is not negotiable, however remote the probability that it will not occur.

In the case of *Carlos* v. *Fancourt*, 5 Term R., 483, which was an action upon an instrument, payable on an event which was contingent, Lord KENYON says,—"The question in this case is not whether the plaintiff in error, who may have promised, for a valuable consideration, to pay the defendant a certain sum of money on an event, which has since happened, is or is not bound to perform that promise? If this promise was made on a consideration, there is no doubt but that an action might be maintained upon it as a special agreement. But the question now before the Court is, whether or not the note set forth in the record can be declared on as a negotiable security under the statute of 3 and 4 of Anne, c. 9. The object of that statute was to put promissory notes on the same footing with bills of exchange, in every respect. It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies; and if the persons, to whom they are offered in negotiation, were obliged to inquire when the uncertain events would probably be reduced to a certainty."—"The justice of the case is certainly with the defendant in error, but we must not transgress the legal limits of law, in order to decide according to conscience and equity." In the same case, ASHHURST, J., says,—"Before the statute of Anne, promissory notes were not assignable as *choses in action*, nor could actions have been brought on them, because the considerations do not appear on them; and it was to answer the purpose of commerce, that those notes were put by the statute on the same footing with bills of exchange. Then they cannot rest on a better footing than bills of exchange, but must stand or fall, on the same rules by which bills of exchange

are governed. Certainty is a great object in commercial instruments, and, unless they carry their own validity on the face of them, they are not negotiable."

The language of the statute of Anne is, "therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiable in like manner," &c.

Judge STORY, in his work on bills of exchange, in § 60, says,—"The general rule is, that a bill of exchange always implies a personal general credit, not limited, or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation, and, if the bill wants, upon the face of it, this general essential quality of character, the defect is fatal."

That the scrip of the defendants is negotiable is not denied. But the coupons have been separated therefrom, and passed by delivery, to those who are strangers to the scrip; and it was not expected or designed, that the holder of the former should ever possess the latter, which, being negotiable, will be scattered far and wide, with no means of tracing its progress. If of par value, it will pass from hand to hand, as current cash bills.

The coupons in suit, it is not suggested, are in terms payable on a contingency, but they have on their face nothing which makes them negotiable, and, whether they can be shown to be so, by inspection of the scrip from which they were taken, must depend upon a very remote contingency.

A person in commercial pursuits receives negotiable paper, because he is satisfied that the parties to whom he could look for payment are responsible, and because he knows, if the paper shall be protested, the paper itself and the protest is all he needs to recover the amount in a suit in his own name.

It is true, that the public are so informed of the terms of the scrip, that its negotiability is unquestioned, and, so long

as the corresponding coupons are promptly paid, they would be taken as would notes, not negotiable, against persons of known ability to pay. But, in a suit upon a coupon like those before us, in the name of the holder, who had not the piece of scrip from which it was taken, if it should be defended, on the ground that it was not negotiable, the proof that the paper from which it was taken was so, must be from the inspection of the paper itself, and the difficulty presented therein must ordinarily be absolutely insurmountable. The paper, to be negotiable, must be so upon its own face, without reference to any other.

2. It is insisted, that the paper in question has the character of negotiability, by custom. It is not, however, claimed that this custom is such that it has become a part of the law merchant to be pronounced by the courts. But it is attempted to be shown, like local customs, which, if established, are supposed to be referred to when certain species of contracts are made, and are treated as elements in their interpretation. The custom attempted to be shown in testimony does not appear to us to be of that character. The whole amount of the evidence on this point is, that coupons, separate from the scrip to which they were originally attached, have passed from hand to hand with very little regard to their form, and without consideration whether they contained negotiable words or not. They have been received in various transactions, because they had been promptly paid, and were expected to be so paid in future, without suit in the name of any one. A negotiable character cannot with so much reason be claimed for them as was claimed for goldsmiths' and other promissory notes, in the time of Lord HOLT, which has been referred to. We have seen that the promissory notes of that time were generally esteemed by merchants as negotiable, they being so in form; but their negotiability was strenuously opposed by the courts, till the enactment of the law in the 3 and 4 of Anne, c. 9. Promissory notes never were legally negotiable in England, till they were made so by Act of Parliament.

But from the evidence introduced of custom, the great test of practical negotiability of coupons was wanting, that is, there was nothing to show that the holder of a coupon, like those in suit, has ever attempted to sustain an action in his own name thereon, when he was not also the holder of the scrip to which it corresponded, much less that any such suit has been maintained when its negotiability has been controverted. If the mere passage of coupons from one to another, as the representative of money, would give to them this character, other species of paper, for a like reason, might become so, when such a result would not be thought of by any one. It is not easy to perceive, in what manner the evidence introduced on this point can bear upon the case, in any mode whatever; and the evidence itself was not sufficient to require the Court to put the question of negotiability to the jury.

3. The third ground on which it is contended that the action can be maintained, is by the authority of the statutes which have been referred to. It is contended in defence, that the statute of 1856 was repealed by what has generally been denominated the Repealing Act, in the revision of 1857, and that the saving clause in § 2 of that Act, cannot be invoked in this case. We cannot doubt that the saving clause referred to would embrace this case, as all the coupons now in suit were possessed by the plaintiffs, who had paid a valuable consideration therefor.

Assuming, then, that these coupons are outstanding and available security against the city of Augusta, which is a matter of fact not yet settled, at the time of the passage of the statutes referred to, which then became the law of the State, by the terms thereof these coupons were embraced, and were made subject to their provisions. This is not denied in the defence, but it is insisted that, as this was after the scrip and the coupons were issued, the statute impaired the obligation of those contracts. By the scrip, the promise is to the holder, without the name of any payee expressed. The coupons are promises to pay, generally, no

name being expressly mentioned, and not to holder or bearer. The former contemplates the payment of the sum named therein, on presentment thereof, at the end of twenty years from date. The latter are referred to in the former, and to be paid as they severally become due; and contain an express promise to pay. The payment is not to be made on presentment of the scrip, but it is manifest that it is to be on the presentment of the coupons alone. It is therefore quite evident that it was the intention that the coupons would be detached from the scrip, and disposed of as occasion might demand, or would be presented by the holder of the scrip for payment, without the scrip itself. This is in accordance with the evidence introduced on both sides, and no controversy exists as to the fact. The intention of the city to pay some one is clear, otherwise the instrument is simply absurd. The payment was to be made to the holder of the scrip and the coupons, if the latter had not been assigned. No impediment existed to the recovery of the coupons, in the name of the holder of the scrip, whoever the latter might be. The transfer of the coupons without the scrip being in contemplation of the city, as we have seen, was somewhat similar to the assignment of a chose in action, not negotiable. This provision in no sense affected the substantial rights of the city. It provided for the institution of and the recovery in a suit, in the name of the holder of the coupon for a valuable consideration, thus providing that the owner should recover upon the promise actually made when the scrip is issued. The case is distinguishable from that of *Jackson* v. *Y. & C. R. R. Co.*, 48 Maine, 147, where the statute invoked in its support was passed pending the action, and the contract was a specialty, and the coupons were not payable to any one, or to bearer.

It is said, that the statute is in violation of the constitution, because it makes the coupons negotiable. The doctrine relating to the negotiability of promissory notes, under the statute of 3 and 4 of Anne, c. 9, is, that if they are negotiable, an action may be sustained in the name of the

indorsee, so that this right and negotiability are convertible terms. The statute of this State does not in terms provide that coupons detached from the scrip shall be negotiable, but that the assignee, having paid a valuable consideration for the assignment, may maintain assumpsit on the instrument in his own name, thus allowing the real owner of the paper to recover thereon, instead of the one whose interest has ceased. The suits are not, by the statute provision, increased in number or expense, but allow the holder, who has paid a valuable consideration for the paper, to recover thereon against the party who made the promise originally, with the expectation that it would be presented for payment, if there should be occasion, separate from the scrip, by one having no interest in the latter.

The statute evidently looks to the remedy alone, and does not impair the obligation of contracts existing in these instruments. Actions, in the name of the holder, under the provision, are quite analogous to the action which allows one to maintain the equitable suit, for money had and received by the defendant for the plaintiff's use, on the ground that the former has in his hands money which belongs to the latter, without any express promise to pay it to him.

But it is contended, in behalf of the city, that these statutes are inapplicable to this case, because they refer to coupons for the interest of *bonds* issued, &c., or where coupons for interest are issued with *bonds*, &c., and R. S. of 1841, c. 1 § 3, clause 1, are invoked in support of the position, and also c. 1, § 4, clause 1, in the revision of 1857, which is substantially the same. The rule is as follows, — "All words and phrases shall be construed according to the common and approved meaning of our language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to that peculiar meaning."

We think the construction contended for is too restricted to accord with the intention of the Legislature. The term bond has a great variety of significations, and in law it does

not necessarily import a seal, as the word is ordinarily used. Webster defines it to be an obligation, or deed, by which a man binds himself, his heirs, &c. The definition of the word "technical," which is, "pertaining to art or the arts," will not generally apply to the word bond. The same lexicographer adds to the foregoing meaning of the word, "a technical word is a word that belongs properly or exclusively to an art."

When the whole of § 1 of c. 248 of the statutes of 1856 is examined together, and § 34 of c. 51 of R. S. is read in connection with the next preceding section, it is very manifest that the construction insisted on cannot be adopted. It could not have been the design of the Legislature, in these provisions, to exclude every contract from their operation which had not upon it a seal. It is difficult to conceive of any reason for such an exclusion. And we think the plain meaning of the Legislature forbids it.

The conclusion is, that the third ground taken by the plaintiffs in support of the action is sustainable, provided the city was ever liable upon the scrip, and the coupons in question are now outstanding uncancelled evidence of indebtedness of the city in the hands of the plaintiffs.

Nonsuit taken off, and the action to stand for trial.

CUTTING, MAY and DAVIS, JJ. concurred.

GOODENOW, J., concurred in the result.

ELIAS MILLIKEN *& al. versus* SETH WHITEHOUSE *& al.*

The acceptance of negotiable paper for a debt, and giving a receipt in discharge thereof, are an extinguishment of the original liability, unless it appears that the parties did not so intend.

When the debt of a corporation is settled by its negotiable note, and that note, when due, is taken up by another note, and nothing appears to show the intention of the parties, the date of the second note must be treated as the time when the indebtedness of the corporation accrued, so far as relates to the liability of its stockholders.

A judgment against a corporation is binding upon the stockholders till reversed, and is conclusive upon them in a subsequent action against them, by the same plaintiff.

Section 18 of c. 76 of the Revised Statutes of 1840 was repealed by the Act of 1855 (c. 169, § 1); and *it seems* that by this repeal § 30 of the same chapter is rendered ineffectual.

Manufacturing corporations do not come within the provisions of c. 271 of the laws of 1856.

But c. 109 of the laws of 1844, (which is not repealed by the Act of 1856,) applies to them.

The liability of stockholders under the Act of 1844 is restricted, by the Act of 1856, to the amount of their stock.

By the second section of the "Repealing Act," in the Revised Statutes of 1857, liabilities which had accrued by force of previous statutes were preserved, and can still be enforced.

No amendment to a declaration can be allowed, which introduces a new cause of action.

A declaration against a stockholder for the debt of a corporation, containing only the allegations to bring the case within the provisions of c. 271 of the laws of 1856, cannot legally be amended, against the defendant's objections, so as to bring the case within c. 109 of the laws of 1844.

ON REPORT.

CASE against the defendants as stockholders in "The Mechanics' Association," a manufacturing corporation established by law, at Augusta, to recover a debt of that corporation.

The writ originally contained but one count, with allegations to bring the case within the provisions of c. 271 of the laws of 1856.

Under the general leave to amend, the plaintiffs filed two

additional counts, which are, in all respects, copies of the first count, except that in one of them is this additional averment, viz. :—

"And the plaintiffs further aver, that the said Mechanics' Association, heretofore, to wit, on the said 20th Dec., 1856, had not complied with the prohibitions and limitations imposed by law upon manufacturing corporations in this State, then and still in force, in respect to the debt aforesaid, but had then contracted debts, and have ever since been indebted to an amount exceeding the amount of their capital invested in real estate, buildings, machinery and other fixtures within the State of Maine, and exceeding, also, one-half of the amount of their capital stock paid in and remaining undivided."

And the other additional count contains the above averment, with the following additional words, viz. :—

"Whereby an action hath accrued to the plaintiffs, to have and recover of the defendants, stockholders, as aforesaid, the amount of said unsatisfied judgment."

At the trial the defendants' counsel objected to the above amendments, as not within the terms of a general leave to amend, and their legal admissibility was reserved for the determination of the law Court.

The facts proved by the evidence are stated in the opinion.

Williams & Cutler, for plaintiffs.

R. H. Vose, for defendants.

The opinion of the Court was drawn up by

TENNEY, C. J. — In the specifications of defence, it is denied that the defendants are stockholders in "The Mechanics' Association." Although this point is not surrendered by them, yet no argument is addressed to the Court in support of that denial; and on an examination of the records by the copies which have been furnished, no doubt is entertained that they held such a relation to the corporation.

The action is brought to recover of them, as such stock-

holders, their proportion of a judgment obtained againts the corporation by the plaintiffs, by virtue of the statutes of this State, which is the amount of their stock.

A question is presented, at what time the alleged indebtedness of the company must be regarded as having accrued. This question may be important with a view to determine what statutes of the State apply to the action. It appears that the consideration of the alleged indebtedness of the corporation was the delivery of certain sides of leather, on the 27th of March, 1856, for which a negotiable promissory note was given, payable on time; after this note matured, on Dec. 20, 1856, it was taken up by another negotiable promissory note of the association, purporting to be signed by its treasurer, payable with interest in six months from date. It is well settled, under the law of this State, that the acceptance of negotiable paper for a debt, and a receipt given in discharge thereof, are an extinguishment of the original liability of the debtor, unless the parties did not so intend it. There is no evidence or suggestion that it was not so in this case, and the contract declared on, in the writ in favor of the plaintiffs against "The Mechanics' Association," being the note dated December 20, 1856, that must be treated as the time when its indebtedness accrued, so far as it relates to the defendants' liability.

It is denied that Stephen Hawes, who signed the note as treasurer of the association, was in fact the treasurer, and that the corporation was liable thereon. The evidence shows that Hawes acted as the treasurer; and that it was alleged in the writ against the company, that by their promissory note of December 20, 1856, signed by Stephen Hawes, their treasurer, duly authorized therefor, for value received, promised, &c. In this action the company was defaulted, and the judgment, which is in the case, rendered against it. But it has been decided in this State, that the stockholders in a corporation like this are in privity therewith. *Merrill* v. *Suffolk Bank*, 31 Maine, 57; *Came* v. *Brigham*, 39 Maine, 35, and, as to such, the judgment is valid till reversed.

That such was the intention of the Legislature in R. S. of 1840, c. 76, § 19, is manifest from the provision, that the officer holding an execution against such a corporation, which he is unable to satisfy by property thereof, is authorized to levy the same upon the property of a stockholder, in the same manner as if it were against him individually.

By the R. S. of 1840, c. 76, § 18, in all corporations created by the Legislature after February 16, 1836, in case of a deficiency of attachable property, or estate of the corporation, the individual property of every stockholder thereof, shall be liable to be taken in execution to the amount of his stock, and no more, for the debt of the corporation. Then follows in this, and the succeeding section, the proceedings prescribed to carry into effect these provisions. Sect. 20 provides for a special action of the case, for the attainment of the same object.

By § 22, "when the officers or members of a corporation, or any of them, are liable for the debts of the corporation, or for any acts of such officers or members, respecting the business of the corporation, and, also, when any of the said officers or members are liable to contribute for money paid by any other or others of them, on account of any such debts or acts, the money due may be recovered by a bill in equity, or by an action at law, at the election of the party."

By § 30, stockholders of all corporations, excepting banking corporations and corporations for literary and benevolent purposes, created since March 19, 1831, shall be subject, as it regards debts hereafter to be contracted by such corporations, to all the liabilities imposed on such stockholders by the provisions of the 18th section of this chapter; provided that such liability shall not be incurred, excepting for such stock as they may have acquired since April 24, 1839.

By statute of 1844, c. 109, § 3, all companies referred to in that chapter are expressly prohibited from contracting debts exceeding at any one time the amount of the capital invested; and they are also prohibited from contracting debts to such an extent, that the indebtedness of such cor-

poration shall at any one time exceed one half of the amount of the capital stock paid in and remaining undivided. And a compliance on the part of such companies, with the prohibitions and limitations aforesaid, shall relieve the stockholders from all individual liability for the debts of their respective companies; but if the debts of such companies shall at any one time exceed either of the limitations specified, then the stockholders shall become liable, individually, for all the debts of their respective companies, &c.

By § 4, all such manufacturing corporations as shall observe the prohibitions, &c., as specified in the third section, shall be exempted from the operation of §§ 18 and 30, in R. S., c. 76.

By the statute of 1855, c. 169, § 1, the sixth line of § 18, of c. 76, R. S., making the property of stockholders liable to be taken on execution against the corporation of which they were members, and §§ 19 and 20, were repealed, and other provisions substituted in the same chapter; but the Act was not to apply to any suits or actions pending at the time of its enactment.

The statute of 1856, c. 271, which went into operation on May 11, 1856, by § 6, repealed §§ 19 and 20, and also the Act of 1855, c. 169, saving all suits and processes, &c. It is provided in the statute of 1856, c. 271, § 1, that the stockholders of all corporations created by the Legislature, after February 16, 1836, excepting banking corporations, unless it is otherwise specified in their charter, or by any general law of the State, shall be liable for the debts of the corporation, contracted during the ownership of such stock, in case of a deficiency of attachable property of the corporation, to the amount of their stock and no more.

By § 2, at any time within six months of the return of an execution against a corporation, unsatisfied in whole or in part, for want of attachable property of the corporation, the plaintiff in such execution may demand of any stockholder of such corporation, to disclose and show the officer having the execution, attachable property of such corporation, &c.

Section 3 provides that, after demand as aforesaid, the execution creditor may have an action of the case against such stockholder to recover of him individually the amount of execution and costs, or the deficiency thereof, not exceeding the amount for which said stockholder is liable, by the first section of the same chapter.

What construction is to be put upon the language in the first section of c. 271 of the statute of 1856, "unless it is otherwise specified in their charter, or by any general law of the State?" Does it mean, that if by charter or general law they are *liable*, and also liable for a greater amount than that of their stock, they are to continue liable *to that extent?* or does it mean, if liable by charter or general law, a liability is to continue, but that liability, by the new provision, is limited to the amount of the stock of the stockholders, severally? When we consider, that, by § 3 of c. 109 of statute of 1844, stockholders are exempt from all liability where the corporation shall observe the prohibitions and keep within the limitations prescribed in the preceding section, we think the liability was intended to be restricted to the amount of the stock. But in this case that question is immaterial, in any event, as the plaintiffs make no claim beyond the defendants' stock.

Section 22 of c. 76, R. S., was unrepealed and unaffected by any statute passed anterior to that of 1856, c. 271. Whether it was intended by the Legislature that the provisions of the second and third sections should be substituted for this, and thereby operate as a repeal thereof, or whether § 22 is to remain in force, and the subsequent provisions to be treated as a cumulative remedy, may not be perfectly clear, but it is not necessary that we should determine that question for the disposition of this case.

Section 30 of c. 76, R. S., is not repealed in terms, but stockholders, designed originally to be affected by it, were made subject to all the liabilities imposed on them by the provisions of § 18 of the same chapter. The section last named being repealed, with an exception not material to the present inquiry, the basis of § 30 seems to be taken away.

Section 3 of c. 109 of statute of 1844 had not been repealed before the revision of the statutes in 1857. It stood in force till that time, even if modified, as has been suggested, restricting liability to the amount of the stock of the several stockholders. So that the provisions of this section may have an important influence upon the case before us, according as the condition of the Mechanics' Association, touching their indebtedness, as named in that section, make the defendants liable, or render them wholly exempt from liability under the statutes of 1856, c. 271, or any unrepealed provisions of previous statutes.

Most if not all the provisions of the statutes upon the subject now under consideration, existing and not repealed at the time of the revision of 1857 took effect, have been substantially reënacted in the latter code, though not all incorporated into the same chapter. For example, the provisions found in the statute of 1856, c. 271, are found in the statutes revised in 1857, in c. 46. Those of c. 109, of statute 1844, so far as they are reënacted, are in c. 48 of the new code.

The statutes which we have treated as having an influence upon the questions which we have considered, and which were in force at the time the present Revised Statutes went into operation, were repealed by the general repealing Act of April 17, 1857, with the saving clause in § 2 of that Act, providing that the Acts declared to be repealed shall 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." It is insisted, for the defendants, that "rights," as used in the foregoing provision, are to be treated as absolute rights, and not liabilities. Such restricted view cannot be admitted. We cannot believe, when statutes, which were in full force up to the close of the year 1857, and were reënacted in form with such provisions incorporated as had long existed upon the subject now under consideration, that it was intended

that, the next day, all the security before provided, by which creditors could recover their debts against corporations, of individual stockholders therein, should be struck down and annulled. The language used by SHEPLEY, Justice, in *Treat* v. *Strickland*, 23 Maine, 234, will well apply:—"When the language is considered in connection with that of the forty-ninth section of chapter 145, and with the recollection that the general purpose of the revision was to embody, in a more systematic form, the existing laws, with certain modifications and new provisions, without destroying existing rights; there can be little doubt that it was the intention of the Legislature to preserve, not only actions which, technically and properly speaking, had accrued or been founded on the statute, but those, also, which were preserved and secured to a party by the repealed Act."

The conclusion is, that this action is to be determined by the statutes which were in force at the time of the date of the note given by "the Mechanics' Association" to the plaintiffs.

It is in evidence, that the association owned no real estate or personal property, after June or July, 1856. The debts of the corporation were some thousands of dollars in March and June, 1856, and the note in question was outstanding at a time when it had no capital stock paid in and remaining undivided. A liability of the stockholders had accrued by reason of a failure in the company to comply with the prohibitions and limitations specified in the statute of 1844, c. 109, § 3.

The evidence shows that the steps required by the provisions of the statute of 1856, c. 271, §§ 2 and 3, have been complied with, and the plaintiffs are entitled to recover of the defendants the amount of their stock, which is one share, it appearing by legal proof that there was an entire deficiency of attachable property of the corporation, provided there is a proper process for that purpose.

The writ, as first made and entered in Court, was somewhat defective in not alleging the condition of the corpora-

tion, in relation to their property and indebtedness. Under leave of Court amendments have been made, which cure this defect, but, it is insisted, that they were in law inadmissible, which is a question now to be considered.

"No process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes, which by law are amendable, when the person and cause can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the Court orders." It is a general rule, that amendments may be granted in the discretion of the Court, when they do not present a different cause of action.

In framing the original count in the writ in the action before us, it is quite manifest that § 3 of c. 109 of the statutes of 1844, escaped the pleader's attention. This is not a cause of surprise, when we find that the individual liability of stockholders, in certain classes of corporations, had been the subject of so many enactments and repeals of statute provisions. In looking at the first three sections of the statute of 1856, chapter 271, there seemed a mode provided by which this action could be maintained, on proof of all the facts alleged in the writ. But § 3 of c. 109 of the statutes of 1844 was unrepealed, as we have seen, and that required proof of certain facts which were indispensable, and, if indispensable in proof, their allegation in the writ were equally so. To make a stockholder liable, it was not sufficient to show that attachable property of the corporation, in which he was a stockholder, could not be found after such steps had been taken for the purpose as were alleged in the writ, as it first stood, but it was necessary for his success, that the plaintiffs should allege and prove that the corporation had contracted debts exceeding at one time the amount of their capital invested in real estate, buildings and machinery, and other fixtures in the State of Maine, and they had contracted debts to such an extent that the indebtedness of the corporation at one time exceeded one half the amount of

their capital stock paid in and remaining undivided. These facts were a substantial part of the *gravamen* of the action, and were such a part of the cause thereof, that being supplied by the amendments, the cause of action was not the same as before.

The cause of action depending upon a statute, is not to be tested by the object or result intended to be secured, as in this case a judgment against a stockholder individually, for the purpose thereby of obtaining satisfaction, wholly, or in part, of one against the corporation, of which he is, or has been a member, but by the facts required to be substantiated by the statute, to make the statute invoked applicable to his case. If one should bring his action under a statute which had been unconditionally and absolutely repealed, and another substituted therefor, essentially different, and requiring different facts to be proved to make it effectual, an amendment could not be allowed changing the declaration so that the action should conform to the new statute instead of the old, although the ultimate object of the plaintiff might be to obtain a judgment, which would cover the injury for which he was seeking redress.

As the case was, before the amendments, it could not be rightly understood. The original count contained nothing which would or could lead to the conclusion, or even the suspicion, that the facts made essential to the maintenance of the action, required by § 3, c. 109, of the statute of 1844, were any part of the cause of the action, and it does not fall within the provision of the statute allowing amendments in the discretion of the Court.

The amendments were improperly allowed, and they constitute no part of the plaintiffs' writ and declaration, which being insufficient without them, according to the agreement of the parties, *the plaintiffs must become nonsuit.*

RICE, CUTTING, GOODENOW and DAVIS, JJ., concurred.

Catharine Harriman *versus* Mary Gray.

A release of dower to a stranger to the title does not extinguish the right of dower.

If the releasee afterwards acquires the title, the release operates to bar the dower as to him, by way of estoppel.

When a person quitclaims his title in land, by a deed containing no covenants, and closing in these words: — "So that neither I, the said Joab Harriman nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will, by any way or means, have, claim or demand any right or title to the aforesaid premises, or their appurtenances, or any part or parcel thereof forever," a title subsequently acquired by him does not enure to the benefit of his grantee.

A release of dower to a person who has conveyed the land, by *such a deed*, creates no estoppel in favor of any other person than the releasee.

On Report.

Action of Dower. The marriage, the seizin of plaintiff's husband, his death, and the demand, were admitted.

The tenant relied upon a release of dower; the facts in relation to which are stated in the opinion.

J. Baker, for the plaintiff.

S. Titcomb, for the tenant.

The opinion of the Court was drawn up by

Appleton, J. — On the 23d of October, 1823, the plaintiff's husband conveyed the premises in which dower is demanded, to Joab Harriman, by a deed to which she was not a party.

On the 19th January, 1827, Joab Harriman quitclaimed the same to James Harriman by deed having no covenants and closing in these words: — "So that neither I, the said Joab Harriman nor my heirs, or any other person or persons claiming from, or under me or them, or in the name, right or stead of me or them, shall or will, by any way or means, have, claim, or demand any right or title to the afore-

said premises, or their appurtenances, or any part or parcel thereof forever."

From James Harriman the title passed through various mesne conveyances to the tenant.

Upon the case as thus presented, the plaintiff's right to dower would seem to be unquestioned. The tenant claims to bar the plaintiff's right to dower by reason of her release of the same to Joab Harriman, by deed dated April 2, 1838. But, long before this, the title to the premises in question had been conveyed to those under whom the tenants claim. The releasee had ceased to have any interest therein. A release of dower to a stranger constitutes no defence. *Pixley* v. *Bennett*, 11 Mass., 298. "In dower, the tenant pleads a release from the demandant to such an one, tenant *in possessione tenementor. prædict. existent.*, and because not said he was *tenens liberi tenementi*, it was holden no plea; and adjudged for the demandant; for a release of dower to a tenant for years, or at will, can be no bar of dower, because she cannot demand it against them." Cro. Jac., 151.

Neither is the demandant to be estopped by this conveyance. Estoppels, to be binding, must be reciprocal. As between the demandant and Joab Harriman, she would be estopped. But the release to Joab does not enure to his grantees, and, not enuring by estoppel to their benefit, they cannot set it up as a bar. It has been repeatedly settled, that a grantee is not estopped from setting up a subsequent title, by language such as is found in the deed of Joab to James Harriman. Nor do the subsequently acquired rights of Joab enure to the use of his grantee. *Pike* v. *Galvin*, 29 Maine, 183. *Case to stand for trial.*

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

HARRISON CROSBY *versus* JONATHAN B. BESSEY *& al.*

Where a tanner has thrown his ground bark into a stream for more than twenty years, he does not thereby acquire a right by prescription to do so, to the injury of the owner of land on the same stream below, on which the natural action of the water deposits the bark, unless it appears that the bark has been deposited on the same land, and the owner thereof annually injured thereby, for the whole term of twenty years.

Although the tanner and those under whom he claims have thrown their ground bark into the stream for more than twenty years, yet if the owner of the land below has not been thereby annually damaged until within the last six years, this is not sufficient to establish a right by prescription; and the owner of the land injured may maintain an action for damages.

Although the land below has only been injured by the deposit of bark, since the removal of a dam above and the formation of one below, without the agency of either of the parties, yet, *it seems*, the tanner is responsible for the damages to the land occasioned by the deposit after those changes took place.

ACTION OF THE CASE against the defendant for throwing ground bark from his tannery, in Albion, into the stream on which the tannery is situated, which bark, it is alleged, was carried down by the stream, and deposited on the plaintiff's land below, to the damage of the plaintiff. Plea, the general issue, with a brief statement, claiming a right in the defendant to throw bark from his tannery into the stream, and denying that he had committed any unlawful act.

MAY, J., presiding, instructed the jury that, if the defendant had the right to throw bark ground by him into the stream, and did so at a reasonable time and in a reasonable manner, although it might be deposited by the water on the plaintiff's land, and he be injured thereby, the action could not be maintained; but, if he had no right so to use the stream, and did so use it, he would be liable for the natural and direct consequences thereof.

He further instructed them, that the right to subject the plaintiff's land to such annual deposits of ground bark might undoubtedly be acquired by prescription; but that the defendant, in order to establish such a right, must satisfy them that he, and those under whom he claimed, had so used the

stream for twenty years before the commencement of this suit, and that damage to the plaintiff's land had annually been done thereby.

He further instructed them, at the plaintiff's request, that, unless the defendant, or those under whom he claimed, had acquired by grant or prescription the right to deposit his ground bark in the stream, he had no right so to deposit it, as that, by the natural action of the water, it would be carried on to the plaintiff's land below, to his damage; and if he did thus deposit it, without having acquired such right, and it was carried on to the plaintiff's land to his damage, the plaintiff was entitled to recover in this action.

The defendant's counsel requested the Judge to instruct the jury, that if the defendant, and those under whom he claimed, had, for more than twenty consecutive years prior to the commencement of this action, used the stream for floating the bark away from their tannery, they had acquired the right so to use it, to the same extent to which it had been so used, and that this action could not be maintained.

2. That if the defendant, and those under whom he claimed, had, for twenty consecutive years, thrown the bark from their tannery into the stream, they thereby acquired a right so to put it in, to the same extent, and the plaintiff, whose land is below, must take the stream, subject to such adverse right.

3. That if, by any change in the course or condition of said stream, not caused or occasioned by any act of the plaintiff, or those under whom he claimed, the quantity of bark, by said stream deposited upon the plaintiff's land, is increased, the defendant is not liable therefor, provided he deposited no more bark in the stream than he had been accustomed to do for more than twenty years prior to the commencement of this action.

4. That if, by reason of the plaintiff's land having been recently cleared up and improved, the damage done by the bark is greater than was occasioned thereby prior to such clearing and improvement, the defendant is not liable, un-

less he deposited in said stream a greater quantity of bark than had been deposited therein yearly for twenty consecutive years, by those under whom he claimed, or had used the stream in a manner different from that in which it had been used by them during that time.

5. That if any bark had, every year for more than twenty years prior to any complaint made, been carried and left by said stream upon the plaintiff's land, some damage was to be presumed to have been done thereby.

6. That if the defendant, and those under whom he claims, had, for more than twenty years before any complaint was made by the plaintiff, exclusively enjoyed the stream described in plaintiff's writ, for putting their bark therein and floating it away from their tannery, it afforded a conclusive presumption of his right so to enjoy it.

7. That twenty years exclusive enjoyment of water in any particular manner afforded a conclusive presumption of right in the party so enjoying it.

8. The defendant also requested the Judge to instruct the jury, that if the tan put into the stream as aforesaid, by the occupants of the tannery, has, for more than twenty consecutive years, been carried by the water and deposited in greater or less quantities upon the lot of land now owned by the plaintiff, and described in the writ, the occupants of the tannery would have the right so to deposit the tan in said stream; and if by reason of a dam or the removal of a jam of logs, by other persons, a greater quantity of tan had been thrown upon the plaintiff's land for the last four or five years than formerly, without any agency of said occupants, their right so to deposit the said tan would not be defeated, —which was given by the Judge, with the variation that the words "doing damage annually," were by him inserted after the word "writ."

Each and all of said requested instructions the Judge refused to give, any further than appears from the instructions herein stated to have been given.

There was evidence tending to prove that formerly, for

many years, there was a jam of logs and drift stuff in said stream and against the plaintiff's land, which prevented the bark, to a great extent, from being carried and deposited by the water upon plaintiff's land, and that the jam was burned in the fall of 1855. Also that a dam lower down the stream had been raised within the last six years, so as to back the water upon the plaintiff's land in freshets, and that the bark only came on in freshets.

Several questions were put to the jury in writing by the Judge, to be answered by them with their verdict. Their answers to these questions are stated in the opinion of the Court.

There was also evidence tending to prove that the plaintiff's land, upon which the bark is alleged to be deposited, was cleared up twelve or fourteen years ago.

The verdict was for the plaintiff, and the defendant excepted to the instructions and refusals to instruct.

Bradbury, Morrill & Meserve, in support of the exceptions. [No minutes of their agument have been received by the Reporter.]

A. Libbey, for the plaintiff.

1. The instructions given state the law correctly.

2. The requested instructions not given, were properly refused.

3. If there was error in the instructions given, or in refusing to give those requested, the special findings of the jury, in answer to questions put by the Judge, remove all cause of exception by the defendant, except as to the 1st, 2d, 6th and 7th requests. *Gordon* v. *Wilkins*, 20 Maine, 134; *Dyer* v. *Green*, 23 Maine, 464. These requests were properly refused. They are all based upon the proposition, that the defendant had acquired the right to have his bark deposited on the plaintiff's land by the natural action of the water of the stream, by reason of having thrown it into the stream for more than twenty years, without depositing any part of it on the plaintiff's land. Such acts were not *ad-*

verse to the plaintiff's rights, gave him no cause of action, and the defendant acquired no prescriptive rights as against the plaintiff by so doing. *Donnell* v. *Clark*, 19 Maine, 174.

The opinion of the Court was drawn up by

GOODENOW, J.—This is an action on the case, to recover damages of the defendant, for throwing the ground bark, from his tannery, into the stream upon which said tannery is situated, the same bark being carried by the current down the stream and deposited on the plaintiff's land below, to his injury.

The defendant, by his brief statement, claims a right to throw bark from his tannery into said stream, by prescription.

The verdict was for the plaintiff. And the jury found specially, in answer to questions propounded to them by the Court, that the defendant, and those under whom he claimed, had been accustomed for a period of twenty years successively, before the bringing of the suit, to put or turn the refuse ground bark made at the tannery, now owned and occupied by him, or some part of it, into said stream. And they also found, that the same bark *had not* annually been deposited upon the plaintiff's land below, during the said twenty years; and that such deposits of bark had been made on the plaintiff's land only about six years. The plaintiff could have no right of action until he was injured. There had been no such adverse and long continued occupation of the plaintiff's land by the defendant, as a place of deposit for his bark, as to create a presumption of a grant.

We are not able to perceive any error in the instructions which were given, or any necessity for those which were requested, in addition to those given, and refused.

Exceptions overruled.—Judgment on the verdict.

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

CHARLES E. GRAY *versus* GEORGE BROWN *& als.*

Where a promissory note embraced usurious interest, and, after suit brought, the holder, without the knowledge of the maker, and without actually receiving anything, indorsed a sum not sufficient to reduce it to the amount of the actual principal and legal interest to that time, the note is still usurious, and subject to all the provisions of R. S. of 1857, c. 45.

ASSUMPSIT on a promissory note given by the defendants, dated Nov. 12, 1858, for one hundred dollars and interest, payable in eight months.

The defendants pleaded the general issue, but relied on usury in the contract declared on for defence.

It was admitted that the sum loaned to them by the plaintiff was ninety-four dollars, which was the sole consideration for the note; that in July, 1860, the plaintiff indorsed on the note, "received six dollars"; but that neither of the defendants paid anything, or knew of said indorsement until afterwards.

The facts were agreed upon, and submitted to the law Court to render such judgment as the case required.

R. Foster, for the plaintiff, cited *Wing* v. *Dunn*, 24 Maine, 128; *Cummings* v. *Blake*, 29 Maine, 105; *Hankerson* v. *Emery*, 37 Maine, 16; *Lumberman's Bank* v. *Bruce*, 41 Maine, 505; *Knight* v. *Frank*, 48 Maine, 320.

S. Heath, for the defendants.

The plaintiff, having admitted that the note was usurious, can recover only $94 and legal interest, without costs, and must pay the defendants' costs, unless something has occurred since the suit was commenced to change the result.

In July, 1860, the plaintiff indorsed six dollars on the note, without the knowledge of the defendants, and without their having paid anything. But, under our present statute, an indorsement of the full amount of excessive interest on a note tainted with usury, cannot, after suit brought, avail the plaintiff against the penalty for instituting such action.

Our usury law has been essentially changed. In 1820, a usurious contract was void. In 1841, the party reserving or taking usurious interest could recover no costs, but must pay costs to the other party, provided the damages were reduced by the *oath* of the defendant by reason of such usurious interest. In 1846, "provided the damages are reduced by proof of such usurious interest." In 1857, "and in *such action*, if the damages are reduced by proof of such excessive interest by the oath of the party or *otherwise*," &c.

The decisions under the usury law have been principally made under the law of 1841 and 1846. *Cummings* v. *Blake*, 29 Maine, 105, was made when the statute required the damages to be reduced by the *oath* of the party. *Hankerson* v. *Emery*, 37 Maine, 16, is wholly unlike in its facts to the present case, and was decided under the law of 1846. Neither of these cases throws any light upon the true construction of the last statute.

After sundry decisions, the Legislature saw fit to change the law in many particulars, as will be seen by comparing the earlier and later statutes.

Chapter 45, § 2, R. S. reads,—"In any action brought on any contract whatever, in which there is *directly* or *indirectly* taken or *reserved* a rate of interest exceeding that established in section 1, (being six per cent.,) the defendant may, under the general issue, prove such excessive interest, and it shall be deducted," &c. And the concluding portion of the same section, reads thus,—"And, in *any such action*," that is, one brought on a contract thus tainted, (the plaintiff brought suit to recover the whole of a note admitted to be usurious,) "if the damages are reduced by proof of such excessive interest by the oath of the party or *otherwise*," &c.

The word "*otherwise*," has a wide meaning, whether in the statute it refers to other modes of proof than the oath of the party, or to the reduction of damages in any manner in *such an action*.

If it refers to other kinds of proof merely, the admission

of the fact of usury by the *party*, or of a fact from which the Court must necessarily infer usury, is the very highest and most satisfactory kind of proof; and this proof, too, is furnished at the trial of the cause. If the term "otherwise" refers to a reduction of the damages, below what the plaintiff demanded in such tainted action, then of course an indorsement of the excess will not save the plaintiff from the statute penalty.

It appears to have been the design of the Legislature, in the latest statute, to make usury a losing business, and that whenever a party should resort to the *law* to recover what the law said he should not have, he should not be able to resort to any shifts by indorsement of the amount reserved, to escape the legal penalty. The term "otherwise" effectually closes the door against all such attempts to escape.

But if the Court should be of opinion that a party may purge the tainted contract, after a suit upon it is instituted, by an indorsement of the excess, still, in this case, the plaintiff has failed to make an indorsement equal to the excess. The case finds the indorsement of $6 was not made until July, 1860. Although no date is affixed to the indorsement on the back of the note, the facts agreed have fixed the time when it was actually made. If this note had been pure in its inception, and upon it was found an indorsement of a certain sum without date, without any evidence as to the time of payment, it would be deducted as of the date of the note; but, if evidence was introduced that it was actually made at a subsequent period, the holder would be entited to recover the whole sum and interest to the time of the actual payment, and the balance after deducting the sum indorsed. And in this case, if it is to be determined on the principle invoked by the plaintiff, that the damages are reduced by the voluntary indorsement of the plaintiff, still, the indorsement is not large enough, as he sued for the entire note, and did not remit the $6, until the note had been running twenty months. The indorsement is to be deducted at the time it was actually made. So that in any view that

may be taken of the law, the diminution of the amount of the note by the indorsement is not equal to the excess of interest reserved therein. In any event, the judgment must be for a less sum than *sued for*, the defence being usury alone, which brings it within the provisions of the statute and makes the plaintiff liable to pay costs.

In a case under a prior statute, the Court say:—"The provision of the statute was intended as a penalty to prevent the reserving and taking usurious interest, and is not to be evaded." *Warren* v. *Coombs*, 20 Maine, 144.

Drummond, in reply, contended that the indorsement having been made without date, it is to be construed as made at the date of the note. The actual time of payment may be shown, but here was no payment. The indorsement was evidently made to show the true consideration for the note.

The plaintiff, after the indorsement, claims only $94, and legal interest thereon. It is admitted that he is to recover this, which is all he claims. How, then, are the damages reduced by proof?

The time of the indorsement is of no consequence. The date of the payment controls. When was the payment made, which this indorsement is to acknowledge? It was at the date of the note, and must be so allowed.

The opinion of the Court was drawn up by

TENNEY, C. J.—The note in suit, for the sum of one hundred dollars, bearing interest from date, was given for the sole consideration of the loan of the sum of ninety-four dollars, for the term of eight months. And the case would fall within the prohibition of R. S., c. 45, provided no indorsement had been made. And the question is, whether the indorsement of the sum of six dollars, without date, upon the note, made by the plaintiff in July, 1860, neither of the defendants having made any payment, or having any information of the indorsement for several weeks afterwards, will take the case out of the provisions of the statute.

By the statute of 1846, c. 192, it was provided that in any suit brought, where more than legal interest shall be reserved or taken, the party so reserving and taking shall recover no costs, but shall pay costs to the defendant, provided the damage shall be reduced by proof of such usurious interest. A construction was given to this statute in the case of *Hankerson* v. *Emery & als.*, 37 Maine, 16, and it was held therein, that the proof of usurious interest, was that which should be derived from the evidence adduced at the trial, and not that afforded by an indorsement before the institution of the suit. The indorsement, before the institution of the suit, was a fact in that case, and we see no reason why it should have any effect upon the decision, more than it would have if made at any time between the delivery of the note and the trial of an action thereon; and it was clearly not designed to be any ground for the result.

The R. S. of 1857, c. 45, § 2, provide that, in any such action, if the damages are reduced by proof of such excessive interest, by the oath of the party or otherwise, the plaintiff shall recover no costs, &c. This statute, so far as it relates to costs in actions referred to therein, is substantially the same as that of 1846, upon the same subject. In the former, the evidence of usury was not restricted at all; in the latter, it is the same, but one kind of evidence which is admissible is specified, and other kinds embraced in general terms.

If there had been no evidence or agreement touching the time when the indorsement was made upon the note in suit, the presumption would be that it was done at the time the note was given. The date of a writ, which was made on the Sabbath, according to the date, has been upheld, on proof that it was not made on that day. *Trafton* v. *Rogers*, 13 Maine, 315. So the date of a writ is not conclusive evidence of the time when it was sued out, so as to affect a plea of the statute of limitations. *Johnson* v. *Farwell*, 7 Maine, 370. The presumption of law, that a negotiable promissory note was indorsed and tranferred by the

payee on the day of its date, there being no date to the indorsement, may be rebutted by proof that it remained the property of the payee till a later period. *Hutchinson* v. *Moody*, 18 Maine, 393. The same principles will apply, certainly with equal force, to a payment indorsed on a note, with an erroneous date, or without any date; and the time of payment may be proved.

The indorsement in this case must be treated as indicative of a relinquishment of the sum indorsed at the time it was placed upon the note, and in this respect, it does not differ from a payment. The presumption that it was indorsed at the time the note was executed, can be rebutted in one case as in the other, by proof of the time when it was made. In this case it is admitted that it was made long afterwards.

If the indorsement had been of a sum so large that the amount of the note would have been no more at the time it was made than the sum of ninety-four dollars, and the interest thereon to that time, the case would fall within the principle of the case of *Hankerson* v. *Emery & als.*, before cited. But the interest cast upon this note, according to the well settled rule of this Court, will exceed the amount of the sum of ninety-four dollars and interest thereon. Judgment will be for the plaintiff for the amount of the sum of ninety-four dollars, and interest thereon from the date of the note to the time of judgment, without costs, but he shall pay costs to the defendants.

Rice, Goodenow, May, Davis and Kent, JJ., concurred.

INHABITANTS OF CLINTON, *in review*, *versus* INHABITANTS OF BENTON.

Where an Act has been passed dividing a town, incorporating a part of it into a new town, and providing for the proportional support of the paupers then chargeable, it does not affect the settlement of persons afterwards becoming chargeable, but all questions relating to the settlement of the latter must be determined by the general law.

If, in case of such a division, the two towns, by agreement, apportion the paupers by name between them, and support them accordingly, this does not affect the settlement of the paupers, although the contract may be binding.

If one of such paupers, who has gained his settlement in the territory not embraced in the new town, is, by the apportionment, assigned to said new town for support, not only does his legal settlement remain in the old town, but his children born after the apportionment have their settlement there also, until he or they acquire a new one.

Overseers of towns bound by law to relieve persons in distress may do it in such manner as they deem best, acting reasonably and in good faith, by contracting for their board or otherwise.

Towns called upon to supply paupers are entitled to the avails of their industry, and are only required to contribute when that industry and the means of the paupers fail to afford a comfortable support.

Where one town was by agreement bound to support the pauper and his wife, and the settlement of his children was in another, the latter may be held to pay for supplies furnished for the children, although the father, by his industry, is able to support himself and wife, provided he can do no more.

THE inhabitants of Benton brought an action of ASSUMPSIT, against the inhabitants of Clinton, for supplies to the amount of $32,16 cents, furnished to four minor children of David Goodale, alleged to have their legal settlement in Benton. In this action, judgment was given for the plaintiffs. The defendant town petitions for a review.

The following facts are agreed upon:—

In March, 1842, the town of Clinton was divided, and the southern portion incorporated into a new town by the name of Sebasticook, since changed to Benton. By the Act of division, § 3, it was provided, that the town of Sebasticook "shall be holden to pay their proportion for the support of all paupers *actually chargeable upon the town of Clin-*

ton, at the time of the passage of this Act, to be ascertained as in the foregoing section." The section referred to provides, that all taxes assessed, which remained unpaid, shall be collected and paid into the treasuries of said towns of Clinton and Sebasticook, "in the proportions in which said assessments were made on polls and estates pertaining to said towns respectively; and all debts due from said town of Clinton, shall be paid by said towns in said proportions, and all funds, and all personal and real property, belonging to said town of Clinton, shall be owned and divided between said towns in the same proportions, the same to be ascertained by the last valuation of the town of Clinton."

In compliance with this provision, the two towns agreed to a division of all the paupers actually chargeable upon the town of Clinton at the time of the passage of said Act, and each town took its proportion of said paupers. In said division, made by an authorized committee from each town, amongst others, David Goodale, wife, and four children, being all the children Goodale then had, were assigned to Sebasticook, now Benton, which town has furnished Goodale's family, as paupers, with more or less supplies every year since, up to the time the cause of this action accrued. Goodale had gained a settlement in the town of Clinton, by living on that portion of its territory which remained Clinton, never having lived on the portion included in Sebasticook, prior to the Act.

The four children for the expense of whose support this action was brought, were born after the above mentioned division of paupers, and Goodale's family, at the time the supplies were furnished, consisted of himself, wife and these four children. It was agreed between him and the overseers of Benton, that he should receive two dollars a week for the support of these children, he stating that, in such case, he could and would support himself and wife.

If the Court should be of opinion that the original defendants are chargeable, the amount of their liability is agreed upon as the sum above stated; and the Court may

draw such inferences as a jury might, and enter such judgment as the law and facts require.

J. W. North, for the petitioners in review, argued that the report of the joint committees of the two towns, accepted by the towns themselves, determined the settlement of the several paupers named in the report. The children follow the settlement of their father. *Shrewsbury* v. *Boylston*, 1 Pick., 105; *Westborough* v. *Franklin*, 15 Mass., 254; *West Boylston* v. *Boylston*, 15 Mass., 261. It was so understood by the towns, and Benton supported the whole family for 12 or 15 years accordingly.

If the town of Benton can recover for the supplies furnished to the four children, they cannot recover for the whole amount furnished to the family, as the father and mother were to be supported by Benton. In that case, they should recover not more than a proportionable part of the amount sued for.

C. Hinds, for the defendants in review.

The settlement of Goodale was in the present town of Clinton when the Act of division was passed. The Act provided for the paupers then in the town to be divided proportionally, and this was done. It made no provision for determining the settlement of paupers, nor as to the support of prospective paupers.

It was expressly provided, in the report of the committee who apportioned the paupers, that "any individual connected with the paupers" so apportioned "shall not be affected by this assignment, but shall remain as though this assignment were not made."

Goodale's settlement having been in Clinton as now bounded, at the time of the division, remains so still, he having acquired no new one since. The town of Benton receiving and supporting Goodale and his then family, pursuant to the appointment made, was a mere matter of contract, and did not affect their settlement. *West Boylston* v. *Boylston*, 15 Mass., 261; *Brewster* v. *Harwich*, 4 Mass., 278. No con-

tract, however binding, as to the support of paupers, can transfer their legal settlement. *Westborough* v. *Franklin*, 15 Mass., 254.

The children of Goodale, born since the division of the town, were not provided for in the apportionment of paupers made at that time. Being minors, they have acquired no settlement of their own; and, their father having acquired no new settlement since that time, they must follow the settlement he then had. *Brewer* v. *East Machias*, 27 Maine, 489.

The town had a right to contract for the support of persons in distress belonging to another town, although the contractor was their father, he not being of sufficient ability to support them, and may recover for the supplies furnished, though the recovery be for the benefit of the contractor. *Calais* v. *Marshfield*, 30 Maine, 511.

The original plaintiffs should recover for the full amount of the supplies furnished, unless it is considered that, when Goodale is not able to support the children, the town of Benton should support him and his wife as paupers, although he may be able to support himself and wife without the children. In that case, Clinton should be held to pay for that proportion of the supplies consumed by the children. *Hampden* v. *Bangor*, 41 Maine, 484.

The opinion of the Court was drawn up by

RICE, J.—Chapter 32 of R. S. of 1841, § 1, clause 4, makes general provision for the settlement of paupers in case of division of towns, or the incorporation of new towns from part or parts of one or more old towns.

The Act incorporating the town of Sebasticook modified the general statute so far as the support of the paupers then actually chargeable on the town of Clinton was concerned, by providing that each town should contribute to the support of such paupers in the proportion to their polls and estates, as ascertained at the valuation of the town of Clinton then last taken.

By a contract entered into between the authorized agents of the two towns, dated April 8, 1842, the future support of the existing paupers, for which they were jointly liable, was provided for by a division of the persons then chargeable, and an assignment thereof to the respective towns. By this arrangement, David Goodale, with the family he then had, was to be supported, or provided for, by the town of Sebasticook, and Goodale has been a recognized pauper of the town of Sebasticook, from that time to the present, having received supplies as a pauper every year. His original settlement, however, had been gained in that part of Clinton which was not included in the new town. The four children, whose settlement is now the subject of contest, have been born since the incorporation of Sebasticook, and since the date of the contract between the towns already referred to.

The Act incorporating Sebasticook, so far as it modified the general statute in relation to paupers, and the contract between the towns, refers only and in terms to paupers actually chargeable upon the town of Clinton at the time of the passage of the Act of division. All other questions of settlement must be determined by the general law. *West Boylston* v. *Boylston*, 15 Mass., 261.

It appearing that the legal settlement of David Goodale was in Clinton, and there being no evidence that he had obtained a settlement elsewhere, he having been supported by Sebasticook only by virtue of the contract of April 8, 1842, his minor children, born since that time, obtained a derivative settlement from him in the town of Clinton.

Overseers are to relieve persons destitute, found in their towns and having no settlement therein. R. S., c. 24, § 24. To authorize such relief, the persons relieved must be destitute; and the relief furnished must also be reasonable and proper. The statute does not prescribe the manner in which this relief shall be administered, whether personally by the overseers, or by contract with other parties. This must be left, in the first instance, to the sound discretion of the

overseers, who are bound to act reasonably and in good faith.

It was the duty of Goodale to support not only himself and wife, but his minor children also, if of sufficient ability. If, however, he was unable to support his minor children, they not being emancipated, and they became chargeable, he thereby became a pauper. *Garland* v. *Dover*, 19 Maine, 441.

Independent of the contract, the whole family would have been chargeable upon the town of Clinton, Sebasticook (now Benton) being liable, under the Act, to contribute its proportion, if anything, to the support of Goodale and his wife. Under the contract, the minor children, only, are chargeable to Clinton, and to their support Benton is not bound to contribute.

Towns are entitled to the avails of the industry of their paupers, and are required to contribute only when that industry or other means of the pauper fail to afford a comfortable support. Sebasticook was, therefore, entitled to the avails of the industry of Goodale and his wife for their support, and it was only when there was a surplus of avails, or when Goodale ceased to be a pauper on his own account or that of his wife, that such surplus could be appropriated to relieve the town of Clinton from the support of the minor children.

The evidence proposed, tends to show that without the children the parents would be able to support themselves, and that the supplies furnished were, in this instance, rendered necessary, wholly for the relief of the children.

Assuming such to be the fact, no reason is perceived why the town of Clinton should not be chargeable for those supplies which were actually furnished, and which were necessary for the relief of the children. If Goodale, after supporting himself and wife, contributed in part to the support of his children, by his surplus earnings, he did no more than his duty; and, for such surplus, neither he nor Sebasticook are entitled to recover. It is only for the supplies which

were necessary, and which were furnished by the town, beyond what the father was able to furnish, that the defendants are liable. This would seem to be the sum of $32,16, as per bill of items rendered. For that sum, the original plaintiffs are entitled to judgment, with interest from date of demand, and costs.

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

JEWETT HUNTER, *in Error*, *versus* NOAH COLE.

An appeal from the judgment of a magistrate vacates that judgment, and the entry of the case in the Supreme Court gives the latter jurisdiction.

When an appellant fails to produce the proper *copies* in the appellate Court, the action may be dismissed, and the judgment of the magistrate in favor of the plaintiff affirmed with additional costs.

This may be done by an oral motion and without filing a written complaint.

ON AGREED STATEMENT.

WRIT OF ERROR to reverse a judgment of this Court.

It was agreed that, in the original action, (which was an appeal from the judgment of a magistrate,) the appellant produced no *copy* of the record of the magistrate, and thereupon, when the case was reached in order for trial, the following entry was made on the docket:—"Action dismissed for want of papers. Judgment below affirmed with additional costs;" that afterwards the clerk upon the production of a copy of the writ, the original pleadings before the magistrate, the recognizance, and a paper in the form of a record signed by the magistrate, but not attested as a copy, entered up judgment for the defendant in error (the original plaintiff) for the amount of damages awarded by the magistrate, and costs, including the costs before the magistrate and in the Supreme Court.

Drummond, for plaintiff in error.

Hinds, for defendant.

The opinion of the Court was drawn up by

RICE, J.—In this case there was a regular judgment before the justice in the original action, and an appeal therefrom in due form of law by the defendant, and the action duly entered in this Court. The appeal vacated the judgment of the Court below, and the entry of the action here gave this Court jurisdiction. It was the duty of the appellant to produce a copy of the record of the Court below and file the same in this Court. This he failed to do, and when the action was reached in order for trial, the failure of the defendant to produce the record being admitted, the action was dismissed, and the judgment of the Court below affirmed, with additional costs. Perhaps a strict adherence to precise technical language would have required the entry to have been *appeal* dismissed instead of *action* dismissed; but it would require a pretty nice discrimination to perceive distinction in the practical results of the two entries. They are in substance and effect the same, and were manifestly so intended.

But it is contended that there should have been a complaint filed before the entry was made. If the appeal had not been entered, a complaint would have been necessary to bring the action before the Court, but, having been duly entered, it was before and within the jurisdiction of the Court, and required no complaint for that purpose. The provision of § 9, c. 83, in relation to complaints, is evidently directory merely, and, in a case like the present, is unnecessary.

Judgment affirmed.

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

JOEL RICHARDSON *versus* REUEL WILLIAMS.

A person cannot make another his debtor by paying the debt of the latter without his request or consent.

A, being indebted to B, C verbally promised B to pay him the amount, and charged it to A, without the consent of the latter:— *Held*,—

1. That, B not having released or assigned his debt, the promise was without consideration;

2. That such a promise is within the statute of frauds, and, to be obligatory, must be in writing.

ON EXCEPTIONS to the instructions of HATHAWAY, J.

ASSUMPSIT. The case is stated in the opinion. The verdict being for the plaintiff, the defendant excepted.

Williams & Cutler, for defendant.

S. Titcomb, for plaintiff.

The opinion of the Court was drawn up by

RICE, J.—A statement of this case, in a form most favorable for the plaintiff, for the purpose of testing the ruling of the Court, would present the following facts as proved. The Kennebec and Portland Railroad Company, in Dec., 1855, were indebted to the plaintiff in the sum of $257,94, for balance due on a quantity of wood. The defendant, at that time, in his private capacity, verbally agreed to pay that debt to the plaintiff, and, in April, 1856, paid over that sum to his agents, John Means & Son, for the plaintiff, and charged the same to the railroad company. Means & Son failed to pay over the money. There was no evidence in the case that the railroad company had any knowledge of the verbal agreement between the plaintiff and defendant, or has since assented to, or ratified it; nor that the plaintiff has either cancelled and discharged his claim upon that corporation, or assigned it to the defendant.

Upon these facts, thus assumed to have been fully proved, the Judge instructed the jury that, the defendant having charged to the railroad company the amount of the balance

due to the plaintiff, and having, as he testified, promised that money should be paid, must be considered as having the money in his hands for the plaintiff's use, and that he was liable therefor in this action, on the count in the writ for money had and received, unless he was authorized to pay it to Means, as the plaintiff's agent.

The jury must have found that Means was not the agent of the plaintiff.

The contract was executory, not executed. *Walker* v. *Elliot*, 33 Maine, 488. There was no consideration for the promise. The plaintiff relinquished nothing and the defendant obtained nothing. He could not make the railroad company his debtor by paying or agreeing to pay their debts without their request or consent. *Willis* v. *Hobson*, 37 Maine, 403. It was a contract to pay the debt of another, and, to be legally obligatory, must have been in writing. R. S., c. 111, § 1. On the facts as presented, the ruling was erroneous. *Exceptions sustained and new trial granted.*

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

JOSEPH EATON *versus* DANIEL JACOBS.

A verdict for a tenant, who claims title by twenty years' possession, cannot be sustained, where there is no evidence that his possession was adverse to the title or interest of the demandant who was the true owner.

WRIT OF ENTRY upon the demandant's own seizin.

The demandant put in evidence an office copy of a deed from Crosby Barton to Thomas W. Smith, dated February 5, 1824, conveying the demanded premises; and traced his title through sundry mesne conveyances from said Smith.

The defendant claimed title by virtue of a possession of

the premises for more than twenty years; and introduced testimony that he had so occupied the same; that during that time he had largely increased the value of the farm by his labor, and the erection of new buildings thereon.

There was testimony tending to show that, at or soon after the time he took possession of the premises, it was with the expectation that he should acquire title to it by purchase.

The verdict was for the defendant. The case was presented to the full Court, upon the demandant's motion to set aside the verdict, as being against the evidence in the case, which was fully reported; and also upon exceptions to certain rulings of RICE, J., presiding at the trial.

Evans and *Heath*, for the demandant.

Vose & Vose, for the tenant.

The opinion of the Court was drawn up by

CUTTING, J.—The demandant traces a record title to the demanded premises through mesne conveyances from one Crosby Barton, who conveyed the same, on February 5, 1824, and is entitled to recover in this suit, unless the tenant can prevail in his defence, which is adverse possession for twenty years before the commencement of this action. We have examined the evidence reported and have failed to perceive any testimony even tending to show any possession adverse to the title or interest of the true owner. It is true the evidence was conclusive of the tenant's possession for more than twenty years, but of no claim of ownership in his own right. The motion, then, to set aside the verdict as against evidence, must be sustained, and the exceptions become immaterial. *Motion sustained,*

Verdict set aside, and

New trialg ranted.

RICE, DAVIS, KENT and WALTON, JJ., concurred.

CYRUS ARNOLD *& ux., App'ts from decree of Judge of Probate, versus* NATHAN MOWER, *Executor.*

A devise to A "of the income of fifteen hundred dollars to be paid to her annually, to be put at interest by the executor, and to be equally divided among the children after her decease," is a devise of the net income after deducting taxes and other expenses.

When the account of an executor has been allowed by the Judge of Probate, and no appeal is taken, it cannot be revised in the Supreme Court.

In the settlement of such an account, the Judge of Probate may rightfully allow charges to correct errors in former accounts.

When income, payable annually, is devised to a person, over payments may be regarded as advances, and deducted from the income subsequently accruing.

ON REPORT.

APPEAL from a decree of the Judge of Probate for Kennebec county, allowing the third account of Nathan Mower, Executor of the will of Moses Dow.

The case is stated in the opinion.

J. W. North, for appellants.

The widow was entitled to the *net* income only. *Clark* v. *Foster*, 8 Met., 568.

The sums allowed in the second account for payments to the widow, for taxes, for interest on taxes paid, are erroneous.

The allowance of these items could not properly be made. *Longley* v. *Hall*, 11 Pick., 124.

The executor cannot open his first and second accounts to correct errors occasioned by his negligence, and thus reduce the principal.

But, if the accounts are opened, all the errors may be corrected.

The Court has power to rectify the accounts from the beginning. 1 Pick., 206. The executor should be required to charge himself with the principal.

J. M. Meserve, for the executor.

The *third* account only is before the Court. The errors

in former accounts were rightly corrected. 16 Maine, 308; 9 Pick., 27; 1 Pick., 157. No other items of the former accounts enter into this, and they cannot be considered. 27 Maine, 78, 85.

The widow is entitled to the whole income of the $1500. The will shows this. The testator failed to provide for certain expenses. They should be taken out of the estate, rather than out of this devise.

The opinion of the Court was drawn up by

DAVIS, J. — By the terms of the will it is evident that the testator intended that, after paying his debts, his estate should be divided among his children, except fifteen hundred dollars to be reserved for his widow. To her he bequeathed "the income of fifteen hundred dollars, to be paid to her annually;" that sum "to be put to interest by the executor, and to be equally divided among the children after her decease." He must have intended, therefore, that there should be that sum left at the decease of the widow. It follows, that the "income" to be given to the wife would be the net income, after deducting taxes and other expenses. *Clark* v. *Foster*, 8 Met., 568.

The executor has paid the widow the entire interest of the fifteen hundred dollars, charging the taxes and expenses to the estate. She has, therefore, received annually more than was her due. And this, in part, has reduced the sum invested much below the original amount.

But, in settling his first account, in 1829, the executor, by mistake, charged himself with five hundred dollars too much. He also allowed the estate about three hundred dollars for demands which proved unavailable, and which were afterwards credited to him in his second account. In consequence of this over estimate of the property, when he divided the first portion of it among the heirs, he paid them over one hundred dollars, each, more than was their due. This, with interest upon it from 1829, (which would be the only way to revise the whole matter,) would nearly make up the deficiency in his hands.

But none of these matters are now before us. They are *res judicatæ* in the Probate Court, the orders and decrees of which are conclusive. Nothing is presented by the report but the propriety of allowing the third account, from which the appeal was taken.

Nor is there any item in this account in regard to which there can be any doubt, except that of $37,80 paid to the widow. The errors in the first and second accounts were properly corrected. The appellants did not move the Probate Court to have any other errors corrected. There was therefore no refusal from which they could appeal. And no appeal was taken from the allowance of either the first or second account. The matter was within the jurisdiction of the Probate Court, and the judgment of that Court is final and conclusive.

As the widow had already received more than was her due at the time, the payment to her since the settlement of the second account, was wrongfully made. The decree of the Probate Court allowing the executor the sum of $37,80, paid to her, is reversed; and the remainder of the decree allowing the account is affirmed. The widow will be entitled to receive the net income of fifteen hundred dollars during her life; the over payments may be regarded as advances; and it will be the duty of the executor to resume the annual payments as soon as anything more shall be due.

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

GEORGE WILLIAMS, *in Equity, versus* WILLIAM R. SMITH *& als.*

The assignee of a mortgage, who has parted with all his interest, and has never made himself liable for rents and profits, should not be made a party to a bill to redeem the premises, unless he is charged with fraud or collusion, or a discovery is sought from him.

A bill in equity to redeem a mortgage cannot be maintained, under our statutes, against an assignee of the mortgage, by virtue of a tender made to a previous assignee, who has since parted with all his interest.

BILL IN EQUITY to redeem a mortgage given by one Fowler to Henry L. Nichols, and by him assigned to the defendant Smith, and by him assigned to the other defendants—the plaintiff being the owner of the equity of redemption.

The case is stated in the opinion.

North, for the plaintiff.

Libbey, for the defendant Smith.

Drummond, for the other defendants.

The opinion of the Court was drawn up by

RICE, J.—The case is before us on bill and demurrers. The bill alleges, that while the defendant Smith held the mortgage and notes, the complainant tendered him the amount due thereon, which tender was refused. Neither the time when the tender was made, nor the amount tendered, are set out in the bill. Whether a tender set out in such general and indefinite terms could be held legally sufficient to sustain the bill, we do not now inquire, as the case turns upon other considerations. The bill also alleges, that subsequent to the tender, and before this process was commenced, Smith, to wit, on the 22d day of April, 1859, sold, transferred, and assigned said notes and mortgage to H. S. and Albert Tobey, the other defendants.

There is no suggestion that Smith retained any interest in

the notes or mortgage after this assignment. Nor is he charged with any fraud, collusion or concealment in the transaction. It does not appear that he has been in the actual occupation of the premises, or that he has in any way made himself liable to account for rents or profits. The notes mentioned in the mortgage were long past due when they were transferred by Smith, and therefore subject to all equities in the hands of his transferees. Nor is any discovery sought from Smith. The bill, therefore, not only fails to show any interest in Smith, but, on the contrary, clearly shows that he has no interest whatever, and had none when the bill was commenced. As to him, therefore, the demurrer must be sustained.

Can the bill be maintained as to the other defendants? If maintained, it must be under the provisions of c. 90, R. S.

No tender has been made to them, nor has there been any demand upon them to account. They are not shown to have been in possession, nor in the reception of rents or profits. The provisions of §§ 13 and 14, c. 90, R. S., do not therefore apply. Nor are they liable under the provisions of § 16 of the same chapter, because no process for the foreclosure of the mortgage under § 5 has been commenced; nor is it alleged that they reside out of the State, nor that their residence was unknown to the complainant.

It is not perceived how the transfer from Smith could have kept the complainant out of the possession.

The demurrers of all the defendants must be sustained, with costs.

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

LOT M. MORRILL *versus* JOSEPH H. SANFORD.
SAME *versus* DANIEL BUNKER.

A mortgage of personal property, executed by two or more persons residing in different towns in this State, is invalid as against other persons than the parties thereto, unless it is recorded in every town in which any of the mortgagers reside, or possession of the mortgaged property is taken and retained by the mortgagee.

ON REPORT.

THESE were actions of TROVER. The facts are stated in the opinion.

J. M. Meserve, for plaintiff.

It was not necessary that the mortgage should be recorded at Norridgewock. The statute only requires a record of it in one town, i. e., "the town where the mortgager resides."

A record of the mortgage in the town in which either mortgager resides, is a full compliance with the statute.

The object of the statute being to give notice to the public of any incumbrance upon the property, a third party purchasing, knowing there were two owners residing in different towns, would examine the records of both towns in order to ascertain whether there were incumbrances upon it.

Ordinary diligence would oblige him to do this.

The statute requires the record to be in the town where the mortgager resides, but does not require a record in more than one place; and any party having occasion to inquire would know that a mortgage given by two owners who were partners, living in different towns, might be recorded in either place, according as it might be made by one or the other partner.

Coburn & Wyman, for the defendants.

The opinion of the Court was drawn up by

MAY, J.—The plaintiff claims title to the property in question, under a mortgage from Pinkham & Blunt to him,

dated April 8th, 1857. The mortgagers were co-partners and stage owners, and were engaged in running stages on several lines. Pinkham resided in Augusta, where the mortgage in behalf of said firm was executed by him; and Blunt, at Norridgewock, where most of the partnership business was transacted by him.

The defendant Sanford claims the mare and colt, for which the action is brought, through a sale made by Blunt, and the defendant Bunker justifies the taking of the property by his deputy, for which he is sued, as having been rightfully attached and sold, as the property of said Pinkham & Blunt, upon an execution against them in favor of one Farrington. The sale of the mare which has since borne the colt, and the attachment of the other property, were since the registration of the mortgage, which appears to have been recorded only in the city of Augusta. The possession of the mortgaged property was not delivered to and retained by the mortgagee. It is contended, therefore, in defence, that the mortgage, under the R. S. of 1841, c. 125, § 32, which were in force at the time of its execution, is invalid as against the defendants, who were not parties thereto, because it was not recorded in Norridgewock as well as in Augusta.

The question is a novel one, and depends upon the construction of the statute. The statute, where the possession of the property is not taken and retained by the mortgagee, requires that the mortgage, to be valid against persons other than the parties thereto, "shall be recorded by the clerk of the town where the mortgager resides." The purpose of such registry is to give notice to the creditors of the mortgager, and to subsequent purchasers of the mortgaged property, so that they "may know the kind, the situation and value thereof, when the goods are suffered to remain with the mortgager, and to be treated as his own." *Sawyer* v. *Pennell*, 19 Maine, 167. Before this statute, such notice was left to be inferred from the delivery of the property, and retaining its possession. The statute was designed, in

the absence of such delivery and possession, to give at least equal and perhaps greater notoriety by means of the record. The record is deemed to be a substitute for such delivery and possession. *Bullock* v. *Williams & al.*, 16 Pick., 23; *Smith* v. *Smith*, 24 Maine, 555. To have such effect, however, it must appear to have been made as the statute requires.

Where there are several mortgagers, it does not follow, because the actual possession of the property by one of them is the possession of all, that, therefore, the registry of the mortgage in a town where only one of them resides, is sufficient. The statute must receive such a construction, within the fair meaning of its words, as will best secure the notice it is designed to give. Where notice is derived from possession, the creditor or subsequent purchaser obtains his knowledge at the place where the property is. The attachment or purchase of it, therefore, must be made with the evidence of notice in full view, while the record of a mortgage gives no evidence or notice of its contents, except to him who sees or reads it. Partners too, often, as in the present case, reside in different towns, and away from their principal place of business. To hold, therefore, that the recording of a mortgage made by partners or other persons so situated, in a town where one of them resides, and perhaps at a distance from the property and their principal place of business, is the notice required by which creditors and subsequent purchasers are to be bound, would be to defeat the very end which the statute was designed to effect. We think, when a creditor or a stranger finds property in the use and possession of one of two or more mortgagers, residing in different towns, and, on searching the records of the town where the party in possession resides, finds no mortgage of it noted or registered upon the books, he is well justified in concluding that no such mortgage exists. Under such circumstances, it would be manifestly unjust, that an attachment or purchase made by such creditor or stranger should be held to be void and of no effect.

For the purposes of justice, therefore, as well as to give effect to the design of the Legislature, the words "mortgagee" and "mortgager," as used in the statute, must be regarded as including the plural as well as the singular number. This construction is allowable under the statute relating to the publication and construction of statutes. R. S. of 1841, c. 1, § 3, ¶ 2. To be effectual, therefore, as against other persons than the parties thereto, a mortgage of personal property, when executed by two or more parties residing in different towns within this State, must, under the statutes of 1841, c. 125, § 32, as well as under the statutes of 1857, c. 91, § 1, in which the same provision is contained, have been recorded in each town where any one of the mortgagers resides. No other construction can effectually give the notice intended by the statute, or remedy the evils which it is intended to prevent.

The conclusion to which we have arrived on this point renders it unnecessary to consider the other points which have been urged in defence. The result is that the plaintiff must become nonsuit in both suits. *Plaintiff nonsuit.*

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

STATE *versus* PATRICK MAHER.

A motion to quash an indictment is addressed to the discretion of the Court, and exceptions will not lie if it is not granted.

The question presented on such a motion may be reserved for the full Court on report; if not thus reserved, the defendant must plead it in abatement, if he would avail himself of it.

ON EXCEPTIONS.

BEFORE pleading, the respondent filed a motion to quash the indictment, but it was denied, and he excepted.

Meserve, for defendant.

Drummond, *Attorney General*, for the State.

The opinion of the Court was drawn up by

DAVIS, J.—The defendant filed a written motion in this case that the indictment be quashed, because the grand jury by whom it was found were not legally drawn. This motion was overruled by the Court, and he filed exceptions.

Such a motion is addressed to the discretion of the Court, and no exceptions will lie if it is not granted. This has been so often decided that it is unnecessary to cite authorities.

The question presented on such a motion may be reserved for the full Court, on a report signed by the presiding Judge. R. S., c. 134, § 26; *State* v. *Low*, 4 Greenl., 439. But if not so reserved, and the motion is overruled, the defendant must plead the matter in abatement. Upon issue duly made up on such a plea, if the indictment is adjudged good, exceptions will lie to any ruling upon matters of law, whether the case is one in which he can plead over, or not.

Exceptions dismissed.

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

ELISHA COOLEY *versus* JOSEPH W. PATTERSON, *Adm'r.*

An account in set-off may be filed on the first day of the term at which the defendant is obliged to appear.

Under the statutes of this State, an executor or administrator may file an account in set-off, on the first day of the term next after the expiration of the year from the date of his appointment, although the action may have been commenced at a previous term.

This provision does not extend to an administrator *de bonis non*; but he is obliged to defend, at any time after the expiration of a year from the date of the appointment of the first administrator.

On Exceptions to the ruling of Rice, J.

Assumpsit against the defendant as administrator *de bonis non* of one Tylor.

The action was entered at the August term, 1858, when the defendant appeared specially. The action was continued from term to term till the August term, 1859, when the defendant, on the first day of the term, and within less than a year after his appointment, filed an account in set-off. The suit was commenced more than one year after the appointment of the first administrator upon the estate of said Tylor.

The case was referred, and the referee reported in the alternative, that if the account in set-off was seasonably filed, judgment should be rendered for the defendant; otherwise, for the plaintiff. The presiding Judge ruled, that the account in set-off was not seasonably filed, and ordered judgment to be entered on the award for the plaintiff, and the defendant excepted.

Vose & Vose, for defendant.

Administrators, not being obliged by law to defend suits within one year of their appointment, cannot be compelled to take any steps necessary for their defence.

They stand precisely in the position of an absent defendant, against whom an action has been entered, without service. After notice ordered and given, he may appear at a subsequent term, and file an account in set-off. To all intents and purposes, it is for him the first term.

The statute applies to administrators *de bonis non*. It makes no distinction between them and first administrators. They are all subject to the same liabilities, and have the same duties to perform. There is no reason why administrators *de bonis non* should be excluded from the benefits of the statute.

J. Baker, for the plaintiff.

The opinion of the Court was drawn up by

Kent, J. — We think that the provision in c. 87, § 11,

that an executor or administrator shall not be obliged to make a defence for one year after his appointment, does not apply to an administrator *de bonis non*. The law intended to give one year to the *representative or representatives of the estate* to look about, examine accounts, and get ready to defend; but did not intend to give a year at every new appointment. The words are administrator or executor, not administrator *de bonis non* also, as is often stated in the statutes when it is intended that the provision shall apply to both. See §§ 4, 5, 6, 16, 17. If an administrator had appeared after a year and the case was pending for trial, or even after one trial, and the administrator dies, would his successor have a right to keep out of court a year? As suggested by the counsel for the plaintiff, by management and by timely resignations, a suit, or all suits, against the estate might be kept undecided for a long series of years, or forever, if each administrator is to be allowed a full year.

The administrator *de bonis non* should answer at the first term, if more than a year from time of first appointment of an administrator, and file his account in off-set. In other words, it is the estate that is to have a year and not every representative of the estate.

We think the first administrator is not obliged to file his account in offset within a year. He clearly is not bound to *defend* before that time. It is true the language of the statute is that it must be filed on "the first day of the term to which the writ is returnable." But it is also provided that an administrator may file all proper matters in set-off. He is not obliged, by another provision, to defend for a year. Is it not defending when he files in offset? The very object of the law is to give him a year to examine and ascertain facts. He may be sued, and the Court sit in a month or even less, after his appointment, and there may be complicated accounts to examine and statements to prepare. He may defeat the suit by a tender without costs.

How is it in case of an absent defendant on whom no service has been made, and those cases where a defendant is not bound to appear at the first term? He certainly must

be allowed to file his account in set-off at the first term after he is by law obliged to appear. Yet the words of the statute are imperative, when literally interpreted. "At the first term to which *the writ is returnable*," he must file his account. It was decided, in *Otis* v. *Adams*, 41 Maine, 258, that an absent defendant may file an offset at second term. Must not this be construed to mean the first day of the term *at which the defendant is obliged to appear?*

This, we think, is the true construction of the statute.

Exceptions overruled.

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

STATE *versus* ISAAC CLOUGH.

The *venires* for grand jurors need not direct the constables in what manner they should notify the meeting in their towns for drawing the jurors.

It is well, although not indispensable, that the constables should state in their returns what notice was given.

The burden of proof, that the notice was defective, is upon the one alleging it.

A constable may be allowed by the Court to amend his return upon the *venire* according to the facts.

A person drawn as a grand juror, without any notice to the inhabitants of the town, and with only a verbal notice to the municipal officers, has no authority to act as such, although duly sworn.

The mere presence of a stranger at the finding of an indictment, does not render it void, *if he does not act.*

But if an unauthorized person participates in the proceedings, the indictment is void, though twelve competent grand jurors concurred in finding it.

ON REPORT.

THIS was an indictment for perjury, found at the March term, 1861. Before pleading, the respondent moved to quash the indictment, because the grand jury that found it was not legally drawn, and had no power to act in the prem-

ises, for the following reasons, which fully appear by the record thereof here in Court produced and made a part of this motion:—

1. The venires are insufficient and defective in not specifying the manner of notifying and warning the town meeting for the draft of said jurors, according to the requirement of the statute in such case made and provided.

2. The return of the officer on said venires does not show that any town meeting was notified to meet for the purpose mentioned in said venires, in the manner required by the statute in that case made and provided; nor does it show that any such meeting was held, or that the town clerk, or any one of the municipal officers, was present or drew the name of the person returned by him as grand juror from the box kept for that purpose.

3. That James Robbins of Vassalboro', Henry A. Stanley of Winthrop, Benjamin Marston of Farmingdale, James Carson of Mt. Vernon, George W. True of Litchfield, and J. E. Sturdy of Augusta, were admitted into the grand jury room at the term when this indictment was found, and allowed to act as jurors, when they had not been legally drawn or summoned as such, but were mere unauthorized strangers thereto.

After this motion was filed, the constables of Vassalboro', Farmingdale and Winthrop, by leave of Court, amended their returns. The following is a copy of the return of the constable of the town of Winthrop, as amended:—

"Kennebec, ss. Winthrop, Nov. 17, 1860. I have notified and warned such of the freeholders and other inhabitants of the town of Winthrop aforesaid, as are qualified by law to vote in the choice of representatives, and particularly the Selectmen and Town Clerk, to assemble, as within directed, to appoint as the law directs, one man to serve as grand juror at the within mentioned Court; and Henry A. Stanley was appointed for that purpose, and I have notified and summoned him four days before the sitting of said Court, to appear and attend the same accordingly."

The returns of the other constables were similar, except that of the city of Augusta.

The constable of Augusta, by leave of Court, amended his return so as to read as follows:—

"Kennebec, ss. Augusta, Nov. 17, 1860. On this day I verbally notified the Mayor, Aldermen and City Clerk of the city of Augusta, to assemble on the same day as within directed, to appoint as the law directs, one man to serve as grand juror at the within mentioned Court, and J. E. Sturdy of the city of Augusta was appointed for that purpose," &c.

The *venires* directed the constables to "notify and warn the inhabitants," &c., without specifying the manner of notifying.

Upon these facts, it was agreed to report the case to the law Court, to determine the validity of the indictment.

J. Baker, for respondent.

Drummond, Attorney General, for the State.

The opinion of the Court was drawn up by

DAVIS, J.—To the indictment in this case the defendant filed a written motion, in the nature of a plea in abatement, praying that it might be quashed, for the reason that some of the grand jurors by whom it was found were not legally drawn, and had no authority to act in the premises. The validity of the indictment is submitted to us, by agreement, upon the facts which appear by the venires, and the returns thereon.

The *venires* did not direct the constables to whom they were sent, in what manner they should notify the meetings in their respective towns for drawing the jurors. This was not necessary. The mode of giving notice was prescribed by statute, except in those towns where the inhabitants had fixed some other mode. And it was the duty of the constable in each town to give the one or the other. The statute has since been changed, making the notice uniform in all cases. But no statute, or rule of law, has ever required the notice to be set out in the *venire*.

Nor is it indispensable that the constable should state in his return what notice he has given, though he ought to do so. The facts, if necessary, can be proved *aliunde*. *American Bank* v. *Doolittle*, 14 Pick., 123.

Upon all the *venires* but one, in the case at bar, nothing appears in the returns, except the fact that the constables "notified the inhabitants," &c. But, upon a collateral issue, like the one before us, the notice will not be presumed to have been defective, without evidence. *Gilmore* v. *Holt*, 4 Pick., 258. The jurors are admitted to have been regularly acting as such, under the direction of the presiding Judge. The defendant having alleged in his plea that they were "not legally drawn or summoned," the burden of proof is upon him to show it, *dehors* the record, or by it. 1 Greenl. Ev., § 92.

After this indictment had been returned, some of the constables came into Court, and were allowed to amend their returns according to the facts. This has been done, even after a verdict, in a capital case. *Commonwealth* v. *Parker*, 2 Pick., 550.

But the return of the constable of Augusta, shows affirmatively, that *J. E. Sturdy* was drawn as a grand juror without any notice to the inhabitants, and with only a verbal notice to the municipal officers. Sturdy was one of the grand jury by whom the indictment was found. Though duly sworn, he had no authority to act.

In *Low's case*, 4 Greenl., 439, all the jurors were competent, but the indictment was found by less than twelve. In *State* v. *Symonds*, 36 Maine, 128, three jurors who were disqualified, because not legally drawn, acted in finding the indictment, and it was quashed because there were only *eleven* who were qualified. In the case at bar there were *seventeen*, for aught that appears, who were competent to act. Does the fact that another was present, and acted with them, who was incompetent, render the indictment void?

The mere fact that a stranger *was present* when the in-

dictment was found, would not render it void. Though obviously proper, and highly important, that the proceedings of a grand jury should be in secret, one who is indicted cannot take any advantage of it if they are not. *Shattuck* v. *The State*, 11 Ind., 473. The secrecy is not required for his benefit,—but otherwise. "One reason may be to prevent the escape of the party, should he know that proceedings were in train against him; and another may be, to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be known to the accused." 1 Greenl. Ev., § 252.

But the fact that an incompetent juror was not only present, but participated in the proceedings, presents a more serious question; not on the ground that, without his concurrence, there were not twelve jurors in favor of finding the indictment. Such a fact, if essential, must have been pleaded. But even if the jury were unanimous in finding the bill, they might have been so influenced by arguments and opinions of each other, that it would be impossible for us to know that the indictment would certainly have been found, if none but the competent jurors had acted.

The question here presented was first raised in the fourth year of Charles the First, in *Withipole's* case. *Three* of the jury of inquest were incompetent to serve; and the indictment was quashed for that reason, though there were more than twelve remaining. Cro. Car., 134, 147. This decision was under the statute 11 Hen. IV., c. 9, which made "void" all indictments so found. Such has been the law of England ever since that time. 2 Hale's P. C., 60, 155; 4 Black., 302. And the same rule has been adopted in this country. *State* v. *Duncan*, 7 Yerg. (Tenn.) 271; *Barney* v. *State*, 12 S. & M. (Miss.) 68; *State* v. *Jacobs*, 6 Texas, 99. *Indictment quashed.*

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

AUGUSTUS F. WINSLOW *& ux. versus* BENJ. H. GILBRETH.

In an action brought in the name of a husband and wife, the defendant will not be allowed, under the general issue and specifications of defence, to introduce evidence to show that the plaintiffs were not lawfully married.

Such an objection can only be taken advantage of by plea in abatement.

THIS was an action of TROVER against the late sheriff of Kennebec county, for the conversion of one half of a schooner, alleged to be the property of Abby, wife of Augustus F. Winslow. After filing specifications of defence, the defendant, by leave, filed an amendment of the specifications, denying the marriage of the plaintiffs.

The defendant was defaulted, and damages assessed at one half of the amount the vessel sold for on execution, and interest since the date of the writ, upon the agreement, that if, in the opinion of the full Court, it is competent for him to prove, under the general issue and the specifications of defence, that the said plaintiffs, at the time of bringing this action, were not lawfully married, and that the said Augustus was not the lawful husband of the said Abby, and if such fact, if found by the jury, would bar the action, the default is to be taken off and the case to stand for trial, upon that issue, subject to any motion which the plaintiffs may make to amend the writ by striking out the name of either plaintiff, such motion to be determined by the Court.

Evans & Putnam, for the plaintiffs, cited Chitty on Pleadings; *Coombs* v. *Williams*, 15 Mass., 243; *Benner* v. *Fowles*, 31 Maine, 305, and cases cited; *Langdon* v. *Potter*, 11 Mass., 315; Story's Pleadings, 15 and 31, and cases cited.

Tallman & Larrabee, for the defendants, cited Chitty's Pleading, 66, 74, 489, 499; *Cram* v. *Burnham*, 5 Maine, 213; *Langdon* v. *Potter*, 11 Mass., 313; *Roach* v. *Randall*, 45 Maine, 438.

The opinion of the Court was drawn up by

WALTON, J.—It was not competent for the defendant to prove, under the general issue and the specifications of defence, that the plaintiffs at the time of bringing the suit were not lawfully married. Such an objection, the only effect of which is to defeat a suit, without touching its merits, if available at all, can only be taken advantage of by plea in abatement. So held in *Dickenson* v. *Davis*, 1 Stra., 480; *Coombs & ux.* v. *Williams*, 15 Mass., 243; and in *Benner & ux.* v. *Fowles*, 31 Maine, 305, exceptions were sustained and a new trial granted, because such evidence was received under the general issue. This decision is not in conflict with the decision in *Cram* v. *Burnham*, 5 Maine, 213. In that case the note was made payable to the alleged wife, and the suit was by the husband alone, and his only title to the note was by virtue of the alleged marriage, so that it was as necessary for him to prove the marriage to enable him to recover, as it would be for the indorsee of a note to prove the indorsement to enable him to maintain a suit upon it in his own name; and the plaintiff having offered evidence of the marriage in support of his title, the defendant was permitted to offer rebutting evidence that the marriage was not valid. In this suit the female plaintiff's right of action is in no way dependent upon the validity of her marriage, and the joining of her alleged husband with her in the suit was wholly unnecessary, and in no way prejudiced the rights of the defendant.

Default to stand; Judgment for plaintiffs for the amount agreed upon in the Report.

RICE, CUTTING and KENT, JJ., concurred.

APPLETON, J., concurred in the result.

WILLIAM R. GAY *versus* WILLIAM BRADSTREET & *al.*

Trespass *quare clausum* does not lie against a street commissioner duly authorized by a city council, to construct a street within their jurisdiction, laid out by their action, and upon a petition in legal form.

If the acts of the council in such a case are erroneous, they can only be vacated by *certiorari*.

Evidence that individual members of the council voted in favor of the street, because a party interested had tendered a bond that he would pay the costs and damages, would be insufficient to support an action of trespass.

If public convenience and necessity require the laying out or alteration of a way, it is immaterial at whose expense it is made, or that private individuals contribute to relieve the public burthens.

TRESPASS *quare clausum*. The defendants pleaded the general issue, with a brief statement justifying their acts as performed under the orders of the city council of Gardiner.

The proceedings of the city council, authorizing the extension of the street, were in evidence. It was admitted that a part of the street in question crossed the plaintiff's land, below high water mark, but not below low water mark.

The plaintiff offered to prove that, in each branch of the city council, before the vote was taken on the acceptance of the street, a bond was exhibited, signed by William Bradstreet, and running to the city of Gardiner, in the sum of $3000, conditioned to indemnify the city for all costs and damages that might be incurred by the location and making of the street; and further offered to prove, by three members of the city council, that they voted for the street solely in consideration of the bond being given and to be held by the city, and would not have voted for it otherwise. This testimony was excluded.

It was admitted that Bradstreet paid to the city treasury $850, being the damages awarded to the plaintiff; and that this sum was tendered to the plaintiff, and refused by him.

The case was withdrawn from the jury, to be submitted to the full Court. If the Court should be of opinion that the plaintiff cannot contest, in this form, the validity of the action of the city authorities, and that the evidence offered and excluded, so far as admissible, would not authorize him to contest the said action, the plaintiff is to be nonsuit. But, if the acts of the city council do not furnish a justification for the defendants, they are to be defaulted. If the evidence excluded is admissible, and would, with the other evidence in the case, authorize the jury to find for the plaintiff, and if such finding would defeat the justification set up, the case is to be sent back for trial.

The case was elaborately argued, but, as the decision turned mainly upon a single point, the arguments are not fully reported.

L. Clay, for the plaintiff, contended that the city council had no authority to locate any part of a road below high water mark of a navigable river. Neither County Commissioners, nor city or town authorities, can lay out roads or highways over tide waters, or wharves upon a navigable stream, without special authority from the Legislature. *Kean* v. *Stetson*, 5 Pick., 492; *Charlestown* v. *County Commissioners*, 3 Met., 202; *Marblehead* v. *County Commissioners*, 5 Gray, 451; *State* v. *Anthoine*, 40 Maine, 435.

It is true that § 7 of the charter of the city of Gardiner provides that any highway, town-way or bridge located in said city, between high and low water mark, shall be deemed to be legally established; but this can only be construed to imply that the city council shall have all the authority vested in selectmen of towns and County Commissioners; otherwise, the power of the city council over tide waters would be unlimited.

In this case the proceedings are defective,—the *petition*, in not stating the *termini* of the proposed road. *Com.* v. *Coombs*, 2 Mass., 490; *Sumner* v. *County Commissioners*, 37 Maine, 112; *Southard* v. *Ricker*, 43 Maine, 575. The *notice* is not in accordance with the petition. *Dwight* v.

Springfield, 4 Gray, 107; *Com.* v. *Cambridge*, 7 Mass., 158; *Gloucester* v. *County Commissioners*, 3 Met., 379; *Livermore* v. *County Commissioners*, 11 Maine, 275; *Wiggin* v. *Exeter*, 13 N. H., 304.

Unless the records show that all the proceedings have been in conformity to the statute, they are entirely void; and this may be shown in an action of trespass as well as upon *certiorari*. *Haywood* v. *Charleston*, 34 N. H., 23; *State* v. *Richmond*, 6 Foster, (N. H.,) 239; *Barnard* v. *Haworth*, 9 Indiana, 103; *Guptail* v. *Taft*, 18 Illinois, 365; *Pritchard* v. *Atkinson*, 3 N. H., 335.

Another fatal defect is, that there was no adjudication of the city council, prior to the location, that the way was required by common convenience and necessity. Until such adjudication, the council had no jurisdiction, and this may be shown collaterally in an action of trespass. *Parks* v. *Boston*, 8 Pick., 217; *Com.* v. *Egremont*, 6 Mass., 490; *Danvers* v. *County Commissioners*, 2 Met., 185; *Small* v. *Pennell*, 31 Maine, 268; *Bethel* v. *County Commissioners*, 42 Maine, 478.

This is a town-way, and not a highway or public road; and in respect to such ways, it has been uniformly held that trespass is the only remedy, and that *certiorari* will not lie. *Baker* v. *Runnells*, 12 Maine, 235; *Harlow* v. *Pike*, 3 Maine, 438; *Todd* v. *Rome*, 2 Maine, 55; *Robbins* v. *Lexington*, 8 Cush., 292.

The fact that Bradstreet, and not the city, was to pay all damages and expenses, appears to have been the inducement for the location of the street. It has been settled in Massachusetts, that where there has been no adjudication that the public convenience and necessity require the establishment of a road, and where offers of indemnity by private individuals have a controlling influence, the proceedings are unauthorized and void. *Com.* v. *Cambridge*, 7 Mass., 167; *Com.* v. *Sawin*, 2 Pick., 547; *Parks* v. *Boston*, 8 Pick., 217. So in New Hampshire, *Dudley* v. *Cilley*, 5 N. H., 558; *Gurnsey* v. *Edwards*, 6 Foster, 224. A conditional

laying out of a town or private way is void. *Christ Church* v. *Woodward*, 26 Maine, 172.

Danforth, for the defendants.

The opinion of the Court was drawn up by

KENT, J. — This action is trespass *quare clausum*, and the trespass alleged is the entry on plaintiff's land, and the pulling down and destruction of certain buildings thereon. The defendants justify their acts on the ground, that whatever was done by them was necessarily, properly and lawfully done in the building or making of a street or road, legally located and established over the *locus in quo*, by the city of Gardiner.

The defendants to sustain their defence, offered certain records and proceedings of the city council of Gardiner, by which it appeared that, that body had undertaken to locate such a way, and had, after various proceedings, finally by vote, established the same.

The first question is, whether these proceedings gave jurisdiction to the city council, and, if so, whether any inquiry as to the regularity of these proceedings can be made in this action. It is insisted, that these proceedings, establishing the way, can only be annulled or vacated upon *certiorari*, and that, until thus vacated, they must remain valid and operative.

It was early settled in this State, that in case of a town way, laid out by the selectmen and accepted by the town, *certiorari* does not lie to quash the proceedings, and that the proceedings of the town in such a case may be examined and controverted in actions of trespass *quare clausum*. *Harlow* v. *Pike*, 3 Maine, 438; *Longfellow* v. *Quimby*, 29 Maine, 202; *Robbins* v. *Lexington*, 8 Cush., 292.

It has also been decided in numerous cases in this State and Massachusetts, that the writ of *certiorari* will lie as to proceedings of Courts of Sessions and of County Commissioners in laying out and establishing roads. *Baker* v. *Runnels*, 12 Maine, 235; *Longfellow* v. *Quimby*, 29 Maine, 202.

The same cases also establish the doctrine that, until re-

versed or annulled, or vacated, the proceedings before such tribunals will remain valid and operative.

The case of *Baker* v. *Runnells*, 12 Maine, presented the question distinctly, whether in an action of trespass for breaking and entering a close, where the defence was (as in the case before us) that the entry was for the purpose of making a road, legally laid out by the then Court of Sessions, any defects, errors or omissions in the records of the laying out could be inquired into in the action of trespass. It was held that they could not be, and that the adjudication of that Court must be respected as operative until annulled or vacated on *certiorari*. See also *Todd* v. *Rome*, 2 Maine, 61.

The next question is, whether the same rule shall apply to proceedings of a city council, acting under a charter which gives to that body exclusive authority and power to lay out any new street, and to estimate damages, and, in other respects to be governed by the same rules and restrictions as are by law provided for regulating the laying out of public highways and repairing streets.

In the case of *Parks* v. *Boston*, 8 Pick., 217, it was decided that the power vested in the Mayor and Aldermen of Boston, to lay out or alter streets, whenever in their opinion the safety or convenience of the inhabitants shall require it, was *judicial* in its nature, and that a *certiorari* lies to remove the proceedings. In *Dwight* v. *Springfield*, 4 Gray, 107, it was held that the same rule applies to the proceedings of a city council, where the charter vests the power of laying out streets in such council.

The same doctrine is sustained, by necessary implication, in *Preble* v. *Portland*, 45 Maine, 241, where *certiorari*, in a case like the one before us, was sustained.

The city council of Gardiner acquired jurisdiction to authorize the commencement of their proceedings. This is all that is required. *Small* v. *Pennell*, 31 Maine, 267. The petition in this case asks the continuance of a street, from one place to another, both named, and declares that such a new way would be of great public convenience. The stat-

ute, c. 18, § 1, only requires, that petitions to the County Commissioners should be in writing, and describe a way, and state whether its location, alteration or discontinuance is desired. The petition being sufficient, and having been received and acted on, jurisdiction attached. If subsequent acts are erroneous, they are valid until vacated by *certiorari*. What the decision of the Court may be, if the record is brought before us in that form, can only be known after an examination to ascertain whether there are substantial defects in the proceedings.

We do not think that the facts offered to be proved by plaintiff, if proved, would authorize him to deny the validity of those proceedings in this form of action. Nor do we see how these facts, if established, could authorize a jury, or the Court, to find such fraud, collusion and corruption in the city council as would require that the whole proceedings should be treated as null and void, on the ground of intentional fraud and corruption; which is the only ground on which we can be called to act in this form of action. It was held in *Parks* v. *Boston*, before cited, that the essential question is, whether public necessity and convenience required the laying out or alteration. If it did, it is immaterial at whose expense it was made. "A donation or contribution from individuals to relieve the burden upon the city, has no tendency to prove that the enlargement of the street was not a public benefit." We cannot nullify the solemn acts of a city government on the ground here assumed, because two or three members now are willing to declare that they voted in a particular way in consequence of a bond being filed.

Whether there is sufficient evidence in the records to show that the city council or its committee have ever declared that this street was of common convenience and necessity may be a question hereafter. We suspend all these matters, because in this action they are not properly before us.

Plaintiff nonsuit.

RICE, CUTTING, DAVIS and WALTON, JJ., concurred.

CHARLES MATTHEWS *& al. versus* JOHN MATTHEWS.

When it appears that a petitioner for partition, prior to the present process, had given a power of attorney to one to "sue for and recover any right or interest" he might have to property in Maine, "or to compromise the same with parties representing adverse interests;" and that said attorney had given a deed of the premises of which partition is asked to the present respondent, — this is not sufficient to bar the rights of the petitioners, unless it is shown that the grantee represented "adverse interests," and that the deed was given for the purpose of compromising the claims of the petitioners.

PETITION FOR PARTITION.

THE property described in the petition belonged to William Matthews, the grandfather of the petitioners and father of the respondent. The petitioners claim as children and heirs of William Matthews, their father, and the respondent's brother, and that one piece described descended to their father, as devisee of their grandfather, and the other two pieces, as heir. For the purposes of this trial, and without prejudice to the rights of the respondent, if the Court should order a trial, the title of the petitioners was admitted.

The respondent introduced a power of attorney from the plaintiffs to Zenas King, which will be found in the opinion of the Court, and which was dated March 8, 1858, and a deed of the premises of which partition is asked, given by said attorney to the respondent, July 24, 1860.

The case was thereupon withdrawn from the jury, to be reported to the full Court for their opinion upon the sufficiency of the power of attorney and deed to bar the rights of the petitioners. If held by the Court to be sufficient, a nonsuit is to be entered; if not, the case is to stand for trial.

J. Baker, for the petitioners.

Vose & Vose, for the respondent.

The opinion of the Court was drawn up by

APPLETON, C. J. — The petitioners, on 8th March, 1858,

made and executed a power of attorney, under seal, to one Zenas King, in the following terms:—

"Know all men by these presents, that we, Charles Matthews and Lavinia M. Thorne, of the city and State of New York, children of the late William Matthews of Hallowell, State of Maine, have made, constituted and appointed, and by these presents do make, constitute and appoint Zenas King of Hallowell, Maine, true and lawful attorney for us, and in our name, place and stead, to collect all moneys due to us by virtue of our relations to the decedent William Matthews aforesaid, and to *sue for and recover any right or interest which we have or may have in any real or personal estate in Maine, or to compromise the same with parties representing adverse interests*, giving and granting unto our said attorney full power and authority to do and perform *all and every act and thing* requisite and necessary to be done in and about the premises, *as fully*, to all intents and purposes, as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitute shall lawfully do or cause to be done in virtue hereof.

"In witness whereof, we have hereunto set our hands and seals," &c.

The title of the petitioners being provisionally admitted, the respondent offers a deed made and executed by said King, under and by virtue of the above power of attorney. The question before us is, whether the defence is made out upon the proof *now* presented.

The authority to "sue for and recover any right, title and interest" to certain specified real estate in Maine, or "*to compromise the same with parties representing adverse interests*," as fully as the principals might do the same, is given to the attorney in the most explicit terms. TOMLIN defines a compromise to be "any adjustment of matters in dispute, by mutual concession, without resort to law." The compromise may be made, and its terms declared, by a deed or other contract under seal. The power of attorney is a sealed instru-

ment. Every general power necessarily implies the grant of whatever is necessary to its complete execution. The principals might compromise their "right, title and interest" in dispute, either by a release of part or of the whole for a pecuniary consideration. It would seem that the attorney has the same power of compromise as his principals, within the special limitations imposed upon his action.

But the power of attorney gives no general authority to sell. The case as presented fails to show that the release under which the respondent claims was made by way of compromise, and "with parties representing adverse interests," as it must be if in accordance with the authority given. *The case to stand for trial.*

RICE, CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

STATE *versus* GEORGE CARVER *& al.*

An indictment for compound larceny against A, as principal, will not be held defective because it contains allegations against other persons as accessories before the fact.

A motion in arrest of judgment will be sustained only for defects apparent on the record of the particular case.

Objections to the qualification of grand jurors can be taken only in *abatement.* By pleading generally, they are waived; they furnish no ground for arrest of judgment.

ON EXCEPTIONS to the rulings of RICE, J.

Carver and Lunt were tried upon the following indictment.

"The jurors for said State, upon their oath present, that George Carver, late of East Livermore, in the county of Androscoggin, and George Lunt, alias George W. Lunt, of Boston, Commonwealth of Massachusetts, at Fayette, in said county of Kennebec, on the twenty-sixth day of December,

in the year of our Lord one thousand eight hundred and sixty, with force and arms the store of one Howard B. Lovejoy, there situate, in the night time of the same day, feloniously did break and enter, and five pieces of Farmers' and Mechanics' cassimeres, of the value of twenty-four dollars, [and other articles not material to be described,] of the goods and chattels of the said Howard B. Lovejoy, then and there in the store aforesaid being found, then and there, in the night time, feloniously did steal, take and carry away, in the store aforesaid.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that George E. Wilson, late of Boston aforesaid, and John B. Clapp, late of Roxbury, in said Commonwealth of Massachusetts, before said felony and larceny was committed, in manner and form aforesaid, to wit, on the twenty-sixth day of December, in the year aforesaid, at Hallowell, in said county of Kennebec, with force and arms did feloniously and maliciously incite, move, procure, aid, counsel, hire and command the said George Carver and George Lunt, alias George W. Lunt, the said felony and larceny, in manner and form aforesaid, to do and commit, against the peace of said State and contrary to the form of the statute in such case made and provided."

After verdict of guilty these respondents moved in arrest of judgment:—

1. Because it appeared by the venires that several persons acting upon the grand jury, which found the indictment, were not legally drawn as grand jurors, on account of defects in the manner of notifying the town meetings for the draft of said jurors, &c.

2. Because there is no sufficient indictment against them, and the indictment on which they were arraigned and to which they pleaded, was not in fact an indictment against them, but against George E. Wilson and John B. Clapp only.

3. Because said indictment, if any there was against them, is void for uncertainty and duplicity, and for containing a charge of two distinct offences against different persons in the same count.

The presiding Judge overruled this motion, and the defendants excepted.

J. Baker and *Gaslin*, for the respondents.

I. This indictment was not found by any legal grand jury, but only by an unauthorized body of men.

II. A motion in arrest of judgment is one legal mode of taking advantage of this defect.

The indictment is not merely *voidable*, but absolutely void—a mere blank piece of paper—issues from no authorized body of men, and of course no judgment can be rendered on it; nor can neglect, waiver, or even consent give it vitality or the Court jurisdiction. 4 Comyn's Dig., 644; 2 Tomlin's Law Dictionary, 291; 1 Chitty's Cr. Law, 661; 2 Heywood, (N. C.,) 113; 5 Dane's Ab., 228; 36 Maine, 128; 38 Maine, 200, 296; *Com.* v. *Parker & al.*, 2 Pick., 559; *Com.* v. *Smith*, 9 Mass., 109 and 110.

Not only what appears on the face of the indictment, but by the proceedings connected therewith, and making a part of the record, may be shown in arrest of judgment. Of this latter description are the venires for the grand jury and the returns thereon, as much as the writ and returns in civil actions. 1 Caines, 583.

Even after *plea*, as well as after *verdict* of guilty, the motion may be sustained.

III. The indictment is insufficient on its face.

1. It is not an indictment against these defendants at all, but only against the accessories before the fact. There is not one word in it that would not be necessary in an indictment against the accessories alone, and a judgment in this case would be no protection against prosecution.

2. Principal and accessories cannot be charged in one indictment.

Drummond, Attorney General, for the State.

I. The indictment is good.

1. Accessories may be indicted and tried with the principals. R. S., c. 131, § 6.

This precise form of indictment is given in Train and Heard's Precedents, (p. 15,) in Wharton, and in Archbold, (Cr. Pl. & Pr., p. 77.)

2. The part relating to the other respondents may be rejected as surplusage, and leave an indictment in common form against these respondents.

II. The motion in arrest, on account of the informality in the drawing of the grand jury, cannot be sustained.

1. The objection comes too late. It must be taken in abatement. 1 Arch. Cr. Pl. & Pr., 340; *Rex* v. *Marsh*, 6 Ad. & E., 236. Such is the rule in this State:—*Fellows' case*, 5 Maine, 333; *State* v. *Burlingham*, 15 Maine, 104. In Massachusetts,—14 Mass., 205; 1 Pick., 38. In Connecticut,—*Smith* v. *The State*, 19 Conn., 493, 498. In New York,—*People* v. *Monroe*, 20 Wend., 108. In Texas,—*State* v. *Foster*, 9 Texas, 65; *Jackson* v. *State*, 11 Texas, 261. In Indiana,—*State* v. *Henley*, 7 Black., 161, 324; 6 Black., 248. In North Carolina,—*State* v. *Martin*, 2 Iredell, 101, 121; *State* v. *Underwood*, 6 Iredell, 96, (a capital case). In South Carolina,—*State* v. *Blackledge*, 7 Richardson, 327, in which the point is examined at length. In Tennessee,—*State* v. *Wills*, 11 Humph., 222. In Alabama,—*State* v. *Greenwood*, 4 Porter, 474; *State* v. *Middleton*, 4 Porter, 484. In Mississippi;—*McQuillen* v. *The State*, 8 Snedes & Mars., 587. See also 13 S. & Mars., 468, and *Cady* v. *State*, 3 Howard, 27.

In *State* v. *Symonds*, 36 Maine, 128, the decision is put expressly upon the ground that the objection is in abatement.

2. This objection cannot be taken on a motion in arrest of judgment.

It requires to be supported by proof; and on motions in arrest no proof can be admitted. *State* v. *Bangor*, 38 Maine, 592, and cases therein cited.

The opinion of the Court was drawn up by

DAVIS, J.—This was an indictment against Carver and

Lunt, as principals, and also against Wilson and Clapp, as accessories before the fact. The first two, only, appear to have been arrested. Upon arraignment they pleaded guilty, and afterwards their counsel filed a motion in arrest of judgment. This was overruled by the Court, and the case comes before us on exceptions.

We see no objection to the indictment itself which can avail the defendants, especially after the general plea of "guilty." The count against them as principals is sufficient in all respects; and, without intending to intimate that Wilson and Clapp may not be held upon the same indictment, we are clearly of the opinion that judgment may now be entered upon the pleas of the other defendants.

Another ground of the motion in arrest is, that the grand jury, by whom the indictment was found, were "not legally drawn, and had no power to act in the premises." This allegation is one of *fact*, as well as of *law*. The facts do not necessarily appear of record, though in this case the return upon one of the *venires* does show that one of the grand jurors had no authority to act as such. *State* v. *Clough*, *ante* p. 573. But neither the *venire*, nor the *return*, constitutes any part of the record of this particular case. The proceedings of the departments of the government, of counties and towns, and officers of counties and towns, are all brought into requisition in order to constitute the Court. Some of these are matters of record in the Court, of which judicial notice will be taken, without other proof. But, if pleaded, they are to be pleaded as matters of *fact* however proved. They are proceedings preliminary to the *organization* of the Court, and not proceedings of the Court after it is organized. A motion in arrest of judgment in any particular case does not necessarily bring them before us. They cannot be brought before us except by being pleaded specially; and they cannot be pleaded in such a motion with any more propriety than any other extrinsic facts.

A motion in arrest of judgment, in many of the States, is substantially a motion for a new trial, often for reasons

entirely extrinsic of the record. But, at common law, "judgment can never be arrested but for that which appears upon the record itself." *Peachy* v. *Harrison*, 1 L'd Raym., 232; S. C., 1 Salk., 77; *Sutton* v. *Bishop*, 4 Bur., 2283, 2287. The same rule prevails in this country. Such a motion can only be made "on account of some intrinsic defect, apparent on the face of the record, which would render the judgment in the case erroneous." Howe's Practice, 533; *Bedell* v. *Stevens*, 8 Foster, 118; *Burnett* v. *Ballard*, 2 N. & M., 435; *State* v. *Bangor*, 38 Maine, 592, and cases there cited.

That the "record" referred to in these decisions is the record *of the particular case under consideration* was expressly held in the case last cited. It was alleged in the motion that another indictment for the same offence was found at the same term of the Court. But it was decided that such a motion would not be entertained where *proof* was required to sustain it, though the proof was a matter of *record* in the *same Court*.

A motion in arrest presents only the sufficiency of the indictment. *State* v. *Nixon*, 8 Verm., 70. It is equivalent to a demurrer, and can be sustained only when all that is alleged in the indictment may be true, and yet the person convicted not have committed any offence. *State* v. *Hobbs*, 39 Maine, 212, and cases cited. And, even for defects which would be fatal to an indictment upon demurrer, if they are such as are aided by a verdict, judgment will not be arrested after conviction. *Commonwealth* v. *Tuck*, 20 Pick., 356.

Nor will judgment be arrested for anything that could have been pleaded in abatement.

By pleading generally to the indictment the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. The decisions to this point, both in England and in this country, are numerous. But it is urged that such cases are to be distinguished from the one at bar, because here the defendants deny that there

is any indictment, on the ground that there was no legal grand jury.

The question here presented has often been raised in this country, and it has uniformly been held that it is too late, after a verdict, to object to the competency of the grand jurors by whom the indictment was found, or to the mode of summoning or impanneling them. All such objections must be pleaded in abatement. The question is discussed at length in the case of *People* v. *Robinson*, 2 Parker's Cr. Rep., 235, where many of the American cases are collected. The Attorney General, in the case before us, has cited other cases where the same doctrine is held. And we are not aware of any cases where it has been called in question.

The exceptions must be overruled.

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

STATE *versus* AMELIA O'CONNER.

On the trial of an indictment against a person as a common seller of intoxicating liquor, the instruction to the jury, "that under our present statutes, no particular number of sales are necessary to be proved to constitute a common seller, but that the jury must be satisfied, from the evidence, that selling intoxicating liquors was her common and ordinary business, and they might be authorized to find the respondent guilty without proof of any particular number of sales," is sufficiently favorable for the respondent.

ON EXCEPTIONS, from *Nisi Prius*, RICE, J., presiding.

THIS was an indictment against the respondent under the statute of 1858, as a common seller of intoxicating liquors.

The testimony offered by the government tended to prove more than six distinct sales of intoxicating liquors by the respondent.

The presiding Judge instructed the jury, that under our

present statutes, no particular number of sales was necessary to be proved to constitute a common seller; but that the jury must be satisfied, from the evidence, that selling intoxicating liquors was her common and ordinary business, and they might be authorized to find the respondent guilty without proof of any particular number of sales.

The verdict being against the respondent, she excepted.

Hunter & Clay, for the respondent.

In this case, the instruction of the presiding Judge was manifestly wrong. The law of 1858, for the suppression of drinking houses and tippling shops, does not define what constitutes a common seller of intoxicating liquors. The words "common seller," like those of "common barrator," are a term of art appropriated by the law; and we must have recourse to the common law to determine in what the offence consists.

Common seller is analagous to common barrator, and it is well settled that, at least, three instances of offending must be shown, within the time covered by the indictment, to prove the offence of barratry. Bishop on Criminal Law, § 59, vol. 2; *Commonwealth* v. *McCulloch*, 15 Mass., 227; *Commonwealth* v. *Davis*, 11 Pick., 432, 435; *Commonwealth* v. *Tubbs*, 1 Cush., 2, 3. The case of the Barrators, 8 Rep., 36; *State* v. *Day*, 37 Maine, 244.

Under this instruction the jury would have been authorized to find the respondent guilty without proof of three sales. A defendant might be shown to have a place fitted up for a bar for the sale of liquors, (as in Tubbs' case, 1 Cush., 2,) and to be ready there, by himself or his agent, to sell liquor, and, in fact, to have sold to one person or more, and a jury, with instructions like those given in this case, might be justified in finding a verdict of guilty, although the law has been distinctly laid down in *Commonwealth* v. *Tubbs*, already cited, that, though facts like the above "are proper to be submitted to the jury as evidence of three distinct sales," yet, "it must be proved that the

defendant made three or more distinct sales of spirituous liquors" in order to be convicted as a common seller.

The Judge should have instructed the jury that three distinct sales, at least, in connection with other evidence, were necessary to be shown in order to find the defendant guilty as a common seller. Bishop on Crim. Law, § 995, vol. 2.

Drummond, Attorney General, for the State.

The instruction complained of was more favorable to the defence than the law warrants.

A person may be presumed to be a common seller by proof of three sales, but the sales do not constitute the crime; *they are only evidence of it.*

The case cited by the counsel for the respondent, from 1 Cushing, was decided under a statute which defines the crime in such a manner as to make it necessary to prove three sales, or their equivalent, in order to procure a conviction.

The opinion of the Court was drawn up by

RICE, J.—Section 8, c. 33, laws of 1858, provides that no person shall be a common seller of intoxicating liquors. This statute does not define what acts shall constitute the offence.

The Act of 1856, c. 255, § 14, defined a common seller to be any person against whom three unlawful sales of intoxicating liquors should be proved within the time laid in the indictment therefor; or any person who should have been twice convicted of unlawful sales of intoxicating liquors against the provisions of the Act, and who should commit a third offence against the same, within six months subsequent to the last of such convictions.

Section 23, of the same Act, provided that any person who, at one term of the appellate Court, should be convicted in three appealed cases, should also be deemed a common seller.

Chapter 211 of the laws of 1851, § 13, provided, in case

of seizure, that when the quantity of liquors seized should exceed four gallons, if the final decision should be against the appellant, that the liquors were intended by him for sale, he should be adjudged a common seller of intoxicating liquors.

These several statutory provisions, defining the offence of common seller, have been repealed by subsequent legislation. They were all arbitrary provisions, based upon no principle, and in palpable violation of the well established meaning of terms. To punish a person for the acts described in those provisions was one thing, and perhaps well enough; but to say that such acts necessarily constituted the persons guilty thereof "common sellers," was a misapplication of terms — an assault upon the integrity of the English language.

The courts in Massachusetts have attempted to define the term "common seller" with little better success. In *Commonwealth* v. *Odlin*, 23 Pick., 275, that learned Court decided that three sales to one person ought to have the same effect as the same number of sales to three different persons. They also well remark, that, "in either case, as no statute and no rule of common law has precisely determined what shall constitute a common seller, the evidence should be left to the jury, with any circumstances tending to support or rebut the inference arising from such evidence."

In *Com.* v. *Tubbs*, 1 Cush., 2, the Court held that three distinct acts of sale are necessary to constitute a common seller. Such, they remark, has been the general rule as to a common barrator and other cases of this nature. In that case, the jury were instructed that one sale, acccompanied with other circumstances of preparation for selling and readiness to sell, stated in the instructions, would be sufficient to constitute the defendant a common seller. The Court held this to be erroneous, and properly, because the circumstances referred to were facts only tending to prove that he was a common seller, but not in themselves conclusively proving that fact. The Court were of the opinion that the circumstances referred to tended to prove three

sales, and pretty clearly indicate the opinion that the three sales would constitute the principal offence. This, however, does not follow, upon any established rule or principle of law. Three sales may be conclusively proved and still the person making them not be a common seller.

In the case of *Com.* v. *Perley*, 2 Cush., 559, the Court decide that all the sales necessary to constitute a common seller may be made in one day.

In this State the Court has not attempted to define in terms the offence of "common seller" of intoxicating liquors.

In the case at bar, the evidence tended to prove more than six distinct acts of sale of intoxicating liquors by the defendant, and the Court instructed the jury that, "under our present statute, no particular number of sales were necessary to be proved to convict a common seller, but that the jury must be satisfied from the evidence that selling intoxicating liquors was her common and ordinary business."

It has already been remarked that the various statute definitions of a common seller have been repealed. In view of this fact, can the ruling be erroneous? It is so contended; and that the term common seller, like common barrator, is a term of art, and requires that at least three distinct instances of offending must be shown within the period of time covered by the indictment. To this it is sufficient to remark that "common seller" is not a term of art, and is not defined either by statute or by common law. *Com.* v. *Odlein*, 23 Pick., 275. Its definition must therefore be sought from the same sources that we seek the meaning of other words or phrases in our language which are in common use.

COMMON, as defined by Worcester, means *frequent*, *usual*, *customary*, *habitual*. A common seller, therefore, is one who sells frequently, usually, customarily, habitually. But this is not all. The jury were required to find from the evidence that the defendant made the sale of intoxicating liquors not only her common but also her ordinary business. ORDINARY, as defined by the same lexicographer, means *es-*

tablished, settled, accustomed, conforming to general order. And yet it is said, that this instruction, thus comprehensive and guarded, is too hard upon the defendant. The fault, if any it have, is the other way. This will be manifest from a moment's consideration.

There are many offences recognized by statute and of common law bearing strong analogy to this; such as common barrator, common scold, common drunkard, fiddler, piper, night walker, evesdropper, and the like.

The evidence by which these and kindred offences are established arises according to the peculiar characteristics of the offence itself. In some, the evidence must necessarily be positive, in others, principally circumstantial, and in others, mixed. There is no cabalistic rule of *three* which can be invoked as matter of demonstration in all or even any of these cases. Take the case of a common barrator, the only case in which the books have indicated any particular number of individual acts necessary to constitute the offence. But in relation to this offence, "the books," say the Court in *Com.* v. *McCulloch*, 15 Pick., 275, "seem less explicit than we had thought." No one can be convicted as a common barrator in relation to one offence only—it must be in relation to many cases. 8 Coke's R., b. 37. This arises from the very nature and definition of the offence, which consists in *frequently* exciting and stirring up suits and quarrels either at law or otherwise. The proof, too, must necessarily be positive in its character, as it has few or no surrounding circumstances to indicate its existence—no implements of trade—no distinctive ear marks.

So of a common scold. The law prescribes no particular number of acts of scolding, or proof of particular words or expressions used to constitute the offence; it is sufficient to prove that she is always scolding, 1 Russ., 327.

What would be said of the proposition to convict a woman as a common scold who had scolded three times; or a person as a common fiddler who had fiddled three times, or of a common piper, for piping three times?

Would a person be deemed a common drunkard who

should be proved to have been intoxicated three times within a given period, while one who should be proved to have been commonly and ordinarily drunk during the same period, would not be deemed guilty? No, the fundamental idea attached to *common*, as applied to these acts, is that they are constantly, continually occurring, and not individual, isolated cases.

But the case at bar is more strongly analogous, especially as to the evidence by which it is to be sustained, to other cases of the same general class. Such is the case of a common bawdy house, where it is unnecessary to prove particular acts of illicit sexual intercourse, or even what particular persons visit the house, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment. Ros. Cr. Ev., 744; 1 Russ., 323. Or, a common gaming house, where idle and evil disposed persons come unlawfully to play together, &c. 1 Russ., 323. Or, of being a common innholder or common victualler, which facts may be established by proof of opening a house and hanging out a sign, &c. 3 Bl., 166. These, and cases of a similar character, afford circumstantial evidence of their existence, not less satisfactory than the most positive proof. The same is emphatically true of common sellers of intoxicating liquors.

The witnesses, under the rule requiring positive proof of three distinct sales, must almost of necessity be the customers, and are generally the victims of the sellers. Who that has had any considerable experience in the trial of these cases has not been pained and mortified at the melancholy exhibition of human nature, when the buyer and seller, the victim and the victimizer, have been brought face to face in Court; the one as the witness, the other as the accused? To what pitiful evasions, self stultification and downright perjury will not such witnesses frequently resort, when thus under the eye of the persons who have pandered to their morbid but depraved appetites! *It is the most fruitful source of perjury in our Courts.*

Yet under the rule requiring positive proof of three sales

to convict, this class of witnesses must necessarily be principally relied upon, as the shops of liquor sellers are not frequented except by their customers.

Courts do not enforce such narrow technical rules in other cases. Criminals, from the murderer to the keeper of the bawdy house, may be convicted on circumstantial evidence. But, under this rule, the dealer in intoxicating liquors may have a shop filled with barrels and casks of liquor, exposed for sale; his counter may be supplied with all the appliances for the traffic; he may advertise his business in the public journals; the sound of drunken revelry may go up during the hours of night from his place of business; crowds of trembling inebriates may press around his doors, and staggering drunkards be ejected therefrom, and all these facts and circumstances be seen and known of the police or other sober and reliable citizens, and yet the keeper of such a shop go with impunity, unless some sober citizen can, or some drunken victim will testify to three distinct acts of sale! A rule so purely technical and arbitrary cannot commend itself to our common sense. It is also at variance with analogies of the law, and, in our judgment, tends to evil. Distinct acts of sale undoubtedly tend to show that the person making them is a common seller. The more frequent those acts the stronger is that tendency. Other facts and circumstances have also the same tendency, and are frequently more satisfactory in their character. These distinct acts, when proved, and other facts and circumstances tending to show the character of the business of the accused, should all be presented to the jury, and, from the whole testimony they should determine whether the offence has been committed. Deeming the instructions correct in principle, and certainly sufficiently favorable for the defendant, the *exceptions are overruled.*

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

INDEX.

AGENCY.

See ASSIGNMENT, 1.

AMENDMENT.

See CORPORATION, 10.

APPEAL.

See FORCIBLE ENTRY AND DETAINER.

ARBITRATION.

See ASSUMPSIT. JUDGMENT.

ASSIGNMENT.

ASSUMPSIT.

See RECEIPTER, 6.

ATTACHMENT.

an attachment of the same property, returned upon a new writ, on the next day, but antedated so as to correspond with the receipt, although, at the time the receipt was given, it was expected that the new writ would issue, upon which the property was to be attached. *Waterman* v. *Treat*, 309.

See LOGS AND LUMBER.

AWARD.

See ASSUMPSIT.

BANK.

See POOR DEBTOR, 11.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a draft, which was drawn on a firm in Philadelphia, was protested for non-acceptance, the certificate of the notary that he had "duly notified the drawer and indorser," (who were citizens of this State,) is, by the law of the State of Pennsylvania, where the draft was payable, evidence of the facts certified by the notary, — and, in the absence of contradictory proof, sufficient to charge the indorser. *Orono Bank* v. *Wood*, 26.
2. In this State, likewise, the notary's certificate is, *prima facie*, sufficient; but not so conclusive, as to exclude explanatory or contradictory evidence. *Ib.*
3. In an action against the indorser of the draft, the holder will be entitled to damages at the rate of six per cent. additional to the contents of the bill and interest; for the statutes of 1841 and 1857 are not materially variant; the difference in phraseology was only for the purpose of condensation. *Ib.*
4. A parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there has been no privity, is within the statute of frauds as a promise to pay the debt of another. *Plummer* v. *Lyman*, 229.
5. Although a written promise to accept a non-existing bill operates as an acceptance, if the bill is drawn within a reasonable time, a verbal promise to accept such a bill is not valid. *Ib.*
6. Where A has a lien on a vessel for materials used in building it, and B holds the vessel to secure him for advances made to the builder, a promise made by B to accept the order of the builder in favor of A, for the amount of his claim, cannot be enforced, unless it appears to have been made for some consideration, such as a discharge of A's lien on the vessel, or his promise to discharge it, or to release his claim on the builder. *Ib.*
7. The fact that the acceptance of the order would, by operation of law, discharge the lien, would not be a consideration for a previous verbal promise to accept it. *Ib.*
8. The owner of a promissory note may maintain an action thereon in the name of a third person, by his consent. *Patten* v. *Moses*, 255.

CONTEMPT OF COURT.

COSTS.

COUPONS.

DOMICIL.

DOWER.

EASEMENT.

EQUITY.

See ASSIGNMENT, 2. MORTGAGE, 15, 16. PARTNERSHIP, 2. PUBLIC LOTS. WILL, 8.

ESTOPPEL.

See Dower, 8, 10. Limitations. Railroad, 16, (13).

EVIDENCE.

EXCEPTIONS.

EXECUTION.

EXECUTORS AND ADMINISTRATORS.

See PROBATE ACCOUNT.

FORCIBLE ENTRY AND DETAINER.

GUARDIAN.

LOGS AND LUMBER.

MARRIED WOMEN.

MILLS.

MORTGAGE.

See Dower, 1, 2.

MORTGAGE OF CHATTELS.

PARTNERSHIP.

PAUPER.

PAYMENT.

PLEADING.

POOR DEBTOR.

PRACTICE.

PRESCRIPTION.

See Real Actions, 2.

PROBATE ACCOUNT.

PUBLIC LOTS.

RAILROAD.

REAL ACTION.

REPLEVIN.

See BOND, 4.

RIPARIAN RIGHTS.

See PRESCRIPTION.

SALE.

SCHOOL DISTRICT.

SET-OFF.

SHERIFF.

See OFFICER.

SHIPPING.

STATE LANDS.

STATUTES CITED.

SPECIAL LAWS.

STATUTE OF FRAUDS.

1. A person cannot make another his debtor by paying the debt of the latter without his request or consent. *Richardson* v. *Williams*, 558.

2. A, being indebted to B, C verbally promised B to pay him the amount, and charged it to A, without the consent of the latter:— *Held*,—

   1. That, B not having released or assigned his debt, the promise was without consideration;

   2. That such a promise is within the statute of frauds, and, to be obligatory, must be in writing. *Ib.*

See ASSIGNMENT, 5, 6, 7. BILLS AND NOTES, 4, 5.

TAXES.

1. If a person has a home established in a town in this State, and goes therefrom for a specific purpose, intending to return when that purpose shall be accomplished, without making any other place his home for an indefinite period of time, his residence is not changed. *Church* v. *Rowell*, 367.

2. Otherwise, if he takes up his abode in another place, without any present intention to remove therefrom. *Ib.*

3. If he acquires a new residence, and leaves there to go to his old home, with the deliberate intention of not returning, and of abandoning his new residence, then goes to the town of his first residence, as to his former established home, and is there on the first day of May, having no intention to go to reside in any other particular place as a home, he is subject to taxation in that town. *Ib.*

4. But if he leaves in such case with the intention of returning, and not to abandon his new home, and that intention is retained by him on the first day of May, he is not a subject of taxation in that town. *Ib.*

5. The declarations of a person, in connection with his departure from a place, are not admissible in his favor, unless accompanied by some act of starting or preparation to start. *Ib.*

See COLLECTOR OF TAXES.

TENANT IN COMMON.

See PARTNERSHIP, 2, 7.

TOWNS.

1. The statute c. 117, §§ 46, 47, of R. S. of 1841, (R. S. of 1857, c. 84,) providing that an inhabitant of, or proprietor of land in a town, may voluntarily pay his proportion of an execution against the town, was intended to

TRESPASS.

See Action, 2. Collector of Taxes, 1. Mortgage, 1, 2. Sheriff, 2. Ways, 7, 9.

TROVER.

TRUST.

TRUSTEE PROCESS.

given him an unconditional bill of sale of their stock of goods in their store which he took possession of — all which transfers were intended to secure him against liabilities he had assumed and for moneys paid for them, it was *held* that where there had been no fault or neglect on his part, he could not be charged with the real estate, or with the amount of the judgment, and required to credit the value thereof in part of their indebtedness to him; but that he would be liable under the provisions of the R. S., c. 86, § 50, to deliver the goods to the plaintiffs upon the payment of his claims by them.

Held, that although the condition of the sale of the goods was not expressed in the transfer, the sale was not void, as having been made in fraud of the statute, which requires that mortgages of personal property shall be recorded, the trustee having taken possession of the property at the time of the sale.

Shreve v. *Femno*, 78.

See INSURANCE, 11.

USURY.

1. As a note, made for the accommodation of the payee, has no validity, as a contract, until it has been negotiated, the retention of more than the legal rate of interest will be usurious, where the person discounting it knew the purpose for which the note was made. *Tufts* v. *Shepherd*, 312.
2. And the makers may show the usury, in a suit against them, by such indorsee, or by another person who received the note from him after it was dishonored. *Ib.*
3. Where such a note, payable in one year, was negotiated on the day after its date, and the party purchasing it made an agreement with the payee, which was written on it, that "the note is to run a year and a day," the time of payment named in the note was not affected by the memorandum of the agreement. *Ib.*
4. And, even if the memorandum constituted a part of the note, the day of payment, by it, was within the year, and the three days of grace, until the expiration of which the note would not be due. *Ib.*
5. Where a promissory note embraced usurious interest, and, after suit brought, the holder, without the knowledge of the maker, and without actually receiving anything, indorsed a sum not sufficient to reduce it to the amount of the actual principal and legal interest to that time, the note is still usurious, and subject to all the provisions of R. S. of 1857, c. 45.

Gray v. *Brown*, 544.

VERDICT.

A verdict will not be set aside as being against evidence, unless it so preponderates in favor of the losing party as to authorize the Court to infer that the jury acted under a mistake, or were influenced by improper motives.

Williams v. *Buker*, 427.

See also *Perkins* v. *Hitchcock*, 468.

WAYS.

WILL.

there are more than one estate or subject matter of devise, or more than one person, whose description follows out and fills the words used in the will; — 2nd. When the description of the thing intended to be devised, or of the person who is intended to take, is true in part, but not in every particular.
Howard v. *American Peace Society*, 288.

3. *Thus*, such evidence is admissible to show that by a bequest to "*The Congregational Society of Auburn*," the testator intended "*The First Congregational Society in Auburn;*" and that by a bequest to "*The Congregational Foreign Missionary Society*," the testator intended "*The American Board of Commissioners for Foreign Missions.*" *Ib.*

4. When the name used in a will does not designate with precision any person, and the circumstances concur to indicate that a particular person was intended, and no similar conclusive circumstances appear to distinguish any other person, the person thus shown to be intended will take. *Ib.*

5. The general provisions of the statute of charitable uses (43 Eliz., c. 4) are in force in this State, not as the basis of the equity power of the court in cases of trusts, but as incorporated into our chancery jurisprudence. *Ib.*

6. A bequest to "*the suffering poor of the town of Auburn*" is not void for uncertainty; nor because no trustee, to execute the trust, is expressly named in the will. *Ib.*

7. Under our statute (R. S. c. 87, sec. 8, par. 7) the Supreme Court is authorized to determine from all the provisions of a will, and from extrinsic evidence, whether the testator intended that the executor not expressly appointed trustee, should act as such. *Ib.*

8. A bequest to the Congregational minister of the Congregational society of the town of Auburn, absolute and subject to no contingency, there being none at the date of the will, will apply to the person who first became such in the legal sense of the term. *Ib.*

9. It will not be held to apply to a person who preaches to that society temporarily, but only to the regularly settled pastor. *Ib.*

CORRECTION.

The following paragraph was accidentally omitted in its place, under the head of

LIQUORS, SPIRITUOUS AND INTOXICATING.

7. On the trial of an indictment against a person as a common seller of intoxicating liquor, the instruction to the jury, "that under our present statutes, no particular number of sales are necessary to be proved to constitute a common seller, but that the jury must be satisfied, from the evidence, that selling intoxicating liquors was her common and ordinary business, and they might be authorized to find the respondent guilty without proof of any particular number of sales," is sufficiently favorable for the respondent.
State v. *O'Conner*, 594.