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 L.

HALLOWELL:
MASTERS, SMITH & CO.
1865.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

A. D. 1862.

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, in place of MAY, J., from May 14, 1862.

A. D. 1863.

HON. JOHN APPLETON, CHIEF JUSTICE.

HON. RICHARD D. RICE,
HON. JONAS CUTTING, LL. D.,
HON. WOODBURY DAVIS,
HON. EDWARD KENT, LL. D.,
HON. CHARLES W. WALTON,
HON. JONATHAN G. DICKERSON,
HON. WILLIAM G. BARROWS,

} ASSOCIATE JUSTICES.

*** TENNEY, C. J., and GOODENOW, J., retired at the expiration of their respective terms, and on the 24th day of October, 1862, APPLETON, J., was appointed Chief Justice, Hon. EDWARD FOX and Hon. JONATHAN G. DICKERSON, Justices. FOX, J., having resigned, Hon. WILLIAM G. BARROWS was appointed to the vacancy on the 27th day of March, 1863. RICE, J., having resigned, Hon. CHARLES DANFORTH was appointed on the 5th day of January, 1864.

ATTORNEY GENERAL.—HON. JOSIAH H. DRUMMOND.

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CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT.

1861.

COUNTY OF KENNEBEC.

REUEL WILLIAMS *versus* MARSHALL S. HAGAR.

The directors of a railroad company, which was failing in its circumstances, agreed in writing with its president, that if he would indorse for the company for an amount not exceeding sixty thousand dollars, they would severally indemnify him in the "*proportions* set against their names." The total of the various sums subscribed was $38,000, — the liability assumed by the president was $40,000. In an action against one of the signers, *it was held*: —

That the assumption of liability was a sufficient consideration for the contract of indemnity; —

That the contract being perfect in itself, in the absence of any parol evidence explaining it, the director would be liable for the full amount of his subscription.

But parol testimony was admitted without objection, showing that the plaintiff verbally contracted to indorse to the amount of sixty thousand dollars; — these agreements constituted two mutually dependent contracts; one verbal, the other written.

Under the two contracts, the plaintiff having performed in part, was, in the same proportion, entitled to be indemnified.

As no particular mode of indorsing the notes of the company was indicated, his signing on the back as *guarantor*, was an *indorsement* within the terms of the contract.

Williams *v.* Hagar.

Money raised on his own private securities, with which he paid the debts of the company, although equally advantageous to the company, the directors would not be liable for — not being within the *form* of the contract.

Otherwise, where he had taken the notes of the company payable to himself, for money so paid by him, negotiated them and paid them as *indorser*.

As to the mode of computing the amount of damages to which the plaintiff is entitled.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of ASSUMPSIT. The writ contains the general counts, and a special count upon a written agreement, alleged to be signed by the defendant; which agreement is as follows, viz.:—

"A large part of the bonds of the Kennebec and Portland Railroad, and of the preferred stock authorized by the stockholders, not being disposed of or issued, and the holders of the floating debt of the company requiring payment of their dues, faster than money can be realized from those bonds and preferred stock, it has become indispensable to the preservation of the property and success of the road that immediate provision should be made to meet a part of the floating debt, and to give confidence in the security of the bonds and of the preferred stock, so that they may be sold and issued, and, seeing no other mode to effect that object than for the directors to assume a personal responsibility for the payment of the treasurer's notes, on which money may be raised for the use of the company, and the undersigned stockholders in, and directors of, said road, not willing to put our names upon paper to be used in the market, but willing to assume our several proportions of the hazard and liability for so doing, hereby propose to Reuel Williams, president of the corporation, that, if he will indorse notes to be made by the treasurer, not to exceed sixty thousand dollars, in such sums and payable at such times as he and the treasurer may find best suited to raise money upon, we will severally indemnify and save him harmless for so doing, as also for his indorsing any notes that may be given by the treasurer as renewals of or substitutes for any of the aforesaid notes, in whole or in part, but in no case to exceed the

amount of sixty thousand dollars, in the proportions set against our respective names, the said Williams having a mortgage on the personal property of the company as indemnity for his said indorsements and other purposes, and no notes to be indorsed that are not payable within two years; and, in case any loss happens, we are to have our several proportions of the benefit of the mortgage, after said Williams is paid for his advances and prior indorsements for the road, except the notes of Dec., 1852, and renewals thereof.

"June 18, 1855." (Signed,)

"Geo. F. Patten, eighteen thousand dollars.

"Wm. D. Sewall, thirty-three hundred dollars.

"M. S. Hagar, thirty-three hundred dollars.

"F. T. Lally, thirty-three hundred dollars.

"Benj. A. G. Fuller, thirty-three hundred dollars.

"F. T. Lally, six hundred and sixty-seven dollars additional.

"Benj. A. G. Fuller, six hundred and sixty-seven dollars additional.

"Wm. D. Sewall, six hundred and sixty-seven dollars additional.

"M. S. Hagar, six hundred and sixty-seven dollars additional.

"J. D. Lang, four thousand dollars."

At the return term a bill of particulars was filed by the plaintiff, being a schedule of certain notes indorsed by the plaintiff and taken up by him, as alleged in the special count.

The plaintiff, who was called as a witness, produced and verified the several notes enumerated in the bill of particulars; all of which are signed by Gilman, treasurer, as maker, together with the notarial protests and notices to the plaintiff, as indorser, upon each one of the notes, except one for $430,76, dated Nov. 8, 1855.

The witness testified, that "after making the agreement of June 18, 1855, and in pursuance of it, he indorsed these

several notes; that he was duly and seasonably notified of non-payment by the maker, upon all of them; and that he paid them all as indorser, together with the interest that had accrued and the notarial expenses, as stated in the bill of particulars.

"The agreement was signed at a meeting of the railroad directors, held at Bath, June 17th and 18th, 1855, by all the parties who were expected to sign it, except Mr. Lang, who signed it afterwards. There is no disagreement between us,—that I was to bear a proportion of the liabilities contemplated in that paper. I was to go on and indorse for the whole sum which should be raised. They were to pay me in the proportions of their several amounts, to the whole amount intended to be raised. They were answerable to that extent. That is what I claim. The counsel who made the writ, made it as he understood the contract, or, as he thought it might be understood. I was to bind myself by indorsing for the whole. They were to take and relieve me for what they signed, and I was to take the rest. I was not to sign the agreement."

On cross-examination, witness testified that, as a part of the arrangement made by the directors at the meeting, a mortgage was authorized to be made to him for his indemnity for previous advances and liabilities for the company, amounting to $43,090,41, and for the further liabilities then contemplated. The mortgage was of the rolling stock; was not made until he returned to Augusta, on the next day.

Among the notes specified in the bill of particulars, before mentioned, were four, amounting to $18,410,63, all of the date of July 2d, 1855, which were called the "Amoskeag notes;" two notes of $1500 each and another note for $430,76, called the "Hathorn notes;" three notes called the "Thayer notes," amounting to $18,427,87, and a note of $500, to Woodbury.

From the testimony of the witness, it appeared that the four notes first named, were given to the Amoskeag compa-

ny for sundry notes which that company held against the railroad company for an engine called the "Lang." That, soon after the engine was received, it ran over a bank, and was so badly damaged, it was sent back to the makers to be rebuilt. It was rebuilt at a cost of $3000. The company refused to accept the note of the railroad company, and held on to the engine for the repairs upon it. One of the original purchase notes became due and was not paid; a suit was instituted thereon and another engine attached. They proposed to Gilman, (the treasurer,) to give an extension of credit, if he would procure the witness to indorse the notes for the purchase money and for the repairs.

At that time witness was in advance for the company over $40,000, for money he had let the company have, and was indorser of the company's notes for $23,000 more. Being unwilling to incur any more debt he called the directors together and stated to them the condition of matters. This was the occasion of the meeting held on the 18th of June and the arrangements made on that day.

All the notes held by the Amoskeag company were due at that time, but some of them were not then payable. They were outstanding, and, to provide for them and other like debts, was the very object of raising this money. These notes were renewed by his indorsing the four notes. The form of the guaranty, in which he was required to indorse, was furnished by the agent of that company.

The witness further testified:—"Prior to the 1st of Dec., 1855, I was requested by some of the signers to the agreement sued on, not to indorse any more notes under it. I said I would not, if the other signers would agree to it. They agreed to it and I engaged not to indorse any more.

"The notes given Hathorn were for sleepers for the road. I paid them as indorser, on notice of non-payment by the company."

While the witness was receiver of the earnings of the railroad, he testified, he paid out faster than he received; the balance overpaid was from his own funds. At the end

of his receivership there was $4000 more due him than when he began.

With reference to the Thayer notes, the witness testified, that, "at the making of the agreement of June 18th, it was supposed that, if we could immediately raise $20,000 in cash, out of the $60,000, we could get along for the time. I went at once to Boston. The treasurer made three notes for $10,000 each, payable to myself, on which I supposed I could raise money in Boston, on my indorsement of them. Thayer Brothers would lend me the money, but they would not have anything to do with railroad paper; not with my indorsement." The witness specified the debts of the road paid by him out of the money thus obtained. The witness further testified:—"When I got through paying these debts I carried all the vouchers to Gilman and took these three notes. The money these notes represent went to pay existing debts of the company. The notes were to reimburse the advances from Thayer. The notes were discounted and I paid them as indorser."

There was testimony introduced in defence; the nature of it, as well as other facts proved in the case, will appear from the arguments of counsel and from the opinion of the Court.

H. W. Paine and *Whitmore*, for the defendant.

1. The paper writing of June 18th, 1855, though bearing the defendant's signature, *is not his contract.*

This writing is free from all ambiguity and admits of but one construction. The signers severally undertake *fully* to indemnify the plaintiff. The contributive portion of each is fixed. As the whole sum subscribed is to the whole loss, so is the amount subscribed by each individual to his share of the loss.

The language is:—"We will severally indemnify and save him harmless for so doing * * * in the proportions set against our respective names." Whatever the loss may be the plaintiff bears no part of it.

The whole amount subscribed is, say, $38,000; $\frac{1}{38}$ of the loss is to be borne by Patten, and $\frac{4}{38}$ by each of the other subscribers. The testimony shows conclusively; indeed, it is not denied by the plaintiff, but substantially admitted, that he was to assume a part of the risk.

Hagar swears that Williams said—"I will take the paper and see Lang and get him to take what he will, and I will take the balance of the $60,000. We signed severally for $3,300; Patten had signed for $18,000. Lang was not expected to take above $6000. Williams said, 'I cannot bear the balance and I will not.' We divided up McKeen's part, and signed the additional sums. Williams professed himself satisfied."

Sewall swears:—"Williams took the paper in its then condition, saying that he would have it filled up by the subscription of Lang, together with what he would take, to provide for $60,000. After consulting, it was said by some one of the persons who afterwards subscribed for $3,300, that if Patten and Williams would take $40,000 of this sixty, we would take the balance among ourselves; and we first subscribed on that basis. Patten declined to take over $18,000. McKeen did not take any. Mr. Williams said, after thus looking at the paper, 'you have left that for me, have you?' We said, 'yes.' He said, 'I will not take it.' We then subscribed the additional sums put down to each of us, and estimated Lang's at $6000, which would have left Williams $20,132. Mr. Williams accepted, undertaking, as I understood, to get Lang's subscription, and he would take the balance."

Mr. Williams, himself, says:—"They were to take and relieve me for what they signed, and I was to take the rest." That all parties understood and agreed that the whole amount was to be taken, and that the plaintiff was to take a part; that he was to take so much of the balance as Lang did not take, is clear beyond a doubt.

It is true Mr. Williams says, "I was not to sign the agreement."

Hagar and Sewall say he was to sign it; both were surprised in 1858, when, on the production of the paper, it was found *not* to bear his signature. The fact, undoubtedly, was this:—It was not expressly agreed that Williams should subscribe; neither was it agreed that either of the others should sign. They agreed to take and did subscribe. He agreed to take but could not subscribe till Lang's portion had been ascertained. The amount of their several risks depended, not only on the amount set against their names, but upon the number of signers, the total amount of subscription. If Williams did not subscribe for $22,000, Hagar had $\frac{4}{60}$.

Williams says he was not to sign. This is his construction of the obligation of the verbal agreement. He did agree to take. Was not this an agreement to subscribe? How else could he take his proportion?

If he did not sign the others took the whole. This is the dilemma. It was agreed between all the parties that he should take all of the $60,000 which Lang would not take. Without signing, he could and did take nothing. Did not the agreement "to take," involve necessarily the agreement to subscribe? If he was to sign, the contract has never been completed, and Hagar well says it is not his contract.

It may be urged, that the parties could not have expected Williams to sign, because they describe themselves as unwilling to put their names upon paper to be used in the market, and this description excludes Mr. Williams.

But the paper assumes the form of a proposition by the directors to the president of the road; a proposition to be accepted or declined. It was then and there verbally accepted. No other acceptance could take place till Lang had subscribed. It would have been consistent with the form adopted, for Mr. Williams to have accepted in writing, adding that he assumed the risk to the amount of $22,000.

2. Assuming the paper writing of June 18, to be the contract of the defendant, the plaintiff has proved no such loss as he was indemnified against.

The contract recites the condition of the corporation, states the objects to be accomplished and prescribes the manner in which it is to be done.

The company was owing a floating debt and had certain bonds and preferred stock then unavailable. This was the condition.

To pay off a portion of the floating debt and give confidence in the security of the bonds and preferred stock, so that they might be sold and issued, was the declared object of the arrangement proposed. And these objects were to be accomplished by raising money on the notes of the company indorsed by Williams.

All this appears on inspection of the contract; the language is explicit; and there is no occasion to resort to the conversation of the parties if it were allowable.

The contract manifestly looks to the raising of money on the company notes indorsed for the use of the company. And such a course of proceeding would tend to accomplish the declared purpose; would tend to create a confidence in the securities which the company had to dispose of.

It was for the signers of this contract to prescribe the terms upon which, and upon which alone they would be bound.

Now it does not appear in the proof that one dollar was paid by the plaintiff on the notes of the treasurer, made to raise money upon. It does not appear that one dollar was raised to go into the treasury of the road.

One item of the plaintiff's claim, and a large item, is for money which he paid as guarantor of notes to the Amoskeag company. This company held the notes of the treasurer for some $18000, matured and about to mature. An arrangement is made whereby the time of payment is extended and the plaintiff becomes surety. This was an acknowledged inability to pay on the part of the road. An extension is but another name for insolvency. Did that operation increase the public confidence in the road or its

securities? Did it not, on the contrary, have the effect to defeat the object aimed at?

The Hathorn notes and the note to Woodbury are subject to the same remarks. They fall into the same category.

The residue of the plaintiff's claim is of a different character.

Mr. Williams, understanding the contract to require the raising of money on the notes of the treasurer, immediately after the Bath meeting went to Boston with the treasurer's notes and endeavored to borrow money on them. He failed of success. He did not inform the signers of the contract, but borrowed money on a pledge of his own stocks, and disbursed the money from time to time in discharge of the debts of the company.

On the 24th Oct. he settled his account with the treasurer and the disbursements were allowed, and he took the treasurer's notes therefor.

The answer to this part of his claim, is, that the defendant never agreed to pay any part of it. And it is not for the Court to substitute a new contract. The defendant never promised to refund the plaintiff moneys which he might advance the company.

3. The items, "coupons given up," "60 days interest on do.," "coupons," "6 months interest on notes," "dividend on preferred stock," under head of "R. Williams' account," were payments not authorized by the contract, or contemplated by the signers. These items aggregated amount to $2,459,95.

The first, second, and third of these items were no part of the *floating* debt of the company.

The fourth item is interest on notes held under an arrangement of December, 1852.

By the concluding sentence of the contract of June 18th. these notes are excluded.

P. Barnes and *J. H. Williams*, for the plaintiff.

The defence, in almost all its parts, is purely technical.

Whether the *plaintiff* was required to *sign* the agreement of June 18th, is a mere question of form. The testimony is decisive that he was not to sign it. The use of the word "take," by all the parties, shows that the idea of *signing* was a mere inference and afterthought in the minds of Hagar and Sewall. The terms of the paper itself explicitly repel the idea that Williams was to sign it.

By what *ratio* are the "proportions" of the signers to be expressed? One would be to make the aggregate of their subscriptions, 37,868, the denominator and each separate subscription the numerator; the defendant's ratio, in that way, would be, in approximate even numbers, $\frac{4}{38}$. The other would be, to make the maximum sum named in the paper, the denominator; so, the defendant's ratio would be $\frac{4}{60}$.

If the ratio of 38 parts is the true construction, then the six signers would "take" the whole $\frac{38}{38}$.

If the ratio is 60ths, then the signers would "take" $\frac{38}{60}$, leaving Williams to "take" $\frac{22}{60}$.

The latter, the plaintiff contends, is the true ratio, and he claims only on that interpretation.

A careful analysis of the terms of the paper requires this construction.

They engaged to indemnify in "proportions;" but, when they subscribed, they did not put down "proportions" but absolute sums, in dollars. Showing that they were thinking of the maximum sum named in the paper, and intended to express what part, in dollars, of that sum, in dollars, they would take, if so much should be raised, and a corresponding part, of course, if any less sum.

Contemplating indemnity, they must have regarded not only "proportions" but an *extent* or *limit* of some aggregate. They could not then know what the aggregate would be. It is most simple and natural to infer, that they assumed the known limit of 60,000, as the aggregate basis of their proportions. So each one would know his utmost sum in dollars, and his obvious and exact ratio of any smaller aggregate.

It is plain that when the defendant and the others subscribed at Bath each understood that his ratio was exactly fixed. But that could not be unless the ratio was 60ths. Any other ratio would be uncertain, depending on the amount Lang should subscribe, from 6000 down to any smaller sum.

No testimony, phraseology or circumstance sustains the interpretation of 38 parts.

As to the point that the notes were not indorsed or negotiated as required: —

Regard being had to the object of the agreement "to make provision to meet a part of the floating debt" and to the *mode* of doing it, — the assumption of "a personal responsibility," — there is nothing in the paper which requires the term "indorse" to be interpreted in any technical sense. The indemnity is binding if Williams gave his "personal responsibility" in any form consistent with any definition of the term.

As to the negotiation of the Amoskeag and Hathorn notes it is enough to say, that the parties took the notes as money, and allowed them as money in discharge of their previous debts; that was a proper "negotiation."

On the Amoskeag notes Williams was indorser as well as guarantor. So both parties intended.

As to the Thayer notes Williams certainly "assumed a personal responsibility" to "meet a part of the floating debt."

He started with the treasurer's notes strictly indorsed, to "raise money."

Nothing in the agreement forbade him to negotiate the notes to himself, or to raise money of himself.

The original notes, it is presumable, he held as his voucher and security until October 24th, when the "substituted" notes were given for the actual amount raised.

The preponderance of the testimony is that the substituted notes *were* negotiated out of the plaintiff's hands; but whether or not, is wholly immaterial; "money was raised" to meet the floating debt" by plaintiff's "personal respon-

sibility" on the strength of the treasurer's notes to him as payee.

But, in fact, no question about the *negotiation* of these notes is open to the defendant. He promised to indemnify for *indorsing*, and exacted no duty from plaintiff about *negotiating*. When plaintiff had *indorsed* the notes, and made them available to the treasurer, his right to the indemnity was complete. What he did in fact, with respect to the disposal of the notes, he did as agent of the treasurer, or as a financial officer of the company, not as a party to the agreement of June 18th.

The opinion of the Court was drawn up by

DAVIS, J. — In 1855, the Kennebec and Portland Railroad Company, of which Reuel Williams, the plaintiff, was president, owed a large floating debt, of which the current receipts afforded no means of payment. A failure was inevitable, unless funds could be raised on credit; and this could not be done upon the notes of the company, without a good indorser. In this emergency a meeting of the directors was held, of whom the defendant was one, to determine what should be done. At this meeting, held June 18th, an agreement was made that the plaintiff should indorse for the company to an amount not exceeding sixty thousand dollars; and the directors would "indemnify and hold him harmless, in the proportions set against their names." The sum set against the name of the defendant was $3,967.

The agreement of the directors was in writing, and was perfect in itself. The assumption of the liability by Williams would have been a sufficient consideration for the contract of indemnity. And in the absence of any parol evidence explaining it, the directors would have been liable for the full amount of their subscriptions.

But it appears by the parol testimony, admitted by both parties without objection, that the plaintiff made a verbal contract to indorse notes for the company to the amount of

sixty thousand dollars. This was an additional consideration for the contract of indemnity. These together constituted two mutually dependent contracts,—one verbal—the other written. One was an agreement to assume a given amount of liability; the other was, in case the whole liability should be assumed, to indemnify in part, to a given amount. The assumption of the liability by the plaintiff was a condition precedent to the liability of the others to indemnify him.

Taking the two contracts together, as proved, if there was only part performance by the plaintiff, he could exact only part performance of those who agreed to indemnify him. If he indorsed the company notes for only *forty* thousand dollars, instead of *sixty* thousand, then they became liable to him for only forty-sixtieths, or two-thirds of the sums by them subscribed. These sums, though denominated "proportions," in their relation to each other, were actual subscriptions in their relation to the plaintiff; to be paid fully if he should pay sixty thousand dollars upon company notes indorsed by him; to be paid in proportion if he should pay a less sum.

Such we understand to have been the intention of the parties, as expressed by the written contract on the one side, with the verbal one on the other.

Under this arrangement the plaintiff assumed various liabilities for the company, amounting to over forty thousand dollars. These he afterwards paid, at various times, from Nov. 5, 1855, to July 5, 1856. These payments, with interest, costs of protest, &c., amounted to $41,138,88. If he could rightfully claim indemnity for all of them, then those who agreed "to hold him harmless" became liable for a portion of each payment when made by him, with interest afterwards. And the amount of each payment for which they became liable was that part bearing the same proportion to the whole, that $41,138,88, bears to $60,000. And of this the defendant became liable to pay a part only, his

proportion being only $3,967 out of $37,868, the whole amount subscribed.

Nearly one half of the plaintiff's claim is for notes of the company which he signed upon the back as *guarantor*. We have no doubt this was an "indorsement", within the terms of the contract. The particular mode of indorsing was left to his discretion.

Another portion of the claim, equally large, was originally for money advanced by the plaintiff. Being unable to get the company notes discounted, he raised money upon his own private securities, and therewith, in connection with the treasurer, paid nearly twenty thousand dollars for the company. For money so advanced by him, though equally advantageous to the company, the defendant and his associates were not liable. It was not within the *form* of the contract made by them.

And the plaintiff seems to have been aware of this. For he afterwards indorsed notes for the company to reimburse himself; and, having negotiated them, he paid them at maturity. He probably did this to bring the transaction within the terms of the contract. We do not perceive that this is any objection to it. It varied from the contract, originally, *in form merely*. The money was raised for the purpose contemplated by the parties. And the indorsements afterwards actually made, being in execution of the original understanding, were within the letter as well as the spirit of the agreement.

Objection is made to some small sums paid to the plaintiff himself. Whether these constituted any part of the floating debt we need not determine. That indebtment was *the reason for making the contract*. The disbursement of the money raised was not limited to that. The plaintiff does not appear to have abused the power given to him, by preferring his own previous claims against the company. According to the agreement of the parties, judgment must be entered for the plaintiff. The amount is to be determined according to the principles previously stated, for the defendant's pro-

portion of $41,138,88, with interest from the date of the several payments. The mode of computation is hereto annexed.

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

RICE, J., having become interested in the subject matter of the suit, did not participate in the decision.

NOTE. — Method of computing the amount for which judgment is to be rendered for the plaintiff: —

The payments made by the plaintiff commenced Nov. 5, 1855, and continued until July 5, 1856. He made eleven different payments.

Upon each payment his right of reimbursement was for $\frac{41,138,88}{60,000,00}$ of the amount paid. For this, the defendant was liable with the other signers of the agreement.

The defendant's proportion of the amount for which *all* were liable to the plaintiff was $\frac{3,967}{37,868}$.

The plaintiff is entitled to interest from the date of each payment.

Each of the eleven payments to be computed in this way, and the whole added together for the amount of the judgment in this case.

MARLBOROUGH P. FAUGHT *versus* ISAAC H. HOLWAY.

A conveyed to B a portion of a lot of land of a certain width, and extending so far in length "as will make precisely twenty acres;" and immediately afterwards A and B, by mutual agreement and survey, marked the lines and corners of the granted premises by spotted trees and stakes. The next year, A conveyed to C the remainder of the lot, more or less, bounding it on the east "by the west line of B's land." B and C occupied their several parcels according to the line marked by A and B, for about twenty-five years. In the mean time, B, by the decision of a lawsuit between him and a third party, had his lot widened on one side four rods, and in consequence relinquished two rods on the other side. C, without any suit, conformed his lines to B's new ones. But the division line between B and C, and their occupation of their respective parcels, continued as before. In an action brought by C's grantee to recover of B's grantee all of the original lot except twenty acres, it was *held*, that the parties intended, in the conveyance from A to C, to bound the land conveyed by the well known marked line then existing, and not by an imaginary west line of B's land to include therein "precisely twenty acres."

Faught *v.* Holway.

After an acquiescence by all the parties in a line so established, for a length of time sufficient to give a title by disseizin, it will not be disturbed, although the occupation has not been such as, aside from the marking of the line, would amount to a continuous disseizin for the whole time.

THIS was an action of TRESPASS, *quare clausum fregit.* The defendant pleaded title to the *locus in quo.* The facts were reported from *Nisi Prius*, by RICE, J. The testimony was voluminous, but the facts appeared to be substantially as follows:—

September 24, 1832, Shubael Baker and another conveyed to Arza Hayward by deed, the west end of the north part of lot No. 39, in Sidney, being one half of the width of the lot, "and continuing, from the west side, one half the width of the lot, so far as will make precisely twenty acres." Immediately afterwards, according to a previous agreement, Baker and Hayward went on to the land with surveyors, run out the lines of the lot conveyed by Baker's deed, and marked the lines and corners by spotted trees and stakes. The defendant, through intervening conveyances, became the owner of this lot of land, deriving his title from Hayward.

September 12, 1833, Baker and another conveyed the remaining part of the north half of lot No. 39 to James Shaw, describing it as ten or twelve acres, more or less, bounded on the east by "the west line of said Hayward's land." The plaintiff claims title from Shaw, through several mesne conveyances.

There was evidence tending to show, that, from the time the line between Baker and Hayward was marked by them, they and the subsequent owners occupied their respective lots in accordance with the marked lines, each party cutting trees, from time to time, on his own side of the line, and, without dispute or counter claim, until about the year 1857.

In 1833, or 1834, Hayward had a lawsuit with Bacon, the owner of the next lot on the north, as to where the true north line of Hayward's land, bought of Baker, was, and it resulted in establishing Hayward's north line four or five

rods north of where it was supposed to be when he bought of Baker. After this, Hayward removed his south line two rods farther north. The owner of the Shaw lot removed his north and south lines to correspond with Hayward's, as established by the result of the suit. This made Hayward's land forty and one half rods from north to south, instead of thirty-eight as was supposed when he bought. There was evidence that the west line of Hayward's lot was not changed, after the change of the south and north lines, but that that and the Shaw lot were still occupied as before.

The plaintiff became the owner of the Shaw lot in Dec., 1857, and the defendant of the Hayward lot about the same time.

The alleged trespass consisted in cutting trees on a strip of land six rods wide, lying east of the west line of Hayward's land, as marked and spotted in 1832.

The case was withdrawn from the jury, and the evidence reported for the full Court to draw such inferences as a jury might, and render such judgment as law and justice should require.

Vose & Vose, for the plaintiff, argued that the deed from Baker to Hayward, and subsequent deeds of the same land, were plain and easy to be understood; that those deeds obviously conveyed twenty acres, and no more; and that the record of those deeds held out to the plaintiff that no more land had passed to the defendant or his grantors than described therein. Of what use are public registries, if not to give true information as to the ownership of land, and if, when the description is plain, and the land may be readily found, a purchaser is obliged to look elsewhere for a description less definite, or for some line traced or monument erected, perhaps by mistake, and which can only be proved by parol?

The evidence introduced by the defendant to prove a location different from that contained in the deed, and which would give the grantee more land than was conveyed to

him, is inadmissible. The rule that parol proof cannot be admitted to controvert, vary or explain a written instrument under seal, is as old as the law itself. The cases where a location upon the land after the execution of the deed is permitted to be proved, are limited to that class where the construction of the deed itself might otherwise be doubtful. 3 Starkie on Ev., 995, 1002, 1026; 7 Term Rep., 138.

But, if this evidence is admissible, it fails to establish the defence. The deed under which the defendant claims is clear and explicit in its terms, and all the boundaries therein named are precisely defined, and proved to be well established; it conveys an exact quantity of land, precisely twenty acres, and there is no difficulty in making the admeasurement. It is proved that the location contended for by the defendant, and on which his defence rests, was made under a mistake of four rods as to the true north line of lot 39, they assuming it to be four or five rods south of where it is now established; that Hayward discovered his mistake the year after his purchase, and then and ever since repudiated the north line located by him and Baker, and removed his line four rods further north. By thus widening his whole lot, his west line would fall some rods further east than he had located it, and yet give him his full quantity of land as conveyed to him. So that the defendant, while he claims to correct a mistake in his north line, refuses to correct the mistake in his west line, although he would still have all the land intended to be conveyed by the original deed to Hayward. There is neither law nor equity in such a defence. An erroneous location is not binding. *Prop. Ken. Purchase* v. *Tiffany*, 1 Greenl., 225.

The evidence adduced fails to show a continued disseizin for twenty years. The occasional cutting of a tree does not amount to a disseizin, if the evidence were otherwise sufficient. 18 Pick., 449.

Bradbury, for the defendant.

The seller of land may agree upon a boundary between

what he conveys and his remaining land, and when he and the purchaser have, by mutual consent, set up monuments along the line agreed upon, and their possession and claim is in accordance therewith for a reasonable time, such line will not be disturbed, notwithstanding it may give to the grantee more or less land than is named in the deed. *Emery* v. *Fowler*, 38 Maine, 99; *Moody* v. *Nichols*, 16 Maine, 23; *Waterman* v. *Johnson*, 13 Pick., 261.

Our original surveys are not, as in the great west, made with scientific accuracy. The shape of lots is often irregular, and the quantity of land loosely estimated. Accurate admeasurements, if allowed to prevail, would disturb nine-tenths of the original lines established by the parties, and open a fruitful source of litigation. Parties who have thus marked out boundaries are estopped from repudiating their own acts, precisely as one is estopped by acquiescence in the possession of the other party. Nor is it necessary that such acquiescence continue for twenty, or even ten years.

It is said that there was a mistake in regard to the *north* line of lot 39, and therefore the principle of *Emery* v. *Fowler* does not apply to the defendant's *west* line. The plaintiff had nothing to do with the suit by which the defendant's lot was widened on the north. He was in no way bound by it, nor were those under whom he claims. How, then, can he be placed in a better or worse condition as to the *west* line, by the result of the suit affecting only the *north* line?

The proof is positive that the defendant's west line was not changed when his north line was varied, nor subsequently.

The plaintiff has no title to the land in dispute. Shaw, his original grantor, purchased of Baker only up to, and was bounded on the east by "the west line of land sold to Hayward." That west line was established and marked before Shaw purchased. There was no other west line in existence. The marked line became a monument. *Moody* v. *Nichols*, 16 Maine, 23.

The land in question has been in the uninterrupted posses-

sion of the defendant and his grantors for twenty-seven years, and their occupancy has been such as is described by Rev. Stat., c. 104, § 58, and previous statutes. *Tilton* v. *Hunter*, 24 Maine, 39.

The opinion of the Court was drawn up by

DAVIS, J.—This is an action of trespass *qu. cl.*, involving the title to real estate. Both parties claim, through mesne conveyances, under Shubael Baker and wife.

The defendant derived his title from Hayward, to whom Baker and wife conveyed, Sept. 24, 1832. The deed described a piece of land from lot number 39, one half the width of said lot, on north side, "and, continuing,' from the west side, one half the width of said lot, so far as will make precisely twenty acres." Immediately after the deed was given, Baker and Hayward, in pursuance of a previous agreement, went upon the lot with surveyors, and had the premises conveyed run out, and the lines and corners fixed by spotted trees and stakes.

The plaintiff claims through James Shaw, to whom Baker and wife deeded Sept. 12, 1833. The deed to him described ten or twelve acres, more or less, from the same lot, number 39, being the remainder of the north half of said lot, bounded on the east by "the west line of said Hayward's land."

At the time this deed was given, the west line of Hayward's land had been run out, and marked; and Shaw and Hayward recognized that as the true line, each cutting wood up to it on his side of it. And, though there was no fence upon the line, and no occupation except by cutting wood, the owners upon both sides continued to acquiesce in the line originally established until 1857.

In 1833, or 1834, Hayward had a suit with Bacon, who owned lot number 40, on the north, in regard to the division line between them. That resulted in changing the north line of lot 39, and locating it four rods further north. This increased the width of the lot, in consequence of which

Hayward had more than half the width of it. But Hayward voluntarily relinquished two rods on the south side of his premises to the owner of the south half of the lot. He still had more than twenty acres left, as his lot was two rods wider than before. But Shaw, who then owned the other part of the north half of the lot, was no party to the controversy with Bacon, and took no part in the matter, except, as a result of it, to give up two rods in width on the south side, and receive four rods in width on the north side of his land. The division line between him and Hayward was not changed. The occupation continued as before, by the parties and their grantees, until 1857.

The case at bar is in all respects within the principles established by the case of *Moody* v. *Nichols*, 16 Maine, 23.

The parties agreed upon and marked out a line of boundary immediately after the defendant's deed was given, and possession was given in accordance with it. The "west line" of it, by which the land deeded to Shaw in 1833, was bounded, was an established, visible monument, well known to the parties. Shaw himself assisted in fixing and marking it, when Hayward's land was run out in 1832. It is clear that in the deed to Shaw, the parties intended, not an imaginary west line of Hayward's land, but the well known marked line as then existing.

And, after an acquiescence by all the parties in a line so established for a length of time sufficient to give a title by disseizin, it will not be disturbed, though it does not appear that the occupation has been such as, aside from the marking of the line, would amount to a continuous disseizin for that length of time. *Plaintiff nonsuit.*

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

GEORGE H. BILLINGS *& als. versus* RUFUS BERRY.

The judgment upon a complaint under the statute, to recover damages caused by flowing lands, is not conclusive upon the parties except for the time embraced in it, and for one year after that time.

The damages, accruing after the complaint is filed, must be assessed in *yearly* sums, reckoning from the date of filing the complaint; and the judgment should embrace all the yearly payments that have become due when it is rendered.

The notice, preliminary to bringing a second complaint, may be given at the end of a year after the expiration of the time embraced in the judgment upon the first complaint, although it is less than a year after the rendition of such judgment.

A judgment upon an order of the Law Court, certified to the clerk in vacation, must be entered up as of the last day of the preceding term.

A judgment upon a complaint for flowage, on an order of the Law Court, certified to the clerk in vacation, can properly embrace only the sum due on the last day of the preceding term, although another yearly payment is due before the certificate is received.

A motion in abatement of a suit can be sustained only upon matters of record. If allegations, requiring proof of matters of fact *dehors* the record, are embraced in such a motion, they will be disregarded.

A motion in abatement of a complaint for flowage, alleging "that said complaint was brought before the expiration of one year after the rendition of judgment upon the original complaint," is properly overruled.

EXCEPTIONS from the ruling of RICE, J., presiding at *Nisi Prius*.

COMPLAINT FOR FLOWAGE, entered at the November Term, 1859. On the second day of the term, the defendant filed a motion to dismiss the complaint, because, he says, "said complaint was brought before the expiration of one year after the rendition of judgment upon the original complaint, and that no payment has been made for any year subsequent to the rendition of said judgment. And that no notice of the entering of said complaint has been given by said complainants to said Rufus Berry, as is by the statute required, and because he alleges that said complaint is premature and unauthorized by the statute in such case made and provided."

At the hearing upon the motion, the defendant put in the record of the first complaint, dated June 30, 1855; the report of the commissioners fixing the yearly damages since June 30, 1852; and the docket entries in the former case showing that the report of the commissioners was offered Nov. 7, 1855, and objections to it were filed by the defendant, that the cause was submitted to a jury, March Term, 1859, and a special verdict rendered sustaining the report, that the case was carried to the Law Court on exceptions, and, on the twenty-third day of July, 1859, an order was received from the Law Court to enter "Exceptions overruled, Judgment on the verdict." It was admitted that that judgment had been satisfied before the complaint in this case was filed. The notice which had been given before filing this complaint was also introduced.

Upon this evidence, the presiding Judge overruled the motion and the defendant excepted.

May & Webb, for defendant.

The statute does not allow a second complaint to be brought until one year after the rendition of judgment on the first. *Commonwealth* v. *Ellis*, 11 Mass., 464; *Staples* v. *Spring & als.*, 10 Mass., 72; 2 Met., 508.

The judgment, though recovered as of March Term, 1859, was actually *rendered* July 23, 1859. So far as the particular case is concerned, it was as if the March Term had continued to that date.

The damages up to that date were, therefore, properly included in the judgment. *Com.* v. *Ellis*, above cited.

This case was entered at the next November Term, and is, therefore, premature.

Vose & Vose, for plaintiffs.

The opinion of the Court was drawn up by

DAVIS, J.—Upon a complaint under the statute to recover damages, caused by flowing lands, the judgment in regard to *future* compensation is not conclusive upon either party.

At any time, "after the payment of the *then last year* is due," notice may be given to the other party; and, after the expiration of thirty days from such notice, a new complaint may be brought, to increase, or to reduce the damages.

The language employed in this restriction is somewhat ambiguous. It originated in the Massachusetts statute of March 4, 1800. The statute of Feb. 27, 1796, gave to both the parties a right to institute a new complaint immediately. That of 1800, provided that no new complaint should be presented "until the expiration of one month after the past year's damages shall have become due."

The damages accruing *after* the complaint is filed must be assessed in "yearly sums." The date of the filing of the complaint is the beginning of every new year. The past year's damages become due at that time; and whoever is then the owner of the dam and mill is liable for the year then terminated. *Lowell* v. *Shaw*, 15 Maine, 242; *Bryant* v. *Glidden*, 36 Maine, 36.

As neither the commissioners, nor the jury, are required to find any *amount* of the *entire* damages, but only "the yearly damages" which are also to be "the measure of the yearly damages" until increased, or reduced upon a new complaint, when the judgment is rendered, (which may be long after the report, or the verdict,) it should embrace all the yearly payments that have then become due. Such a judgment is according to the verdict, or the report, as the case may be.

The statute evidently contemplates that there shall be one yearly payment, not embraced in the judgment on the first complaint, accruing before the second shall be commenced. Or, in other words, the judgment on the first, shall be "the measure" of damages for at least one year, that shall not be embraced in the second. But the new yearly payment is not likely to become due a whole year after the judgment is rendered; as the year is reckoned, not from the date of the judgment, but from the date of filing the complaint. So that a yearly payment not embraced in the judgment may

become due very soon after it is rendered. And, when such new payment becomes due, though it should be the next day after the rendition of the judgment on the first complaint, either party may give the notice preliminary to instituting another. So that the statement made incidentally by the Court, in the case of *Stevens* v. *Fitch*, 2 Met., 507, 508, that a new complaint "cannot be brought until after the expiration of more than a year from the judgment for annual damage on the former assessment," is not strictly accurate. No such point was decided in the case. The rule is stated with more care in *Staple* v. *Spring*, 10 Mass., 72, that the statute suspends the right to commence a new complaint "for one year and one month following *the time comprised in the prior decision.*"

Under our present statutes the clerk of courts in any county may, during a vacation, receive a certificate of a judgment, pronounced in another county. In such case, he is required to enter it up, and issue execution, "as of the preceding term." R. S., c. 77, § 20. Such a judgment can properly embrace only the sum due on the last day of the term as of which it is entered.

In the case at bar, the clerk received the certificate, ordering judgment to be entered, July 23d, 1859. This being in vacation, he entered up the judgment as of the preceding March Term. The complaint was *dated* June 30th, 1855. We suppose it was *filed in the clerk's office* on that day,—though the case is silent on that point. If so, the annual payments became due June 30th; and, as the judgment was entered as of the March Term, 1859, it could embrace the annual payments accruing up to, and including that of June 30, 1858, and no more. The presumption is, that the clerk so entered it. The case as made up, does not show to the contrary, though it is stated otherwise in argument.

As a yearly payment not properly embraced in the judgment accrued June 30, 1859, it became due immediately after the judgment was rendered. It could not have been collected without a suit; but the liability to such a suit

was incurred forthwith. It was the annual payment "of the then last year;" and either party had the right to give the notice preliminary to instituting a new complaint.

But it is said in argument, and we doubt not correctly, that the complainant in fact took judgment for the payment due June 30, 1859, and even for the fractional part of the year, ending July 23, 1859. Whether the other party could thus be deprived of any rights, we need not inquire; for no such facts are alleged in the motion.

There are three causes for abatement of the new complaint stated in the motion. One of these is a matter of record, for the Court. The other two are matters of fact *dehors* the record, for the jury. Such questions cannot be joined in a *plea* in abatement; and none but the first can be presented by a motion. But assuming that joining the latter did not invalidate the motion, but that, rejecting the last two causes, the first might be considered, the most that can be claimed, is, that the evidence sustains it. Even if the record proves *more* than the allegations in the motion, it can avail nothing beyond what is alleged.

Excluding, therefore, the questions whether, if it were necessary, the last year's damage had been actually paid, or whether the requisite notice was given, before the new complaint was filed, nothing remains in the motion but the allegation "that said complaint was brought before the expiration of one year after the rendition of judgment upon the original complaint." And we have already seen that, admitting the truth of this allegation, it does not necessarily follow that the new complaint was premature. A yearly payment, not embraced in the original judgment, might become due long before the expiration of a year.

In fact, in the case at bar, if the original judgment had been properly entered up, a yearly payment, not embraced in it, would have been due as soon as it was pronounced. That it was not thus entered, does not appear by the motion, nor by the exceptions, nor by any papers referred to as part of the case. Nor is there anything to show that the atten-

tion of the Court at *Nisi Prius* was called to the fact that an additional year's damage was in fact included in the judgment. And if it was, the Court ruled, not upon the proofs, but upon *the motion*, as the proofs sustained it. Whether a motion might not have been made that would, upon the same record evidence, have justified a dismissal of the complaint, we need not determine. The motion presented was insufficient, and was properly overruled.

Exceptions overruled.

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

INHABITANTS OF READFIELD *versus* HENRY J. SHAVER *& als.*

Where a town voted to accept a collector's bond if signed by certain sureties, and a bond was prepared with the names of the proposed sureties inserted in it, but, after a part of them had signed, one refused, and his name was erased, after which the remaining sureties placed their names to the bond: — in a suit on the bond against the collector and his sureties, for a default of the collector, the verdict of a jury against the defendants will not be disturbed, although the evidence was conflicting, as to whether the co-sureties, who signed before the erasure of one of the names, consented to the change or not.

Instructions to the jury, that if any surety signed the bond upon the condition that all whose names were accepted by the town should sign, otherwise the bond should not be delivered, such surety would not be liable, if all did not sign, unless he subsequently waived the condition; but that if, without that condition, he signed for the purpose of indemnifying the town for any breach of duty by the collector, and the bond was left to be delivered and used for that purpose, and was so delivered, the surety would be bound, notwithstanding he may have expected, when he signed it, that all would become sureties whose names were accepted by the town, — were not objectionable.

A party who signs an instrument which creates a liability is ordinarily presumed to know all its contents, if no fraud is practised upon him; but if a surety signed a bond after one of the names accepted by the town had been erased, it is immaterial whether he knew it or not, if he did not annex to his act the condition that the bond was not to be delivered until all those accepted by the town had signed.

The neglect of the municipal officers to enforce the collection and paying over of the money until some time after the year was out, or to take the tax-bills from the collector, did not release the sureties on the collector's bond.

Readfield *v.* Shaver.

Where a person was collector of taxes for two successive years, and at the end of the second year proved to be a defaulter, he had a right to appropriate payments made by him to the town to either year, at the time he made each payment; if he failed so to appropriate them, the town might appropriate them as they desired; and, if no appropriation was made by either, the law would appropriate such payments to the oldest debts, although the whole deficit is thereby made to fall on the second year.

Where a person was collector of taxes for two successive years, and the sureties on his official bond were not the same the second year as the first, in a suit on one of the bonds for an alleged default, it is for the defendants to show what part of the deficit belonged to each year.

Where the clerk, in preparing a blank verdict for the jury, made a mistake in the name of one of the defendants, and the error escaped the notice of the jury, it may be amended by the Court, after the return of their verdict, so as to conform to the writ and other papers in the case, the jury being present, and affirming the verdict as amended.

EXCEPTIONS from the ruling of MAY, J.

THIS was an action on the bond of Henry J. Shaver, collector of taxes in the town of Readfield for the year 1857, as principal, and Asa Gile and others, as sureties.

It was in evidence that Shaver was collector of taxes for 1856 and 1857. In 1856, he gave a bond which was accepted by the town. In 1857, he offered as sureties the names of the same persons as the preceding year, except one, and the town voted to accept them. Evidence was introduced by the plaintiffs to prove the execution of the bond. It appeared that after several of the sureties had signed it, one of those whose names had been accepted by the town refused to become a surety, and his name, which had been inserted in the bond, was erased by one of the sureties who had already signed. There was conflicting testimony as to whether those who signed the bond before and after the erasure was made, were notified of the erasure, and assented thereto.

After the bond was executed by all the defendants, it was handed to one of the selectmen, was seen by all or a majority of the board, and by one of them filed away.

In August, 1858, it was discovered that Shaver had not paid over all that he had collected on the tax bills, and in October, the selectmen made a settlement with him, and,

after allowing his payments and all uncollected taxes, found him in debt to the town in the sum of $495,93. It did not appear that they made any attempt to ascertain what proportion of the deficit belonged to each year.

The instructions given by the presiding Judge, to the jury, and also various instructions requested by the counsel for the defendants, so far as they are important to the case, are stated in the opinion of the Court.

When the case was given to the jury, the clerk gave them a blank verdict, in which was written at the beginning, "Inhabitants of Readfield *v. William* J. Shaver & als." The jury were in their room when the Court adjourned for the night, and sealed up their verdict, and handed it into Court the next morning. The clerk read it to the jury, and they affirmed it. But immediately afterwards, and before the jury had left their seats, the clerk discovered the error, and the Court allowed the verdict to be amended by striking out the word *William*, and inserting *Henry*, this being in accordance with the writ and docket; and the verdict, as so amended in form, was again affirmed by the jury before they separated. The verdict was against the defendants for the sum of $588,67.

The defendants filed exceptions to the rulings and instructions of the Court, and also moved to set aside the verdict as against the weight of evidence, against law and the instructions of the Court, and on account of the amendment allowed to be made after the verdict was returned.

Vose & Vose, for the plaintiffs.

The clerical error in the verdict was rightfully amendable. *Bank* v. *Conolly*, 1 Hill, 209; 1 Salk., 47, 53; Cro. Car., 144, 338; *Little* v. *Larrabee*, 2 Greenl., 38, and cases cited; 1 Bacon's Abr., 164, 165; Roll. Abr., 337; *Root* v. *Sherwood*, 6 Johns., 69.

The instructions requested, as to waiver of the condition that all the sureties accepted by the town should sign, were substantially given, so far as the defendants had a right to

have them given. It was for the jury, not the Court, to determine what constituted a waiver of the condition on the part of any of the sureties.

The statute with regard to the acceptance of official bonds by municipal officers does not require a definite official act or vote. Evidence of the approval of the bond by the majority of the board in any form is sufficient. The giving out of the tax-bills to the collector was evidence that his bond had been approved.

Where neither the collector nor the town appropriated the payments made by him to either year, the law appropriates them to pay the earliest charges against him; and the balance for each year, except the last, being thus extinguished, the town may recover the final balance against him in an action on the last year's bond. *Sandwich* v. *Fish*, 2 Gray, 298; *Milliken* v. *Tufts*, 31 Maine, 497; *U. States* v. *Kirkpatrick*, 9 Wheat., 737; *Colerain* v. *Bell*, 9 Met., 499.

J. Baker, for the defendants.

This action is on a bond against the principal and ten sureties. It is a joint action, and, if any one of the defendants is not liable, none of them can be held.

At the town meeting, the ten sureties all consented to sign the bond, if all would become sureties who were so the preceding year, except Hayward. The signing afterwards was in pursuance of this agreement. The evidence shows that, at the time of signing, some of the sureties insisted on this condition. These facts should have led the jury to find for the defendants, and would have had that effect, but for the erroneous instructions of the Court.

The bond, if executed without condition, was never properly delivered. There must be an intention on the part of the parties to the bond, to deliver it as an executed instrument, in order for the delivery to be valid. But, here, all the sureties swear that they did not consent that this should be delivered as their bond until all had signed. They each delivered it to Shaver to have the execution completed, and not to be delivered to the town until that was done.

The bond, if delivered, was never legally approved. It does not appear that any action was taken upon it by the selectmen, nor that it was examined by more than one of them. The giving out of the tax bills has no tendency to show that the selectmen approved the bond. It is the *assessors* who give out the tax bills.

In March, 1858, the balance of taxes in Shaver's hands was, by his warrant, to be paid to the town, yet he was suffered to go on until October, eight months after, without a settlement. If the bond was valid, the town had lost its right to recover by its own neglect. *U. S.* v. *Kirkpatrick*, 6 Curtis' Dig., 214.

The instruction given, as to the appropriation of payments, was erroneous. The sureties on the bond of 1857 are liable only for the deficit of that year. The law appropriates the money where it equitably belongs, in a case like this.

But, by bringing suits on the bonds, both for 1856 and 1857, the town did make an appropriation. The town had the means of showing how much was the deficit of each year, and it was for them to do it. *Starret* v. *Barber*, 20 Maine, 457.

The jury erred in their verdict, in allowing interest on the amount of deficit prior to the settlement in October, 1858. At that time, the selectmen found what was due, and prior interest must have been included or waived. In so much the damages were excessive.

The alteration of the verdict, after the separation of the jury, was unauthorized.

The opinion of the Court was drawn up by

TENNEY, C. J.—This suit is upon a sealed instrument, purporting to be the official bond of Henry J. Shaver, as the collector of taxes of the town of Readfield, for the municipal year 1857, and his sureties. The sureties deny their liability, on the ground that they consented to be the sureties of the collector solely on the condition that the bond should be executed by those whose names appear

thereon, together with Moses Whittier, who refused to become a party, after his name had been inserted in the body of the bond by the scrivener, who drew the instrument, the said Whittier and the other persons whose names were inserted, having been deemed sufficient, by the town, expressed by a vote in open town meeting.

Evidence was introduced to show that, after the principal and three of the sureties had signed their names, on its being ascertained that Whittier declined to place his name upon the bond as a surety, his name was erased from the body thereof, and subsequently the other sureties added their signatures.

The great questions in the case were whether the sureties, who executed the bond before the erasure of the name of Whittier, had consented to be holden by word or act, or both, after they had been informed that he had refused to become a surety; and whether those who affixed their names to the instrument afterwards did it under such circumstances as to render them liable; and also whether the bond, if executed, so that the obligors could make no objection to the execution, had been approved by the selectmen, according to law, and delivered so as to become effectual. The evidence on these questions was not in harmony, one portion with another. But, under the instructions given to the jury by the presiding judge, a verdict was rendered for the plaintiffs, which is sought to be vacated on a motion, because it was against the evidence adduced and for other reasons stated in the motion. The conclusion of the Court is, that the verdict cannot be disturbed on the motion, consistently with the principles well settled applicable to the facts of the case.

The question is then presented, whether the Court erred in any of the rules of law, which it stated to the jury, or whether it erroneously withheld any instructions which were requested by the defendants, to be given to the jury, in matters of law.

The counsel in defence requested that twelve instructions,

reduced to writing, should be given to the jury; five of which, the first, third, fourth, fifth, and seventh were given as requested; the others were refused, given with qualifications, or were embraced in the general instructions.

The second requested instruction was, "that, to constitute such a waiver of the condition," [that all whose names were in the body of the bond should execute it according to the evidence, which was not in controversy,] "the party must be informed that Whittier was not to sign; and consent that it should be delivered as his bond without his name." This request assumes that the party could be legally holden only by express consent, given upon information, that the one whose name was erased was not to become a surety. The general instructions were substantially as follows:—That if any or all of the sureties, whose names were on the bond, placed them there with the condition before stated, and that the bond should not be delivered, without the fulfilment of that condition, it would not be binding on them, unless they waived that condition subsequently. But if they signed the bond without any condition, but for the purpose of indemnifying the town for any omission of official duty of the principal, and the bond was left to be delivered and used for the purpose for which it was signed, and it was so delivered, the delivery would be valid and the signers would be bound, notwithstanding at the time of its execution they might have expected that all who were accepted by a vote of the town, would become sureties on the bond. These instructions are more comprehensive than the one requested, which we are considering, and were not objectionable; and were all under the request to which defendants were entitled.

The last instruction requested had relation to the execution of the bond by those who affixed their names thereto, after the erasure of the name of Whittier in the body thereof, and was, "If any of the sureties signed the bond in pursuance of the agreement made at the town meeting, after the erasure of Whittier's name, but without knowing it, or knowing that he was not to sign, and, at the time of signing,

annexed the condition that it should not be delivered without all signed whose names were accepted by the town, they would not be held." This instruction was not given.

When a party executes an instrument, which, from its terms, creates a liability, he is ordinarily supposed to know its contents and every thing apparent upon it, and affected accordingly, if no fraud was practised upon him, which in this case is not pretended. But whether a surety, in fact, signed the bond after the erasure, or a knowledge that Whittier was not to sign, or otherwise, is a question wholly immaterial under this request, as the general instructions, to which we have referred, embrace the case supposed, whether this knowledge existed or not; and the liability was made to depend upon the fact, that the sureties who signed, did not annex the condition, that the bond was not to be delivered till it was signed by all whose names were on the list accepted by the town.

The sixth and seventh instructions requested were not given in the terms of the request, but were in substance a compliance therewith.

The eighth and ninth instructions requested, that if the jury find that the officers of the town neglected to enforce a collection of the taxes, and the paying over the money on the part of Shaver, to Oct. 23, 1858, or to take the tax bills from him, this would be such laches on the part of the town, as would release the sureties from all liabilities for defalcation subsequent to the time when said officers were legally required to do so. And that that time was when the year was out, March, 1858. Such instructions have no statute or common law principle for their support.

The tenth and eleventh requests were, that the jury might be instructed that the plaintiffs can only recover damages for what they prove were actual deficits of the tax of 1857; and that the burden is on the plaintiffs to show what part, if any, of the sum of $495,93, said to be due on the two years, was in fact a deficit of 1857, and they can recover only so far as they show that. These instructions were giv-

en, with the qualification, that if Shaver was collector for the years 1856 and 1857, it was his duty to settle and pay over for both of those years, and he had a right to appropriate all payments made during the second year, at the time they were made, to the year to which he wished them applied. If he failed to make such appropriation, then the town would have the right to appropriate such payments as they might desire; and, if no appropriation was made by either, the law would appropriate such payments to the oldest debts. If payments were made when there was only one liability, and that for the year 1856, in the absence of any appropriation by the parties, the law would apply them to that year; so that, if the parties made no appropriation, in this case, the whole of the deficit of the sum of $495,93 might be regarded as having occurred during the last year, and, if so, would be recoverable in this suit, with interest from the time it ought to have been paid.

It was proved that, about Oct. 23, 1858, a partial settlement was made with Shaver, in behalf of the town, for the years 1856 and 1857; that there was a balance of the sum of $495,93 on both years, for money collected by him and not paid over; the amount of uncollected taxes taken from him, and he was credited for so much. Amount of uncollected commitment of 1856 was $14,98, and due on the bills. Uncollected taxes of 1857 were $102,43. It was not ascertained how much was the deficit in unpaid collections of the year 1856 or of 1857. There is a suit pending upon the bond of 1856, and the signers are not the same as those upon the bond of 1857.

It was for the defendants to show what part of this deficit belonged to one year and what to the other. The principal on the bonds is supposed to have the means of doing this, by the receipts taken by him, or by other modes. In the absence of all evidence on this question, we cannot assume that either party made the appropriation to one year or the other. Hence the money which he paid from time to time must be treated as his own, and the law will make the ap-

propriation thereof to discharge the liability which first accrued. That being done, and the amount of the collections which are withheld by the collector being fixed, the liability falls upon the obligors of the bond of 1857. The instructions were in accordance with this principle.

Exceptions are taken to the amendment of the verdict, allowed by the Court, in changing the name of the principal defendant, so as to conform to the writ and all the papers in the case. This was the correction of the error of the clerk in preparing the blank verdict, which escaped the attention of the jury. The authorities cited for the plaintiffs to sustain the propriety of the amendment of the verdict, for a cause which existed and was apparent, upon inspection by the Court, are full and conclusive.

Motion and exceptions overruled.
Judgment on the verdict.

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

STATE, *scire facias*, *versus* JOSEPH BAKER.

A complaint, charging the commission of an offence "at said A.," which place is immediately before described as a city in the county of K., sufficiently alleges that the offence was committed in that county.

The recital in a recognizance, taken by a magistrate, that he found that "there was good reason and probable cause to believe said defendant is guilty," is equivalent to finding that "there was probable cause to charge the accused."

A recognizance taken by a magistrate with a single surety, is valid, although it is his duty to require *sureties*.

A recognizance taken by a magistrate upon the examination before him, of a person charged with a crime beyond his jurisdiction, conditioned for the personal appearance of the accused before the higher Court, "to answer the complaint aforesaid, abide the order of Court thereon, and not depart from said Court without license therefor," is valid.

When a person is committed to jail by a magistrate for failing to give such a recognizance as he has authority to require, two justices of the peace and of

the quorum are authorized by our statutes to admit the prisoner to bail, by taking a recognizance with the same conditions which the magistrate had required.

A writ of *scire facias*, which, after reciting a recognizance, states "all which appears of record, and said recognizance was duly returned to our said Court," &c., and further alleges a default "as appears of record," shows sufficiently that the recognizance was returned to Court and became a matter of record.

EXCEPTIONS from the ruling of RICE, J., at *Nisi Prius*.

SCIRE FACIAS upon a recognizance. The defendant demurred to the declaration. The demurrer was joined by the County Attorney and overruled by the presiding Judge, and the defendant excepted.

The following is a copy of the writ of *scire facias*:—

"State of Maine.—Kennebec, ss.—To the Sheriff of our county of Kennebec, or his Deputy,—Greeting.

"Whereas, at the Municipal Court for the city of Augusta, in the county of Kennebec, on the 24th day of September, A. D. 1858, Samuel W. Lake, alias Stephen Lake, then commorant of said Augusta, was brought before Samuel Titcomb, Esq., the Judge of said Municipal Court, by virtue of a warrant duly issued by said Judge, upon the complaint of George Hale of Waterford, in the county of Oxford, in behalf of said State, on oath, charging the said Lake with having committed the crime of larceny from the person of the said George Hale, at said Augusta, on the 22d day of September, A. D. 1858;—and whereas it appeared to said Judge, after a full hearing thereof, that the offence charged in said complaint had been committed, and that there was good reason and probable cause to believe the said Lake to be guilty thereof, and said offence not being within the jurisdiction of said Municipal Court to try and punish, the said Lake was then and there, by said Judge, ordered personally to appear at the Supreme Judicial Court, to be holden at said Augusta, for and in said county of Kennebec, on the fourth Tuesday of November, A. D. 1858, then and there, in said Court, to answer to said complaint and abide the order of Court thereon, and enter recognizance, himself

as principal, in the sum of five hundred dollars, with sufficient surety in the sum of five hundred dollars, to the State of Maine, that he, the said S. W. Lake, alias Stephen Lake, should, agreeably to said order, personally appear at the said Court, then next to be holden as aforesaid, then and there to answer to said complaint, and abide the order of said Court thereon, and not depart from said Court without license therefor; — and whereas the said Lake neglected and refused to recognize for his appearance, &c., with surety, as required by said Judge, and was therefore committed to the county jail of said county, to be therein confined until he should find surety, as required by said Judge, or be otherwise discharged by due course of law. And whereas afterwards, to wit, on the first day of October, 1858, at the jail office in said Augusta, before William M. Stratton and John B. Clifford, Esquires, two Justices of the Peace and of the quorum, in and for the said county of Kennebec, on application of the prisoner, pursuant to the order aforesaid, he, the said S. W. Lake, alias Stephen Lake, and Joseph Baker of Augusta, in the county of Kennebec, personally appeared and severally acknowledged themselves to be indebted to the State of Maine, in the respective sums following, viz.: the said S. W. Lake, alias Stephen Lake, as principal, in the above named sum of five hundred dollars, and the said Joseph Baker, as surety, in the said sum of five hundred dollars, to be levied upon their several goods and chattels, lands and tenements; and in want thereof upon their bodies, to the use of the State of Maine, if default should be made in the performance of the condition to which said recognizance was subject, which condition was such that, if he, the said S. W. Lake, alias Stephen Lake, should, agreeably to the above mentioned order of said Court first above named, personally appear at the said Supreme Judicial Court then next to be holden as aforesaid, then and there in said Court to answer to the complaint aforesaid and abide the order of Court thereon, and not depart from said Court without license therefor; then, in such case, said recognizance to be

void, otherwise to remain in full force and effect. All of which appears of record. And said recognizance was duly returned by the said justices of the peace and of the quorum to our said Court, holden as aforesaid, in and for said county of Kennebec, on the fourth Tuesday of November, 1858, when and where an indictment was found by the grand jury, against the said Lake, for the same offence as charged against him in said complaint.

"And whereas the said S. W. Lake, alias Stephen Lake, and the said Joseph Baker, although solemnly called to come into the said Supreme Judicial Court at the November Term aforesaid, 1858, did not appear, but made default, as appears of record; whereby the said sum of five hundred dollars became forfeited to us, by the said Joseph Baker, which sum hath not been paid, but still remains to be levied, in manner aforesaid, to our use;—We therefore, willing to have the said sum so due to us, with speed paid and satisfied as justice requires, command you that you make known to the said Joseph Baker, if he may be found in your precinct, that he be before our Justices of our Supreme Judicial Court next to be holden at Augusta, within and for the county of Kennebec, on the first Tuesday of March next, to show cause, if any he have, why we ought not to have judgment, and our writ of execution thereupon, against him, the said Joseph Baker, for the sum by him forfeited and costs:— and further to do and receive that which the said Court shall then consider. Hereof fail not, and have there then this writ, with your doings therein."

J. Baker, pro se.

The declaration is fatally defective in the following respects:—

I. It does not appear by it that the magistrate who examined the case, was authorized to "require" such a recognizance, because,—1st. The declaration does not allege that the offence charged was committed in the county, but only "in said Augusta;" and, as this fact is essential to his juris-

diction, it must be directly and affirmatively alleged in full. *State* v. *Magrath*, 31 Maine, 469.

2nd. Nor did he find the state of facts that authorized him to bind the accused over at all. He found that "*there was good reason and probable cause* to *believe* said *Lake is guilty;*" while R. S., c. 133, § 11, requires him to find "*probable cause to charge the accused.*" The first is a matter of *belief*, the latter a matter of *fact*. *State* v. *Hartwell*, 35 Maine, 129.

3d. He only required one "surety" when, by R. S., c. 132, § 5, "*sureties*" are required. See, also, R. S., c. 132, § 15; c. 133, §§ 8, 12, 14, and 19.

4th. The conditions of the recognizance required by him are not authorized by the statute and beyond his power. R. S., c. 132, § 5, simply authorized him to require the accused to find "sureties to appear before the S. J. Court," but he inserts the word "personally" before appear; and also requires him to answer that "*complaint*" in said Court, which is legally impossible, since it never comes before that Court so that he can answer to it, "to abide the order of said Court thereon, and not depart from said Court without license therefor." These two things are not at all the same in substance or words.

The statute provision is fully answered and complied with by the accused appearing at the Court and submitting himself to the custody of the Court or its officer. Then all liability on the recognizance, both for principal and sureties, ceases. But, by the language used, he must not only do all that, but he must remain in said Court and answer to the complaint, and abide sentence, so that if he should escape from the custody of the sheriff, or from jail, or even from state prison after sentence, for aught we can perceive, the recognizance is forfeited. R. S., c. 133, § 19; *Jordan* v. *McKenney*, 45 Maine, 306; *French* v. *Snell*, 37 Maine, 100; *Owen* v. *Daniels*, 21 Maine, 180; *State* v. *Boies*, 41 Maine, 344.

II. The two justices of the quorum were not authorized to *take* such a recognizance for the reasons already men-

tioned, as their authority is co-extensive with that of the magistrate, both by the terms of the mittimus and R. S., c. 133, § 14.

III. It is not alleged in the declaration that the recognizance was returned to the Supreme Court and *became a matter of record*. Without the latter allegation, the declaration is insufficient. *State* v. *Smith*, 2 Maine, 62; *Libby* v. *Main & al.*, 11 Maine, 344.

Drummond, *Attorney General*, for the State.

1. The first objection is not founded in fact.

2. The second need not be noticed. The phrases are equivalent and have been so used in the statutes. R. S., 1841, c. 171, §§ 16 and 17.

3. Though the statutes may require more than one surety, yet, if but one is taken, he cannot take advantage of the omission.

4. The conditions of the recognizance are authorized by law.

The statute provides that the prisoner may be admitted to bail, and does not prescribe the conditions.

In the cases cited in defence, the provisions of the recognizance were fixed by the statute.

What is bail? It is a substitute for the custody of the accused. *The condition may require him to do what he would be compelled to do if he remained in custody.* Tried by this test, this condition was authorized. If he had remained in custody, he would have been compelled to appear personally, to answer the charge, to abide the order of Court, and not depart without license. This view is fully sustained by the authorities. 2 Hawk. Ch., 15, §§ 2, 84; 1 Hale, 324, 620; 2 Hale, 124, 125, 126; 4 Bl. Com., 297; 1 Chitty's C. L., 75, 86; *People* v. *Stager*, 10 Wend., 431, 433, 435; 1 Bac. Abr., Bail, &c., 497; Burns' Justice, 144; Crown Circuit Companion, 54; 7 Cowen, 141; 17 Wend., 252, 253, 374; 7 Hill, 39; 19 Pick., 127, 139, 143; 15 Pick., 193; Davis' Justice, 139; Baker's Justice, 32, 52; 7 Gray, 316; 14 Barb. S. C. R., 35; 1 Denio, 454; 5 Denio, 58; 4 N. H., 366; 3 Parker's C. C., 143, 147.

The opinion of the Court was drawn up by

MAY, J. — The defendant claims, that the declaration in the writ is insufficient to authorize a judgment against him. His demurrer puts its sufficiency in issue, and nothing more. And, first, it is said that the recognizance declared on fails to show that the alleged offence was committed within the county of Kennebec. But this objection is found to have no foundation in fact. It is charged as having been committed "at said Augusta," which place is described immediately before, in the complaint as set forth, as being a city in the county of Kennebec. This description of the place is, therefore, equivalent to a direct allegation that the offence was committed in that county.

2nd. It is contended that the Municipal Judge had no authority to require the accused to enter into recognizance at all, because it does not appear that he found, on the whole examination, that "there was probable cause to charge the accused," as is required by the R. S., c. 133, § 11. The recital in the recognizance is, that he found that "there was good reason and probable cause to believe said Lake is guilty." If there is any difference in the meaning or finding, as manifested in these different forms of expression, we fail to perceive it. Each form appears to have been used in the statutes of 1841 to convey the same idea. R. S. of 1841, c. 171, §§ 16, 17. Under such circumstances, the dropping of one form, in the revision of 1857, c. 133, § 11, before cited, cannot be regarded as creating a new rule of judgment for the action of magistrates, in the examination or treatment of alleged offenders when brought before them. That the Municipal Judge found that the offence charged had been committed, fully appears. The recognizance therefore shows that he found all the facts necessary to justify his action in requiring bail. The case of *State* v. *Hartwell & als.*, 35 Maine, 129, cited in defence, is unlike this, because of the wide difference between suspicion and probable cause to believe. In that case the magistrate did not find that the "offence had been committed," nor that there was probable

cause to *believe* the prisoner guilty, but only that—"it appearing to me that there is good cause to suspect the said Samuel Hartwell to be guilty of said offence." The *offence* was not found to have been committed, and the magistrate only *suspected* Hartwell to be guilty—did not *believe* it. See stat. 1841, c. 171, § 17.

3d. It is next objected that the Municipal Judge required but one surety when, by the R. S., c. 132, § 5, "sureties" are required. That it was the official duty of the Judge to require reasonable sureties, cannot be denied. The whole history of the law in relation to bail, in civil as well as criminal cases, shows that such has always been the rule, not only in this country but in England. This rule applies to sheriffs as well as to magistrates. Prior to the statute of 23 Henry VI., §§ 9, 10, sheriffs were held personally responsible for the forthcoming of prisoners committed to their custody, in all cases, whether civil or criminal; and were under no legal obligation to admit them to bail. By that statute it was made their duty "to let all persons out of prison, in any personal action or indictment of trespass, upon *reasonable sureties*, having sufficient within the counties where such persons were let to bail." Crabb's Hist. Eng. Law, c. 24, p. 366. Subsequently various statutes were passed upon the subject of bail in cases of felony; but, in the reign of William IV., these provisions were extended so that any two justices, of whom one or the other must have signed the warrant of commitment, might admit to bail any person charged with felony, in such sum and *with such sureties* as they might think fit. 1 Harrison's Digest, (2d American ed.,) p. 2159. Thus, the authority and duty of letting to bail in criminal cases, which at first rested upon the sheriffs, came to be transferred to civil magistrates. The magistrates proceeded to grant bail by taking a recognizance, while the mode pursued by the sheriff was by taking a bail bond. In both cases, however, the statutes authorized bail only upon the taking of sufficient sureties.

The statutes of this State and of Massachusetts are in

some respects similar to the English statutes, in relation to the manner of taking bail. In civil cases, the authority to take bail is vested in the sheriff; in criminal cases, it is in the magistrate who takes the examination, and, after commitment and before a verdict of guilty, or for not finding sureties, it is in any Justice of this Court, or in two justices of the peace and quorum. R. S., c. 85, § 1; c. 133, §§ 11, 14; Mass. R. S. of 1860, c. 125, § 2; c. 170, §§ 25, 36. It is also apparent, from these statutes, that sureties are required. In some of them the word "sureties" is used. In others, the language is, "may admit to bail." This language, in view of the common law, must be understood to mean that reasonable sureties are to be taken. The power which is conferred upon magistrates or sheriffs, by these statutes, is not a judicial power. Their action under it is merely ministerial. Magistrates act for the protection of the State, as well as for the relief of the accused; and sheriffs for the protection of the creditor, as well as for the relief of the debtor. The former take bail by a recognizance, the latter by a bail bond.

The taking of a recognizance, or bail bond, is wholly collateral to the original proceeding. The recognizance taken in criminal cases is, in its nature, a civil matter. The fact that it depends upon a record, in connection with a criminal case, does not affect its character. If the magistrate had jurisdiction and authority to take it, it is subject to the same rules of construction and treatment as any other civil matter.

The authorities which are so numerous, both in England and this country, that they need not be cited, show that a bail bond, executed by the principal and one surety, is valid, notwithstanding it is the legal duty of the sheriff to require two or more sureties; and the sheriff, if he fail to do so, is held responsible to the creditor for the damages sustained. So, too, replevin bonds, notwithstanding the statute requires sufficient sureties, if executed by one only, are held valid unless the defendant objects thereto by seasonably pleading such fact in abatement of the writ. The party, for whose

benefit such bonds are taken, may waive the defect. The taking of but one surety, in either case, is not an excess of authority. It is simply a failure to act up to the full extent of such authority. No reason is apparent why a recognizance with but one surety, taken by magistrates in a criminal case, upon the application of a prisoner committed before verdict of guilty, for a bailable offence, or for not finding sureties to recognize for him, may not, for matter and effect, be regarded the same as replevin or bail bonds so executed are regarded, as an insufficient performance of a ministerial duty, but nevertheless valid so far as it goes, and obligatory upon the principal and surety; it being, so far as they are concerned, a complete execution of the requirements of the law. The provision of law requiring another or more sureties, being wholly for the benefit of the State, the surety is not injured by any neglect in this particular, any more than the principal himself would be, in cases where he is discharged from custody upon his own recognizance. In this view of the law, the defendant, who voluntarily and alone became the surety of the principal, has no ground of complaint.

4th. The next objection is, that the Municipal Judge, in ordering the recognizance, exceeded his authority in the requirements of its condition. The condition requires the party accused "personally to appear at the next term of the Supreme Judicial Court to be holden at Augusta, within and for the county of Kennebec, on the fourth Tuesday of November, 1858, then and there in said Court to answer to the complaint aforesaid, abide the order of Court thereon, and not depart from said Court without license therefor."

It is claimed that there was an excess of authority in requiring the accused personally to appear at this Court, and, to sustain this position, several cases are cited, of which the one principally relied on is that of *French* v. *Snell*, 37 Maine, 100. On looking into the case it is found that the recognizance declared on was taken upon an appeal from the judgment of a justice of the peace, in a civil suit. The R.

S. of 1841, c. 116, § 10, under which it was taken, required the party appealing to recognize, with no other condition except "to prosecute his appeal with effect, and pay all costs arising after the appeal." The recognizance which was taken, among other things, required him *to appear* at the appellate Court. This provision, which the Court construed as requiring his personal appearance, was held to be unauthorized. The prosecution of such appeal did not necessarily require such appearance. The cause could proceed to trial without it. The recognizance before us was taken in a case where the party accused must be personally present in this Court or his trial could not proceed. Hence the statute, c. 132, § 5, before cited, expressly authorizes the magistrate before whom the examination is had, when the offence is not within his jurisdiction, to cause the party accused to recognize for his appearance before this Court. The language, as used in the statute, means that he shall personally appear. There was, therefore, no excess of authority in this particular. *Commonwealth* v. *McNeil*, 19 Pick. 127.

It is further urged that so much of the condition as requires the accused to answer to said complaint in this Court, is legally impossible, and therefore unauthorized. This provision does not necessarily refer to the complaint simply as a process. It may refer, and, under attending circumstances, evidently was intended to refer to the offence therein charged. The word complaint is often used in the sense of accusation. It was so used here. It must have been understood as meaning the accusation or charge contained in the complaint; or, in other words, the offence complained of. Any other meaning would be impracticable, if not senseless.

The only remaining ground of objection to the condition is, that it requires the accused to abide the order of Court upon said complaint, and not depart from said Court without license therefor. The authorities cited by the Attorney General show that such a provision is fully authorized. The authority to admit to bail, or to recognize a party accused of crime, to appear before the Court and answer, *ex proprio*

vigore, includes the right to insert it in the condition. Whether we look at the forms which have been used from time immemorial, or to the object which such proceedings are designed to secure, or to the authorities upon the subject, we are brought to this result.

Bail is designed to be a substitute for imprisonment, and its object is to produce the same result in regard to persons who are charged with crime. The result to be accomplished by either, is simply to enforce the appearance of the party accused at the proper term of the Court, and his submission to the process and judgment of the law. The condition of a recognizance which does not go beyond this, is lawful when there is nothing in the statutes that shows that less was intended to be required. We perceive nothing in the recognizance required by the Municipal Judge which is unauthorized by the law.

The words "and not depart from said Court without license therefor," mean, not depart from the *term of the Court at which he was recognized to appear*. *State* v. *Richardson*, 2 Maine, 115.

5th. The objection, that the magistrates who took the recognizance were not authorized, does not seem to be well founded. The defendant concedes that their authority is coextensive with that of the Municipal Judge, and we have no doubt, that under the provisions of the R. S., c. 133, § 14, the recognizance taken by them is binding upon the defendant. The party bailed was in prison for a bailable offence. He had failed to offer sureties at the time of his examination, as he might have done under the provisions of the same chapter, § 11; and it was upon his application that he was admitted to bail. Under these circumstances the magistrates had full power to bail him by taking a recognizance with the entire condition which the Municipal Judge had required. The regularity of the proceedings of that Judge has rendered it unnecessary to determine whether they would have had that power had the irregularities contended for by the defendant, or any of them, been found to exist.

6th. The position of the defendant, that the declaration in the writ is insufficient, because it does not allege that the recognizance was returned to this Court and became a matter of record, will not avail him, because enough appears in the writ to show that the law in this respect has been complied with. *State* v. *Smith*, 2 Maine, 62; *Commonwealth* v. *Downing*, 9 Mass. 520.

Upon the whole case, and especially in view of the provision in the R. S., c. 133, § 20, by which the strictness of the common law has been so modified that no action on such recognizances can be defeated for any defect in the form of the recognizance, if it can be sufficiently understood from its tenor at what Court the party was to appear, and, from the description of the offence charged, that the magistrate was authorized and required to take the same, we cannot come to any other conclusion than that the declaration is sufficient, and this action is maintained. *Commonwealth* v. *Nye*, 7 Gray, 316.

Exceptions and Demurrer overruled, and Judgment for the State.

RICE, GOODENOW, and KENT, JJ., concurred.

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

RICHARD MILLS *versus* LLEWELLYN F. SPAULDING.

Where the "head of a family or householder" claiming the benefit of c. 207, of the laws of 1850, caused his certificate to be recorded *after* a judgment (for costs) had been entered up against him, the premises described in his certificate will not be exempt from the levy of any execution that may be issued thereon.

And if the debtor so long neglect to pay the judgment that no execution can be issued, and a suit is brought on the judgment, the execution that afterwards issues may be levied on the premises, notwithstanding it includes interest and costs that have accrued *after the recording* of his certificate of exemption.

Mills *v.* Spaulding.

On agreed statement of facts. Writ of Entry, to recover a parcel of land in Belgrade, in the county of Kennebec.

The demandant claims title to the premises by virtue of a levy made April 20, 1858, upon an execution in his favor against one William W. Spaulding, issued from the office of the clerk of the Supreme Judicial Court for said county, on a judgment recovered in said Court, March 31, 1858.

On the 28th of June, 1852, said William W. Spaulding was the owner of the demanded premises, in the actual possession thereof, a householder, and the head of a family: on which day he filed, in the office of the register of deeds for said county, a certificate covering certain premises not exceeding in value the sum of five hundred dollars, of which the demanded premises are a part, therein declaring his wish to hold said premises exempt from attachment and levy, or sale on execution.

Said William W. Spaulding remained in possession until April 20th, 1858, and was in the possession of and owned said premises at the time of the demandant's levy. At the time of the service of the writ in this action, the said Llewellyn F. Spaulding was in the possession and occupation of the demanded premises, as tenant of the said William W. Spaulding.

On the 10th day of January, 1852, said Mills recovered judgment before a justice of the peace, in said county, against the said William W. Spaulding for costs, from which judgment said Spaulding appealed to the District Court then next to be held at Augusta, in April following—but neglected to enter and prosecute said appeal—and the judgment rendered against him by the magistrate, was, upon due proceedings had, affirmed by said District Court at said April term, 1852, with additional costs.

In 1858, said Mills sued the last named judgment, and, at the March term of this Court, in that year, recovered judgment for the original judgment and officer's fees, and costs of suit. This judgment was rendered on March 31st,

and the plaintiff's levy made on April 20th, 1858, as above stated.

The tenant defends on the ground that, at the time of the levy, the premises were exempt from attachment as the property of said W. W. Spaulding, by virtue of the statute of 1850, c. 207, and of said Spaulding's proceedings under the same. The certificate signed by him and filed on the same day in the registry of deeds for the county of Kennebec, is as follows :—

"Know all men by these presents, that I, William W. Spaulding, of Belgrade, in the county of Kennebec, wishing to avail myself of the benefit of an Act entitled 'An act to exempt homesteads from attachment and levy or sale on execution,' approved August 29th, 1850, do hereby certify and declare my wish and herein describe the property which I am the owner of, and in actual possession of the same, and wish to hold under the provisions of said Act, exempt from attachment, levy or sale on execution, or so much thereof as shall not exceed in value the sum of five hundred dollars, namely — a certain tract or parcel of land situate in said Belgrade, containing about twenty acres, being my homestead farm, and now occupied by myself and family. For a more particular description, reference is hereby made to a deed from Burleigh Palmer to me, dated some time in the year A. D. 1850. Given under my hand the 28th day of June, in the year of our Lord eighteen hundred and fifty-two."

Bradbury & Meserve, for the demandant.

E. W. McFadden, for the tenant.

The opinion of the Court was drawn up by

Appleton, C. J. — The Act of 1849, c. 135, "to exempt homesteads from attachment and levy or sale on execution," was "to take effect from and *after* the last day of December next." This statute was repealed by the Act of August, 1850, c. 207.

It will be perceived that, between the first day of January, 1850, when the Act of 1849, c. 135, went into effect, and the time when the repealing Act of August, 1850, c. 207, became operative, rights of exemption might be acquired. Those were protected by § 1 of the latter Act. *Lawton* v. *Bruce*, 39 Maine, 484.

By c. 207, § 4, of the Acts af 1850, it was provided that "the head of any family, or householder, wishing to avail himself of the benefits of *this* Act, may file a certificate by him signed, declaring such wish and describing the property, with the register of deeds in the county where the same is situated; and, upon receiving the fees now allowed for recording deeds, such register shall record the same in a book kept by him for that purpose; and so much of the property in said certificate described as does not exceed the value aforesaid, shall be exempt from seizure or levy *on any execution* issued on any judgment *recovered for any debt contracted jointly or severally, by the person signing said certificate, after the* DATE *of the recording thereof;* * * * and *upon being recorded* as aforesaid, the property described in the first section of this Act shall be exempted within the provisions thereof."

This section is prospective in its operation. "The head of any family, or householder," is to file his certificate, the same being recorded, he holds the described property, and to the value specified, "exempt from seizure or levy on any execution issued on any judgment recovered for any debt *contracted* jointly or severally, by the person signing the certificate, *after the date* of the recording thereof." The property thus exempted remains, however, liable to seizure or levy, on executions issued on judgments recovered on debts contracted after the Act of 1850 went into effect, and before the date of the recording. Creditors prior to the recording are thus protected. Subsequent creditors cannot complain, for the certificate, when recorded, is notice to all that the real estate therein described is to be, and to remain exempt from seizure or sale on execution. They can no longer give

credit upon the faith of property thus made exempt by statute, and, if they do, it is their own folly.

The plaintiff's judgment was recovered April term, 1852. The defendant's certificate was filed June 28, 1852. The plaintiff subsequently commenced an action of debt upon his judgment, in which he recovered a new judgment, and, by virtue of the execution issued thereon, he made the levy under which he claims title. But this judgment was not upon a debt contracted "*after* the date of the recording" of his certificate, and therefore, by § 4, the real estate of the defendant is not exempt from seizure or levy, on the execution issued thereon. The defendant has failed to show his estate exempted from seizure under the ordinary process of law, and his defence fails.

The law gives interest, by way of damage, for the non-payment of a debt. It was the fault of the defendant that such damages accrued. But, accruing, they became a part of the judgment and follow the same rule as the principal.

So, too, costs are incident to any attempt to enforce by process of law the collection of a debt. The estate not being exempt from the debt, neither is it exempt from the costs, which the defendant, by neglecting to pay what was justly due, has compelled the plaintiff to incur or lose his debt. *Defendant defaulted.*

RICE, CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

JOHN MARSHALL, *Adm'r*, *versus* MELLEN WING.

Ejectment may be maintained against an infant for disseizin, that being a tort.

But he must appear and plead by guardian, or the judgment will be erroneous; otherwise, if, pending the suit, he attains to full age and afterwards pleads.

After an action has been commenced upon a mortgage, a tender of the amount to discharge it, should include the costs. To make the tender, if refused, of any avail, the money should be brought into Court, after the action has been entered.

ON STATEMENT OF FACTS.

THIS was an action of EJECTMENT. It was admitted, that the defendant, at the time this suit was commenced, was in possession of the premises demanded, claiming under the mortgager and withholding them from the plaintiff; that, at that time, he was a minor, but has since become of full age. Also, that on the 20th day of August, 1859, (this was after the action was brought,) the mortgager tendered to the plaintiff's attorney an amount of money, which was refused; but the money was not brought into Court.

It appears that the amount tendered was a little less than the mortgage debt, and exclusive of the cost that had accrued.

Vose & Vose, for the plaintiff.

Titcomb, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—Infants are liable for torts. Disseizin is a tort, and ejectment may be maintained against an infant therefor. *McCoon* v. *Smith*, 3 Hill, 147; *Beckley* v. *Newcomb*, 4 Foster, 363.

"In an action against an infant he must appear by guardian," for, as it is quaintly remarked, "he has neither knowledge of his own affairs, or to choose one to plead for him; and may have an action against his guardian if he mispleads for him." 6 Com. Dig. Pleader, 2, c. 2, (202). Error

will lie if no guardian be appointed. *Crockett* v. *Drew*, 5 Gray, 399; *Beckley* v. *Newcomb*, 4 Foster, 359.

But the defendant did not plead his minority, and, when issue was joined and the cause was tried, he was of full age. In equity, an infant, who attains his full age pending a suit, may generally be allowed to come in, as of course, and demur, plead, or answer. *Tessier* v. *Wyse*, 3 Bland. Ch., 28. So, at common law, pleading to the action after the defendant attains to the age of twenty-one years, is a waiver of any defect of service during minority. *Hillegass* v. *Hillegass*, 5 Barr., 326. The defendant attained to full age, and then pleaded to the action. He can no longer take advantage of a minority, which has ceased to exist. A guardian cannot be now appointed. The defendant must plead for himself. He may take advantage of any defence which he may have to the action. Infancy was originally no ground of defence, and certainly is not now.

The tender made was after action brought, and does not include costs. It was not enough. It was after condition broken. *Maynard* v. *Hunt*, 5 Pick., 240. It has not been brought into Court. It cannot be of any avail to the defendant.

Defendant defaulted; —
Judgment as on mortgage.

RICE, CUTTING, DAVIS, KENT, and WALTON, JJ., concurred.

WILLIAM BRANN *versus* INHABITANTS OF VASSALBORO'.

Where a report of the majority of referees is recommitted, for the specific purpose of having them certify that the disagreeing referee acted with them in the trial of the case, but refused to sign the report, they may thus amend their report, without the knowledge or presence of their dissenting associate.

Even if the statute provided that referees might certify a report of evidence to the Court, a report certified by one, only, would be insufficient, especially when it does not purport to be in behalf of the board.

ON EXCEPTIONS to acceptance of report of referees; and on REPORT by RICE, J., on motion to set aside the award and for a new hearing before the referees, or for a new trial in Court, on the ground of newly discovered material evidence.

This was an action to recover damages for personal injuries alleged to have been sustained by the plaintiff, by reason of a defective highway in the defendant town. By rule of Court it was referred to three referees. The report was signed by only two of the referees, who omitted to certify that the third participated in the hearing, but disagreed with them in their decision and refused to sign the award. The plaintiff's counsel filed a motion that the report be recommitted for the purpose only of having it thus amended. It appears from the bill of exceptions, that the report went back into the hands of the two referees who originally signed it, and, without notice to the third, or his being present or having any knowledge of their action, the two altered the original report and also made the additional certificate thereon indorsed. It was then returned again to the Court, and its acceptance moved by the plaintiff. The defendants filed objection thereto, because, upon the amendment, on the recommitment of the report to the referees, two of them only undertook to act, and did act without any notice to the other, the third neither participating nor being notified to be present.

The objection was overruled by RICE, J., who ordered

the acceptance of the report; to which the defendants excepted.

On the defendants' motion for a recommitment of the report, or for a new trial in Court, the presiding Judge reported the alleged newly discovered evidence for the consideration of the full Court.

The dissenting referee made a report of the evidence at the hearing before the referees, which he certified as a report, in substance, of all the evidence "according to his minutes taken at the time, and his best recollection:" — on which the defendants relied to sustain their motion.

J. Baker argued in support of the exceptions and motion.

S. Heath, contra.

The opinion of the Court was drawn up by

RICE, J. — Exceptions to the acceptance of the report of referees. The case was referred by rule of Court to three referees, who were all present and participated at the hearing of the parties. Two of the referees only concurred in the report as it was presented to the Court. But it did not appear from the report, as originally presented, that the three were in fact present and participated at the hearing. This was an irregularity. R. S., c. 108, § 7; *Peterson* v. *Loring*, 1 Maine, 64; *Short* v. *Pratt*, 6 Mass., 496.

On motion, and for the specific purpose of enabling the referees, who signed the report, to amend the same according to the admitted fact, it was recommitted. The act authorized by the Court was purely ministerial. It authorized no hearing of parties and required no deliberation of the referees. They were only authorized to certify to facts which had already transpired, at a hearing when all were present. The substance of the award could not be changed in the slightest particular. It is not, therefore, perceived that any injury could, by possibility, have resulted from the course pursued. The presence of the dissenting referee could not have changed facts, the existence of which were

conceded, and to which the concurring referees were simply authorized to certify in their report.

As to the motion, the statute does not provide for a report of evidence to be certified by referees to this Court. If it were so, this report does not purport to be certified by the board of referees, nor by the chairman in behalf of the board. Nor does the chairman, in his own behalf, certify it as a full report of the evidence, but as the "substance of all the evidence in the hearing before the referees according to my minutes taken at the time, and my best recollection."

Such a report, if certified by a member of the Court on a motion for a new trial, would be insufficient. *Lakeman* v. *Pollard*, 43 Maine, 463.

It is necessary in motions for new trials, on the ground of newly discovered evidence, not only to present the evidence alleged to have been newly discovered, but also a full report of the evidence produced on the former trial, that the Court may be able to determine whether the additional facts proposed to be proved, are in fact *new evidence*, and also whether, if admitted in connection with that before in the case, a different result would have been produced. It should also be made to appear, that reasonable diligence had been used to discover and produce the alleged new evidence at the former trial. In all these particulars, the party asking the new trial is deficient. These deficiencies would defeat the motion, were that part of the case properly before us.

Exceptions and motion overruled.

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

ISAAC F. THOMPSON *versus* JAMES SMILEY.

In an action against a receipter for the value of goods attached on mesne process, he cannot defend on the ground that, in the return of the officer, the property is not described with sufficient particularity, — the description being — "a lot of millinery goods and merchandize."

Nor is it a ground for defence, that the clerk did not insert in the execution the correct day of the month on which judgment was rendered, and also misdated it, if the precept be afterwards corrected by order of Court, it being competent for the Court to direct the amendment, even after the return day of the execution.

The party, whose goods were attached, having testified for the receipter, that they were of less value than the amount of the judgment, the plaintiff, on cross-examination, was permitted to interrogate the witness if subsequent attachments of the goods were not made, by his own procurement, in favor of certain other creditors, whom he desired to secure.

EXCEPTIONS from the ruling of RICE, J., at *Nisi Prius*.

ASSUMPSIT on a receipt for a stock of millinery goods attached on a writ in a suit of *Palmer & als.* v. *Weston & al.* The officer, in his return, described the property attached as "a lot of millinery goods and merchandize."

The bill of exceptions sets forth, that the plaintiff introduced a copy of the writ, *Palmer* v. *Weston & als.*, dated June 25th, 1858, returnable to the Supreme Judicial Court, to be held at Portland on the 1st Tuesday of October, 1858, and the officer's return thereon, dated June 25th, 1858, a copy of the record of the judgment at the October term, 1858, in said case, and the execution issued thereon, dated Nov. 30, 1858. It was proved that when the execution was put into the officer's hands, and when a demand was made on the receipter, (Dec. 14, 1858,) the execution bore date November 26th, 1858, and the judgment on which it was issued was recited therein to have been rendered, November 23d, 1858, and that the date of said execution had been since changed to November 30, and the date of judgment therein recited had been changed to November 29, 1858.

The defendant's counsel moved for a nonsuit on the ground that the officer's return on said writ was too vague and un-

certain, to prove an attachment of the property for which the receipt was given, but the presiding Judge refused to order a nonsuit and ruled that said return was sufficient to show an attachment of the goods.

Defendant introduced the deposition of Laura S. Weston to prove, among other things, the value of the goods. Defendant's counsel objected to several cross-interrogatories by plaintiff, on the ground of competency, and not to the form thereof, which were objected to at the taking of the deposition. Plaintiff claimed to read them with the answers, to contradict the witness in her estimate of the value of the goods attached, and the presiding Judge admitted them for that purpose. The cross-interrogatories and answers are as follows: —

"After the goods were attached, did you not procure two other attachments of the same stock to be made; if so, in whose favor and the amount of their claims?

"*Ans.* — One was in favor of Nason & Hamlin for about $26, the other, my help, for about $25. I applied to the attorney to make them. Did not pay their demands from the proceeds of goods sold after attachment, but from proceeds of bills previously sold.

"If the value of the stock was as small as you estimate it, and Palmer's claim was $1250, why did you procure others to be secured by attachment of the stock?

"*Ans.* — I was advised to do it. My help was uneasy and wished to be sure of their pay. It was done in the hurry of the moment."

Jabez S. Currier, called by defendant, testified, among other things, "that he had been a deputy sheriff for several years; assisted the plaintiff in taking an account of the goods; that a schedule was made of the goods in the store, taken at the cost prices, as given by Mrs. Weston from the cost marks on the goods, and from her bills; that, some two years before, he sold two stocks of goods at auction in Augusta, one was a stock of millinery goods, and the other was part millinery and part dry goods of other kinds; that

he was a dealer in goods in Hallowell in 1858 and 1859, some silks and some ribbons."

Defendant's counsel then asked the witness the following question:—"What, in your opinion, would the goods attached, of which you took an account, have been worth at auction on the 14th day of December, 1858?" which was objected to by plaintiff's counsel, and excluded by the Court.

Defendant's counsel contended that no legal execution was issued on the judgment rendered and put into the hands of an officer, within thirty days from the rendition of said judgment, and that the attachment, if any was made, was dissolved.

The plaintiff introduced a copy of the record of the order of the Court, made at the term holden in Cumberland county in January, 1861, on the application of the plaintiffs in the action against Weston & al., permitting the clerk to correct the errors in the record and execution; and also a copy of the record as corrected.

The presiding Judge ruled that the evidence was sufficient to show that a legal execution was issued within thirty days from the rendition of said judgment; and, if the jury were satisfied that the execution was put into the officer's hands within thirty days from the rendition of judgment, that was sufficient on that point.

The verdict was against the defendant.

Vose & Vose, for the plaintiff.

Libbey and *Titcomb*, for the defendant.

The opinion of the Court was drawn up by

RICE, J.—This is an action of assumpsit on a receipt given by the defendant, for a lot of millinery goods and merchandize, alleged to have been attached by the plaintiff as a deputy sheriff, and which the defendant, in his receipt, promised to redeliver to said officer or his successor in office on demand, or pay the value thereof in money, &c.

The goods were not redelivered. This action was brought to recover their value in money.

The case comes before us on exceptions. The defendant contended that the officer's return on the original writ, was too vague and uncertain to prove an attachment of the property for which the receipt was given, and moved for a nonsuit on that ground. This motion was denied.

It was remarked by SHAW, C. J., in the case of *Baxter* v. *Rice*, 21 Pick., 197, in which the language of the officer's return was in substance very similar to that used by the officer in this case, that "it is highly important, upon grounds of public policy, that a good degree of exactness and particularity should be observed, in returns on mesne process, to show their identity, and thereby more definitely fix the rights and responsibilities of all parties in relation to them. But, from the nature of the subject, it is difficult to lay down a precise general rule.

Though that was a case in which the action was directly against the officer, the Court did not hold the return absolutely invalid, but allowed an amendment, by specifying in detail the articles attached.

But, in the case at bar, the question discussed in the case of *Baxter* v. *Rice*, does not arise. Here the action is upon a receipt in which the defendant admits that the goods had been attached by the plaintiff, and that he received them from him with a promise to return them on demand. He is not in a condition to contest the validity of the attachment, and therefore, as to him, it is sufficient, even if it should be held otherwise between other parties; a proposition, however, which we do not assert. In the language of the Court, in the case of *Drew* v. *Livermore*, 37 Maine, 266, "he voluntarily became the bailee of the officer and cannot avoid his contract by showing informality or invalidity in the attachment, or judgment, so long at least as that judgment stands."

There was no proposition to show that the attachment had been abandoned. And, even if there had been an abandonment proved, it would not have availed the defendant. If the attachment had failed, then the officer was under obligation to restore the goods to the original defendants, and was

entitled to have them returned to him, from his bailee, for that purpose.

Nor was the attachment dissolved by reason of any amendment in the date of the execution or judgment. On general principles, it is competent for a Court of record, and incident to its authority, to correct mistakes in its records which do not arise from the judicial action of the Court, but from the mistakes of its recording officer. And lapse of time will not divest the Court of its power to make such corrections. *Lewis* v. *Ross*, 37 Maine, 230; *Commonwealth* v. *Weymouth*, 2 Allen, 144.

The interrogatory propounded to the witness Currier, was properly excluded for two reasons:—*First*, the preliminary examination did not show him to have been an *expert*, or person of peculiar skill and experience in reference to the subject matter upon which he was interrogated, and he therefore was not entitled to give an opinion. And, in the second place, the question put to him was irrelevant. The issue was not, what the goods would have been worth on a particular day at *auction*, but what was their value at the time and place of delivery. 2 Greenl. Ev., § 261; *Berry* v. *Dwinel*, 44 Maine, 255.

The defendant, in his receipt, promised to return the goods or pay their value in money, not the sum they would sell for at auction.

The interrogatories propounded to Mrs. Weston, one of the original defendants, and objected to by the defendant, were properly admitted. This witness had testified in her examination in chief for the defendant, that the whole stock of goods, at the time of the attachment, was not worth more than $300 or $400.

The interrogatories and answers, on cross-examination, which were objected to, show that, notwithstanding the plaintiff's debt, on which the goods had been attached, amounted to $1250, this witness caused subsequent attachments to be placed upon the same goods for the benefit of her help and other creditors. These acts of the witness, apparently so

inconsistent with her testimony, as given in chief, had a direct tendency to impair her credit with the jury in reference to the question of value, which became material in establishing the amount of damage. On the cross-examination, it was not only competent testimony, but directly pertinent to the issue.

No error being perceived in the rulings or directions of the Court, the *exceptions must be overruled and judgment entered upon the verdict.*

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

EBEN M. SKILLINGS *versus* BENJAMIN M. NORRIS *& als.*

In an action to recover for labor done, if the defendant, in the specification of his grounds of defence, does not deny the performance of the labor, but admits it, and alleges a special contract and payment, the plaintiff will not be required to offer proof of its performance, to entitle him to some portion of the damages claimed, unless the defendant shall establish by evidence some ground of defence.

EXCEPTIONS from the ruling of MAY, J., at *Nisi Prius.*

Stinchfield, for plaintiff.

J. Baker, for defendants.

The opinion of the Court was drawn up by

RICE, J. — Assumpsit for twenty-five days labor. The writ contains three general counts, all for the same cause of action. The defendants, in their specifications, set out the grounds of defence as follows: —

1st. That the plaintiff worked for the defendants on trial the time for which pay is claimed in his writ, and the defendants, for that time, were to pay him what they chose, and no more.

2d. That the defendants have paid the plaintiff for his work all and more than his services were worth.

3d. That the plaintiff agreed to work for the defendants a month on trial, and, if the defendants after that, would pay him a dollar a day, he agreed to work for them till winter; that the defendants, after a trial, were willing and offered to pay him one dollar a day for the said time, yet the plaintiff, without just cause, left the defendants' employ, and the defendants were greatly damaged thereby, much more than all plaintiff's services were worth.

When these specifications were read, the Court remarked that, as the defendants did not deny the performance of the labor, as alleged, the plaintiff need not offer any proof, the work sued for being admitted. And thereupon the defendants, without objection, immediately proceeded to the defence. Exception is now taken to this remark of the presiding Judge.

It will be observed that the specifications not only do not deny, but distinctly admit that the labor for which the plaintiff claims to recover, was performed. The defence rests upon several affirmative propositions, such as special contract, payment and damage to defendants, by violation of contract by plaintiff. The burden of proof, to establish these matters in defence, was upon the defendants, upon the plainest principle of pleading. The plaintiff was not bound to negative them in advance, by proof.

Without proof on the part of the defendants, the plaintiff was entitled to recover something. On the question of damages there was nothing said by the Court. It is obvious that the matter in controversy was the right to maintain the action, and the remark of the Judge was directed to that point. No error is perceived in the remark of the Judge. If the defendants had desired specific instructions on the question of damages, they should have asked for them.

The testimony on the question of the terms, on which the plaintiff was employed by defendants, was conflicting. The jury found for the plaintiff, and there is no such preponder-

ance of evidence in favor of the defendants as will authorize this Court to decide that their verdict was the result of improper influence, or is in fact erroneous.

Motion and exceptions overruled, and Judgment on the verdict.

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

BENJAMIN D. AUSTIN *& als. versus* NAHUM AUSTIN.

The law requires, that the bond to be given by an administrator, before sale of real estate of his intestate, shall be approved in writing by the Judge of Probate.

But, where the evidence fails to show, affirmatively, that the bond was thus approved, and the contrary does not appear, — if the case discloses, that all the other necessary steps were taken with strictness and accuracy; that the sale was public; that the purchaser entered immediately and has held the premises for more than twenty years; that the law required such approval before the bond could be filed, and that the bond was actually filed, — the law fully authorizes the conclusion, that all was done, which was required, to give the purchaser a perfect title.

Where premises were assigned by metes and bounds to the widow, by commissioners appointed by the Judge of Probate, who made no return of their doings, the assignment is ineffectual; but the widow, having entered into possession of the premises thus assigned, and held the same without objection on the part of the heirs, (although some of them were minors at the time,) for more than twenty years, the inference is legitimate, that the dower was assigned with their assent; and, no complaint being made that the assignment was inequitable, there is no rule of law which requires that it should now be disturbed.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was a REAL ACTION to recover certain lands in Belgrade, in the county of Kennebec, brought by the heirs of Benjamin Austin, deceased. By agreement of the parties, the case was withdrawn from the jury, and the evidence reported to the full Court, with jury powers, to draw inference therefrom; the substance and nature of which, bearing

upon the questions in issue, sufficiently appear from the opinion.

J. Baker, for the demandants.

Vose & Vose, for the tenant.

The opinion of the Court was drawn up by

RICE, J.—The plaintiffs are the heirs at law of Benjamin Austin, who died about twenty-five years ago, intestate. The title to the estate in controversy was in him at the time of his decease. His estate was insolvent, and a portion of that now in dispute was sold by his administrator, by authority of the Probate Court, for the payment of debts, and a deed thereof from the administrator to the defendant was executed and delivered, Feb. 6, 1836, under which the defendant immediately entered, and has held possession from that time to the present. It is conceded that all the preliminary measures required by the law, to constitute a valid sale, were taken by the administrator and the Probate Court, excepting that it does not appear by the record, or by papers now on file in the probate office, that the bond filed by the administrator was approved by the Judge of Probate.

By § 5, c. 51, stat. of 1821, the orders and decrees of Judges of Probate are required to be in writing; § 3 requires a record of the proceedings to be made, and § 9 provides that, in all cases where by law bonds are required to be given to any Judge of Probate, or to be filed in the probate office, it shall be the duty of said Judge first to examine and approve of such bond, and, upon being so approved, but not otherwise, the said Judge shall order the same to be filed or recorded in the probate office. Section 6 of c. 470, laws of 1830, requires a bond to be filed by an administrator before he can be authorized to sell the real estate of his intestate. Taking these statutes together, the reasonable construction may be, that the bond in such case should be approved by the Judge of Probate in writing. The evidence produced fails to show, affirmatively, that the bond in this

case was thus approved; nor does the contrary appear. But, when we consider that this was a transaction that occurred more than twenty years ago; that the law required the bond to be approved by the Judge before it could be legally filed; that the bond was in fact filed; that the record shows that all the substantial steps were taken, required by law, and, so far as the administrator was concerned, with technical accuracy; that the sale was a public one, and that the defendant immediately entered under his deed, and has held undisturbed possession for more than twenty years, the law would fully authorize the conclusion that all was done which was required to give the defendant a perfect title. 1 Greenl. Ev., § 20; *Simpson* v. *Norton*, 45 Maine, 281.

This deed from the administrator covers the largest part of the land claimed by the demandants. There is, however, another portion of the same farm, which was also owned by Benjamin Austin, at the time of his decease, known as the "widow's dower," and now in the possession of the defendant, which is also claimed by the demandants in this action.

The defendant claims the right to hold possession of this portion of the demanded premises by a lease from the widow of said Benjamin. The widow's right to dower in the estate in controversy is not denied, and it appears, by the evidence in the case, that she made application to the Judge of Probate for dower, Oct. 26, 1836. On which application a warrant was issued to three commissioners to set out her dower, and that the commissioners proceeded and set out to her, by metes and bounds, that portion of her late husband's estate which the defendant holds by lease from her; and that she entered immediately and held personal possession thereof about twelve years, and, from that time to date of plaintiffs' writ, it has been in the undisputed possession of the defendant, under his lease from the widow. There has been no return of the commissioners to the Probate Court, nor have their proceedings in any way been made matter of record.

The evidence fails to show a legal assignment by order of

Court. This, however, is not absolutely essential to a valid assignment. Dower may be assigned by parol. The widow being entitled of common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her without livery of seizin. Co. Lit., 35, a; 1 Bright's H. & W., 366.

To bind the widow, it is necessary, not only that the assignment be *accepted*, but she must also enter upon it. 1 Rop. H. & W., 400; 1 Bright's H. & W., 375.

The assignment must be some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as will endure for her life, and the assignment must be absolute, unconditional, and without any exception or reservation in diminution of its value. Co. Lit., 34, b.

The person by right entitled to assign dower, when a court of law is not resorted to for the purpose, is the heir, or whoever may be owner of the freehold. Co. Lit., 34, b. The heir within age may assign dower. Co. Lit., 35, a. Or, it may be assigned by guardian. *Young* v. *Tarbell*, 37 Maine, 509; *Jones* v. *Bewer*, 1 Pick., 313. And the demand and assignment may be by parol, and need not be in writing. *Baker* v. *Baker*, 4 Maine, 67; *Shattuck* v. *Gragg*, 23 Pick., 88; *Jones* v. *Bewer*, 1 Pick., 313; *Luce* v. *Stubbs*, 35 Maine, 92.

In view of the facts in this case; that the widow was undoubtedly entitled to dower in this estate; that it was publicly assigned to her and set out by metes and bounds; that she immediately entered upon the portion thus assigned and has continued openly to hold and occupy the same, by herself and her lessee, for a period of more than twenty years without objection, the inference is legitimate that it was thus set out to her with the knowledge and by the consent, if not by the direct procurement of the heirs at law, or those who were entitled to the freehold at the time; and that, under such circumstances, after such a lapse of time, it would be

inequitable to disturb this assignment, which is not, even now, alleged to have been unjust or unreasonable, and that there is no rule of law which would authorize or require it to be done. According to the agreement of the parties a

Nonsuit is to be entered.

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

ERI WILLS *& al. versus* DANIEL GREELY.

In a suit upon a promissory note, given for intoxicating liquors sold, it appearing from the plaintiff's bond (put in as evidence by the defendant) that it had been approved, as the law required, the recital in it, that the plaintiff had been licensed to sell, is sufficient evidence, to warrant the inference of authority to sell, in the absence of any proof to the contrary.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of ASSUMPSIT upon a promissory note, and was submitted to the full Court, upon a report of the evidence, — the Court to exercise jury powers in drawing inferences.

The note was given for intoxicating liquors. The defendant offered the bill of the plaintiffs acknowledging payment, which is of the same amount and date as the note. Also their several bonds, approved by the licensing board, — the portions of which, material to the case, will appear from the opinion of the Court.

It was admitted that Eri Wills made the sale of the liquors named in the bill.

Lancaster, for the plaintiffs.

Greely, for the defendant.

The opinion of the Court was drawn up by

WALTON, J. — The note in suit having been given for intoxicating liquors, the defendant contends that the plaintiffs

ought not to prevail. 1st. Because the evidence is insufficient to show that either of them was authorized to sell. 2d. Because, if authorized, their authority was several, and would not authorize a joint sale by them as co-partners.

The bonds put into the case by the defendant are such as were required by law to be given by persons licensed to sell intoxicating liquors. On the back of each bond is a certificate showing that it had been received and approved by the licensing board; and the bonds recite that each of the plaintiffs had that day been duly licensed to sell intoxicating liquors. There being no evidence to the contrary, these bonds and the recitals they contain, and the certificates on the back of them, signed by the aldermen and city clerk, sufficiently establish the fact, that each of the plaintiffs was legally authorized to sell. Each being authorized to sell separately, would a joint sale by them, as co-partners, be illegal?

It is unnecessary to determine this question, for, although the bill for liquors was made in their joint names, from which, if there was nothing in the case showing the contrary, the Court might infer that the sale was a joint one; yet, it is admitted as a fact in the case, "that Eri Wills made the sale of the liquors named in the bill;" which was undoubtedly intended, and does in fact, exclude any such inference. If the sale was in fact made by Eri Wills, as is admitted; and he was at the time licensed to sell, which is sufficiently established by the evidence, the sale was legal; and afterwards making a bill of the liquors in the joint names of the plaintiffs, would not render it illegal.

Although the note in suit was given for intoxicating liquors, it sufficiently appears that the sale was made, not in violation of law, but by a person duly licensed.

Judgment for plaintiffs.

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

HENRY COOPER *versus* DANIEL WALDRON.

In an action to recover damages for malicious prosecution of a civil suit, the *malice* to be proved is a question of fact for the jury; *probable cause*, upon facts established, a question of law.

The presiding Judge may either order a nonsuit of the plaintiff, or direct a verdict for the defendant, if, in his opinion, the facts admitted, or clearly established, are not sufficient to prove a want of probable cause, notwithstanding evidence, in defence, has been introduced.

An amendment of the writ, charging a different cause of action, will not be allowed.

EXCEPTIONS from the ruling at *Nisi Prius* of RICE, J.

THIS was an action for an alleged malicious prosecution of a civil suit by this defendant, against the plaintiff, "without any lawful or just cause of action, being guided wholly by wanton malice and a desire to oppress, injure and defraud the plaintiff, and to deprive him of his good name and reputation, and injure him in the estimation of his fellow citizens." Under a general leave to amend his writ, the plaintiff filed an additional count, charging the defendant with prosecuting a suit against the plaintiff, to compel him illegally to pay the defendant certain sums of money recovered in a judgment against other parties. The defendant objecting to the amendment as introducing a different cause of action, the Court sustained the objection, and the amendment was disallowed.

The evidence in the case was fully reported in the bill of exceptions and is somewhat voluminous; but it is not deemed necessary to give here an abstract of it, as the substance of it, bearing upon the questions of law considered, appears in the opinion of the Court.

There were exceptions, both to the admission and to the exclusion of testimony, which were not much relied on in argument.

Stinchfield, for the plaintiff.

Bradbury, Morrill & Meserve, for the defendant.

The opinion of the Court was drawn up by

WALTON, J. — The plaintiff claims to recover of the defendant for an alleged malicious prosecution of a civil suit. To do so, he must prove that the suit was instituted maliciously and without probable cause. *Malice* is a question of fact for the jury. *Probable cause*, upon established facts, is a question of law. If the presiding Judge is of opinion that the facts admitted, or clearly established, are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or direct the jury to find a verdict for the defendant. The better course is for the Judge to nonsuit the plaintiff, for it is idle to submit to the jury a question that can be answered only in one way. In *Davis* v. *Hardy*, 6 B. & C., 225, D. & R., 380, which was an action for maliciously indicting the plaintiff, the plaintiff proved a case which, in the opinion of the Judge, showed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and, that being proved, the Judge was of opinion that there was reasonable or probable cause, and it was held that, there being no contradictory testimony as to that fact, and there being nothing in the demeanor of the witness, who proved it, to impeach his credit, the Judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff.

When, in any case it is clear that, upon the evidence, a verdict for the plaintiff cannot stand, and that, in the end, judgment must be rendered for the defendant, what good reason can be assigned for submitting the case to the jury? If their verdict is right, nothing is gained; and, if it should happen to be wrong, it must be set aside. To withhold a case from the jury is no greater interference than to set aside their verdict. To set aside their verdict impliedly impeaches either their intelligence or their integrity, and tends to lessen public confidence in the usefulness of the

institution. A nonsuit may sometimes be ordered as properly after evidence has been introduced in defence, and for the same reason, as before; as, for instance, where the point on which the nonsuit is based is not discovered or sufficiently considered at the moment the plaintiff closes his evidence, and the evidence in defence does not relate to or in any way affect that point. If, however, a contrary rule is to be regarded as established in this State, it is clear, upon reason and authority, that actions for malicious prosecution are exceptions to it; and that the objection to the nonsuit in this case, that it was entered after evidence had been introduced in defence, and was based in part upon the facts thus established, cannot be supported.

I am also of opinion that, upon the plaintiff's own showing, and the uncontroverted and clearly established facts proved in defence, the defendant had probable cause for commencing the suit against the plaintiff. That suit was for an alleged false disclosure, as trustee, in a suit by the present defendant against Hawks & Talpey, and the present plaintiff, as trustee. Cooper, the present plaintiff, disclosed that, in the fore part of Feb., 1857, he sold a brig belonging to Hawks & Talpey for $12,000, and received the pay; and that, before the trustee writ was served on him, he had settled with Hawks & Talpey, and given them his notes for upwards of $8,000; and that, at the time of the service of the trustee writ on him, which was Feb. 24, 1857, he was not indebted to them for anything except these notes, and that he paid them at maturity. Hawks afterwards swore, in his disclosure as a poor debtor, that the proceeds of the sale of the brig were left in Cooper's hands, to settle with their creditors, and that a final settlement with him did not take place till July 31, 1857; that, on that day, there remained in his hands of the proceeds of the sale of the brig, $280,27. If this disclosure of Hawks was true, (and it is not apparent that he had any motive to misrepresent,) Cooper had disclosed falsely, and ought not to have been discharged. The fact testified to by Cooper, himself, that

he had offered to pay Waldron, or give him a note, if he would take seventy-five cents on a dollar, was evidence of funds in his hands for the purpose, and tended strongly to confirm the truth of Hawks' statement. These facts were not only sufficient, but could hardly fail to create in the mind of Waldron, a strong conviction that Cooper had disclosed falsely.

A careful examination has failed to disclose any errors in the rulings of the presiding Judge, in admitting or excluding evidence; or in refusing to allow the plaintiff to file an additional count for an alleged abuse of legal process; or that the plaintiff was in any way prejudiced by any of these rulings. *Exceptions overruled; Nonsuit to stand; and Judgment for defendant.*

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

JOHN POPE *versus* CYRUS LINN.

A promissory note, given on Sunday, is void, as between the parties; and a subsequent promise to pay it, will not make it valid.

EXCEPTIONS from the ruling of APPLETON, J., at *Nisi Prius.*

THIS was an action of ASSUMPSIT on a promissory note dated Nov. 3, 1855. There was evidence tending to prove that the note was executed and delivered on Sunday, Nov. 4, 1855, between the hours of nine and twelve A. M. Also, that some ten days before the note was sued, the defendant was requested to pay the note, as it was nearly outlawed; and that the defendant then said he could not pay it then, but would pay it immediately; and evidence to the contrary.

The presiding Judge instructed the jury—(1), that if they should be satisfied from the testimony in the case, that

the note in suit, although dated on the 3d, was in fact given on the 4th of November, 1855, (Sunday) before sunset, against the provisions of the statute, that it was void, and the plaintiff would not be entitled to recover;—(2), If the note was thus void, no subsequent recognition of the debt, or promise to pay it on the part of the defendant, would render the note valid.

The verdict was for the defendant and the plaintiff excepted.

Titcomb, for the plaintiff.

Bradbury & Meserve, for the defendant.

The opinion of the Court was drawn up by

WALTON, J.—The defence to the note in suit is, that it was made and delivered on Sunday. The plaintiff contends that the note would not be for that cause absolutely void, and that upon this point the presiding Judge erred in his instructions to the jury.

Perhaps it is not strictly accurate to say that such a note is void; for, if such were the law, an action by an innocent indorsee could not be maintained. Notes made on Sunday are, however, generally spoken of as being void, but nothing more is meant than that such notes are void for the purpose for which they are attempted to be used; void as the foundation of the claims then sought to be established by them. The rule of law, applicable to such contracts, was accurately stated by MAULE, J., in *Fivaz* v. *Nichols*, (2 M. G. & S., 500,) "The plaintiff cannot recover where, in order to sustain his supposed claim, he must set up an illegal agreement to which he himself has been a party." The plaintiff is turned out of Court, not because his suit is founded on a contract that is void, but to punish him in part for having violated the law in making it, and because it is beneath the character and dignity of a court of justice to listen to a party who founds his claim upon his own illegal act. *Smith* v. *Bean*, 15 N. H., 577. When the presiding

Judge spoke of the note in suit as being void, it is not probable that he meant anything more than to say that the illegality, if established, rendered the note void for the purpose for which it was then being used; void as the foundation of the plaintiff's claim. If more was intended, it was immaterial, as the plaintiff could not have been prejudiced by it. If void for the purpose for which it was then being used, it was of no importance whether it would be so held in a suit between other parties, or for other purposes, or not.

The plaintiff introduced evidence tending to prove a subsequent promise to pay the note, and contends that such a promise would obviate the objection to his right to maintain his suit.

If the note was made in violation of law, and was therefore illegal, a subsequent promise to pay it would not make it any the less illegal. The transaction, illegal at its inception, would not be purged of its illegality by a subsequent promise to perform it. The doctrine of ratification is not applicable to such a case. It is not in the power of the parties to make a contract legal which the law declares to be illegal, or to free themselves from the consequences which the law attaches to such illegality. "A party cannot be heard to allege his own unlawful act, and, if such act be one of a series of facts necessary to support the plaintiff's claim, then that claim must fail. * * * Whether a claim connected with an illegal transaction, can be maintained in a court of law, may be determined by the test whether the plaintiff must bring in the illegal transaction to aid him in making out his case." *Gregg* v. *Wyman*, 4 Cush., 326. The plaintiff was obliged to bring in the illegal note to make out his case, notwithstanding the subsequent promise. The presiding Judge committed no error, therefore, in ruling that the subsequent recognition of the note, or promise to pay it by the defendant, would not help the plaintiff's case. The law intended to secure a due regard for the Sabbath is wise and salutary, and those who violate it must understand that they do so at the peril of receiving no aid from the Court to

help them out of difficulties, or to enforce claims growing out of such illegal conduct.

Exceptions overruled. Judgment on the verdict.

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

REUEL W. SANFORD *versus* JOANNA HASKELL *& al.*

An action (authorized by c. 22, § 4 of R. S.) to recover double the price of building the defendants' part of a divisional fence, is prematurely brought, if commenced before the expiration of "one month after demand."

In such a case *indebitatus assumpsit* will not lie; it should be an action of the case, setting forth all the facts necessary to be established, to fix the defendants' liability.

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

THIS was was an action of ASSUMPSIT to recover double the price of building the part of a divisional fence which was assigned to the defendants by fence viewers.

The case was argued by *Vose*, who was of counsel for plaintiff, and by

Lancaster, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.—The fence, built by plaintiff, was "adjudged sufficient" by the fence viewers, Nov. 10, 1858. The writ is dated Nov. 20, 1858. As "one month" had not expired "after demand," the suit was prematurely brought. R. S., c. 22, § 4.

Nor will *indebitatus assumpsit* lie in such a case. There was no *promise*, express or implied. It should have been an action of the *case*, setting forth all the facts necessary to establish a *legal obligation* to build the fence, a neglect to do it, the construction of it by the plaintiff, the adjudication of

its sufficiency, and the neglect of the defendants to pay therefor within one month after demand.

Plaintiff nonsuit.

APPLETON, C. J., CUTTING, WALTON and DANFORTH, JJ., concurred.

ADNA L. NORCROSS & *ux. versus* FRED. V. STUART.

An action, in the name of husband and wife for injuries sustained by her, survives; and the husband may withdraw, that the administrator may come in and prosecute.

In such a case, the husband cannot be considered a party after the death of the wife; but, if made her administrator, he may prosecute in that capacity.

EXCEPTIONS from the ruling, *pro forma*, of RICE, J., at *Nisi Prius*.

J. Baker, for the plaintiffs.

E. O. Bean, for the defendant.

The opinion of the Court was drawn up by

KENT, J. — This action was instituted by the husband and wife, against the defendant as a common carrier of passengers, for injuries sustained by the wife alone. The only ground of damage set forth in the declaration, is the alleged injuries to the person of the wife. The wife has died since the entry of the action. The husband has been appointed administrator on her estate. A motion was filed, setting forth the fact of the death of the wife, and declaring, as the ground of the motion to dismiss the action, that it cannot be prosecuted by the husband as survivor, and that the cause of action does not survive, and that there is no provision of law authorizing the appearance of an administrator to prosecute the suit. This motion was sustained *pro forma*.

This action survives, if there are proper parties to prosecute it. *Hooper* v. *Gorham*, 45 Maine, 209.

The defendant insists that it cannot be prosecuted by the husband, as surviving plaintiff, under § 10, c. 87, R. S.

He further contends, that it cannot be prosecuted by an administrator of the wife's estate, because there is a plaintiff in the writ still living, and that he and the administrator cannot be joined.

We think that the first point is well taken. The husband was a necessary party to the suit. It is one where the cause of action would survive to the wife. *Sanford* v. *Augusta*, 32 Maine, 536; *Clapp* v. *Stoughton*, 10 Pick., 463.

But it is contended that he had no such right or interest as would enable him to prosecute the suit in his own name, after the death of the wife. Chitty on Pleading, 74; *Reynolds* v. *Robinson*, 2 Maine, 127.

The survivor, named in the statute, must be one who can do what the statute authorizes a survivor to do, viz., prosecute the suit further in his own name.

Assuming the position of the defendant's counsel to be correct, the husband is but an enabling party, a side supporter, and not the actor. He is only required to be joined by reason of the marriage relation, which considers husband and wife one, and which does not allow the wife to sue alone. He may be likened to a guardian, in whose name an action is brought for his ward. The husband, by joining with the wife in the suit, does not acquire a right on the ground of having reduced the claim to possession. 2 Kent's Com., 124.

The defendant, whilst insisting that the husband is not a party, so that he can prosecute as a survivor, under § 10 of c. 87, contends that he is a party of record, and that there is no power in the Court to allow an amendment, by striking him out as he now stands, or to allow him to describe himself as administrator of his wife's estate. According to this position, he is a party without power to move or act to enforce the suit, and yet he must stand in the writ to prevent any other party from prosecuting it.

It is very clear that such a result is against the spirit and

manifest intention of the Legislature. The object of the statute is to prevent the abatement of actions. It intends that all actions, when the cause survives, may be continued in Court and prosecuted, either by the survivors or the administrator. It seeks to avoid the necessity of commencing new actions, in such cases, after the death of a party.

In this case, we think that the husband, being a mere nominal party in effect, having no right to be in the writ, except as aid and supporter of his wife and as one with her, dies as a party when his wife dies, and may therefore withdraw, as the husband, to allow the administrator to come in.

It is said, that this will leave the suit without any plaintiff in Court, for the time intervening between his withdrawal and the coming in of the administrator. If this would be so, it is but the common case contemplated by the statute where there is but a single plaintiff and he dies pending the action.

The Court in Massachusetts have taken the same view we have now taken, in a case similar in all respects to the one before us and under a similar statute. *Pattee* v. *Harrington*, 11 Pick., 220. In that case, the husband, who was administrator, was allowed to come in, although he was an original plaintiff with his wife, in a case that survived. The same decision was made in *Crozier* v. *Bryant*, 4 Bibb, 174.

Exceptions sustained.

APPLETON, C. J., RICE, CUTTING, DAVIS and WALTON, JJ., concurred.

WILLIAM WINSLOW *& ux. versus* BENJAMIN H. GILBRETH.

Since the Act of 1847, (R. S. of 1857, c. 61, § 1,) authorizing a married woman to hold property exempt from payment of her husband's debts, if his creditor would impeach her title to any property conveyed to her, the burden is on him to prove that it came to her, directly or indirectly, from her husband, after coverture, and fraudulently as to creditors.

EXCEPTIONS from the ruling of APPLETON, C. J., presiding at *Nisi Prius*.

THIS was an action of TROVER against the defendant, as sheriff, for the act of a deputy, in attaching and selling one half of a vessel, (as the property of said William Winslow,) which, it is alleged in the writ, was the property of the wife of said Winslow, the female plaintiff.

The plaintiffs put into the case a bill of sale conveying to Hepzibah Winslow, (the female plaintiff,) one half of the vessel in controversy. The bill of sale contained the usual consideration clause—"for and in consideration of $910, * * * * to us in hand paid, before, &c., by Hepzibah Winslow," &c.

It was admitted that the plaintiffs were husband and wife at the time.

The plaintiffs offered no evidence to prove that the money paid for the purchase of the vessel did not come from the husband.

The Court directed a nonsuit; to which ruling the plaintiffs excepted.

Evans and *Putnam*, in support of the exceptions.

Stat. 1844, c. 117, by its terms, throws the burden on the wife to show that the property *did not* come from the husband. *Clark* v. *Viles*, 32 Maine, 32; *Eldridge* v. *Preble*, 34 Maine, 152, were decided under that statute.

Stat. 1847, c. 27, materially modified the statute of 1844.

What are the circumstances declared which render property of the wife liable for the debts of the husband? In

the first place, the statutes declare generally that all property of which a married woman becomes seized or possessed by direct bequest, demise, gift, purchase or distribution, in her own name, &c., shall be "exempt from the debts of her husband." In the next section it is provided that, "if it shall *appear*," &c., then the same shall be held "for the payment of the prior contracted debts," &c. The statute, reversing the rule of 1844, required distinctly that the whole proviso must "*appear*" before it can be of force. Now it cannot be said, by any construction of language, that in this case it "*appears*" that the property of the husband has in any way gone into this vessel. Apply the ordinary rules, and, though nothing *appears* one way or the other, it would be presumed that the bill of sale was for full value from the person to whom it runs. Refuse to apply them, and, whatever may be *presumed*, nothing would *appear* on that point from the evidence in the case.

Another rule of construction is, that when a general rule is prescribed in one section, and exceptions are made in a subsequent section or, indeed, in a subsequent clause, the party who would avail himself of the exceptions, must allege and prove them. In stat. 1847, the general rule is made in the first section, and no mention is made of the exceptions, of which defendant seeks to avail himself, until the second section.

Section 1, c. 61, R. S., is entirely a revision from the then existing statutes; and, although considerably abbreviated, makes no change of any of their leading principles, but adopts, so far as consistent with abbreviation, their very phraseology. The various provisions of the stat. of 1847 assume precisely the same order in the codification, and what, in the statute of 1847, followed in a distinct section, here follows in a distinct clause.

Tallman & Larrabee, contra.

"In the absence of clear and satisfactory proof that property purchased by the wife, after marriage, was paid for out of her own separate funds, the presumption is, that it

was paid for by means furnished by the husband." *Bradford's Appeal*, 29 Penn. State Rep., 513, (5 Casey.) "Evidence that she purchased it amounts to nothing, unless it be accompanied by clear and satisfactory proof that she paid for it with her own separate funds." *Ib.*, 515.

"A married woman, who claims money in the hands of another as her separate property, must show that she acquired it in her own right. The husband is presumed to be the owner of all the personal property possessed by the family until the contrary appears." 31 Penn. State Rep., 328, (7 Casey), *Topley* v. *Topley;* 35 *ib.*, 375, *Hallowell* v. *Horton;* 39 *ib.*, (3 Wright, 129), *Robinson & Co.* v. *Wallace.*

Evans, in reply.

A Pennsylvania decision should not be of such authority with our Courts as to compel a disregard of principles of evidence and construction generally acknowledged in our State, especially in those matters relating to the rights of married women, as the statutes on that subject and the decisions relating to them, are hardly alike in any two States.

Neither of the cases pretends to state any principles of construction to sanction their position. They all rest solely on the alleged reason that the statute would operate unjustly, unless the Court presumes that all conveyances to married women are fraudulent as to their husbands' creditors, and throws the burden of proving otherwise on them. When such an argument is used, not in cases of very doubtful construction, but to add to a statute what plainly is not contained in it, and to overthrow the established presumptions of the common law, it should be addressed, rather to the Legislature, than to the judiciary. In this State, the Legislature has refused to admit the force of such an argument, as we have already shown in examining the phraseology of the statutes of 1847. On the other hand, the Pennsylvania statute, which will be found cited in *Kenney* v. *Good*, 9 Harris, 349, does not contain the decisive phraseology of our statutes, which alone is sufficient to decide this case.

The opinion of the Court was drawn up by

APPLETON, C. J.—By the statute of 1844, c. 117, it was enacted that "any married woman may become seized of any property, and in her own name, and as of her own property; provided *it shall be made to appear by such married woman*, in any issue touching the validity of her title, that the same *does not*, in any way, come from her husband after coverture." By this Act, it will be perceived, the burden was on the wife to prove that the estate in controversy did *not* come from the husband. She must make it so *to appear*. *Eldridge* v. *Preble*, 34 Maine, 148.

By the Act of 1847, c. 27, "any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase or distribution, in her own name and as of her own property, exempt from the debts or contracts of her husband, provided that, "*if it shall appear* that the property so possessed, being purchased after marriage, was purchased with the moneys or other property of the husband, or, that the same being the property of the husband, was conveyed by him to the wife directly or indirectly, without adequate consideration, and so that the creditors of the husband might thereby be defrauded, the same shall be held for the payment of the prior contracted debts of the husband." This statute requires that the proviso must *appear*—must be shown to be true—before it can have effect, and relieves the wife from the burden of proof resting upon her by the Act of 1844, c. 117, and imposes it upon the creditor who would impeach her title.

The proviso of the Act of 1847 is substantially adopted in R. S., 1857, c. 61, § 1, by which it was enacted that "*when* payment was made for property conveyed to her, (the wife,) from the property of her husband, or it was conveyed by him to her without a valuable consideration, it may be taken as the property of her husband to pay his debts, contracted before such purchase." WHEN a party alleges the existence of facts authorizing the seizure of property, the title to which is in the wife, wherewith to pay the

debts of the husband, he must establish their existence by proof. The burden is on him.

The bill of sale of the vessel to the wife, reciting payment therefor by her, makes out a *prima facie* case of title in her. The creditor who denies its validity, must impeach it by proofs. The statute authorizes the wife to take a conveyance, and her rights, under it, are entitled to the protection afforded other grantees.

The ruling at *Nisi Prius* was erroneous.

Exceptions sustained.

CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

WYMOND SHAW *versus* WILLIAM B. SHAW.

Parol evidence is inadmissible to prove that a promissory note was intended as a receipt for money put into the defendant's hands, by the payee, to be loaned for him.

It seems now well settled that parol evidence of an oral agreement, *made at the time* of making or indorsing a note, cannot be permitted to vary or contradict the terms of the written contract.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of ASSUMPSIT on the promissory note of the defendant to the plaintiff, dated February 7, 1856, for $780, on demand with interest.

The defendant offered evidence to prove that the note in suit was given as a receipt for money which plaintiff let the defendant have, to be loaned by him for the plaintiff's benefit, in such manner as the defendant might consider most advantageous to the plaintiff; that he loaned it for plaintiff, using great care to loan it safely and well, but the parties to whom the money was loaned, failed, and no part of it has been repaid; that the plaintiff knew and approved of the parties to whom the loan was made; that the defendant was acting as the agent of the plaintiff in loaning the money, without any pecuniary benefit to himself.

This evidence was objected to as inadmissible, and the presiding Judge so held. The defendant consented to be defaulted, subject to the opinion of the full Court upon the question of exclusion of the evidence offered.

Danforth, for the plaintiff.

Whitmore, 2d, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—The evidence offered was at variance with the terms of the note in suit. In *Billings* v. *Billings*, 10 Cush., 178, parol evidence was held inadmissible to show that a promissory note, in the usual form, was intended as a receipt, and that the sum for which the note was given, was in fact a payment by the payee to the maker, of an antecedent debt, and not a loan or advancement. So, in an action on a note payable absolutely, evidence is not admissible to prove an oral agreement, when the note was made, that it should be given up in an event which has happened. *Tower* v. *Richardson*, 6 Allen, 351; *Currier* v. *Hale*, 8 Allen, 47. Indeed, the law seems well settled that parol evidence of an oral agreement, *made at the time* of the making or indorsing a note, cannot be permitted to vary or contradict, to add to, or subtract from the terms of the written contract. *Underwood* v. *Simonds*, 12 Met., 275; *Woodbridge* v. *Spooner*, 3 B. & A., 233; *St. Louis Perpetual Ins. Co.* v. *Homer*, 9 Met., 39; *Hoyt* v. *French*, 4 Foster, 198.

Default to stand.

CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

ANDREW J. SMITH *versus* MONMOUTH MUT. FIRE INS. CO.

A mortgage is not such an alienation of property as will defeat a policy of insurance which provides that if the property insured is alienated, the policy shall be void.

A bond of defeasance will convert a deed, absolute in its terms, into a mortgage if such bond is seasonably recorded; and such bond is seasonably recorded if done before it is introduced in evidence, and before any change of title has taken place, or the right of any third party has attached.

Such a case is distinguishable from *Tomlinson* v. *Ins. Co.*, 47 Maine, 232, as in that, the bond introduced had not then been recorded.

When a policy, if assigned without the consent of the insurers, is to be void, and the assured executes an assignment to be delivered, after such consent has been obtained, but not delivered, because consent was withheld, the assignment is inoperative to affect the rights of the parties.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of ASSUMPSIT on a policy of insurance, dated Aug. 21, 1855, for $700 on a house in Mt. Vernon, and $60 on the furniture therein. The writ is dated July 16, 1858. The loss occurred November 28, 1857.

The policy contains this proviso:—"And it is also provided, that in case he shall have assigned this policy, sold or alienated the property in whole or in part, without the consent of the company, certified on the back of this policy by the president and secretary or by two of the directors, the policy shall be absolutely void." Also this provision: "It is mutually agreed that this policy is made subject to the lien created by law, and with reference to the votes and by-laws of the company, which may be resorted to in explanation of the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." The defendant's charter, § 6, provides for a lien on the property insured, and § 9 provides, among other things:—"And when the property insured shall be alienated by sale or otherwise, the policy shall thereupon be void." The 8th by-law of the company provides:—"In case the insured shall have sold or alienated the property in whole or in part without having transferred the policy to the purchaser or

alienee, with the consent of the company certified by the president and secretary, or by two of the directors, on the back of his policy, then the policy shall be absolutely void."

May 23, 1856, the plaintiff conveyed the property to Nathan Porter, by a warranty deed, taking back a bond for a re-conveyance on the payment of $948,36, in one, two, and three years, in unequal instalments, bearing the same date as the deed, and under seal. The deed was recorded August 16, 1856, and the bond November 2, 1859.

In defence, it was contended that this was a total alienation of the insured property, and therefore rendered the policy absolutely void, not only for the real estate, but for the furniture also; it being one contract, entire, indivisible, one premium note given, and one premium paid.

A circular of the directors, dated February 14, 1845, contains the following:—"Mortgaging property after it is insured does not affect the insurance, provided the incumbrance does not exceed two-thirds the value thereof."

E. O. Bean, for the plaintiff.

J. Baker, for the defendants.

The facts in the case bearing upon the point of the assignment of the policy will appear from the opinion of the Court, which was drawn up by

WALTON, J.—This is an action on an insurance policy, and it is objected that the plaintiff is not entitled to recover: 1. Because he had alienated the insured property; and 2. Because the policy was assigned without ratification.

We think the property was not alienated within the meaning of that word as used in the policy. Nor was the policy ever assigned.

The case shows that after the insurance was procured the plaintiff gave a deed of the property to Nathan Porter, but Porter, at the same time, gave back an instrument of defeasance, and the two together constituted but a mortgage; and "a mortgage of insured property is not an alienation."

Pollard v. *Insurance Co.*, 42 Maine, 221, and authorities there cited.

But it is contended that the conveyance cannot be regarded as a mortgage, because the instrument of defeasance was not seasonably recorded, and the decision in *Tomlinson* v. *Insurance Co.*, 47 Maine, 232, is referred to as decisive against the plaintiff upon this point. But the cases are not alike. In that case (*Tomlinson* v. *Insurance Co.*,) the instrument of defeasance was never recorded. In this case it was recorded. In the former the question was as to the effect of an instrument of defeasance which was never recorded, while, in this case, the instrument, when introduced in evidence, had been recorded, and the only question is whether it was *seasonably* recorded. In the former case the instrument, when introduced in evidence, not having been recorded, the Court could not know or assume that it ever would be, and could not therefore allow it to have the effect to convert a deed absolute upon its face into a mortgage. In this case the instrument of defeasance, when introduced in evidence, had been recorded, and, as before remarked, the only question is whether it was *seasonably* recorded. The cases therefore are not alike, and the decision in the former is not decisive against the plaintiff in this.

Was the instrument set up as a defeasance in this case seasonably recorded? We think it was. It was recorded before it was introduced in evidence, and before the rights of any third party had attached. At the time it was recorded, the title to the real estate was in all respects in the same condition as it was when the deed and the instrument of defeasance were executed. As between the parties to it, the instrument of defeasance was effectual to convert the absolute deed into a mortgage without being recorded; and, being recorded before the rights of any third parties had attached,—in fact, before any change whatever had taken place in respect to the title of the real estate to which it related, the transaction must always remain a mortgage, not only as between the parties, but as to all the world.

If an instrument of defeasance, recorded before it is introduced in evidence, and before the rights of any third party have attached, or the title to land has undergone any change whatever, is not seasonably recorded, the question naturally arises, within what time should it be recorded? The difficulty at once felt in answering this question is a strong argument in favor of the conclusion to which we have arrived, that the instrument in this case was seasonably recorded, and that the objection to the plaintiff's right to recover on that account is not sustained.

Another objection to the plaintiff's right to recover is, that the policy had been assigned without the consent of the company. But this objection is not sustained by the evidence. It appears that the plaintiff procured an assignment to be written on the back of the policy, and sent it to the company for ratification, with directions to have the policy delivered to the assignee, in case the assignment should be ratified by the company, and, if not so ratified, to have it returned to him; and the assignment not being ratified by the company, the policy was returned to plaintiff. This was but an attempt to make an assignment, and failed for want of ratification by the company and delivery to the assignee. Such an attempt was not improper, and would not render the policy void. *Judgment for plaintiff.*

CUTTING, DAVIS, BARROWS and DANFORTH, JJ., concurred.

SAMUEL H. MOULTON *versus* CHARLES LAWRENCE *& al.*

The possession of a chattel continued for ten years under claim of ownership, will not, of itself, vest title therein; it would be evidence tending to show title, but liable to be controlled by other proof.

As against one having such possession, a delivery by the true owner will not be necessary to vest title in the vendee.

EXCEPTIONS from the ruling of RICE, J.

THIS was an action of TRESPASS, for an injury to the plaintiff's booms in the Kennebec river at Pittston, by taking therefrom certain logs or sticks of timber which were a part of the structure of said booms. There was evidence tending to show that the plaintiff and others built the booms as early as 1850, and that the sticks taken by the defendants were used at that time in the making of said booms by plaintiff, who succeeded to the rights of the others to the boom. There was evidence tending to show title to the sticks in the defendants. There was also evidence tending to show that the plaintiff had from the time of using said sticks in 1850, claimed to own them. The defendants, if they purchased, bought them as late as 1857 or 1858. The sticks were taken from the boom in August or September, 1861.

1. The Court instructed the jury that possession, though continued for eight or ten years under claim of ownership, would not of itself vest the title in the plaintiff. That such possession would be evidence tending to show title, but liable to be controlled by other proof.

2. That if Moulton, the plaintiff, had no title to the logs in dispute, a delivery from the vendor to the defendants would not be necessary to vest the title in Lawrence as against Moulton, although at such time the logs were in the possession of Moulton, he claiming to own them.

The plaintiff excepted.

Clay, for plaintiff.

Danforth, for defendants.

The opinion of the Court was drawn up by

BARROWS, J.—The plaintiff seems to rely entirely upon a title by occupancy. Chancellor KENT says,—"The means of acquiring personal property, by occupancy, are very limited. Though priority of occupancy was the foundation of the right of property in the primitive ages, and though some of the ancient institutions contemplated the right of occupancy as standing on broad ground, yet, in the progress of society, this original right was made to yield to the stronger claims of order and tranquillity. Title by occupancy is become almost extinct under civilized governments."

The plaintiff's claim here does not come within any of the exceptions to this doctrine. He showed only a naked possession, which, though *prima facie* evidence of title, was liable to be controlled by other proof. The defendants' title to the logs accrued in 1857 or 1858, and there is nothing in the case to indicate that, if they had seen fit, or found it necessary to resort to legal process to recover their property at the time they took possession of it, they could not have maintained replevin for it against the plaintiff, if he had refused to surrender it.

The first instruction complained of was correct. 2 Kent's Com., 355. So was the second. *Case of the Sarah Ann*, 2 Sumner, 211. *Exceptions overruled.*

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

PHILIP C. HOLMES *& al. versus* JACOB P. MORSE, *Adm'r.*

A power of attorney, given to the mortgager of a mill by the mortgagee, who is at the same time the mortgagee in possession of certain unmanufactured lumber, by which power the former is authorized to manufacture and dispose of the lumber as agent of the latter, and account for the net proceeds, confers no authority to purchase fixtures or make improvements in the mill at the expense of the mortgagee, however it may be as to the hiring of men, mills or vessels, in execution of the powers granted.

The relation held by a mortgagee does not in itself make him responsible for permanent improvements or essential additions made to the estate by the mortgager, or enable a party furnishing work or materials therefor to maintain an action against the former, without proof of any further fact than is disclosed by the mortgage.

Where an account was stated between the mortgager and mortgagee, by a person employed for the purpose, the fact that a debt due a third party for fixtures for the mortgaged premises was included in the account without objection by either party, would not be conclusive in making the mortgagee responsible therefor, if such account was stated merely to ascertain what the mortgager had done with the money he had received, and was not made or used for the purpose of a settlement between the parties.

Proof of the declarations of an agent after his agency has ceased, if inconsistent with his present testimony, may be admitted to affect his credibility, but is not to be regarded as evidence of facts to influence the jury in determining the points at issue in an action brought by a third party against the principal.

In an action to recover, of the mortgagee of a mill and lumber, the value of fixtures furnished whilst the mortgager was running the mill under a power of attorney from the mortgagee, the power of attorney was rightfully admitted in evidence as showing a relation between the parties as to the business, although insufficient to prove such an agency as would make the mortgagee responsible for improvements or new machinery.

EXCEPTIONS from the ruling of MAY, J., also on motion to set aside the verdict.

ASSUMPSIT to recover of the defendant, as administrator on the estate of John Henry, late of Bath, deceased, payment for articles named in an account annexed to the writ.

June 29, 1849, Stephen Jewell, Stephen P. Jewell, William Lowell and Jacob Lowell mortgaged to the deceased a mill in Bath, called "the Lower Steam mill," with the land, privileges and property appurtenant, to secure the deceased for all sums which might be due to him, and relieve him from

any liability on their account as indorser or guarantor, within five years from that date.

June 27, 1849, they mortgaged their lumber of certain described marks, on the Kennebec river and its branches, to John Henry, John R. Dow and Nathan W. Bridge for like purposes and under like conditions.

And, on the 29th, Henry, Dow and Bridge gave to the abovenamed mortgagers a power of attorney, appointing them "agents to manufacture into boards, or other lumber, the logs mortgaged to us by them on the 27th instant, in the Kennebec river and its tributaries, and to dispose of said boards and lumber for us, they accounting to us for the net proceeds thereof, after deducting all expenses and a commission to them for doing the business; this power to be irrevocable so long as said Stephen Jewell, Stephen P. Jewell, William Lowell and Jacob Lowell shall fully comply with the terms thereof, not exceeding the term of five years."

January 6, 1851, the same mortgagers mortgaged to Henry, Dow and Bridge, certain other logs, subject to a prior mortgage to W. Hall and G. W. Duncan.

March 26, 1851, the abovenamed mortgagers executed a writing, whereby they agreed to give the mortgagees immediate possession of all the mortgaged property, real and personal, and authorized them to dispose of their right in equity, and apply the proceeds to pay their liabilities; the mortgagees agreeing at the same time to discharge their trust with fidelity, &c.

It was admitted that the plaintiffs furnished to Stephen Jewell & Co., (the above named mortgagers), certain machinery amounting to $695,19, for which Jewell & Co. gave the plaintiffs their note, January 10, 1850, payable in six months, and at the maturity of the note paid part, and gave a new note for $600, which remains unpaid.

Evidence was introduced, tending to show that the deceased was at the mill, from time to time, and gave certain orders and directions respecting the business.

In March, 1851, Henry employed B. C. Bailey to examine the mill accounts, and make a statement of them. Henry

and two of the partners of the firm of Jewell & Co. were frequently present during the examination; and did not object at the time to Bailey's statement of the accounts. Bailey testified that he was told by Henry and by Stephen Jewell, that the object of the investigation was to ascertain whether Jewell & Co. had used more money than they were authorized to use by the agreement between the parties.

Bailey's statement of the accounts contains a charge for a note of $600 to Holmes & Robbins not paid.

Nathan W. Bridge, called by the defendants, testified, amongst other things, that the firm of which he was a member never appointed Jewell & Co. their agents for any purpose further than appears in the paper dated June 29, 1849; that they had nothing to do with the mill in 1849, and never authorized Jewell & Co. to make any purchases.

The deposition of Stephen Jewell was introduced by the defendant, in which he testified, amongst other things, that Jewell & Co. bought and put in the machinery charged in the plaintiffs' account, and that they had no agency for Henry, or Dow & Co. except as appears by the power of attorney.

The plaintiffs introduced proof of declarations made by Stephen Jewell, tending to contradict the foregoing statements in his deposition.

The power of attorney was admitted by the presiding Judge, MAY, J., against the objections of the defendant, the Judge instructing the jury that it did not of itself establish such an agency as would enable the plaintiffs to maintain their action, without other proof.

The verdict was for the plaintiffs. The counsel for the defendants filed exceptions to the ruling of the presiding Judge, admitting the paper called a power of attorney in evidence, and also submitted a motion for a new trial, on the ground that the verdict was against the weight of evidence.

Tallman & Larrabee argued in support of the motion and of the exceptions.

N. M. Whitmore, contra.

1. The agency of Jewell & Co. for Henry and others was concealed till March, 1851, and the plaintiffs had until then no means of knowing it. *Raymond* v. *Crown & Eagle Mills*, 2 Met., 313; *Upton* v. *Gray*, 2 Maine, 373.

2. Henry was mortgagee of the mill, and in possession of the lumber, and may be presumed to have caused the gang saws furnished by the plaintiffs to be put in. The evidence tends to show that it was so.

3. The gang saws put in enhanced the value of the property of Henry in the mill.

4. The $600 note having been put into Bailey's statement without objection, proves that Henry regarded it as chargeable to him.

5. The Judge having instructed the jury that the power of attorney did not of itself constitute Jewell & Co. the agents of Henry and Dow & Co., its admission as evidence was wholly immaterial.

The opinion of the Court was drawn up by

KENT, J.—The defendant moves to set aside the verdict on the ground that the same is against the weight of the evidence.

It clearly appears that the articles were delivered to, and purchased by, Stephen Jewell & Co.; that the credit was given to them; that they gave their negotiable promissory note for the amount and paid a part, and gave a new note for the balance. The plaintiffs claim now to recover the amount of the last note, on the ground that the defendant's intestate is liable to them, because he was the mortgagee of the mill, for which the machinery sued for was furnished, and that he so conducted as to give authority to the Jewells to obtain the same on his credit.

The defendant took a mortgage deed of the mill from the Jewells in June, 1849, and before the articles were furnished by plaintiffs. He was then in the relation of a mortgagee out of possession, to the mill property. As part of the

same transaction, a large lot of logs were mortgaged by the Jewells to the defendant and Dow & Co., and the defendant and Dow & Co. gave a power of attorney to the Jewells, authorizing them, "as their agents, to manufacture into boards, or other lumber, the logs mortgaged, and to dispose of the boards and lumber; they accounting to the principals for the net proceeds, after deducting all expenses and a commission to them for doing the business."

It is evident that the Judge who presided was correct in his ruling that, by the terms of this paper, no authority or agency was created, which empowered the agents to make the purchase in question, on the credit of the principals therein named. It is clear that the only authority conferred had relation to the *manufacture* of the logs. There was no power to purchase mills, or to place gangs of saws therein, or to make contracts of any other character than such as were directly connected with the manufacture and sale of the logs and lumber, as therein specified. The power might be exercised properly in hiring men, mills and vessels, but not in purchasing fixtures, or in making improvements like those in the case before us.

The relation of the defendant, as mortgagee, does not, in itself, authorize the mortgager in possession to contract, as his agent, for permanent improvements or for essential additions to the estate, so as to enable the party doing the work, or furnishing the materials, to maintain an action directly against the mortgagee, without proof of any other fact than that disclosed by the deed of mortgage.

But the mortgagee may be thus liable, if the proof establishes such facts as show that the mortgager was expressly, or by fair implication, authorized to contract for such work on the credit of the mortgagee; or that he may properly be held for such contracts, by reason of prior authority or subsequent ratification.

The plaintiffs rely upon the statement of the accounts made by B. C. Bailey at the request of the defendant. In that statement the charges for the plaintiffs' work and materials

are included, and, at the bottom of the account stated, the amount remaining due, ($600,) is included in a list of unpaid bills. The legitimate effect of this evidence must depend upon the object of the investigation, as stated by the witnesses. If it was to ascertain how much was properly chargeable to the defendant and others, *in settlement of the agency* created by the written power, and for the purpose of such final settlement, the evidence that this charge of the plaintiffs was inserted without objection would be, to a certain extent, important in fixing a liability on the defendant. The defendant, however, insists that the only object of the statement was to ascertain how they had disposed of their property; and not for any settlement with Jewell & Co. This is the testimony of N. W. Bridge, one of the parties. It is stated by Mr. Bailey, (on cross-examination,) that the object was to ascertain what Jewell & Co. had done with the property. The testimony of Mr. Bailey, in chief, is to the effect that the parties both desired the investigation, to ascertain, as Mr. Jewell said, whether they had used any more money than they were authorized to use by the agreement. Mr. Bailey says he was requested to state an account, made up from all the mill accounts of Jewell & Co., and see how they stood.

It does not appear that this statement of accounts was ever used in making any settlement, or that the defendant ever recognized the items as legal charges against him.

There are certain items in the account stated, which could not be properly charged to the defendant in a settlement of the agency to manufacture. One is a charge of "$300, paid expenses dividing Flag Staff" (township). This clearly could not be a proper charge in the settlement of the accounts respecting the sawing and sale of the lumber. Another charge is for "cash ($600) paid for boiler sent to California." This charge, without some connecting testimony, could not be within the agency.

Taking the items as stated, the testimony of the witnesses as to the object in employing Mr. Bailey to state the ac-

count, — the fact that no use was made of it in settlement, we cannot think that any inference can be drawn therefrom legitimately, to charge the defendant in this suit. It would be drawing an inference from facts which do not in themselves warrant it, to say that by this statement made by Mr. Bailey the defendant acknowledged all the items therein as proper charges against him in a settlement of the agency. The testimony of Mr. Jewell (found among the *written* documents in the case) is corroborative of this view.

The plaintiffs rely upon certain admissions of the defendant by words and acts. It is urged that he and his administrator have paid certain bills incurred by the Jewells during the agency. This is admitted, but it is replied that these bills were all for work in and about the logs, and the manufacture thereof, and therefore properly paid by the principals. George Moulton, who put in a new boiler, says he called on defendant for pay, and he replied that he had nothing to do with it. And when told that the engine would be removed, still refused to pay for it, but said he would hire it. This offer to hire, it is presumed, was after he took possession under his mortgage. This testimony rather negatives than establishes an agreement or understanding that he was to pay for the engine. This charge in its nature is similar to the one now in question.

The testimony of James Hinkley is also relied upon by plaintiffs. He says he worked for defendant for many years off and on; that he asked Mr. Henry why he put in the gang of saws, and he said it was to save cut of lumber; that it would save the expense of putting them in in a year.

It will be observed that the whole force of this testimony depends upon the use of the word "*he*," in the question put. The apparent object of the question was to ascertain *why* the gang was put in; not *by whom* put in. The witness seemed desirous to ascertain whether the saving from the use of the gang would equal the cost. The answer, as stated, refers to this point and gives as the reason, that it was to save *cut* of lumber. The change of a single word in the

question would alter the whole bearing of the interrogatory, on the point as to the person or party who put the gang of saws into the mill. If the question had been, "why was the gang put in?"—or, "what was the object in putting it in?" and the answer had been as stated, the question and answer would have had no bearing upon the point now in controversy. If the question had been put as stated, the defendant might not have observed the form of it, as implying that he had put the saws in himself, as the substance of the question had relation to the use and profit of the gang of saws.

It is not to be overlooked, that the witness says that this conversation took place more than ten years before; that nothing has refreshed his recollection since that time; that he don't know that he has given the exact words of the conversation; and, that he has never been called as a witness in the other similar cases against this defendant.

Considering all these points, we do not think that a jury would be justified in rendering a verdict upon the testimony of this witness alone, to charge the defendant upon a promise, implied from his admission of liability. And this seems to be the only part of the evidence which remains to be considered on this point, in the testimony offered by the plaintiff before he rested.

The defendant introduced the deposition of Stephen Jewell, and he testifies that he purchased these articles for the firm of S. Jewell & Co., and gave notes in payment, and that the gang of saws was put in by himself and partners. The plaintiff introduced several witnesses who testified to declarations of the deponent, at different times, more or less inconsistent with the statements in the deposition. We think that the jury might be influenced by these declarations to doubt or reject the testimony. At least, we may say that, if the case had rested on that deposition, we should not have felt bound to interfere, if the jury did disregard it.

But the testimony given, of declarations inconsistent with his present testimony, could only be considered as affecting

the credibility of the witness, and not as facts established by testimony. This distinction is highly important, but is not always regarded by a jury, by reason of a misapprehension of the rule. It is quite clear, that the declarations of an agent, after his agency has ceased, cannot be given in evidence, as testimony of facts to be considered by the jury in determining the weight of evidence, but may be heard by the jury, only as contradicting a witness and thus impeaching his credibility.

The result of this investigation is, that, there not having been any authority to contract this debt on the credit of the defendant, by reason of the written power of attorney, nor by the relation of mortgagee out of possession, the plaintiffs can only recover by proof of a direct or implied promise. The burden is on the plaintiffs to prove such direct promise, or such facts as would authorize a jury to infer or imply such promise. We do not think that there was sufficient evidence to authorize such finding, and therefore there must be a new trial. *Motion sustained.*

New trial granted.

The exceptions must be overruled. The Court did not err in permitting the power of attorney to be read, as it served to show a relation between the parties in reference to the lumber and business. The subsequent ruling stated the true construction of the paper plainly. If the defendant had any objection to the papers going to the jury, he should have called the attention of the Judge to his objection at the time the papers were delivered to the jury. We do not mean to say that it was not properly delivered.

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

COUNTY OF SOMERSET.

WILLIAM ATKINSON *& al., pet'rs for review, versus* EZEKIEL DUNLAP.

The Legislature, undoubtedly, has constitutional jurisdiction over remedies; but after all existing remedies have been exhausted, and rights have become permanently vested, all further interference is prohibited.

Thus, enactments are found abridging the period of former limitations, which are rendered constitutional by a *proviso*, that suits may be commenced within a certain time after their passage, but none reviving and extending a limitation with such a provision.

A judgment of Court becomes final when, by the then existing laws, the time for a review and for reversal for error, has expired; it then becomes a vested right, by force of the constitution and the existing laws.

And a statute, designed to retroact on such a case, by reviving the right of review, is unconstitutional and void.

And such was the statute of 1859, c. 94, if such was its intendment.

But that statute should be construed as intended to be prospective, and so, constitutional; it was thus additional and cumulative, — operative, only for a period of six months, when, by its terms, it expired.

PETITION FOR REVIEW of an action in which judgment was rendered for the defendant for his costs, on a verdict in his favor, at the term of the S. J. Court in October, 1850. This petition is based upon the statute of 1859; and was commenced within six months of its enactment. At the hearing, October term, 1861, TENNEY, C. J., granted the review as prayed for. The respondent excepted.

The bill of exceptions sets forth that "the petitioners presented proofs which satisfied the Court of the truth of the allegations in the petition.

"The respondent offered no oral testimony, relying on the legal grounds of defence: the statute of limitations, touching the time within which petitions for review should be commenced; also; upon the previous adjudications, of the

Court, upon applications of the petitioners for a rehearing and review; and contended, that the statute, on which the petitioners relied, was inapplicable and unconstitutional."

The facts in the case, so far as they bear upon the questions of law considered, will sufficiently appear from the opinion of the Court.

For the petitioners, the questions presented by the exceptions were elaborately argued by

Atkinson, one of the petitioners,—who contended, that, under the statute of 1859, he was entitled to a new trial, if it was proved that the witness for the defendant had sworn falsely. Of this he had satisfied the Judge presiding at the hearing; and so the exceptions show, and upon the naked question of perjury the case is to be determined.

The statute did not contemplate cases, where the petition was "dismissed without prejudice," for some legal defect. It contemplated, when speaking of a "former unsuccessful petition," a case where a hearing had been had upon the merits."

The Legislature has the authority to extend the time, fixed by the statute of limitation, in which application may be made for the redress of a wrong done. The constitutional power of the Legislature to extend the time, within which the remedy may be applied to the right or cause of action, has been so well settled in the case of *Ogden* v. *Saunders*, and in other cases, that argument, on that point, seems useless.

In *Bronson* v. *Kinsey*, 1 Howard, 311, the Court say:—"Although a new remedy may be deemed less convenient than an old one, and may in some degree render the recovery of debts more tardy and difficult, yet, it will not follow that the law is unconstitutional.

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided that the alteration does not impair the obligation of contracts.

"But, if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the con-

tract itself. In either case it is prohibited by the constitution."

The Court further say:—"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases, between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligations of the contract, and the right of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is no substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless, or impracticable to pursue it."

The petitioner cited and commented on *Green* v. *Biddle*, 8 Wheaton, 75; 1 Blackstone's Com., 55; *Calder* v. *Bull*, 3 Dallas; *Colby* v. *Dennis*, 36 Maine, 9.

J. S. Abbott, for the respondent.

The opinion of the Court was drawn up by

CUTTING, J.—From the records and evidence presented and referred to as exhibiting the question hereafter to be considered, it appears—*that* the petitioners, on April 6th, 1849, brought the original action before a magistrate for an alleged trespass by the respondent for cutting a quantity of white ash timber on their land, in the town of Embden, without their consent; *that* the respondent, being the defendant in that suit, was adjudged guilty, who appealed to the next term of the District Court, where the action was duly entered, and continued from term to term, until the October term, 1850, when it was tried and a verdict recovered by the respondent, on which verdict, after motion

duly filed for a new trial had been heard and overruled, at the same term judgment was rendered.

It further appears that, in 1851, these petitioners entered a petition for a review in the District Court, which process came regularly into this Court by the abolition of the former and a transfer of its powers to the latter Court, where, at the September term, 1853, the petition was "dismissed without prejudice."

Again, at the succeeding December term, 1853, in this Court, another petition is entered praying for a new trial in consequence of the perjury of a certain witness on the former trial before the jury, and, at the December term, 1855, we perceive the following entry; viz.:—"And now in this term the parties appear, and after a full hearing of all matters and things concerning the same, the prayer of the petitioners is denied, and the petition ordered to be dismissed."

At this last adjudication we may well pause and contemplate the rights of the parties as disclosed by their prior proceedings. In 1850, judgment had been rendered for the respondent, which became a verity, subject only to reversal on error within six years after the entering up thereof, or to be reviewed within three years from that time; both of which contingencies had transpired before the subsequent proceedings hereafter to be considered, and consequently that judgment by the then existing laws became permanent and effectual forever. And why should it be otherwise? It was a judgment rendered by a Court of competent jurisdiction. It was based upon the verdict of a jury. A motion to set the verdict aside had been overruled. It had passed the time of a reversal for error, and the ordeal of two petitions for a review, and the statute of limitations had forever barred its further interruption. Or, in other words, by force of the constitution and the existing laws that judgment had become a vested right and incapable of annihilation, except by payment and satisfaction. Such was the opinion of this Court in the case of *Treat* v. *Ingalls*, 9

Maine, 61, in delivering which, WESTON, J., remarks that—"Judgments may be subject to be revised, according to laws *existing at the time of their rendition.* This is a fixed and settled qualification of rights vested under them. But, with this exception, there can be no higher title to any right or interest whatever, than what arises from a regular judgment of law."

But, by the statute of 1859, c. 94, it was enacted, that a petition for review, commenced within six months after its passage, might be maintained, notwithstanding there may have been an unsuccessful petition for review of the same action, when it shall be made to appear to the satisfaction of the Court, that a witness, in the original trial, testified falsely to a material fact and the petitioner was thereby taken by surprise and unable at the trial to produce evidence of the falsehood, which has since been discovered, &c., in which case the petitioner shall be entitled to a review, &c.

It next appears that the petition, now under consideration, was instituted within the time limited by the Act, which alleges matter sufficient to bring it within its provisions, and that after certain proceedings had in this Court at the September term, 1860, and the law term in 1861, which it becomes unnecessary to consider, the petition was finally heard at the succeeding term, a review granted, and exceptions were duly filed by the respondent, alleging, among other things, that the Judge erred in a matter of law in his construction as to the validity of the Act, and its constitutionality as affecting previously vested rights.

If the foregoing enactment was intended to be retrospective, it is not difficult to perceive that all judgments, rendered since the organization of the State, were by its provisions liable to be affected. Not because they might embrace an element of perjury, but because of the principle involved in the Act. If a review of such judgments may be ordered for one cause, it may be equally so for another, or any cause within the discretion of the Legislature. Then the salutary maxim of the common law "*finis finem litibus*

imponit" would become obsolete, when all cases heretofore settled by the most solemn adjudications known to the law, involving all rights and titles acquired under them, might pass in review before a subsequent tribunal, long after witnesses had deceased or their memories had become impaired.

Human nature is so constituted that it seldom occurs, that the losing party is satisfied with the result of a trial; but charges a delinquency either upon the counsel, witnesses, Court or jury. All this such a party has undoubtedly the right to do, but it must be done upon his own responsibility and within the time and according to the forms prescribed by law. These petitioners had heretofore availed themselves of all their legal rights. Their days in Court had terminated, all legal remedies exhausted, and the time had arrived, when their opponent, protected by the law, could repose in common with all other citizens, whose rights had vested, after much tribulation. But, it is contended, that the Legislature of 1859 inaugurated a retrograde movement, interrupting the former quietude and repose by removing all bars between the past and present. Such would virtually be the result, if the Act of that year is considered to be retrospective in its operation.

That the Legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited. Thus, we find enactments abridging the period of former limitations, which are rendered constitutional by a *proviso*, that suits may be commenced within a certain time after their passage, but none reviving and extending a limitation with such a provision, except it be the Act now under consideration.

We are not unmindful that the decision in *Colby* v. *Dennis*, 36 Maine, 9, is somewhat in conflict with our present views. It is there said, that the statute under consideration only affected the remedy; if so, that decision can have no application here; for we have seen that all remedies had been tried and exhausted.

In *Prop'rs Ken. Purchase* v. *Labaree*, 2 Maine, 273, C. J. MELLEN remarks that—"By the spirit and true intent and meaning of this section, every citizen has the right of 'possessing and protecting property' according to the *standing laws* in force at the time of his 'acquiring it,' and *during the time* of his continuing to possess it. Unless this be the true construction, the section seems to secure no other right to the citizen, than that of being governed and protected in his person and property by the laws of the land, for the time being. Such a provision, for such a purpose merely, would not have been introduced (into our constitution) even by jealousy itself," &c.

Again, in *Burch* v. *Newbury*, 6 Selden, 394, the Court say,—"The misfortune of having vested rights, under judgments and decrees of our Courts, thus disturbed, is far from being trivial, if we consider that, on this principle, no judgment whatever in a court of law can be rested upon as final." See authorities there cited.

In view of the foregoing considerations, we conclude that, if the Act was intended to be retrospective, and thereby affected vested rights, it was manifestly unconstitutional; if prospective, the petitioners do not come within its provisions. But, in justice to a co-ordinate branch of the government, we charge no design to interfere with vested rights, unless we are to infer from some unpremeditated remark from one of the petitioners, that the Act was passed for their exclusive benefit, and was thus a specimen of special instead of general legislation. But the Act is susceptible of no such constructive infirmity. It does not necessarily recognize any such party as the petitioners, whose rights at the time of its passage had been legally determined and all their remedies barred.

The Act is to be construed as prospective in its operation and thus constitutional. It operates *imperatively* upon the Court to grant a review in cases before open to a review for a specified cause, notwithstanding *a former review had been denied*, and also authorized the attachment of the respondent's property on the petition. The Act was therefore ad-

ditional, cumulative and prospective for a period of six months after its passage, when its period of limitation expired. *Exceptions sustained.*

APPLETON, C. J., RICE, KENT and WALTON, JJ., concurred.

JOSEPH BERRY, *pet'r for review*, *versus* MARK A. LISHERNESS.

At the hearing on a petition for review, for newly discovered evidence, a witness will be confined to the matter set forth in the petition, to be proved *by him*; and cannot testify as to other facts set forth, which are to be proved by other witnesses therein named, (R. S., c. 89, § 3.)

Nor will the petitioner be allowed on such hearing to testify to facts known to him at the time of the trial, from testifying to which the rules of evidence *then* precluded him, although, by statute, a party is now made a competent witness.

A party has an undoubted right to have his case tried by the application of the rules of law and evidence existing and regulating such cases, at the time of trial; but after his rights have been thus ascertained and settled, he cannot have a new trial, on the ground, that a change has been subsequently made, by the Legislature, in the law or in the rules of evidence applicable to his case.

EXCEPTIONS from the ruling of TENNEY, C. J., presiding at *Nisi Prius*, excluding testimony on the hearing of a petition for review.

THE petitioner offered one Strickland, as a witness, to prove a material fact alleged, in the petition, to exist, and to be proved by witnesses therein named. The witness offered was not one of those named by whom the fact was to be proved, but was named a witness to prove other alleged causes for review. Objection was made for this reason, and the Court excluded his testimony to that point.

The petitioner Berry, is only a nominal party; the party in interest in the suit, of which a review is now sought, being William Atkinson, who prosecutes this petition. The

petition set forth certain facts to be proved by said Atkinson, which were known to him at the time of the trial of the former action, but to which he could not then testify, his interest, under the law existing at that time, making him an incompetent witness. His testimony was now offered on the ground that the recent statutes had changed the former rule excluding an interested party, and now allowed the party to testify as a witness. The presiding Judge ruled the testimony to be inadmissible.

Atkinson, pro se.

Foster, for the respondent.

The opinion of the Court was drawn up by

KENT, J.—The first exception is answered by the provision in c. 89, § 3 of the R. S.,—"when the discovery of new evidence is alleged in the petition, the names of the witnesses to prove it, *and what each is expected to testify*, must be stated under oath." The wisdom of this rule, and the necessity of enforcing it in every case, is too apparent to need elucidation.

The other exception is based upon the ruling of the Judge, which excluded the testimony of the party in interest, to facts known to him at the time of the original trial, but which he was precluded from giving in evidence, because, as the law then stood, he could not be a witness on account of his interest. The law, at the time of the hearing on this petition, allowed him to be a witness, notwithstanding his interest.

This, clearly, is not newly discovered evidence, for it existed, and was known to the party at the time of the first trial, and he would undoubtedly have testified at that trial, and have disclosed all the facts he now sets out as the basis of his petition for a review, if the law would have authorized him so to do.

But the petitioner insists that his case comes within the spirit, if not within the letter of the law, and, that what

he was precluded from using, although known, should be regarded as within the purview of the rule as to newly discovered evidence.

It is not questioned that the Legislature may prescribe what evidence shall be received in Courts and the effect of that evidence, and may restrict or enlarge such rules. The petitioners' case was tried, when interested parties or witnesses could not, by the law of the land, testify to any facts known to them. Afterwards, the Legislature saw fit to alter that rule and to allow such persons to testify. The petitioner's case was finally determined, and judgment rendered therein, before the new law came into operation. It is true, he had a right to present a petition for review within three years thereafter, and the Court was authorized, in its discretion, if sufficient grounds were shown, to grant the review prayed for. The ground set forth in the petition is newly discovered evidence. The petitioners in the matter now under consideration, have not *discovered any new evidence*, but have discovered a new way to make testimony available, which was before known, but unavailable. But, is this a good ground for a review? If it is—then, upon every change in the law of evidence, or in relation to the competency of witnesses, reviews may be granted.

The statute which requires that every promise to answer for the debt of another must be in writing may be repealed, and a verbal promise made effectual and binding. If a case had been tried and finally determined in favor of the defendant, where such a promise was alleged, because it was not in writing, could the plaintiff reasonably and legally claim to have the action reviewed because the law had been altered, and he could prove a verbal promise. Or, to reverse the case—A plaintiff recovers judgment on a promise not in writing, and which the law as it existed at the time of the trial did not require to be in writing; afterwards the Legislature passes an Act, which renders all that class of promises void if not in writing; must a review be granted to enable the defendant to avail himself of the new rule of evidence?

Many cases may be suggested, where, by a change of the rules of evidence, or in the established doctrines of the law, the result of trials before and after the change would necessarily be different. A party has an undoubted right to have his case tried by the application of the rules of law and evidence, existing and regulating such cases at the time of trial. But, after his rights have thus been ascertained and settled, he cannot have a new trial, on the ground that a change has been subsequently made by the Legislature in the law or in the rules of evidence applicable to his case. It may be his misfortune that he lived and had his rights determined, before all the modern reforms had found their way into the statute book.

We find that the question raised in this case has been considered and decided in Rhode Island, and, that the conclusion reached by that Court, in two cases, is similar to the opinion above stated. *Briggs* v. *Smith*, 5 R. I., 213; *Kendall* v. *Winsor*, 6 R. I., 453. *Exceptions overruled.*

RICE, CUTTING, GOODENOW, DAVIS and WALTON, JJ., concurred.

PAMELIA F. BICKFORD *versus* STEPHEN ELLIS *& als.*

An attorney, who prosecutes a bastardy process to final judgment and execution, has a lien for his services and disbursements upon the bond given by the respondent in that process; and he may maintain a suit thereon to recover his claim, notwithstanding the complainant in the original process has given a full discharge to the obligors.

THIS was an action of DEBT on a bond, and came from *Nisi Prius* on a report of the evidence.

J. S. Abbott, for the plaintiff.

Webster, for the defendants.

The facts essential to an understanding of the case appear from the opinion of the Court, which was drawn up by

CUTTING, J.—Action of debt on a bond, given in pursu-

ance of the requirements of R. S., c. 97, relating to "bastard children and their maintenance."

It appears that judgment had been rendered against the putative father, the principal in the bond, for the maintenance of his illegitimate child with costs of prosecution;—*that John S. Abbott*, Esq., appeared as *senior* counsel for the plaintiff in that prosecution, who now in the present action claims *at least* a judgment for the amount of his lien, it being for fees and disbursements, embraced in the costs of the former judgment.

That he had a lien on that judgment cannot be controverted; neither can it be denied that his remedy embraces all prior legal contracts to secure its enforcement, which cannot be annulled without his consent as a party, perhaps, the most deeply interested. See *Newbert* v. *Cunningham*, *post*.

But it appears, that after this suit was commenced, the plaintiff discharged the sureties, who are two of these defendants; which act as to *her* would operate as a release of the principal, inasmuch as they covenanted jointly, and the declaration is framed accordingly; consequently she, perhaps unadvisedly, has lost her remedy.

But not so as to her counsel, who must recover judgment against all the defendants, to the amount of his lien claim, which is to be ascertained at *Nisi Prius*, as agreed by the parties. *Defendants defaulted.*

APPLETON, C. J., DAVIS, WALTON and BARROWS, JJ., concurred.

ARTHUR SPAULDING, (*in error*,) *versus* IRA S. ROGERS.

When, for error, a judgment is sought to be reversed, the error must affirmatively appear; for the judgment will not he held to be erroneous when, from aught that appears, it may have been legally rendered.

EXCEPTIONS from the ruling, *pro forma*, of TENNEY, C. J., presiding at *Nisi Prius*.

WRIT OF ERROR to reverse the judgment allowing the defendant costs in an action in which he was summoned as trustee of Calvin M. Sawyer, brought by the present plaintiff.

The errors assigned are as follows; viz.: (1) The judgment rendered for said Rogers, was, that he be discharged as trustee, and recover costs of said Spaulding, taxed at $19,86, whereas no costs should have been taxed and allowed to said Rogers, because he did not come into Court and submit himself to examination, at the first term of the pendency of said action.

(2) Said action was entered at the March term of said Court, A. D. 1860, and continued from term to term to the September term, A. D. 1861, without any appearance for said Rogers, when he appeared and submitted himself to examination on oath and was discharged; and costs were taken for him and judgment rendered for the same in his favor, and execution issued on said judgment; whereas no costs should have been taxed or allowed for said Rogers.

The record of the judgment made part of the case; and the proceedings therein recorded, so far as they bear upon the question in issue, will appear from the opinion of the Court.

Webster, for the plaintiff in error.

J. S. Abbott, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—The record of the judgment sought

to be reversed, incorporates the disclosure presented to the Court for its adjudication.

From the date of the disclosure, as thus incorporated, it appears that the trustee, at the return term, signed and swore to a disclosure in which he denied having any goods, effects or credits of the principal debtor in his hands, at the time of the service of the writ on him, and submitted himself to examination. At the same, or a subsequent term, he was examined by the counsel for the plaintiff, but the disclosure was not presented to the Court, to determine whether trustee or not, until the term when judgment was rendered.

To justify the reversal of a judgment for error, it should distinctly and unequivocally appear that an error has been committed. It should not be a matter of doubt or uncertainty. Notwithstanding the record shows the disclosure was not adjudicated on at the first term, it does not show that the trustee did not then appear and submit himself to examination. On the contrary, it does appear by the disclosure itself, which being made part of the record must be deemed as true, that the trustee did appear, denied his liability upon oath, and submitted to further examination as the law requires. In the usual course of practice, the disclosure would be placed on file the term at which it was made. Nothing indicates that such was not the case here. The want of authority to allow costs, should be affirmatively shown. This is not done, and we are not to presume the judgment erroneous, when, from aught that appears, it may have been legally rendered.

Exceptions sustained. Judgment affirmed.

CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

JAMES WHITTEN *versus* ARNOLD PALMER.

The defendant in his plea, verified by oath, alleged usury, and offered to be defaulted for a specified sum which was the amount claimed, less such interest; and the plaintiff indorsed the amount of the excessive interest upon his note before trial and accepted the offer: — *Held* that the damages are not reduced *by proof*, so that the plaintiff forfeits his, and becomes liable for defendant's costs, as provided in the Act of 1862, c. 136.

But the plaintiff will have costs to the time of filing the offer, and the defendant, *after* that time. R. S., c. 82, § 21.

EXCEPTIONS from the ruling of APPLETON, C. J., presiding at *Nisi Prius*.

ASSUMPSIT on a promissory note. The defence was, that the note was usurious. Plea, general issue, with a brief statement, verified by the oath of the defendant, alleging usury.

The defendant filed an offer to be defaulted for a specified sum, being amount due upon the note, after deducting the amount alleged to be usurious, — which amount last named, the plaintiff indorsed upon the note and accepted the defendant's offer, and he was defaulted.

The Court ruled that the case was not within the provision of c. 136, § 2, of the laws of 1862; that the amount claimed had not been reduced *by proof* — that the plaintiff, and not the defendant, was entitled to costs.

The defendant excepted.

J. Wright, for the plaintiff.

E. E. Brown, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — It was determined in *Knight* v. *Frank*, 48 Maine, 320, if the plaintiff voluntarily indorses on the note in suit the amount of usurious interest reserved therein, before the cause comes on for trial, that the damages are not reduced "*by proof*" of such usurious interest, within the Act of July 22, 1846, c. 192.

By the Act of 1862, c. 136, § 2, it is provided, "in any action brought, or hereafter to be brought, on any contract whatever, in which there is directly or indirectly taken, promised or received a rate of interest exceeding the rate established in § 1, or when such contract is relied upon by either party in the maintenance or defence of any action, either party may, under the general issue, prove such excessive interest, the defendant giving notice of such defence in his specifications of defence, and it shall be deducted from the amount due on such contract; and, if in any such action, the amount claimed by either party under such contract, *is reduced by proof of such excessive interest*, the party taking or receiving the same, shall recover no cost, but shall pay cost to the adverse party."

This action is upon a promissory note. The defendant pleaded the general issue and filed a brief statement of defence, alleging that usurious interest had been taken, made oath to the truth thereof and offered to be defaulted for the amount due, less such interest. Before the cause came on for trial, the plaintiff indorsed on his note the usurious interest therein, accepted the defendant's offer and a default was entered. The defendant claimed full costs, under § 2. The presiding Judge disallowed the defendant's claim and allowed the plaintiff costs, to all which the defendant filed exceptions.

The defendant, by his brief statement, gave notice that at a future day, when the cause should come on for trial, he should offer proof of excessive interest. None was offered in the present case. The brief statement, or specifications of defence, whether sworn to or not, were not proof. The amount was not reduced "*by proof* of such excessive interest," either before the jury or the Court, but by the voluntary act of the plaintiff. The defendant does not bring himself within § 2, for there has been no reduction of the amount by proof on his part, for he has never offered any.

The defendant was however entitled to costs, by R. S., 1857, c. 82, § 21, since, and the plaintiff to the offer.

Exceptions sustained.

CUTTING, DAVIS, WALTON and BARROWS, JJ., concurred.

WORTHY C. BARROWS *versus* SILAS W. TURNER.

A mortgage of personal property was given to secure the payment of a note therein described; but that offered in evidence to support the mortgage was materially different; in that case, it must be clearly shown, that the last note was intended, by the parties, as a renewal of the former.

Before the statute of 1859, c. 114, personal property mortgaged could not be legally attached, until after tender of payment of the mortgage debt.

If a mortgage of personal property has been recorded in the town in which the mortgager resided at the time, and he afterwards removes to another town, taking the property with him, the statute does not require the mortgage to be again recorded in the town to which he has removed.

REPORTED from *Nisi Prius*, TENNEY, C. J., presiding.

THIS was an action of TROVER against the sheriff of the county of Somerset, to recover the value of certain personal property, which had been attached by his deputy Nye, as the property of Mott & Gage.

J. H. Drummond, for the plaintiff.

J. S. Abbott, for the defendant.

The facts in the case, and questions of law argued by counsel, appear from the opinion of the Court, which was drawn up by

APPLETON, C. J.—On Jan. 31st, 1853, Samuel Springer and Charles L. Mott mortgaged their furnace building, shop, furnaces, flasks, &c., &c., to Thomas Tolman, to secure two notes, each for $250, one payable July 13, 1853, and the other Dec. 13, 1853. This mortgage was assigned on 7th Aug., 1854, to the plaintiff, but, on the trial of this case, he

produced neither of the notes referred to therein. Instead thereof, he offered in evidence a note signed by Charles L. Mott, payable to himself, for $222,83, and dated 7th Aug., 1854, claiming this to be given in renewal of the mortgage notes. But it will be perceived that the note produced, varies from those described in the mortgage in date, amount, time of payment and in the names of the payor and payee. It is undoubtedly true, that the renewal of a note secured by mortgage is not such a payment as will discharge the mortgage, unless so intended. *Hadlock* v. *Bulfinch*, 31 Maine, 246. But if it were competent to show a note thus variant from, to have been given in renewal of, the notes secured, the plaintiff has failed so to do. Mott was a witness, but he testified to no such fact. His statements, whether oral or written, as to past renewals, might be admissible as against him, but not as to third persons. As the plaintiff has neither of the mortgage notes, and has not proved the one offered to have been given in renewal of the same, he must, so far as relates to the Tolman mortgage, fail.

The plaintiff next claims under a mortgage from Mott to him, dated August 7th, 1854, to secure $77, to be paid Dec. 31st, 1854. The debt secured being due and unpaid at the time of the attachment of the defendant's deputy Nye, the mortgagee was entitled to immediate possession of the mortgaged property. True, he had suffered the mortgager to remain in possession, but no agreement has been proved by which he was at any time precluded from taking possession of the goods mortgaged. It is the common case of an attachment of goods, the time of payment specified in the mortgage having elapsed. The defendant is liable for the unlawful interference of his deputy with the property of the plaintiff. *Melody* v. *Chandler*, 3 Fairf., 233; *Foster* v. *Perkins*, 42 Maine, 168; *Staples* v. *Smith*, 48 Maine, 47.

By R. S., 1841, c. 117, § 38, an attachment of mortgaged property is authorized, the creditor "*first* paying or tendering to such mortgagee, pledgee, or holder, the full amount of the debt for which it was so mortgaged or pledged; and

any property so redeemed, may be sold on execution as any other personal property." But this preliminary of a payment or tender of the mortgage debt, was not complied with. As the mortgage was valid, the attachment was unauthorized. *Foster* v. *Perkins*, 42 Maine, 168.

This suit, it must be remembered, was commenced before the statute of 1859, c. 114, "relating to the attachment of mortgaged property," and therefore does not fall within its provisions.

There was no confusion of goods, as it is technically termed. The articles in dispute were more easily distinguished from those belonging to the judgment debtor than in the case of *Tufts* v. *McClintock*, 28 Maine, 424. If there was any intermingling it was by the act of the mortgager, for which the mortgagee should not suffer. *Willard* v. *Rice*, 11 Met., 494.

The mortgage from Mott to the plaintiff was recorded in the office of the town clerk of Westbrook, where the mortgager then resided. The property mortgaged, at the time of its attachment, was at Kendall's Mills in the county of Somerset, to which place the mortgager had removed.

By R. S., 1841, c. 125, § 32, a mortgage of personal property is not valid, unless the mortgagee takes and retains possession thereof, "or, unless the mortgage has been or shall be recorded by the clerk of the town where the mortgager resides." The statute requires a mortgage of personal property to be recorded but once, and that at the place of residence of the mortgager. The Court cannot add to the requirements of the statute. The mortgage has been recorded according to its provisions. Being thus recorded, the rights of the mortgagee will be protected and enforced throughout the State. *Whitney* v. *Heywood*, 6 Cush., 82; *Brigham* v. *Weaver*, 6 Cush., 298; *Esson* v. *Tarbell*, 9 Cush., 407; *Langworthy* v. *Little*, 12 Cush., 107.

The mortgage to the plaintiff would seem to embrace the articles previously mortgaged to Tolman. The evidence adduced does not satisfy us that this mortgage has been paid.

It does not appear very clearly what articles were removed by Nye. The schedule made at the time is lost. Some of the articles sued for were returned as attached, and additional ones were sold on the execution. From the evidence, the officer should be held responsible for what was attached and for what was sold on execution.

The cart hub pattern and two sets of stove patterns were returned on the writ, and five sets of damper patterns and two sets of barn door rolls were sold on the execution. These articles, when taken, were of the value of $86, for which sum with damages, at six per cent. interest, from the date of the attachment, judgment must be rendered.

Defendant defaulted for $86, *and interest from December* 30, 1856.

RICE, CUTTING, DAVIS, WALTON and DICKERSON, JJ., concurred.

DAVID D. STEWART *versus* JOSIAH CROSBY.

Payment of the debt, secured by a mortgage of real estate, *before* condition broken, revests the title in the mortgager; but not so, if made *after* breach of condition.

And if there has been no release of the estate to the mortgager, his right of redeeming it may be seized and *sold* on execution, with the same effect, as though there had been a *levy* of the execution thereon, notwithstanding the debt *after* condition broken has been fully paid.

PER APPLETON, C. J., and CUTTING, J. — Money paid for a deed of release, without covenants, where no fraud is charged, cannot be recovered back, although, by the deed, no title or interest passed to the releasee.

THIS was an action of ASSUMPSIT to recover back money paid to the defendant for his release of an equity of redemption of certain premises, which the defendant represented to the plaintiff he had purchased and owned.

At *Nisi Prius*, TENNEY, C. J., for the purpose of giving progress to the cause, ruled upon certain questions of law,

and a verdict by consent was taken for the plaintiff for a sum agreed upon by the parties.

The questions raised by the defendant's exceptions, and the facts in the case, sufficiently appear from the opinion of the Court.

The case was very fully argued by

Crosby, pro se, in support of the exceptions, and by

Abbott, contra.

The opinion concurred in by a majority of the Court was drawn up by

DAVIS, J.—The defendant, having claims against one Charles Hanson, commenced suits thereon, and caused his right of redeeming certain real estate, previously mortgaged by him, to be attached, September 15, 1848. Judgments were recovered February 17, 1854; executions were issued March 17, and Hanson's right of redemption seized thereon the same day; and, on April 22, of the same year, the officer duly sold to the defendant all of Hanson's right to redeem, which he had at the time of the attachment.

October 23, 1854, the defendant sold to the plaintiff, by a quitclaim deed, "all the right, title, and interest acquired by him by virtue of his deed" given to him by the sheriff upon the sale referred to. The plaintiff, upon inquiry, afterwards ascertained that Hanson, after the attachment, and before the seizure of his right of redemption upon the executions, had fully paid the mortgage debt. But the mortgage had not been discharged, either by an entry upon the record, or in any other manner.

The plaintiff claims that such payment was itself a discharge of the mortgage, so that Hanson's title was no longer a *right of redemption*, which could be *sold* by the sheriff, but a *fee*, upon which the execution should have been *extended*. And he has brought this suit, to recover back the purchase money, on account of the failure of title.

The defendant does not concede that the plaintiff would

be entitled to recover, if there was a failure of title, as he has alleged, as he gave a mere release, with no covenants of title. But he contends that the mortgage was not discharged by *payment*, merely; and that, if the mortgage debt had been paid, it was a benefit, and not an injury, to the plaintiff.

In the case of *Martin* v. *Mowlin*, 2 Burrow, 978, Lord Mansfield is reported to have said, "a mortgage is a charge upon the land, and whatever would give the money will carry the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. * * The assignment of the debt, or the forgiving it, will draw the land after it, as a consequence, though the debt were forgiven only by parol," &c.

The case under consideration was a suit at law; and the confounding of principles of law with those which prevail in equity, only, is probably due to the reporter, whose language it is. For he admits, in publishing his notes of cases, that he did not always take down the *restrictions* with which a proposition was qualified, "to guard against its being understood universally, or in too large a sense." 1 Burr., 9.

It is worthy of notice that in that case, as generally in English mortgages, the condition was, that, upon performance, the mortgagee should *reconvey the premises:*—and not, as in this country, that the deed *should be void.* It would seem therefore to be certain that payment *on the law day* would not have revested the title in the mortgager, without such reconveyance. *Harrison* v. *Owen*, 1 Atk., 520; 2 Cruise, (London ed.,) 110. Upon mortgages *to be void* upon performance, such as are usually given in the United States, it is everywhere conceded that payment *before* condition broken will divest the mortgagee of his title, without reconveyance, or other discharge. 1 Washburne on Real Prop., 543; *Whitcomb* v. *Simpson*, 39 Maine, 21; *Holman* v. *Bailey*, 3 Met., 55.

In this country there has been a constant tendency to ap-

ply the views attributed to Lord MANSFIELD indiscriminately, at equity, and in law. Sustained by such jurists as Chancellor KENT, Judge STORY, and Mr. Greenleaf, it is not strange that the weight of authority should turn in that direction. But in Maine, Massachusetts, Connecticut, and in several other States, the old doctrines of the common law still prevail. Though in *equity* the mortgage is an incident, and the debt the principal thing, at *law* the mortgage is a conveyance of the title, to be defeated upon a condition subsequent. Unless thus defeated, the legal title is in the mortgagee. He may assign the debt without the mortgage, in which case he holds the mortgage *in trust* for such assignee. Or, he may assign the mortgage without the debt, or, the mortgage to one, and the debt to another, the owner of the mortgage always holding *in trust* for the owner of the debt. So that the assignment of the debt operates as the *equitable*, but not as the *legal* assignment of the mortgage. And *payment* of the debt, *after* condition broken, does not divest the mortgagee of his *legal* title; but the mortgager must resort to equity for a release, or a reconveyance. These principles, though extensively denied in this country, are sustained by so many decisions in the States before referred to, that it is unnecessary to cite them. 1 Washburne, 553; 1 Hilliard on Mort., 476.

Mr. Greenleaf collects the authorities, in the first volume of his edition of Cruise, and in support of the opposite doctrine suggests that the *acceptance* of payment, after condition broken, is a *waiver* of the condition, and has the same effect as a *performance* of it. 1 Greenl. Cruise, 595. But this is more specious than sound.

A *waiver* of the condition may operate to confer the same *rights* as a *performance* of it. This is the case in regard to *bonds* for the conveyance of real estate. But it does not follow that such a waiver can operate, by our laws, *to convey or release a legal title to real estate.* It cannot do so, in the case of a mortgage, any more than of a bond. So that this theory, like all others in support of the doctrine, rests upon

a denial that the mortgagee *has* the legal title, until after foreclosure.

But another answer to it is, that such an acceptance of payment is not a *waiver*. A waiver is a voluntary relinquishment of some *right*. But the mortgagee relinquishes nothing in such a case. The mortgager pays it as a *matter of right;* and it is not at the option of the mortgagee whether it shall be paid or not, until the right of redemption expires. A receipt of payment *after that* would be a waiver of the forfeiture; but before forfeiture, the mortgager, by payment, acquires a right to a release, or a reconveyance, not on the ground of *waiver*, but of contract, and of law.

But though it is well settled in this State, that upon payment *after* condition broken, the *legal* estate remains in the mortgagee, until it is released, so that the mortgager cannot maintain a writ of entry against him; it is equally well settled that, in such case, the mortgagee, not being in possession, cannot maintain such an action against the mortgager. *Hadlock* v. *Bulfinch*, 31 Maine, 247; *Williams* v. *Thurlow*, 31 Maine, 392. The reason assigned for this, is, that by our statutes, in all actions upon mortgages, there must be a *conditional judgment;* and, if the debt has been paid, so that there cannot be such judgment, the demandant cannot recover at all. *Wade* v. *Howard*, 11 Pick., 289; *Webb* v. *Flanders*, 32 Maine, 175; *Gray* v. *Jenks*, 3 Mason, 520. Where there is no provision of statute to prevent, as in an action of *forcible entry and detainer*, it has been held that a suit for possession may be maintained by the mortgagee, after payment. *Howard* v. *Howard*, 3 Met., 548, 557.

The mortgagee, after such payment, holds but a naked trust, without any interest. As in other like cases of holding in trust, he can derive no benefit from it, and can convey no title except as subject to it. And the estate cannot be taken for his debts, though it can be taken for the debts of the *cestui que trust*. As the mortgagee's title in such case is of no value, there can be no motive for transferring

it to a third party; and therefore it is seldom done in this country. That it may be done, would seem to admit of no doubt. *Dudley* v. *Cadwell*, 19 Conn., 218. Such a deed, says WILDE, J., in *Wade* v. *Howard*, before cited, conveys "the legal estate, or a satisfied mortgage; such an estate as is frequently purchased in England, to be tacked to a subsequent mortgage." Numerous cases of this kind may be found cited in the English editions of Cruise, vol. 2, c. 5, which Mr. Greenleaf has omitted, because the doctrine of tacking mortgages does not prevail in the United States.

There is no difficulty in applying these principles to the case at bar. When the executions against Hanson were issued, he had paid the mortgage debt, but the mortgage itself had not been discharged. If the payment had been *before* the condition had been broken, that would have revested the estate without any discharge; and there would have been nothing to seize on the execution. *Grover* v. *Flye*, 5 Allen, 543. But payment *after* breach of the condition had no such effect. His interest in the premises was clearly liable to be seized on the executions; and the only question is, how should the levies have been made;—by a *sale?* or by an *extent?*

If, at the time of *seizure upon the executions*, there had been not only a payment of the mortgage debt, but a release of the mortgage, recorded in the registry of deeds, then there could have been no sale of an equity of redemption, though the mortgage was in force at the time of *the attachment upon the writs*. *Foster* v. *Mellen*, 10 Mass., 421. In *Pillsbury* v. *Smyth*, 25 Maine, 427, the report of the case does not show whether the discharge of the mortgage had been *recorded*. And we need not determine whether, if there is a release, but not on record, the officer may not proceed as if none had been made. For in this case no release had been made, either upon the record, or otherwise.

By the R. S., c. 90, § 14, "when the amount due on a mortgage *has been paid* to the mortgagee, or person claiming under him, by the mortgager, or the person claiming

under him, within three years" from proceedings for a foreclosure, "he may have a bill in equity *for the redemption of the mortgaged premises*, and compel the mortgagee, or person claiming under him, to release to him *all his right and title therein*." And, by c. 76, § 29, "*rights of redeeming real estate mortgaged*, may be taken on execution and *sold*." It was just such a right of redeeming a paid mortgage which Hanson owned, when it was seized on the executions. The same title passed by the *sale* that would have passed by an *extent*. The defendant therefore conveyed a good title to the plaintiff; and the latter, having suffered no loss, is not entitled to recover.

Whether, if there had been no right of redemption *in existence* when the plaintiff purchased of the defendant, he could recover back the consideration paid, on the ground of a mutual mistake *of fact*, is a question which becomes immaterial. See the case of *Earle* v. *De Witt*, with the able dissenting opinion of MERRICK, J., 6 Allen, 520.

Exceptions sustained.
Verdict set aside.

WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

APPLETON, C. J., and CUTTING, J., concurred in sustaining the exceptions for another cause.

APPLETON, C. J.—The plaintiff purchased of the defendant his right, title and interest in certain real estate, and received from him a deed of release without covenants. He was content to rely on a mere deed of quitclaim. He might or might not thereby acquire a good title. The price paid would depend upon the risk to be run. Instead of requiring his vendor to warrant the title to the land purporting to be conveyed, the vendee was satisfied to assume that risk, and, having assumed, he must bear it. The law seems to be well settled in this State, that a mere failure of title furnishes no ground for recovering back money paid as the consideration of a quitclaim deed. *Joyce* v. *Ryan*, 4 Greenl.,

101; *Soper* v. *Stevens*, 14 Maine, 133. There being no fraud, circumvention or concealment, the consideration cannot be recovered back. *Emerson* v. *Washington County*, 9 Greenl., 89; *Bean* v. *Flint*, 30 Maine, 225; *Treat* v. *Orono*, 26 Maine, 217. No one would pay for a deed of release, unless he supposed he was to gain something thereby, either by thus obtaining a good or quieting a doubtful title. If, then, one takes a deed of quitclaim, it is not to be converted into a warranty, if he gain nothing thereby. If the grantee is to have the benefits of a warranty when he neglects to take any covenants in his deed, the distinction between deeds of release and of warranty will be abolished, and every quitclaim will become a deed of warranty to the extent of its consideration. The plaintiff did not pay for a deed with covenants, and he is not entitled to the protection which such a deed would afford him.

The mistake which the grantee in a deed of quitclaim makes, when he pays for a release which is valueless, is not a mistake of fact, which will enable him to recover back the money paid. Every one who takes such a deed expects to be benefited thereby, else he would not purchase, but, if there be no covenants, he risks the goodness of the title acquired.

Neither would the plaintiff be better off in equity. *Abbott* v. *Allen*, 2 Johns. Ch., 523; *Gouverneur* v. *Elmendorf*, 5 Johns. Ch., 84. "The vendor selling in good faith," remarks Chancellor KENT, in the case last cited, "is not responsible for the goodness of title beyond the extent of his covenants." In the case before us the vendor has given no covenants.

These views of the law seem to have been generally adopted. In *Holden* v. *Curtis*, 2 N. H., 61, it was held, that in deeds of quitclaim, when the title failed, the price paid could not be recovered back. In *Getchell* v. *Chase*, 37 N. H., 106, the same question again received the consideration of the Supreme Court of New Hampshire, and it was there held, in the absence of fraud, that no action could be main-

tained for the recovery of the consideration paid for a quitclaim deed of land, though the grantor had no title. In *Clark* v. *Sigourney*, 17 Conn., 510, it was held that a deed of release, without any covenants of title, was a sufficient consideration for a note given therefor. "By the very terms of such a contract," remarks STORRS, J., "the risk and hazard of the title is assumed by the releasee; and to hold that he is excused from performing, because he happened to acquire no interest by the release, would be to throw that risk and hazard upon the releasor, contrary to the plain intent of the parties." The same doctrine has been held in Vermont, in *Higley* v. *Smith*, 1 Chip., 409. The Supreme Court of Pennsylvania, in *Dorsey* v. *Jackman*, 1 S. & R., 42, and in *Kerr* v. *Kitchen*, 7 Barr., 486, decided that a purchaser of real estate could not recover back the purchase money paid for a quitclaim deed, when the title proved defective and there was no fraud. In *Earle* v. *Dewitt*, 6 Allen, 520, this question was very elaborately discussed, and it was then held, in accordance with the earlier decisions in Massachusetts, that a mere failure of title furnishes no ground for recovering back money paid upon a quitclaim deed. The plaintiff has got all he bargained for—the title of the defendant. The defendant has conveyed all he intended to convey—whatever interest he had in the premises released. No covenants were given nor asked for. No fraud is pretended or alleged. In such case the plaintiff has no remedy. Though he may have sustained a loss, he has suffered no wrong.

Exceptions sustained.

New trial granted.

CUTTING, J., concurred.

EBENEZER WYMAN *versus* WARREN M. BROWN *& als.*

What the declaration should set forth in a writ for the recovery of lands, and who may be made defendants.

Under the general issue pleaded, the real contest is, which party can show the better title *in himself.*

The statute requires non-tenure to be pleaded in abatement, and the defendants, who neglect so to plead, cannot avail themselves of that defence, by joining with another defendant in a plea of *nul disseizin.*

Whether a joint plea of *nul disseizin* by three, can be supported as to either, by proof of anything short of a joint tenancy or a tenancy in common by all the three, *dubitatur.*

A conveyance absolute in form only, for a consideration grossly inadequate, the grantor retaining a valuable interest, made with the intent, by both parties, to delay creditors, is void, as well against subsequent creditors and *bona fide* purchasers, as against existing creditors, whether they have notice of the fraud or not.

An estate of freehold, to commence *in futuro*, can be conveyed by a deed of bargain and sale, operating under the statute of uses.

Conveyances which derive their validity from our own statutes, and are executed in accordance therewith, will be upheld, although they purport to convey freeholds to commence at a future day.

REPORTED from *Nisi Prius*, FOX, J., presiding.

WRIT OF ENTRY to recover a tract of land in Palmyra, in the county of Somerset. The defendants are Warren M. Brown, Elvira D. Leathers, his daughter, Daniel R. Leathers, husband of said Elvira, and Lendall M. Gray. Gray was defaulted. The other defendants, at a subsequent term, jointly pleaded *nul disseizin.*

The demandant proved the recovery of a judgment by him against said Brown, in the year 1859, and a levy, on the 30th of August, 1861, of his execution, which was issued on said judgment, upon ten acres of the tract demanded, which were appraised at $160.

That action was upon a former judgment recovered in 1845, upon a note given by said Brown Sept. 29, 1843.

The demandant offered the mortgage deed and notes of Brown to Samuel Shaw, dated April 7, 1847, to secure the payment of $50 and interest.

Also, deed of release, dated Oct. 29, 1847, of said Brown to Levi J. Merrick of the demanded premises, consideration $14. Deed of Merrick to Samuel Shaw, August 15, 1861, consideration $400; and Shaw's deed of the same to the demandant, dated the 31st day of same month; consideration $600.

In defence, subject to all legal objections, were introduced:

(1.) A deed from Henry Warren to Warren M. Brown of the premises in controversy, dated Oct. 30, 1833, recorded Nov. 27, 1841; consideration $100;—

(2.) Mortgage deed of same from Brown to Stephen Hilton, dated Nov. 4, 1841, recorded Nov. 27, 1841; consideration $125, to secure two notes payable one in six and the other in twelve months;—

(3.) Warranty deed of same, Brown to Hilton, Nov. 29, 1844; consideration $220, recorded March 10, 1845;—

(4.) Obligation of the same date, from Hilton to convey the premises to Brown on condition that he shall pay $220 within two years and interest annually. Brown to remain in possession;—

(5.) Warranty deed of same, from Hilton to Hannah Brown, wife of Warren M. Brown, April 24, 1851, duly recorded; consideration named $500.

There was evidence that Hannah Brown died on July 20, 1854; that Warren M. Brown had occupied the premises about thirty years; also evidence (given on cross-examination of defendant's witness) tending to prove that Mrs. Brown had no property of her own or means of paying any considerable amount, and that Hilton was paid by Brown himself. That Elvira D. Brown, on May 20, 1861, conveyed the premises to the defendant Gray; the defendants then offered the release of Gray to said Elvira, dated Aug. 27, 1861, which was objected to by demandant, it not having been recorded until after this suit was commenced.

The demandant introduced office copy of a mortgage given back to Hilton by Mrs. Brown at the time of his conveyance to her, to secure three notes of $50 each.

Also a warranty deed from Mrs. Brown to Oliver S. Nay of the premises, dated May 19, 1854, duly recorded, consideration $1000, in which are the words following:—"*this deed or conveyance not to take effect during my lifetime, and to take effect and be in force from and after my decease; and the said Hannah is to have quiet possession and the entire income of the premises until her decease.*"

Nay, at the same time, gave back his obligation to reconvey, upon payment of any sums he might pay from time to time for said Hannah, &c. Nay testified that he paid nothing; that he took the deed and gave the obligation at the request of Warren M. Brown.

The demandant also introduced the disclosures of said Warren M. Brown, on his application for the benefit of the oath provided for poor debtors.

The nature of this and other evidence, not here reported, as bearing upon the questions considered by the Court, will appear from their opinion.

By consent, the case was withdrawn from the jury to be submitted to the full Court, with jury powers, who were authorized to render such judgment, on so much of the evidence as is legally admissible, as the law requires.

D. D. Stewart, for the demandant.

If the deeds from Brown to Hilton and from Hilton to Hannah Brown are valid, then, on the death of Hannah Brown the title would vest in her heirs; but if invalid, or if she in her lifetime conveyed away her title, the defence fails.

The deed from Brown to Hilton, was made to defraud the creditors of Brown, so intended by both parties; and the demandant and those under whom he claims, being subsequent purchasers for value, have the better title. *Clark* v. *French*, 23 Maine, 221; *Frost* v. *Goddard*, 25 Maine, 414; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Whitmore* v. *Woodward*, 28 Maine, 418; *Clapp* v. *Leatherbee*, 18 Pick., 136; *Ricker* v. *Ham*, 14 Mass., 139. A mortgagee is a subse-

quent purchaser and entitled to set aside a prior fraudulent conveyance. 18 Pick., 131, 134.

The demandant was also a *creditor* at the time of the conveyance.

Even if Hannah Brown had a valid title, it passed by her deed to Nay; so that the defence fails, as no legal estate could descend to her heirs. That deed is not void as attempting to convey a freehold *in futuro*. The doctrine, that by a deed of *bargain and sale* a freehold cannot be created to commence *in futuro*, appears to have originated in Massachusetts some years ago. The authorities in England, and the weight of authority in this country now, are otherwise. *Steel* v. *Steel*, 4 Allen, 417; *Morgan* v. *Moore*, 3 Gray, 319; *Jackson* v. *Dunsbagh*, 1 Johns. Cas., 96; *Jackson* v. *Sloats*, 11 Johns. 337; *Jackson* v. *Swart*, 20 Johns., 86; *Rogers* v. *Eagle Ins. Co.*, 9 Wend., 611; *Bell* v. *Scammon*, 15 N. H., 381; 1 Greenl. Cruise, 58; 2 Smith's Lead. Cases, (5th ed.,) 451; 2 Black., 334—6; 4 Kent, 294—6; 2 Wash. on Real Prop., 123, 252, 617.

The evidence offered by the defendants is inadmissible under their joint plea of *nul disseizin*.

G. W. Whitney argued for the tenants.

To the point that the deed to Nay was void, he cited *Gault* v. *Hall*, 26 Maine, 561; *Emery* v. *Chase*, 5 Maine, 232; *Marden* v. *Chase*, 32 Maine, 329; *Wallis* v. *Wallis*, 4 Mass., 135; *Pray* v. *Pierce*, 7 Mass. 384; *Welsh* v. *Foster*, 12 Mass., 93.

As a *bargain* and *sale* it is clearly void. Can it be effectual as a covenant to stand seized?

There are the usual covenants to be found in a warranty deed. But how about the consideration? The only consideration mentioned in the deed is one thousand dollars paid by Nay. But a *valuable* consideration alone is not sufficient to uphold a covenant to stand seized. It must be one of *relationship* or *affection*. See cases above cited; and especially *Welsh* v. *Foster* and *Wallis* v. *Wallis*.

But if this conveyance had all the other requisites necessary for a covenant to stand seized, yet, it is wanting in one thing absolutely necessary. And that is, the capacity of the grantor to bind herself by such covenants. It is stated in the deed that the grantor was then the wife of Warren M. Brown; was a married woman.

Such a person could not by the common law bind herself by such covenants. Nor do our statutes authorize such to do so now.

The opinion of the Court was drawn up by

WALTON, J. — In modern practice the proceedings for the recovery of land are very much simplified. Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by a writ of entry. R. S., c. 104, § 1.

To a good declaration in a writ of entry four things are necessary: — 1. The premises demanded must be clearly described. 2. The estate which the demandant claims in the premises must be stated, whether it be a fee simple, a fee tail, for life, or for years; and, if for life, then whether for his own life or that of another. 3. An allegation that the demandant was seized of the estate claimed within twenty years; and, 4. A disseizin by the tenant.

In general the action must be against a person claiming an estate not less than a freehold; but if the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, though he claims an estate less than a freehold.

If the tenant would defeat the action on the ground that he was not tenant of the freehold, and had not actually ousted the demandant, or withheld the possession, he must plead non-tenure in abatement. He cannot avail himself of such a defence under the general issue. Under the latter plea, if the demandant proves that he is entitled to such an estate in the premises as he has alleged, and had a right of

entry therein when he commenced his action, he will be entitled to recover, unless the tenant proves a better title *in himself*. Proof of a better title in some third party, even if the tenant holds under such third party, will be no defence under the general issue; the tenant must prove that he has a better title *in himself*.

Being in possession, and possession being *prima facie* evidence of title, the tenant will be entitled to prevail, unless the demandant, taking upon himself the burden of proof, introduces evidence sufficient to overcome this *prima facie* evidence of title in the tenant, and shows that, as against the demandant, (not as against some third person,) the tenant's possession is wrongful. The real struggle, therefore, under the general issue in a real action, is to see which party can show the better title *in himself*.

In the suit now under consideration, the demandant claims title to a lot of land in Palmyra, in the county of Somerset, supposed to contain one hundred acres; or, if not entitled to the whole lot, then he claims title to ten acres of it, on which the buildings stand. The action is against four defendants. One has been defaulted, and the other three have jointly pleaded the general issue, which is joined by the demandant. The question to be determined therefore is, whether the three defendants who have thus pleaded, or the demandant, has the better title. Both parties claim to have derived their titles from Warren M. Brown; and it appears in evidence, and is not denied by either party, that he was once the undisputed owner of the demanded premises.

We will first consider the demandant's title to the whole lot.

It appears in evidence that on the 7th of April, 1847, Warren M. Brown, being then in possession of the premises, conveyed them in mortgage to Samuel Shaw, and afterwards during the same year, gave a quitclaim deed of the same to Levi J. Merrick; and that Merrick afterwards conveyed his interest to Shaw. The legal estate and the equity of redemption being thus united in Shaw, he afterwards, on

the 31st of August, 1861, conveyed the same to the demandant. It is not denied that these deeds were properly executed, and seasonably recorded. The *prima facie* evidence of title in the tenants arising from the mere fact of possession, is thus overcome by evidence of a superior title in the demandant.

Elvira D. Leathers, one of the tenants, then undertakes to show that she is the sole owner of the premises, and traces her title to a conveyance from Warren M. Brown, older than the ones under which the demandant claims. But will evidence of such a title maintain the issue on the part of the defendants? Will the joint plea of *nul disseizin* by three be maintained by proof of title in one, and that the other two held under her? If so, then two defendants make a successful defence under the general issue by proof of non-tenure; a defence which the law allows to be made only under a plea in abatement. Having neglected to put in proper pleas seasonably, can they now avail themselves of the defence of non-tenure by joining with the other defendant in a plea of *nul disseizin?* We think not. Such a defence under the general issue is in direct contravention of the express provisions of law.

The regular course was for Brown and Daniel R. Leathers to have pleaded non-tenure, and for Elvira D. Leathers to have pleaded *sole* or *entire tenancy*. She should have averred in her plea, that she was sole tenant of the freehold, and that the other defendants had nothing therein, and that she did not disseize the demandant, &c. Stearns on Real Actions, (2d ed.,) 184; Story's Plead., 382, 384. And it may well be doubted whether a joint plea of *nul disseizin* by three, can be supported as to either, by proof of anything short of a joint tenancy, or a tenancy in common, by the three.

But we do not find it necessary to decide this question, for we are satisfied that the demandant is entitled to recover upon other grounds. We think the demandant's title is that of a *bona fide* purchaser for value, and that the defendants'

title is tainted with fraud, which, as against creditors and *bona fide* purchasers, renders it void.

In examining these titles we do not find it necessary to determine whether the mortgage from Brown to Hilton, of Nov. 4, 1841, was valid or not; for there seems to be no doubt that the debt to secure which it was given, if such a debt ever existed, has been canceled, and all rights under the mortgage extinguished. Such would be the effect of the subsequent transaction between the parties independent of payment; but we think there is no doubt that the debt has been actually paid by Brown.

Conceding that this mortgage was made to secure a *bona fide* debt of $125, the inquiry naturally arises, why was the security changed? Why did Hilton surrender his security by mortgage and take an absolute warranty deed of the premises?

In several States the giving of an absolute deed as security for a debt, is regarded as conclusive evidence of fraud. Such a deed does not speak the truth, — it is deceptive. It purports on its face to convey an absolute title, while in fact it is intended to give security only. It conceals from creditors the fact that the grantor has a remaining interest in the land, which may be attached. It conceals the amount which a creditor would have to pay to redeem the estate. It does not in any respect represent the transaction truly; and such deeds are so well calculated to deceive, mislead and defraud creditors, that the rule, that they are *per se* fraudulent, is not without strong arguments to support it.

"What fair and proper motive," says RICHARDSON, C. J., in *Winkley* v. *Hill*, 9 N. H., 31, "can any man who is in debt, have to adopt a mode of conveyance that carries falsehood on the face of it, while truth lies hid and concealed beneath?" And, he says further, that "it is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they are the means which dishonest debtors commonly and

ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case." See also *Cooledge* v. *Melvin*, 42 N. H., 510, where the subject is elaborately considered, and numerous authorities to the same point cited.

In this State the courts have not gone quite so far, and such transactions are not regarded as fraudulent *per se*, nor as *conclusive* evidence of fraud. But, when an absolute conveyance, by an insolvent person, is made to secure a debt in amount very much less than the value of the property, and the grantor is permitted to remain in possession, and to treat the property in all respects as his own, we hold that these circumstances are *prima facie* evidence of fraud; and *prima facie* evidence, unless satisfactorily explained, becomes *conclusive*. *Clark* v. *French*, 23 Maine, 228—30.

The consideration for the warranty deed from Brown to Hilton was only $220, less than half the value of the land. In fact one witness says it was worth at that time $1000. There was no change of possession. Brown continued to occupy as before, and there is no evidence that he ever paid or agreed to pay any rent, or that Hilton ever claimed any. Brown was insolvent. His creditors were pressing him. While the title thus remained in Hilton, Brown was twice compelled to disclose as a poor debtor. The premises were afterwards conveyed by Hilton to Brown's wife. Hilton put his warranty deed on record, thus proclaiming to the world that he was the absolute owner of the property, and, at the same time, gave Brown a writing, not under seal, promising to reconvey to him upon payment of $220 and interest. This writing proves that Hilton was not the absolute owner of the farm, that his interest was less than half the value of it; and why should he consent to take a conveyance which should falsely represent him to be the absolute and unconditional owner of the whole of it? The answer is irresistible. Brown was a dishonest man, and desired to conceal his interest in the farm so that his creditors could not reach it. He confesses, in one of his disclosures, that

not far from the time of this conveyance to Hilton, he took from his own pocket $30 in money and gave it to one Christie, and then sold six tons of hay to Christie for the same money, and that he made this sham sale of the hay to cloak it from his creditors!

With these facts before us, the conclusion is irresistible, that Brown's purpose in giving Hilton an absolute warranty deed of his farm, was to protect it from attachment, and that Hilton must have known and participated in this purpose.

"A conveyance actually fraudulent is void against a subsequent purchaser for valuable consideration, *even with notice.*" American Leading Cases, 47, and the numerous authorities there cited. "A mortgagee is a purchaser within the statute of 27th Eliz." *ib.*, 48. "There is no doubt but a mortgagee is a purchaser." Lord MANSFIELD, in *Chapman* v. *Emery*, Cowper, 278. An absolute conveyance on full consideration, if made with intent to hinder and delay creditors, is undoubtedly void against existing creditors; but we do not intend to decide that such a conveyance is void against subsequent creditors or purchasers; we intend to decide only that, when a conveyance is for a consideration grossly inadequate, and is absolute in form only, the grantor retaining a valuable interest in the property, and the conveyance is made with the intent to hinder and delay creditors, and this intent is participated in by both parties, that such a conveyance is void, not only against existing creditors, but against subsequent creditors and *bona fide* purchasers, whether they have notice of such fraudulent conveyance or not. *Ricker* v. *Ham*, 14 Mass., 137; *Clapp* v. *Leatherbee*, 18 Pick., 131; *Beal* v. *Warner*, 2 Gray, 447; *Wadsworth* v. *Havens*, 3 Wend., 411; *Hudnal* v. *Wilder*, 4 McCord, 295.

The defendants claim that the conveyance from Hilton to Brown's wife, was for a full and valuable consideration paid by her, and that she ought to be regarded as a *bona fide* purchaser, and her title, and the title of those claiming un-

der her, protected as such. The conveyance to her purports to have been made for the consideration of $500. She gave her notes for $150, and the evidence satisfies us that these notes were paid by her husband. If Mrs. Brown paid the balance of $350, where did she get the money? and, as Hilton is proved to have been in Court, during the trial at *Nisi Prius*, why was he not called to prove the payment? Where a deed is impeached on the ground of fraud, the clause acknowledging payment of the consideration is the lowest species of *prima facie* evidence, inasmuch as the same motives which would lead parties to make a fraudulent conveyance, would induce them to insert, in the strongest terms, an acknowledgment of the payment of the consideration. Per SHAW, C. J., in *Clapp* v. *Tirrell*, 20 Pick., 247. The circumstances surrounding Mrs. Brown are more than sufficient to control the consideration clause in the deed. It is not pretended that she had sufficient means or property of her own, but Elvira D. Leathers, the defendant who claims to own the premises, testifies that "her mother said her friends let her have it." What friends? Her relations were all poor, except one brother, who owned a small farm. Elvira was 27 years old, and none of her mother's relations had visited her within her remembrance. "Her mother did not say what friends let her have the money, nor how much, nor when." If friends had let her mother have $350 to aid her in buying this farm, is it probable that the names of those friends would have remained forever concealed? It is incredible! We believe that if anything was paid to Hilton, either before, at the time, or after the conveyance to Mrs. Brown, it must have come from her husband, and that the conveyance to her was in pursuance of the original design of keeping it from Brown's creditors. Mrs. Brown's title, therefore, cannot be protected upon the ground that she was a *bona fide* purchaser for value. And, as her heirs can be in no better condition in this respect than their ancestor, the title of Elvira and her sister by descent cannot be supported. Besides, as between *bona fide* purchasers, the eldest

title prevails, and the conveyances under which the demandant claims were prior in point of time to the conveyance to Mrs. Brown. *Qui prior est in tempore, potior est in jure.* 1 Story's Eq., § 381, 434.

This view of the case renders it unnecessary to inquire whether the conveyance from Hilton to Mrs. Brown, in consideration of her promissory notes and a mortgage to secure them, she being at the time a married woman, was valid or not. The Court have decided in another case, (*Brookings* v. *White*, 49 Maine, 479) that a married woman's mortgage, although made to secure her own promissory notes, is not void, overruling all former decisions and *dicta* to the contrary.

Of freehold estates to commence in futuro.—Another question raised in this case is, whether the deed from Mrs. Brown to Oliver S. Nay was valid. The objection to it is, that it purports to convey a freehold estate to commence *in futuro;* and such is its effect, for by its terms Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease."

Deeds in which grantors have reserved to themselves estates for life are believed to be very common in this State; and whether or not such deeds are valid is certainly a very important question, and ought to be authoritatively decided.

It was a principle of the old feudal law of England that there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule was established for two reasons:—1. That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defence of the realm would be weakened. 2. That every stranger who claimed a right to any lands might know against whom to bring his suit for the recovery of them; as no real action could be brought against any one but the actual tenant of the freehold. Consequently, at common law, a freehold to commence *in futuro* could not be conveyed, because in that case the freehold would be in abeyance from the execution of the conveyance till the future estate of the

grantee should vest. And it is laid down in unqualified terms in several cases in Massachusetts, and in one in this State, that an estate of freehold cannot be conveyed to commence *in futuro* by a deed of *bargain and sale*, which owes its validity to the statute of uses, and not to the common law.

But the doctrine, that freehold estates to commence *in futuro* cannot be conveyed by deeds of bargain and sale, since the passage of the statute of 27 Henry 8, c. 10, commonly called the statute of uses, is clearly erroneous. It is clear that, *at common law*, such conveyances could not be made; and it is equally clear that, *by virtue of the statute of uses*, such conveyances may be made. Prior to the reign of Henry 8, real estate could be so held that one person would have the legal title, and another the right to the use and income. To obviate many supposed inconveniences which had grown out of this practice of separating the legal title from the use, the statute of uses was passed, by which it was enacted that the estates of the persons so seized to uses should be deemed to be in them that had the use, *in such quality, manner, form, and condition, as they had before in the use*. It will be noticed that the effect of this statute was to annex the legal title to the use, so that they could not be separated. Mr. *Cruise* says, that when this statute first became a subject of discussion in the courts of law, it was held by the Judges that no uses should be executed that were limited against the rules of the common law; but that this doctrine was not and could not be adhered to, for the statute enacts that the legal estate or seizin shall be in them that have the use, *in such quality, manner, form, and condition, as they before had in the use;* that chancery having permitted uses to commence *in futuro*, and to change from one person to another, by matter *ex post facto*, the courts of law were obliged to admit of limitations of this kind. The statute did not attempt to limit or control the doctrine of uses; it simply declared that where the use was, there the legal estate should be also. The result was that it opened

several new modes of conveying legal estates wholly unknown to the common law; for whatever would convey the use and income of real estate before its passage, would, by virtue of the statute, convey the legal estate afterwards. It will thus be seen that conveyances through the medium of the statute of uses are effected in this way: — The owner of an estate in lands, for a consideration either *good* or *valuable*, agrees that another shall have the use and income of it, and the statute steps in and annexes the legal title to the use, and thus the *cestui que use* becomes seized of the legal estate in the same manner as before the statute he would have been seized of the use. The argument, presented in a syllogistic form, is this: — Since the statute of uses, freeholds can be conveyed in any manner that uses were conveyed before its passage. Before its passage, uses were conveyed to commence *in futuro;* therefore, freeholds may be conveyed to commence *in futuro* since its passage. It must be remembered, however, that neither legal estates nor uses can be so limited as to create perpetuities. If future estates are so limited as to take effect in the lifetime of one or more persons living, and a little more than twenty-one years after, the rule against perpetuities will not be violated. We will refer to a few leading authors: —

Mr. *White*, a very learned English writer, in one of his additions to the text of Mr. Cruise, says: — "By executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited to commence *in futuro*." 1 Greenleaf's Cruise, title 1, § 36.

Mr. *Chitty*, after stating that by a common law conveyance, a freehold to commence *in futuro* could not be conveyed, continues: — "But deeds operating under the statute of uses, such as *bargain and sale*, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." 1 Chitty's General Practice, 306. 2 Bl. Com., 144, note 6.

Mr. *Sugden* says: — "A *bargain and sale* to the use of D, after the death of S, is good." Gilbert on Uses, (Sug. edition,) 163.

Mr. *Cornish:*—"By a *bargain and sale*, or covenant to stand seized, a freehold may be created *in futuro*." Cornish on Uses, 44.

Chancellor KENT:—"A person may covenant to stand seized, or *bargain and sell*, to the use of another at a future day." 4 Kent's Com., 298.

Mr. *Archbold:*—"Deeds acting under the statute of uses, such as *bargain and sale*, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." Note to 2 Bl. Com., 166.

In a note to the 5th American edition of Smith's Leading Cases, vol. 2, p. 451, after noticing the Massachusetts cases, in which it is held that a freehold to commence *in futuro* cannot be created by a deed of bargain and sale, the learned editors say:—"It is undoubtedly true that such limitations are bad at common law; but it seems equally well settled that they are good in deeds operating under the statute of uses, whether the use be raised on a pecuniary consideration or on blood or marriage. The point is so held in England, and has been repeatedly and expressly decided in New York, and several of the other States of this country. The attributes of a use are the same, whatever may be the consideration in which it is founded; and, if uses commencing *in futuro* were without the operation of the statute, when raised by a bargain and sale, they would be equally so when originating in a covenant to stand seized."

In *Rogers* v. *Eagle Insurance Co.*, 9 Wend., 611, the question underwent a most thorough examination, and the conclusion was, that a freehold to commence *in futuro* could be conveyed by a deed of bargain and sale, operating under the statute of uses; and the Court expressed surprise that any one should have ever supposed that such was not the law.

In *Bell* v. *Scammon*, 15 N. H., 381, the same question was raised, and the Court held that "a freehold *in futuro* could be conveyed either by deed of bargain and sale, or by a covenant to stand seized."

Mr. *Washburn*, in his late very able work on Real Property, (vol. 2, p. 617, § 16,) says that the reasoning of Chancellor WALWORTH, in *Rogers* v. *Eagle Insurance Co.* 9 Wend., 611, in which he maintains that an estate of freehold, to commence *in futuro*, can be conveyed by a deed of bargain and sale, and the authorities upon which he rests would seem to leave little doubt in the matter, beyond what arises from the circumstance that other Courts have taken a different view of the law.

It is true, that, in Massachusetts and this State, when determining that the deeds then under consideration were valid upon other grounds, Judges have expressed the opinion that a freehold to commence *in futuro* could not be conveyed by a deed of bargain and sale; but these opinions are mere *obiter dicta*, for they have never yet had the effect of defeating a deed. The idea seems to have originated in an unauthorized statement (probably accidental) to be found in *Pray* v. *Pierce*, 7 Mass. 381. Having under discussion the rule that deeds should be so construed as to give effect to the intention of the parties, and not to defeat it, the case of *Wallis* v. *Wallis*, 4 Mass., 135, was referred to by way of illustration, and the reporter makes the Court say that the deed in the latter case was held to be a covenant to stand seized, "because, as a *bargain and sale*, it would have been a conveyance of a freehold *in futuro*, and therefore void." By turning to that case (*Wallis* v. *Wallis*,) it will be seen that such a statement is unauthorized. The Court remarked that, by a *common law* conveyance, a freehold could not be conveyed to commence *in futuro*, which was unquestionably true; but the Court did not say that such a conveyance could not be made by a deed of bargain and sale, which owes its validity to the statute of uses, and not to the common law. Why the deed in *Wallis* v. *Wallis* was not sustained as a bargain and sale, instead of covenant to stand seized, does not appear. The case was submitted without argument, and, as the deed could readily be sustained as a covenant to stand seized, it may not have occurred to the

Court that it could just as well be sustained as a bargain and sale. On careful examination, it will be seen that these cases (*Wallis* v. *Wallis* and *Pray* v. *Pierce*,) are not authorities for the doctrine they are so often cited in support of.

In *Welch* v. *Foster*, 12 Mass., 93, the deed, for a valuable consideration, to be paid whenever the deed should take effect, and not otherwise, purported to convey a certain part of a mill, with the land, &c., "provided that the said deed should not take effect or be made use of, until the said mill-pond should cease to be employed for the purpose of carrying any two mill-wheels." It was held that nothing passed by the deed, not because it was to take effect only upon the happening of a *future* event, but because the event, if it should ever happen, might be delayed much beyond the utmost period allowed for the vesting of estates on a future contingency. The event, it was held, must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives in being, and a little more than twenty-one years afterwards, to prevent the creating of a perpetuity, or an unalienable estate. Such is undoubtedly the law. Besides, no consideration was ever paid for the deed, and the grantor afterwards conveyed to another. Under these circumstances the Court very properly held the deed void. But the distinction made by Judge JACKSON, in that case, between covenants to stand seized, and deeds of bargain and sale, is mere *dictum*, and has neither reason nor authority to rest upon.

Speaking of the qualities of a bargain and sale, Judge JACKSON says:—"*One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use: from which it follows that a freehold to commence in futuro cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another until the future freehold should vest.*" Hold what? Upon the execution of a deed in which the grantor reserves to

himself an estate for life, and conveys the residue, the grantee obtains a present vested right to a future enjoyment of the property; but, until the future freehold vests, the use, the seizin, and the right of possession, remain with the grantor, and there is no conceivable thing that the bargainee will be required to "hold to the use of another."

Judge JACKSON seems to have supposed that when such a deed is executed the legal estate or seizin passes immediately to the grantee, and that, until his own future freehold vests, he holds this legal estate, or ideal seizin, to the use of the grantor. But such a theory is wrong, and contrary to every authority we have been able to find. In fact, under the statute of uses, such a theory, which separates the legal estate from the use, cannot be correct; for, by the very terms of the statute, the lawful seizin, estate, and possession, shall be deemed and adjudged to be in him that hath the use, to all intents, constructions, and purposes in law; and is made applicable to "any such use in fee simple, fee tail, *for life*, or for years." "The seizin remains in the person creating the future use till the springing use arises, and is then executed to this use by the statute." 2 Washburn on Real Prop., 282. "If raised by a covenant to stand seized, or *bargain and sale*, the estate remains in the covenantor or bargainor until the springing use arises." Gilbert on Uses, Sugden's note, 163. "A person may covenant to stand seized, or *bargain and sell*, to the use of another at a future day." In such a case "the use is severed out of the grantor's seizin." 4 Kent, 298. "Here is a conveyance to the bargainee to take effect at the decease of the bargainor, which creates a resulting use to the latter during life, with a vested use in remainder to the bargainee in fee, *both uses being served, in succession out of the seizin of the bargainor*." *Jackson* v. *Dunsbah*, 1 Johns. Cases, 96.

The rule, that a bargain and sale must be to the use of the bargainee and not to the use of another, applies to only so much of the estate as is bargained for, and not to the residue, which is not bargained for, and not paid for; and

the rule is not violated, and there is nothing inequitable or repugnant to the grant, in requiring him to wait for the enjoyment of the property till such time as, by the express terms of the deed under which he claims, he is entitled to it.

It will be noticed, that Judge JACKSON assumes the existence of a rule, that one use cannot be limited upon another, and that it would be a violation of this rule to give effect to a deed of bargain and sale of a freehold, to commence *in futuro*. Such a rule does exist in England. Mr. *Watkins*, in his introduction to his very able work on conveyancing, says, that "about the time of passing the statute of uses, some wise man, in the plenitude of legal learning, declared there could not be an use upon an use; and that this very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted;" and Lord HARDWICKE, in *Hopkins* v. *Hopkins*, 1 Atk., 591, says, that by this means, a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Mr. *Williams*, in his work on Real Property, page 124, says this rule has much of the technical subtilty of the scholastic logic which was then prevalent. Lord MANSFIELD calls it "absurd narrowness." 2 Doug., 774. *Blackstone* calls it a "technical scruple;" and Mr. *Sugden*, in a note to Gilbert on Uses, page 348, says it never ought to have been sanctioned at all. In *Thacher* v. *Omans*, decided in 1792, (reported in 3d Pick., 521,) on page 528, the Court refer to the censures of Blackstone and Lord MANSFIELD, and express strong doubts as to the propriety of admitting it in this country; and Mr. *Greenleaf* says it may well be doubted whether the rule has been adopted in this country. Note to Greenl. Cruise, title 12, c. 1, § 4. With such a weight of authority against it, if the effect of the rule would be to defeat such conveyances as we are now considering, we think we might be warranted in rejecting it altogether. But such is not its effect. When a freehold is conveyed, to commence at a future day, till such

future day arrives the use results to the grantor, and then passes to the grantee; and the uses are not limited one *upon* the other, but one *after* the other; and, in this way, a fee simple may be carved into an indefinite number of less estates. "So long as a regular order is laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people, separately, for their lives." Williams on Real Prop., 189—90. "Shifting or substituted uses do not fall within this technical rule of law, for they are merely alternate uses." 4 Kent's Com., 301.

The statement that a freehold to commence *in futuro* cannot be conveyed by a deed of bargain and sale, which seems first to have been made in *Pray* v. *Pierce*, as before stated, has been several times repeated in Massachusetts, (*Welsh* v. *Foster*, 12 Mass., 93; *Parker* v. *Nichols*, 7 Pick., 115; *Gale* v. *Coburn*, 18 Pick., 397; *Brewer* v. *Hardy*, 22 Pick., 376;) and once at least in this State, (*Marden* v. *Chase*, 32 Maine, 329;) but the only case we have found in which an attempt has been made to give a reason for the supposed rule is that of *Welsh* v. *Foster;* and a careful examination has satisfied us that the argument in that case is unsound, and not supported by any adjudged case that has the weight of authority. It is admitted in all these cases that if it can be shown that the parties to such deeds are near relatives, effect may be given to them as covenants to stand seized, made, not as they purport to be, for a pecuniary consideration, but in consideration of love and affection. And there is no doubt that if two deeds should be executed instead of one; that is, if the grantor should first convey the whole estate, and then take back a life lease, the transaction would be held legal. The doctrine, therefore, that a freehold to commence *in futuro* cannot be conveyed by a deed of bargain and sale, amounts to no more than this:—that if the owner of a fee simple estate proposes to reserve to himself a life estate, and to sell the residue, if he deals with a rela-

tive, such an arrangement can be carried into effect by making *one* deed; but if he deals with a stranger it will be necessary to make *two*. It is certainly very strange that a doctrine so technical, so easily evaded, and so utterly destitute of merit, should have gained the currency it has.

We entertain no doubt that, by deeds of bargain and sale, deriving their validity from the statute of uses, freeholds may be conveyed to commence *in futuro*. It will be seen that the law is so held in England, and by an overwhelming weight of authority in this country. In fact that such was the law seems never to have been doubted except in Massachusetts and this State; and we think the error originated in the unauthorized remark found in *Pray* v. *Pierce*, and has been repeated from time to time without receiving that consideration which its importance demanded.

We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses. In *Thacher* v. *Omans*, 3 Pick. on p. 525, Chief Justice DANA, speaking of our statute of conveyances, first enacted in 1697, re-enacted in the Revised Laws of 1784, incorporated into the statutes of this State in 1821, and still in force, says:—"This statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments; namely, by deed, signed, sealed, acknowledged, and recorded, as the statute mentions; it does not prescribe any particular kind of deeds or conveyances, but is general, and extends to all kinds of conveyances." On p. 532 he further says: "It seems evident to me that a deed executed, acknowledged and recorded as our statute requires, cannot be considered as a bargain and sale, because the legal estate is thereby passed without the operation of the statute of uses, in as ample a

manner as by a feoffment at common law, accompanied with the ancient ceremony of livery of seizin." Such also were the opinions of Chancellor KENT and Professor Greenleaf. 4 Kent, 461; Greenleaf's Cruise, title 12, c. 1, § 4, *note;* title 32, c. 4, § 1, *note.* Mr. *Greenleaf*, in the note first cited, says that in most of the States, (including Maine,) "deeds of conveyance derive their effect, not from the statute of uses, but from their own statutes of conveyances; operating nearly like a feoffment, with livery of seizin, to convey the land, and not merely to raise a use to be afterwards executed by the statute of uses." Mr. *Oliver*, in his work on conveyancing, ed. of 1853, p. 281, speaking of our common warranty deed, says:—"This deed derives its operation from statute and has therefore some properties peculiar to itself. * * * The transfer is not effected by the execution of a use, as in a bargain and sale, but the land itself is conveyed, as in a feoffment, except that livery of seizin is dispensed with, upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it." We think these views are sound; and if any of the technical rules which have grown up under the statute of uses stood in the way of giving effect to deeds executed in accordance with the provisions of our statute, simply because they purport to convey freeholds to commence at a future day, we think effect might be given to them independently of the statute of uses. But in our judgment no such rules do stand in the way of giving effect to such deeds. They may be upheld either as bargains and sales under the statute of uses, or as conveyances deriving their validity from our own statutes.

Having come to the conclusion that the demandant is entitled to recover upon another ground, it was not absolutely necessary to consider the validity of the deed from Mrs. Brown to Oliver S. Nay, which purports to convey a freehold to commence *in futuro*. But, as the question involved is an important one, and was ably argued by the counsel in the case; and, as the Court has already decided one case

within the past year, (*Hunter* v. *Hunter*, in the county of Sagadahoc,) in accordance with the views here expressed, but without any written opinion; and, as several other suits involving the same question, are still pending before the Court, we deemed it best to make known our decision of the question, and to state our reasons for the decision, in connection with this case. *Judgment for demandant.*

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

COUNTY OF LINCOLN.

ANDREW BOGGS *versus* HUGH ANDERSON.
HUGH ANDERSON *versus* ANDREW BOGGS.

Possession, in certain cases, *implied* notice of title to subsequent purchasers, where the deed was not recorded, before the R. S. of 1841, which required *actual* notice.

Nor, to imply notice, was the occupation required to be entirely exclusive.

Thus, where husband and wife, who had long occupied a farm, conveyed it to their son, taking back a mortgage, conditioned for their support, but omitted to have the mortgage recorded, and the mortgagees still remained on the premises, they and the son constituting one family, and all contributing to its support; and, some years after the giving of the first mortgage, the son made a second, to a third person, which was duly recorded: — *It was held* that the second mortgagee, under the circumstances, should be regarded as having had notice of the legal title of the first mortgagees, at the time of the conveyance to him.

THESE actions are presented on a REPORT OF THE EVIDENCE at *Nisi Prius*, APPLETON, J., presiding.

Lowell & Thacher, for Boggs.

Gould, for Anderson.

The facts in the case, which refer to the questions of law considered by the Court, sufficiently appear from their opinion, which was drawn up by

TENNEY, C. J.—The land, the title to which is in controversy, is a portion of the farm, in the town of Warren, which was formerly called the Boggs farm, consisting of about eighty acres. The suit first named is an action in a plea of land for the entire farm. The tenant disclaims a portion thereof, and defends for the residue, under certain deeds, to be mentioned hereafter, and a partition, in which $\frac{21}{32}$ parts are assigned to him, in a process instituted by him, in which an interlocutory judgment was rendered in 1851; and the partition made by commissioners, afterwards affirmed and recorded, wherein the present demandant was a party defendant. The latter claims to have derived a title to that portion of the farm claimed by the tenant in his petition since the interlocutory judgment, superior to that upon which the petition for partition was founded, from a person, who was neither party nor privy to that process.

The other suit is trespass *qu. cl.* for acts alleged to have been committed on the land in question.

In the trial of the action first named, the demandant introduced a deed to himself, executed by Jane Boggs, his mother, and Nancy Boggs, and Betsey McCollam, his sisters, and daughters of said Jane, dated February 4, 1852, recorded February 14, 1852; a mortgage deed with covenants of warranty from John Boggs, jr., his brother, and son of said Jane, to John Boggs, sen., and said Jane, his parents, dated April 25, 1820, recorded June 10, 1829, conditioned to be void, if the mortgager should support through their lives the mortgagees; and a foreclosure of this mortgage by said Jane Boggs, the surviving mortgagee, by publication in a newspaper, and a record of that publication in the registry of deeds, which foreclosure, it is contended became perfected against the tenant, and those under whom he claims on September 26, 1848.

The tenant relies upon a deed dated September 4, 1812,

from Samuel Parkman, of the Boggs farm, which was recorded September 15, 1812, to Jane Boggs, and the children of John Boggs, sen., and said Jane, their heirs and assigns; also a deed dated April 25, 1823, recorded August 22, 1823, from John Boggs, sen., Jane, his wife, and their children, Betsey, James, Ebenezer, Andrew, and Nancy Boggs, to John Boggs, jr., son of John Boggs, sen., and Jane his wife, of the same premises. The children of said John Boggs, sen., and Jane his wife, are shown to have been those just named, and George, who did not execute the deed. John Boggs, sen., died in 1841, and Jane his widow, in 1855. George, their son, died on July 2, 1829, and James on September 22, 1833, neither having been married, and Ebenezer died abroad on June 17, 1840, and it does not appear by the case that he left issue. The deed last named contains covenants of seizin and warranty against all persons excepting George Boggs, a son of John Boggs, sen., and Jane his wife. The tenant also introduced a deed of mortgage from John Boggs, jr., to William Hovey of the same premises, dated May 1, 1829, recorded May 2, 1829, with notes secured thereby, outstanding; and a foreclosure by publication and registration thereof, which became effectual May 9, 1851; also a mortgage from said John Boggs, jr., to Thomas Hodgman, of the same land, dated May 13, 1829, recorded May 19, 1829, which became foreclosed, by publication and registry of the same, April 26, 1852. Both these mortgages contained covenants of seizin, right to convey and warranty against the lawful claims of all persons. The mortgage to William Hovey was assigned to the tenant May 1, 1851, and the assignment recorded Sept. 8, 1851. The mortgage to Thomas Hodgman was assigned to the same, March 23, 1833, and recorded Feb. 16, 1839. At the time of the conveyance made by John Boggs, sen., his wife and all their children, excepting George, — Nancy, Ebenezer, and Andrew were minors, under the age of twenty-one years, and it appears that they executed the deed themselves and not by guardians. It is contended, how-

ever, by the counsel for the tenant, and does not seem to be controverted in argument for the demandant, that Ebenezer Boggs, by giving and receiving deeds to, and from John Boggs, jr., after he became of the age of twenty-one years, which deeds are in the case, confirmed his deed of April 25, 1823. Upon an examination of the deeds relied upon for this purpose, and the evidence in the case, we think this view correct. But this does not become essential to the decision of the case before us, inasmuch as the tenant defends his portion of the whole farm set off to him, in severalty, a part of which is the share of Ebenezer, and the demandant claiming under the deed of John, jr., as well as the tenant does, the confirmation of John Boggs, jr.'s title to the share of Ebenezer, will inure to the benefit of the demandant, under the mortgage to John Boggs, sen., and his wife, if that mortgage gives a title superior to that of the mortgages to William Hovey and Thomas Hodgman, under which the tenant derives his title.

George Boggs, who did not join in the deed to John Boggs jr., of April 25, 1823, having died without issue, while his father was living, the latter was his heir, and took the right in the farm which George acquired under the deed from Parkman. On the death of John Boggs, sen., the estate which he acquired as the heir of George, in the farm, descended to the father's children; and the right thus derived by John, jr., inured to the benefit of his mother Jane, as surviving mortgagee under the mortgage deed of April 25, 1820, to her husband and herself; *or*, to William Hovey and Thomas Hodgman, by virtue of the covenants in each of these mortgages respectively; and we have seen that John Boggs, jr., had acquired $\frac{21}{32}$ parts of the whole farm, by having $\frac{4}{32}$ parts directly under Parkman's deed, $\frac{16}{32}$ parts under the deed to him, of April 25, 1823, from Jane, his mother, and Betsey, James and Ebenezer, and $\frac{1}{32}$ part being what he derived from his father, of the portion under the Parkman deed, which belonged to George Boggs.

If all these deeds, introduced in the case, had been re-

corded immediately upon their execution, and the proceedings to foreclose the several mortgages were according to law, which is not disputed, the title of Jane Boggs, the surviving mortgagee in the deed to her and her husband, of April 25, 1820, became perfect and absolute to the extent of the interest which John Boggs, jr., ever had in the farm, but not of the parts belonging to Nancy and Andrew Boggs under the Parkman deed, because they were minors when the deed, with their names as grantors affixed, of April 25, 1823, was given.

But, if the mortgages to Hovey and Hodgman, which were dated in May, 1829, and recorded the same month, took precedence of the mortgage to John Boggs, sen., and Jane, his wife, which, though dated much earlier, were not recorded till June 10, 1829, Jane Boggs had no title when the tenant filed his petition for partition, and there was no necessity that she should be a party to that process, and the demandant is concluded by the judgment of partition.

The great question in the case is, therefore, whether the evidence therein, as matter of law or fact, or both, which is wholly submitted to the Court, are sufficient to charge Hovey or Hodgman, under the law as it existed previous to the R. S. of 1841, with notice of the mortgage deed of John Boggs, jr., to his parents, of April 25, 1820.

The father of John Boggs, jr., lived on the farm from the earliest recollection of Nancy Boggs, his daughter, who was born in 1802, and he continued to live there till his death. John lived there, also, after the deed of April 25, 1823, till he was married, which was in 1833. The father and his family, including John, jr., ate at the same table, the father and mother being supported by John, by the help of the father's family, till a short time before the marriage of John, jr. According to the testimony of William Hovey, at the time he took his mortgage from John, jr., he was in possession of the farm, and the father also was there; and the latter had always lived on the place and died there.

Judge TROWBRIDGE, in his Readings upon the Provincial

statute of Massachusetts Bay, for registering deeds and conveyances, published in 3d Mass., 573, says:—"If the second purchaser had notice of the first conveyance, before he purchased, no estate would pass to him by the second deed, though recorded before the first, because it is *fraudulent.*" Again,—"if the bargainee, upon the execution of the deed, enters upon the land, by force of it, and continues in possession, taking the profits thereof without recording his deed, there can be no purchaser of that land, without notice in the sense of the law; because the law deems such entry and occupation sufficient evidence of the property. And the bargainor, having neither the real nor apparent right of possession or of property, is not capable of conveying the land, and a deed thereof to a third person is, by the common law, accounted fraudulent and void." In the foregoing extract, the *entry* of the first purchaser seems to be relied upon as having importance; but, in other discussions of the same subject, it is not always regarded so material when the grantee of the unrecorded deed was in possession of the land before and after its delivery.

"The registry is designed only to give notice, in order to prevent purchasers being imposed upon by prior conveyances, which they are in no danger of, when they have notice of them." *Wormley* v. *DeMattos*, 1 Bur., 474; *McMechan* v. *Griffing*, 3 Pick., 149.

In the case of *Webster* v. *Maddox*, 6 Greenl., 256, which was when Maddox was the undisputed owner of the land and conveyed to one Bean, who, at the same time, conveyed in mortgage the premises to Maddox and his two minor sons. The latter deed was unrecorded at the time Webster caused the land to be attached as the property of Bean; and he levied his execution thereon, before the attachment expired. The Court say—"That Bean was never in possession of the premises, but Maddox and his sons were; at least the tenant was, even if the sons were resident on the premises merely as a part of his family. Such was the state of the possession when both deeds were delivered and took effect.

Now it is a well settled principle of law, requiring at this day no citation of authorities to support it, that the open and peaceable possession of real estate, by the grantee under his deed, perfects and secures his title as effectually as the registry of his title deed." It is further said, that the "vain ceremony of the entry and of the taking of possession merely, was not necessary to give notice to any one; for, at the time the deed was delivered to him, he was already in possession. The title was gone from Bean and vested in the tenant."

Matthews v. *Demerritt*, 22 Maine, 312, was a case in which the title was in one Dunn, who conveyed on July 18, 1837, and the deed was recorded April 26, 1838, to John P. Briggs and his wife, as joint tenants. John P. Briggs died July 22, 1837, and the deed from Dunn was delivered to Mrs. Briggs soon after his death. He lived in the house two or three months before his death, and the tenant boarded in the house, before Briggs died, and had lived there ever since. Dunn never claimed to exercise any ownership over the property. The demandant, on April 18, 1838, made an attachment of the premises, which was succeeded by a levy thereon, within thirty days after the judgment was rendered, as on the property of Dunn. The Court, by SHEPLEY, J., says,—"Before this attachment, Dunn had conveyed the premises, on July 18, 1837, to John P. Briggs and his wife as joint tenants, by a deed, not recorded till after the attachment. But the grantees at the time were in possession of the dwellinghouse and lot conveyed, and they continued in the open and exclusive possession thereof, till after the levy." "It has long been the settled construction, requiring the registry of conveyances, that the visible possession of an improved estate by the grantee under his deed, is implied notice of the sale to subsequent purchasers, although his deed has not been recorded." "A change of possession at the time of the first conveyance, would seem to be required only, when the second purchaser is proved to have known, before the conveyance to the first purchaser,

that he was in possession without claiming title, or when from the circumstances such knowledge must be presumed."

The case of *McKecknie* v. *Hoskins*, 23 Maine, 231, was where one Bawley, the owner of the premises, conveyed to Moulton, taking back at the same time, a mortgage to secure the purchase money, on July 20, 1835. The deed to Moulton was recorded July 9, 1837, and the mortgage Oct. 28, 1836, which was assigned to the demandant on Oct. 30, 1839, and the assignment recorded the next day. Moulton made another mortgage of the premises to Eli Hoskins, on Oct. 29, 1835, which was recorded on the same day, and assigned to the tenant. Bawley occupied the land, at the time he gave the deed and took the mortgage, and so continued till long after the mortgage to Eli Hoskins. The former owner of the premises, Bawley, by a writing dated July 15, 1835, sold to Moulton one half the crops of all kinds, and herbage, then standing and growing on the land, conveyed to Moulton, "by deed of even date herewith," and the materials for erecting a house lying on the premises, the said Moulton to furnish at his own expense, one man to help cut and make the hay, "the present season." The Court held that, as between the parties to that transaction, and those claiming under them respectively, the legal title was under the mortgage from Moulton to Bawley, and that he and those claiming under him had the right of possession at all times, till the condition of defeasance should be fulfilled. He was in possession at the time he took his mortgage, and so continued till after the time that Moulton mortgaged to Eli Hoskins. "The demandant must be treated as being in possession by right, and cannot be presumed, in the absence of evidence, to hold the possession under a title inferior to that which he in part had." And it was held that the demandant must be regarded as having possession under the mortgage to his assignor; and, by the authority of the case of *Webster* v. *Maddox*, that possession perfected his title as fully as would be done by a registry of the deeds.

In the two cases first cited from the Maine Reports, it ap-

pears that the persons who had the legal title had been in the exclusive possession before the conveyance, and so continued afterwards. This exclusive possession was a fact presented by the evidence, and this certainly did not weaken the effect, touching the implied notice, but it is not made the test on which the decision rests. It is not held that it was necessary, to constitute such notice, that the possession should be exclusive, provided the party having an unrecorded deed was in actual possession.

In the case last cited it does not appear that the possession of the first mortgagee was an exclusive possession, nor that such was the case with the demandant holding under him, but the case was decided upon the ground, that the possession of the one having the legal title was notice to the second mortgagee, of a right superior to that of his own grantor.

The mortgage to John Boggs, sen., and his wife, though dated April 25, 1820, was acknowledged April 25, 1823, before the same magistrate who took the acknowledgment of the deed from John Boggs, sen., his wife Jane and their children, dated April 25, 1823; and the condition in the mortgage refers to a contract of even date therewith, which is dated April 25, 1823, and is evidence in the case. The two deeds were probably written on the same day, and the discrepancy in the dates was by error of the scrivener. We cannot doubt that the delivery of both were parts of the same transaction and must be so treated.

From the whole evidence in the case, we think, under the law, as it was at the time that Hovey and Hodgman took their mortgages, the long possession of John Boggs, sen., without any change or interruption before and after the deed was given by him, his wife and children, to his son John, and the facts connected therewith as they appear in the case, must be regarded as implied notice of the title, which he actually had, the entire legal title being at that time in John Boggs, sen., and his wife. It was not a case, where he had no title, before this mortgage to him and his wife. It is

satisfactorily shown that this possession run back to a time anterior to that, when the deed was given to his wife and children, and this deed is no more than a naked release. If it passed a title in fact, it of itself, conferred legal rights upon him, including the right of possession as the law then was. In right of his wife, under the deed, he had a freehold during her life, to the portion conveyed to her. If he had survived her, he would then have been the tenant by the curtesy.

All the right, which John Boggs, jr., had in the farm, passed to his father and his wife under the mortgage deed to them, the covenants therein, and the foreclosure of the same. This title became absolute in Jane Boggs, over the conveyances of John Boggs, jr., of the same title to Hovey and Hodgman. As the basis of the partition, the tenant claimed no other title in the farm, than that which he derived from John, jr., through the mortgages to Hovey and Hodgman. At the time he filed his petition for partition, and at the time of the interlocutory judgment, the absolute title of the portion claimed therein was in Jane Boggs, which passed afterwards to the demandant.

It is insisted, that the demandant is not the owner of Betsey McCollam's share in the farm, which she inherited from her father, that once belonged to George Boggs, deceased, and he derived no title thereto, her husband not having joined her in the deed, in 1852, which was prior to the statute, authorizing married women to convey real estate, without being joined by their husband. But this portion of the farm is not in dispute. The title claimed by the tenant in his petition was to that part of the farm, which he had derived from John Boggs, jr. The share, which Betsey McCollam inherited from her father was not embraced. The partition therefore was made without reference to this, and, after the disclaimer in this suit by the tenant, the interest obtained by the demandant from her was not in issue.

The action of trespass was commenced in September, 1853, for acts alleged to have been done upon the premises

in controversy, after the defendant therein derived the title, which he relies upon. Under the view which we have taken, these acts were not tortious, and the action cannot be maintained.

In the action, *Andrew Boggs* v. *Hugh Anderson*,
Defendant defaulted, judgment for the demandant.

In the action, *Hugh Anderson* v. *Andrew Boggs*,
Plaintiff nonsuit, judgment for defendant.

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

ELIAS BAILEY, *in equity, versus* LOT MYRICK *& als.*

A, to secure certain notes he had given to B, mortgaged to B a lot of land, and then conveyed the land to C. Afterwards C conveyed by warranty the same land to B, and, without taking up A's notes or procuring a discharge of the mortgage, C received from B a bond for a reconveyance of the land upon C's paying in a time limited the original mortgage notes of A: — *Held*, that this did not operate to discharge the mortgage and vest an absolute title in B, subject only to the stipulations of the bond, but was merely a re-affirmation of the mortgage, with an extension of the time of payment.

So far as a bond for the conveyance of real estate is a personal obligation, not touching the realty, it is binding on the parties without being recorded. But, although given at the same time, and as part of the same transaction, with a deed from the obligee to the obligor, it must be placed on record before it can operate as a defeasance, so as to affect the rights of third parties without actual notice.

The assignment of such a bond, as well as the assignment of a mortgage, must be recorded, or it will not affect the rights of third parties having no actual knowledge of it.

After exceptions to the ruling of the Court at *Nisi Prius* have been taken, argued and decided, and no objections made to an amendment allowed at *Nisi Prius*, or, if any were made, they were not sustained, it is too late, when the same case comes a second time before the law Court at a subsequent stage, to raise objections to the amendment permitted at the first trial.

When notice was required by statute to be given by an officer in a "public newspaper," the omission in the officer's return of the word "public" is not fatal, a "newspaper" being necessarily public.

Bailey *v.* Myrick.

In a bill in equity to redeem land which is under a mortgage, where several owners hold distinct parcels of the mortgaged premises, the present value of the several parcels, in case no improvements or erections had been made on them subsequent to the mortgage, is the rule by which to determine what each owner shall contribute to redeem the mortgage, this value to be determined by a master.

BILL IN EQUITY to redeem 100 acres of land in Newcastle. It appears by the bill, answers and proofs, that, in October, 1837, Josiah Myrick and others conveyed said land to Nathan W. Sheldon, and, on the same day, said Sheldon mortgaged the same land to Josiah Myrick, Augustus F. Lash, Cushing Bryant and Lot Myrick, to secure the payment of three notes amounting to $1000. J. Myrick and Lash deceased before this suit was commenced, and E. W. Farley was appointed administrator on the estate of the former. The mortgage notes were partly paid.

Nov. 26, 1837, Bartlett Sheldon conveyed by warranty deed to Joseph Stetson 1¾ acres of the same land, and Nov. 30, 1837, Stetson conveyed a portion of his parcel to Daniel Fly. Sept. 30, 1841, Bartlett Sheldon conveyed to Lemuel S. Hubbard two acres of the mortgaged premises; Hubbard conveyed the same to Enoch Trask, May 10, 1842; Trask to N. Bryant, Aug. 8, 1843; Bryant to the plaintiff, April 30, 1850.

Nathan W. Sheldon conveyed to L. S. Hubbard by warranty deed the same two acres conveyed to him by Bartlett Sheldon, April 12, 1842; and, Oct. 20, 1843, N. W. Sheldon conveyed by quitclaim to Bartlett Sheldon the whole of the mortgaged premises of 100 acres, excepting "the meetinghouse lot, the grave yard lot, and two acres sold L. S. Hubbard," &c. Bartlett Sheldon mortgaged to N. W. Sheldon 60 acres of the premises lying "west of the road," to secure $696,28, dated Oct. 19, 1843.

Jan. 5, 1846, Bartlett Sheldon conveyed by warranty the whole 100 acres to Lot Myrick and Josiah Myrick. On the same day, Lot and Josiah Myrick gave to Bartlett Sheldon a bond, in which, after reciting the history of the deed and mortgage in 1837, and that Bartlett Sheldon had become the

owner of the land, and conveyed it to the obligors, they bound themselves to convey the premises to said Sheldon on his paying the amount due on the mortgage notes in equal instalments in 2, 3 and 4 years. This bond B. Sheldon assigned to William Hall and William Sheldon, Jan. 6, 1847. There is evidence from Hall and others to show that the bond afterwards became the sole property of William Sheldon. Neither the bond or assignment was ever recorded.

In Dec., 1847, the right which Bartlett Sheldon had, as grantee of N. W. Sheldon, the original mortgagee, to redeem the mortgage given by the latter to Myrick and others, was sold on execution to the plaintiff. Some amendments were allowed by the Court to be made in the officer's return of the sale, at the first trial.

In Oct., 1850, N. W. Sheldon mortgaged to James G. Huston, to secure payment of $400, part of the premises "bounded on the west by the old county road," &c.

In July, 1850, E. W. Farley, as attorney for Lot Myrick and Cushing Bryant, the surviving mortgagees in the mortgage given by N. W. Sheldon in 1837, entered on the premises to foreclose the mortgage for breach of condition, of which a certificate was duly made, sworn to and recorded.

It was admitted that Bartlett Sheldon entered into possession of the premises immediately after the deed of Myrick and others to N. W. Sheldon, and continued to occupy the greater part thereof, up to the commencement of this suit.

This case was tried before HOWARD, J., and, on exceptions, was argued before the law Court, and reported in 36 Maine Reports, 50. The Court decided, that, as there appeared to be several persons interested in the matter at issue, who were not parties to the suit, the bill must be dismissed, unless they were made parties.

Subsequently Joseph Stetson, William Sheldon, James G. Huston and Daniel Fly were made parties, and filed their answers and proofs.

The case was elaborately argued by

Ruggles, for the plaintiff.

Thacher, for the defendants, contended that the bond of Myrick to Sheldon, not having been recorded, did not constitute a defeasance, but was merely a personal contract, and cited *Harrison* v. *Phillips Academy*, 12 Mass., 456; *Ransom* v. *Hay*, 2 Edw. Ch., 535; *Eiland* v. *Radford*, 7 Ala., 724; *Wendell* v. *N. H. Bank*, 9 N. H., 404; *Henry* v. *Ball*, 5 Term R., 393; *Hicks* v. *Hicks*, 5 Gill & J., 75; Powell on Mort., 137, *a*, and note 1.

The amendments allowed at *Nisi Prius*, to be made to the officer's return, were improperly allowed, and the question of their admission was carried up on exceptions, and, not having been then decided, is still open for consideration. The officer had ceased to be such when the amendments were made, and it does not appear that he had any minutes by which he could make them. *Hovey* v. *Waite*, 17 Pick., 196; *Haven* v. *Snow*, 14 Pick., 28; *Thacher* v. *Miller*, 13 Mass., 70. The amendments not having been rightfully made, the plaintiff took nothing by the sale.

The plaintiff has no interest in the mortgage, except in the two acres originally conveyed to Hubbard, and this the defendant stands ready to release to him. W. Sheldon, under his assignment of the bond, has a right to redeem, as against the plaintiff.

The opinion of the Court was drawn up by

KENT, J.—It was decided by the Court, when this case was before it, as reported in the 36th volume of Maine Reports, 50, that the plaintiff was, upon the facts, entitled to redeem as owner of two acres of the premises, originally deeded to Hubbard in severalty, out of the whole tract. It is undoubtedly well settled, when the property mortgaged is afterwards conveyed to two or more persons in distinct parcels, that the owner of a part may redeem the whole mortgage and hold the premises as security, until the own-

ers of the other part pay their proportion of the mortgage debt. Whether such owner of a separate portion could compel a discharge or assignment of the whole mortgage, when the holder of the mortgage offers to release the parcel thus held, and to quitclaim all right thereto under the mortgage, is a question which might cause us to hesitate, if the plaintiff had no other ground on which to rest his claim for redemption.

But the principal claim of the plaintiff embraces the whole right in equity, (except as to small portions held by other persons,) by virtue of a sale and conveyance to him of the equity of redemption, on an execution against Bartlett Sheldon, in December, 1847. The facts are stated in the case in the 36th volume of Maine Reports, before referred to, and it is unnecessary to repeat them.

The first question to be considered is, what effect shall be given to the conveyance of Bartlett Sheldon to Lot and Josiah Myrick, and the bond given back by them. At the date of the deed and bond, Bartlett Sheldon was the owner of the equity; he conveyed in warranty to Lot and Josiah Myrick, January 5, 1846. This deed alone would have extinguished the equity, and would have united the whole legal and equitable title in them. But they, at the same date, gave back to Sheldon their bond conditioned to quitclaim the premises, on payment of the three notes secured by the said mortgage of 1837, within four years. This bond recites, in the condition, the facts as to the conveyance and mortgage of 1837, and recognizes Bartlett Sheldon's right to the equity, by deed from N. W. Sheldon. The bond, therefore, is of the same date as the deed, refers to the conveyance made on that day of the same premises, and provides for a re-conveyance, on payment of the notes secured by the first mortgage, within a certain time. It was clearly all one transaction, and there is no evidence that by an act of delivery, the deed and bond became separated. It was a case contemplated by the statute, (R. S. of 1841, c. 91, § 27, and R. S. of 1857, c. 73, § 9,) where it is in-

tended that the estate, conveyed by an absolute deed, may be defeasible by a bond. The bond acts directly on the title, requiring, on certain terms, a conveyance of it. *Noyes* v. *Sturdivant*, 18 Maine, 104. It was, in fact, a mortgage in equity, and must be so treated. It was not a mere agreement for a repurchase. It was for security of a prior debt, and the repayment of money already due. If there had been no prior mortgage, the deed and bond would have created an equity in Bartlett Sheldon, commencing at that time, according to numerous authorities, in this State and elsewhere.

But, at the time of this transaction, Bartlett Sheldon, in fact, was the owner of the equity of redemption from the first mortgage in 1837. He conveys to the surviving mortgagees in that mortgage in 1846, and they give back the bond to quitclaim the premises to him upon payment, within a certain time, of the notes secured by the first mortgage. If this deed and bond created a new and independent equity, it was substantially the same equity that before existed. It secured the same notes, required the payment, for redemption, of precisely the same sum, and to the same parties in interest. The only difference is, that the time of payment is somewhat extended by the bond. There is no formal discharge or surrender of the first mortgage, nor are new notes taken. Myrick and others, it appears from the answers and proof, retained the first mortgage and notes, and actually took possession, in 1850, to foreclose the first mortgage of 1837, and all the forms of foreclosure were apparently complied with. In fact, all the parties seem to have treated the first mortgage as undischarged. Nothing will discharge a mortgage but payment or release. *Crosby* v. *Chase*, 17 Maine, 369.

The decision of the question, whether the first mortgage, with the equity under it, was discharged, and an entirely new one created in 1846, would seem to be of less consequence to this plaintiff (except as to his two acres) than to the others who hold parcels of the estate by conveyances in

1842, from the mortgager, N. W. Sheldon. The plaintiff seems to have purchased all the equity of B. Sheldon, under each of the conveyances,—viz., his right to redeem from the original mortgage, and also from the mortgage of 1846, created by the bond. But, if the transaction in 1846 destroyed the first mortgage and put back the title to the whole tract absolutely in Myrick and others, and a new equity, independent entirely of the first, was then created, the title of the intermediate purchasers of the small parcels would seem to be cut off, as against these defendants. Unless the first mortgage is yet undischarged and open to redemption, they would seem to have lost all right to redeem.

But it is unnecessary to discuss that question, as we are satisfied that the transaction in 1846, and the deed and bond between the same parties that were interested in the first mortgage, amounted in fact, and in law and equity, simply to a re-affirmation of the first mortgage, and not to its discharge. The only difference is, that an extension of the time of payment of the notes secured by the first mortgage is granted—and, with this exception, the parties stand precisely in the same relation to each other as before. The new equity is the same as the first equity; viz.: a release of the premises upon payment of what is due on the first mortgage. We think that Bartlett Sheldon had that right of redemption when he took back the bond, and that, unless he parted with it before the levy and sale, under which the plaintiff claims title, the plaintiff stands in his place as to this right.

It is insisted, that, before this levy and sale of the equity, Bartlett Sheldon had assigned his bond to William Sheldon in good faith, and that thereby whatever interest Bartlett had was legally transferred to William. The question of the validity, good faith and effect of that assignment have been very fully and ably discussed in the arguments of the counsel on both sides. The plaintiff, however, insists that William can set up no right under that assignment as against

him, even if it was made in good faith, and is otherwise valid, because he says it was never recorded.

When it became the settled law that a bond given at the same time, and as part of the same transaction, might operate as a defeasance, and create a mortgage and equity of redemption, as a mortgage deed between the parties would, it became necessary, for the protection of subsequent purchasers and creditors, that the same notice by record should be given of the bond as of the mortgage deed. It would be manifestly unjust, and would open the door for frauds by secret trusts, not only to allow the effect of a deed of defeasance to a personal bond, but to permit such a result against subsequent purchasers or creditors, without any record or actual notice of the existence of such a bond.

The statute before referred to (R. S., 1841, c. 91, § 27) provides that such a bond shall not defeat an absolute estate against any one except the maker of such bond of defeasance, unless it is recorded.

The law looks upon such a bond in a two-fold aspect:— one view regarding it as a personal obligation, not touching the realty, and to be enforced by judgment, in case of breach, out of the money named as the penalty; the other as a defeasance in certain cases, and creating an equity of redemption of the real estate, and an interest in the freehold.

No record is required, so far as it is a personal obligation; but it is required before it can operate, as a deed may, to create or to convey an interest in land. An equity of redemption is real estate, and requires the same formalities for its conveyance as other interests in land.

If we look at the original mortgage of 1837, and the equity under it, it does not appear that Bartlett Sheldon ever conveyed that to William, by any deed or instrument, unless it is conveyed by assignment of the bond. That bond, it appears, was assigned to William; but neither the bond nor its assignment was ever recorded, and no actual notice of its existence, to the plaintiff, is asserted.

If that bond is to be regarded as operating as a defeasance, then, by the statute, it is good without record against the Myricks, and creates an equity of redemption in Bartlett Sheldon, which he might convey as against every one but subsequent purchasers, or attaching creditors of Myricks, the obligors. Subject to the same exception, the equity of Bartlett might be attached by his creditors, as it was. The record is not an essential element in the legal transmission of title. It is only a subsequent act, which the party must see performed, to protect himself against such purchasers or creditors, unless the law expressly makes an instrument void if not recorded. As to everybody else, the title is good.

This equity Bartlett Sheldon undertakes to convey to William, by assigning the bond. Is it necessary to protect that, as a conveyance of the equity against the attaching creditors of Bartlett, that the *assignment* shall be recorded? The same reasons exist, on this point, in case of an assignment, as in case of the first conveyance. It would seem to be mere mockery to require a mortgage deed or bond to be recorded, before the mortgager or obligor could assert his title to the equity as against creditors and purchasers, and to permit the holder of the equity under the mortgage to convey his title secretly to another, by deed or assignment unrecorded. It is very clear, if the mortgager, holding an equity under deeds, should convey his equity by deed, that such deed must be recorded to protect the title, except as to the grantor. Why must not the same rule apply to an equity created and existing only by a bond? So far as the bond is personal, the assignment may be good without recording; but, when it assumes the character and rights of a deed of conveyance, or creation of an estate in realty, if that estate can be transferred by an assignment of the bond, it must be because the bond is as a deed, and can claim no higher rights than a deed, nor protect the title except by the same record that is required to give notice of other conveyances of the title in real estate. *Porter* v. *Millet*, 9 Mass., 101; *Wise* v. *Tripp*, 13 Maine, 9.

It was decided in *Newhall* v. *Pierce*, 5 Pick., 450, that a bond operating as a defeasance must be recorded. This is required by our statute.

In *Clark* v. *Jenkins*, 5 Pick., 280, it was decided, as a necessary result of the ruling, that an *assignment* of a mortgage must be recorded, to protect the title. *Pierce* v. *Odlin*, 27 Maine, 341.

"As an instrument of defeasance affects the title, there would seem to be the same necessity for recording it as for recording the deed, and *for the like purpose of giving notice*. Such, undoubtedly, was the object of the Legislature in framing the law. By analogy, this section should receive a similar construction, in reference to unrecorded instruments of defeasance, with the first section of the statute, in respect to unregistered deeds." *McLaughlin* v. *Shepherd*, 32 Maine, 147. The same reasoning, by analogy, must apply to a transfer of title by assignment of the bond.

Indeed, this may be regarded as a well settled general principle, that all instruments which are to operate as the conveyance of a title in and to real estate, must be recorded, to protect the title, thus acquired, against subsequent purchasers and attaching creditors of the party thus parting with his title. It is the only sound and safe rule to protect the honest and to defeat the plans of the fraudulent, concealing debtor.

In this case, Bartlett Sheldon had an equity liable to attachment by his creditors. His assignment to William could not defeat the levy, because it was not recorded. The opinion of Judge CUTTING, which follows, explains and illustrates the doctrine fully.

This view renders it unnecessary to consider the question before alluded to—viz., whether the assignment was *bona fide*, or colorable and fraudulent.

The defendant's counsel, in his argument, raises some questions as to the legality of the sale by the sheriff, and contends that the return is defective, and the amendments that have been made unauthorized. It is almost impossible

to ascertain the exact state of facts in relation to the amendments, as no case is made up, and the counsel do not agree entirely as to the facts. Indeed, we do not see how these questions are before us. It appears, as well as we can gather the scattered facts, that, in 1852, the case was heard by a single Judge at *Nisi Prius*, according to the law then in force; that the question as to the amendments by the officer was then considered, and the amendments allowed—the defendants duly objecting. The whole case was carried to the law Court, upon the findings and rulings of the Judge; and it was upon the exceptions, thus filed, that the case was heard and determined, as reported in the 36th volume of our Reports. Nothing is said, in the opinion, with reference to the amendments. But it was the duty of the defendants then and there to urge any objections they had to the allowance of the amendments, and none having been sustained, the ruling must stand. A minute from the docket shows that, at October term, 1855, the officer had leave to amend according to the facts; and it would seem that he did thus amend. No objection appears on the docket. The right to amend had been secured by the former proceedings.

In looking at the amendments, we doubt very much whether any amendments, in reference to the points suggested in the argument, were necessary. All the acts, as to giving notice stated, may well be referred, as to time of performance, to the date given as the time of the first act—which was more than thirty days before the sale. All of them were necessarily before the sale, as the officer says he *afterwards* sold. As to the omission of the word "public," before "newspaper," we cannot deem it fatal. A newspaper is of itself a public print, and imports publicity. A private newspaper would be, according to the definition of the word "newspaper," a contradiction in terms. The word "public" is omitted in the corresponding section in the R. S. of 1857, c. 76, § 30. We consider the amendments properly allowed, if they are necessary.

The result is, that the plaintiff must have a decree in his

favor, that he may redeem the mortgage of 1837, by paying the amount found due thereon, and, if necessary to protect his rights, an assignment thereof; that this redemption must be for the benefit of himself, as owner of the two acres, and also of the equity purchased at sheriff's sale; that it must also be for the benefit of Stetson and Fly, as they are owners of the one and three-fourth acres, conveyed to Stetson by N. W. Sheldon, and in proportion and according to their present interests in that parcel.

In 1843, when N. W. Sheldon conveyed his rights and the equity in the whole tract, (with exception of a few acres before conveyed,) he took back a mortgage from Bartlett, to whom he gave the deed of a portion, to secure $696,28, "being on the *west* side of the county road." This gave to N. W. Sheldon a still existing interest to redeem the first mortgage on his proportion of it. If this was afterwards conveyed to Huston, he might also be called on to contribute. But it is asserted, and not denied, that, in the description in the deed to Huston, land on the east side of the road only is included. In that portion N. W. Sheldon had no interest when he gave his deed to Huston. If this be so, then N. W. Sheldon must contribute according to the amount of his claim, which is the debt now due on the mortgage to him.

The value of the several parcels at the present time, disregarding actual permanent erections, and improvements made since the mortgage, by any party, must be the rule of apportionment. Or, as it is sometimes stated, the present value, in case no such improvements or erections had been made.

A master must be appointed to ascertain and report—

1. What is justly and legally due on the notes secured by the mortgage of 1837, after deducting rents and profits received, or which ought to have been received according to the statute, by the mortgagees, after their entry to foreclose.

2. What is the present value of all the premises covered

by said mortgage—not including permanent improvements made on any part since the mortgage.

3. What is such value of the portion of the 1¾ acres held by Stetson, and what that part held by Fly.

4. What is such value of the part of the premises conveyed back in mortgage by Bartlett Sheldon to N. W. Sheldon.

5. To state, on these principles and this decision, what portion of the amount found due on the mortgage notes, and to be paid to the defendants as mortgagees, is to be contributed respectively by the plaintiff; by Stetson; by Fly; and by N. W. Sheldon as mortgagee. The latter must contribute in the proportion that the amount due on the mortgage to him bears to the whole value of the parcel thus mortgaged to him. The holder of the equity of redemption of that mortgage must bear the remainder justly chargeable to that parcel.

The plaintiff will be entitled to costs against the original defendants, who are mortgagees. He claims cost, or a contribution towards his expenses, from the other parties who are benefited by the redemption, on the ground, that by his persistent efforts their rights have been protected, which otherwise would have been lost entirely. It certainly does appear equitable, that those who derive a direct benefit from the result, obtained by the efforts and expenses of one of the parties severally interested therein, should bear a portion of the expenses.

This, however, may be modified by peculiar circumstances. If the other parties' legal rights could have been secured without redemption, and they did not desire the moving party to establish the common right, the equitable claim might not be supported. We think these questions in reference to cost can be better determined upon the coming in of the master's report. But, if the plaintiff requests it, the master may report what amount of actual cost and expenses, beyond those which can be legally taxed, the plaintiff has

necessarily and properly incurred. The whole case, then, can be disposed of by a final decree.

The entry on the Docket of the County Court to be:— "Plaintiff entitled to redeem. A master to be appointed by the Court sitting in the county, to report upon the points as set forth in the opinion of the whole Court, and upon the principles therein stated:—and all further proceedings to stay until the coming in of the report of the master."

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

CUTTING, J., concurring, expressed his views as follows: By R. S. of 1841, c. 91, § 26, the law in force at the time the rights of the parties accrued, and since continued by re-enactment, it is provided that,—"No conveyance of any estate in fee simple, fee tail, or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person, other than the grantor, his heirs and devisees, and persons having actual notice thereof, unless it is made by deed recorded, as provided in this chapter."

The object and design of the record are to give public notice; but, to one having actual notice, the record becomes immaterial—to all such actual notice is equivalent to a record notice, and, by the statute, they are identical in force and effect. For instance, A conveys to B by a deed not recorded and takes back a bond of defeasance unrecorded; as between A and B the transaction constitutes a mortgage, but not so as to A's creditors, *having no actual knowledge* of the deed and bond, and such may attach and levy upon the estate in fee as the absolute property of A. Not so as to A's creditors, *having actual knowledge* of the deed and bond. *Vide McLaughlin* v. *Shepherd*, 32 Maine, 147, where this principle is discussed, and knowledge of a bond of defeasance unrecorded was held to be equivalent to a record and placed on the same footing as unrecorded deeds with notice.

Now, what is a creditor to do under the statute and the decision before cited, delivered in 1850, and again reiterated and confirmed in *Purington* v. *Pierce*, 38 Maine, 447, delivered in 1853, where this Court held that, "to make a bond operative as a mortgage, it must be recorded, *still*, if unrecorded, and a subsequent purchaser is chargeable with notice of its existence, such notice, *as to him*, is equivalent to the registration of the bond."

The creditor not choosing to attach and levy upon the fee, the law would presume that he had notice of the bond of defeasance, in which event he attaches and sells the equity of redemption. Any other presumption would be in opposition to that universal presumption, that every person is presumed to act according to his best interests and information; that he would not take a part when he was justly entitled to the whole. Thus, by his acts, he virtually admits his knowledge.

Thus far the creditor is sustained by the statute as construed by this Court.

But it is contended that, inasmuch as the bond was assigned before the attachment, thereby the debtor's equity was transferred, and he had no attachable interest. Such would be the legal result had the assignment been recorded, or the creditor chargeable with actual notice; neither of which propositions is pretended. Such assignee has neither the record, the statute, or the judicial construction of the statute for his protection.

Now, let me apply the foregoing principles to the case at bar. A conveys to B, who records his deed. B gives back a bond, which, if recorded, would have operated as a defeasance; C, a creditor, has knowledge of the bond and, as to *him*, the legal effect is as though the bond was recorded. He knows then that his debtor A has an equity of redemption and consequently an attachable interest, which fact is disclosed by his attachment, his acts. And why should not such an equity be available? Because, says a third party, I had previous to the attachment an unrecorded assignment

of the bond. That would not be a sufficient answer, unaccompanied with the further averment that the creditor had knowledge of the assignment, but which, if averred, would present an issue of fact, and, as that issue was settled, so would be settled the rights of the parties.

It must be so. Any other construction would open a wide door for the introduction of fraud. The creditor cannot compel his debtor to record his bond; and is the latter by his own neglect or obstinacy to prevent the former from the avails of a valuable equity through fear perhaps of secret or unknown assignment? I think not; and it might not be inequitable to hold that the assignee of an unrecorded bond and assignment, as against attaching creditors, held the premises in secret trust for the benefit of the mortgager.

APPLETON, J., dissenting.—The plaintiff, claiming to have the equity of redemption of the mortgaged premises in controversy, brings this bill to redeem them.

His right to maintain it depends upon the ownership of the equity of redemption.

He makes out his title, if he has any, by a sale of the supposed equity of redemption of Bartlett Sheldon. His title is perfect, if, at the time of the attachment or sale on execution, Sheldon had *in fact, or apparent of record*, such equity.

When the record title is in A, his creditor may attach the estate, notwithstanding he may have conveyed it to B, by deed not recorded; and, if he have no notice of such unrecorded deed, he may, by levy or sale on execution, acquire the legal title.

In the present case, neither at the date of the attachment nor at that of the sale on execution, had Sheldon any title of record.

The proof shows that, long before either date, he had transferred his interest by an unrecorded conveyance.

At the date of the attachment and sale, the registry of deeds disclosed no title in him, nor had he any in fact.

What then could the officer attach and sell? Not the title apparent of record, for none there appeared in Sheldon. He could not attach the actual title, for Sheldon did not own it. When a debtor has neither the apparent (of record) nor the actual title to real estate, I am at a loss to perceive what present attachable interest he can have, or why he should be held to have one because years before he may have had the title.

When the record title is shown to be in a debtor, notwithstanding he may have conveyed it by deed not recorded, the estate may be seized as his by force of the R. S., 1841, c. 91, § 26, and by force of that alone. The title is held to be in him, as against all but those having notice of an unrecorded conveyance. The validity of the attachment of the apparent title depends on the statute.

But it may be attached as the property of the person having the *actual* title, though not recorded, and such attachment will be valid as against all but those deriving their title from the one in whom the registry shows the title to be.

The law recognizes — it can only recognize — the apparent or the legal title. Either may be attached. But one, having neither, has not heretofore been held to have any valuable estate. This may be regarded as the first and only case where one, having *no* title by record *nor* in fact, has been judicially determined to have a perfect title.

The maxim *ex nihilo, nihil fit*, has heretofore been regarded as sound in law, as it is unquestioned in philosophy. I regret that it has been deemed wise judicially to controvert it. It still obtains philosophically.

When the conveyance is in fraud of the creditors of the grantor, a different question arises, which it is not necessary here to consider, as the rights of the parties litigant have not been decided upon that ground.

DANIEL ROSE *versus* THOMAS O'BRIEN.

Where a Judge of Probate, under the statute authorizing a specific distribution of personal property in certain cases, has issued a warrant for an appraisal of a part of a vessel belonging to an estate, and ordered a distribution thereof amongst the heirs in specified proportions, and this has been done accordingly, and a return made, accepted and recorded, the title passed thereby, and the probate records are sufficient muniments of title, without any formal transfer of the several parts distributed.

A decree of the Judge ordering distribution and payment of the balance in the hands of the administrator on the settlement of his last preceding account, passed on the same day the return of the specific distribution was accepted, does not annul the latter, nor require that the share of the estate in the vessel should be sold and distributed in money.

The right which the administrator has by statute to set off any claim he may have in his official capacity upon one of the heirs, against the distributive share of such heir, does not apply to articles of personal property ordered by the Judge to be specifically distributed to such heir.

Neither does the administrator's right of set-off create a lien upon any article of personal property specifically distributed to such heir under the decree of the Judge of Probate.

A policy of insurance on the vessel, obtained after the specific distribution for the benefit of the owners, cannot inure to the benefit of the administrator, whose interest had ceased, and whether it was for the benefit of the distributee is matter of proof.

Where the party who procured the policy, a total loss having subsequently occurred, has collected of the insurance company the amount insured, an action for money had and received may be maintained against him by the assignee of a person who was a part owner when the insurance was effected, for his share of the money, if commenced before such share had been paid over to the assignor.

ASSUMPSIT for money had and received. Plea, general issue.

The facts are very clearly stated in the opinion of the Court.

The case was submitted to the full Court on report of the evidence by CUTTING, J.

Gould, for the plaintiff.

Ingalls & Smith, for the defendant.

1. George F. Carr had no interest in the policy of insur-

ance. It was procured by the defendant, at the request of the administratrix, and for the benefit of the minors under the guardianship of Jacobs, of the widow and of Helen Carr. The defendant at the time made a memorandum on the back of the policy of the proportion belonging to each. The name of George was not mentioned in connection with it. George was indebted to the estate at the time of the decree of distribution, for goods and money advanced, more than twice the value of his distributive share of the vessel. The defendant did not regard him as having any interest in the vessel, and nothing was insured for his benefit. There was no privity of contract between George and the company. Having no interest in the policy, he had none in the amount recovered. The assignment of his interest carried nothing with it. The defendant could not have maintained an action against him for any part of the premium note, which he might have done if he had had authority to insure, and had insured, for him.

If it be argued, that the defendant having caused the part assigned to George to be insured, the insurance was for George's benefit whether so designed or not, it may be answered, in addition to what has been said, that the administratrix had refused to give George a bill of sale of his part until his indebtedness to the estate was paid. The fact of his indebtedness and insolvency, and the further fact that that indebtedness must be paid out of the ship or not at all, gave the administratrix an insurable interest. 1 Arnould on Ins., 236.

The defendant having paid the insurance money recovered to Mrs. Carr, the action should have been brought against her, and not against him.

2. Ships are personal property, and, upon the death of the owner, vest in his administrator or executor. Abbott on Ship., 1. No title can vest in the heirs except through the administrator or executor. No act or decree of the Judge of Probate can transfer the title; it can be done only by bill of sale of the administrator, or a parol delivery by

him. The ship was at the time at sea, and it is not claimed that there was any delivery. A bill of sale was therefore necessary. Abbott, 2.

If it was the duty of the administratrix to deliver or convey the vessel, according to the decree, and she failed to do it, the remedy is on her bond. But she had a right to retain in her hands the share assigned to George, until his large indebtedness to the estate should be paid.

In the case of *Proctor* v. *Newhall*, 17 Mass., 81, the Court say, that the Judge of Probate cannot make a deduction from the share of an heir, on account of indebtedness to the estate, but must order an equal distribution, and the administrator may refuse to pay the distributive share, and claim the right of set-off.

3. This action cannot be maintained in the name of the assignee. The assignee of a *chose* in action, other than a bill of exchange or promissory note, cannot maintain an action in his own name, unless there has been notice of the assignment, and a promise to pay to the assignee. *Weston* v. *Barker*, 12 Johns., 276. In this case the defendant had no notice of the assignment until he had paid over a large part of the insurance. The equities of the case are all against George F. Carr and the plaintiff.

The opinion of the Court was drawn up by

CUTTING, J.—On December 29, 1856, the Bath Mutual Marine Insurance Company caused the defendant, "for whom it concerns," to be insured, payable, in case of loss, to him, in the sum of seven thousand dollars, on three-sixteenths of ship Franklin King, for one year. The ship was subsequently lost in the winter of 1857, and the amount due on the policy was paid to the defendant in May of the same year. And the first question presented is, for whose benefit was the ship insured, or, in other words, who had the insurable interest in one sixty-fourth part thereof, the only part now in controversy. The answer depends upon much evidence, both oral and documentary.

It appears *that* Benjamin Carr died on January 11, 1854, intestate, leaving a widow, Nancy B. Carr, five minor and two adult children, of the latter, was George F. Carr; also leaving much personal property, a part of which was five thirty-second parts of the ship Franklin King; *that* the widow was appointed administratrix, and an inventory of the personal estate was subsequently returned to the probate office on March 4, 1854, at which time she duly signified her dissent to be held accountable therefor at the appraisal.

The next important era in the administration embraces what transpired under the provisions of R. S. of 1840, then in force, c. 108, §§ 21, 22, which provide that— "Whenever, on the settlement of any account of any administrator, there shall appear to remain in his hands any goods and chattels, rights and credits, not necessary for the payment of debts and expenses of administration, the Judge shall order the same to be distributed according to the provisions of chapter ninety-three. When the surplus shall consist of any other property besides money, the Judge may order a specific distribution of the same, in proportion to the value thereof; and for this purpose, if found convenient, he may appoint one or more appraisers to value and make a specific distribution of the same, under oath; and make report thereof to the Judge for his acceptance."

And we next find, *that* on November 3, 1856, the Judge made and issued the following order or decree; viz.:—

"Lincoln, ss.—To John D. Barnard, Richard Robinson and Edward O'Brien. Whereas upon the settlement of the fourth account of Nancy B. Carr, administratrix of the estate of Benjamin Carr, (&c.,) there appears to be remaining in her hands not necessary for the payment of debts and expenses of administration, the following goods and chattels; viz.: five thirty-seconds ship Franklin King," (and portions of sundry other vessels not necessary here to mention,) "which I hereby order to be distributed in proportion to the value thereof; to wit:—one-third to Nancy B. Carr, one-seventh to George F. Carr, one-seventh to Helen M. Carr,

five-sevenths to Rowland Jacobs, jr., guardian," &c. "You are therefore hereby appointed a committee to appraise and make a specific distribution of the same under oath and make report thereof as soon as may be." Then follows the return of the committee in usual form, which was duly accepted at a Probate Court held on December 23, 1856, and ordered to be recorded; by which a specific distribution was made to the widow and heirs as the order directed, and among other things one sixty-fourth part of the ship Franklin King to George F. Carr. These proceedings disclosed "a full administration, after which, the residue of the property passed to the heirs," was ordered to be, and was distributed, and the probate records are sufficient muniments of title. *Bean* v. *Bumpus*, 22 Maine, 554.

But, it is contended by the defendant's counsel that, under the general decree of the Probate Court, made on Dec. 23, 1856, on settlement of the administratrix's fifth account, the balance of eleven thousand three hundred dollars and twenty-three cents, being in her hands, was ordered to be specifically distributed to the widow and children of the deceased, to each their respective proportions according to law. And that the administratrix has a legal right to set off any claim she may have against George F. Carr, who is said to be indebted to her in her official capacity. And, to sustain this proposition, the counsel relies upon the case of *Proctor* v. *Newhall*, 17 Mass., on page 93, where the Court observe that, "if the administrator would avail himself of the right of set-off, he may refuse to pay the distributive share; but this right of set-off does not constitute a lien on the estate." The Court must have referred to a distributive share to be paid in money, otherwise a right of set-off might constitute a lien on the estate or specific chattel, which the opinion negatives.

The case at bar discloses two decrees of the Probate Judge, made on the same day, (Dec. 23, 1856,) viz., the general decree ordering distribution and payment of the balance in the administratrix's possession, on settlement of

her fifth account, and a decree ordering the acceptance and record of the appraisers' report for a specific distribution of certain vessels, which we have before considered. Now, it is again urged, that these two decrees are inconsistent, and that the one ordering a distribution of all the property, to be paid in money to the respective heirs, must prevail. If it be so, and George F. Carr's proportion was due to him from the administratrix in money, then the remarks quoted from 17th Mass. might be appropriate. But the records of the Probate Court manifest no such inconsistency.

The administratrix had charged herself with the personal property, which she was under no obligation to take, and which she declined to take at the appraisal; she then was accountable for its legal appropriation, either in discharge of debts and expenses of administration, or its distribution among the heirs. After the decree perfecting the specific distribution of the vessels, as we have already observed, the property passed to the respective distributees, whose claim against the administratrix to the amount of their appraised value became satisfied, and should be a credit in her administration account. To contend that under the general decree she would be obliged to pay the several sums, ordered to be distributed, in money, would be equivalent to an assumption that, notwithstanding her written dissent to the contrary, duly filed in the probate office, she was to assume and account for all the personal property at its inventoried appraisal, which was then remaining on hand. All the parties, acting under that decree, construed it otherwise, for, on Dec. 24th, the day following, the administratrix settled with Jacobs, the guardian of the minor children, and paid him towards their share, the sum of $3495, by his receipting for three thirty-second parts of the ship Franklin King, which was the proportion and the appraisal under the specific decree. And the same proceedings were had with Helen M. Carr in relation to her share. Now, if the specific decree was annulled by the general one, what authority had the administrator to charge the heirs with any particular por-

tions of the ship? How did she know, otherwise than by the specific distribution, what parts of particular vessels belonged to the one or the other of the heirs, and why did she settle with them in exact conformity with the specific appraisal and distribution? On the final settlement of her administration at the probate office, that record may be deemed of more importance, and be more justly appreciated than it seems to be by the defendant's counsel in the present case.

On Dec. 29, 1856, six days after the distribution, as has already appeared, the defendant obtained the policy, and he does not deny, that it was procured for the owners of the shares according to the specific distribution, except as to the widow and George F. Carr, in relation to whom, he claims for the former, in addition to her share, that also distributed to the latter, being one sixty-fourth part of the ship, contending that the title to that portion never was transferred by a bill of sale from the administratrix, who claimed possession and a lien upon it, by way of a set-off of certain notes said to be due from George to herself, in her official capacity. But we have seen that the property passed without such formal transfer to George, by force of the specific distribution, and consequently the administratrix, at the date of the policy, had no insurable interest in that share. On the twenty-third day of December, then, the business relations between the administratrix and George were thus:— under the general decree, she stood indebted to George on her administration account in the sum of one thousand seventy-six dollars and twenty-two cents, less the sum of five hundred eighty-two dollars and fifty cents, the appraised value of his distributed share in the ship, leaving a balance in her hands to be accounted for in money, of four hundred and ninety-three dollars and seventy-two cents. And, according to the rule promulgated in *Proctor* v. *Newhall*, before cited, so far as it regards the balance, the administratrix may have, perhaps, the right to a set-off, as claimed by the defendant, but which right creates no lien on George's

share in the ship, as to which she stands in the same relation to him as any other of his creditors.

This presents another inquiry. Was the one sixty-fourth insured for George? Otherwise, that portion of the policy was void as a wager policy, and the defendant has received the sum so insured in fraud of the insurance company. Hence arises a question of fact about which the evidence is somewhat conflicting, but, without enlarging upon this point, it may suffice to remark that, in our opinion, the testimony preponderates in favor of the conclusion that the insurance was obtained for George.

The next and only remaining question presented is, whether this action for money had and received can be maintained by the present plaintiff. It is proved that the ship was lost in the winter of 1857, and the amount insured paid to the defendant, in May following, and that George transferred his interest in the policy to the plaintiff on March 6th of the same year; so that the assignment was after the loss and before the payment.

The action is on *assumpsit*, to maintain which, on any count, there must be a promise, either express or implied. No express promise has been proved. Can a promise be implied?

It is said in *Mason* v. *Waite*, 17 Mass., 563, that, "as to any want of privity, or any implied promise, the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over." And, in *Hall* v. *Marston*, *ib.*, 579,—"whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right." Also, in *Rockefeller* v. *Robinson*, 17 Wend., 217,—"where the defendant has received money, which in equity and good conscience ought to be paid to the plaintiff, although nothing has passed between the parties." And, in *Eagle Bank* v. *Smith*, 5 Conn., 75, "a promise may be implied where there is no privity of con-

tract, as between the finder of money lost and the owner, who loses it." But, on an examination of those cases, which are among the strongest that can be cited for the plaintiff, it will be found that they in no way conflict with the well established rule that *choses in action*, except negotiable securities, are not assignable at law, so that the assignee can maintain an action in his own name. No such principle was there invoked. The Courts were considering cases where the plaintiffs claimed directly, and not through the medium of an assignment. And this brings us to the consideration of the nature of the plaintiff's demand in the present suit. The policy, when assigned, was not a *chose in action* against the defendant, but against the insurance company, and, if it had been enforced by a suit at law, it must have been by the defendant as the trustee of the several parties interested at the time of the institution of the suit. If A transfer to B a note not negotiable, which is committed to an attorney for collection, and a suit is to be brought, it must be in the name of A, but, when collected, the *chose in action* is by B, against the attorney; or, if collected without a suit, the relations would be the same. In all such cases the question arises, for whose benefit was the collection made? And the person receiving the money, whether as trustee or attorney, must be considered as receiving it to the use of the assignee, who became such, prior to its reception, and such relation creates a privity of contract and implies a promise. In such case, however, the trustee is justly entitled to avail himself of any equities, which may originate in his paying over to the wrong party, through the *laches* of the assignee, in not giving seasonable notice. And, if the defendant had paid to George the amount collected, before such notice, instead of paying it to a party who had no interest in the policy, he might have been justified.

It appears that the defendant held in his hands, after deducting the premium note and charges against the ship, as the plaintiff's proportion, the sum of five hundred and four dollars and ninety-eight cents, and, on default, judgment

must be rendered for that sum, with interest since the date of the writ. *Defendant defaulted.*

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

WOODBRIDGE CLIFFORD *& als. versus* THOMASTON MUT. INSURANCE COMPANY.

If a policy of insurance on a vessel expires while she is supposed to be on a voyage, and a second policy, for a different sum is taken, after the expiration of the first, there is, in this country, no rule of law which requires payment of that policy under which the vessel sailed, or was last heard from, in the absence of proof of the time of loss.

It is a question of fact for the jury to determine *when* a presumption of loss arises. So, also, in case of loss, the *time* it occurred.

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

THIS was an action of ASSUMPSIT, upon a policy of insurance in the sum of $2000 on one fourth of the brig Hesperus, for one year, from the 13th day of January, 1855, at noon. The plaintiffs are said Clifford, Elbridge Huff and James Chase;—the policy was to "W. Clifford and whom it concerns."

The brig sailed from Boston for the Lobos Islands—a voyage of thirty or forty days—on the 4th day of January, 1856, as the plaintiffs contend, or, on the ninth day of the same month, as is contended by the defendants, and was never heard of afterwards.

On the 26th day of January, 1856, said Clifford obtained from the defendants another policy upon *his* interest in the brig, for $1000 for one year from the 13th day of January, 1856, at noon; on which policy an action is pending, a suit having been instituted to save the limitation of the statute accepting the surrender of the defendant company.

Abandonment was duly made.

The question to be determined, is, under which policy the loss occurred. It was contended by the plaintiffs, that there

is a rule of law, which requires that policy to be paid, under which the vessel sailed, or was last heard of, in the absence of proof of the time of loss. The defendants contended the burden was upon the plaintiffs to show that the vessel was lost before noon of the 13th of January.

If the Court should be of the opinion, that, upon the facts reported, the defendants are liable in this action, they are to be defaulted; but if there is no such rule of law, as plaintiffs claim, and the defendant's liability is a question of fact for the jury, the action is to stand for trial.

M. H. Smith, for the plaintiffs.

"In the case of missing vessels the loss is presumed to have happened immediately after the date of the last news, so that if an insurance be for three months, and the vessel not being heard from, a further insurance is made for a year, and the vessel is never heard from, in that case the first insurer pays the loss." 3 Kent's Com., 301.

The law in France is the same. Boulay, Paty Droit Com., tom. 4, p. 248, ed. 1823.

The Guidon de la mer states that the assured "is to furnish valid attestation of the loss or capture, containing the hour and place where happened, *if it may be*. This expression, *if it may be*, decides the question against the insurer, so that if the assured cannot prove at what time the vessel has perished, it is to be presumed that the loss happened before the final term of the insurance."

Another question, stated by Emerigon:—"I have caused my vessel to be insured for three months, reckoning from the day of departure. Not having any news of her after this term, I effect second insurances. One year or two years pass away without its being known what has become of her. Shall the loss fall on the first insurers or on the second? I think that it should fall on the first, and that the second insurers are in the case of return of premiums. I rest on the example of the absent and I add that the second insurances do not cover the preceding ones, which conse-

quently remain in all their force, until the first insurers have shown that the disaster has happened after the time fixed by their policy.

"The question is then the same, whether the insurances on time have been repeated or have not been so, provided the epoch of the loss be absolutely unknown. This repetition of insurance is a fact foreign to the first insurance." Emerigon, translated by Meridith, p. 617, ed. of 1850.

Emerigon also states, pages 613, 614:—

"The vessel of which no news is heard during a certain time is presumed to be lost; it is a *legal presumption* that the vessel is lost, because *default of news* is viewed as a legitimate attestation of loss."

The question presented has never been decided in this State. When a principle of commercial law is unsettled, the rule adopted by other commercial nations, and especially by so old a nation as France, approved as it is in the United States by authority so high as that of Mr. Chancellor KENT, is worthy of respectful consideration, if indeed it should not be implicitly followed.

The rule as laid down by KENT and, as established in France, is one demanded by public policy, for reasons similar to those that caused the adoption of the rule deducting one-third new for old in the case of repairs. This is a positive rule, originating in the convenience of having a determinate and precise test in all cases, which, by its universality and uniformity, may render unnecessary inquiries into matters and circumstances necessarily uncertain, and which circumstances are rather calculated to perplex than elucidate. See *Smith* v. *Bell*, 2 Caines Cases in Error, 157.

In the case at bar the vessel was never heard from after sailing, hence it is impossible to prove anything about her directly. She may have been lost by foundering at sea, by fire, by lightning, by a sudden squall, (and in no violent or long protracted tempest,) or from other causes, the existence of which could be known only in her immediate vicinity. The circumstances to be proved as contended for by defend-

ants — as of the weather, &c., — are of a most uncertain and unsatisfactory character; the case at bar in effect finding that no positive proof of loss can be produced.

The rule of deducting one third new for old has been adopted on the ground of public policy, and to prevent a multiplicity of suits, although by its application an exactly correct result can never be arrived at, and in many cases the result may be very far from correct; and although the value of the old and of the new is capable of being proved, while in the case at bar the *time* of the loss is not capable of being proved, nor is the *loss itself* capable of proof except as a legal presumption arising solely from lapse of time, and not from weather, storms, &c.

If the ruling contended for by defendants is adopted, in every instance of a missing vessel insured when last heard of, a trial must be had to establish the fact of the *time* of loss, and the fact that there are two policies does not alter it. If this rule be adopted, if there had been no second policy, the plaintiffs in the case at bar must prove the vessel lost before the expiration of the first policy, or he could not recover, although the vessel had not been heard from for any number of years.

In the case at bar the ship has not been heard of for a sufficient time to raise the legal presumption of loss, and abandonment has been duly made, as the case finds (abandonment, however, was not necessary, and so it is decided,) plaintiffs may go to the jury in this case, which has no necessary connection with the suit on the second policy, nor is that suit now before this Court, the uncertain circumstances about weather, &c., that each party may be able to prove to the jury, may not satisfy them that the plaintiffs have proved the loss to have happened before the expiration of this policy, the onus of doing which defendants contend to be on the plaintiffs, and the defendants may recover a verdict in this suit.

Then upon a trial of the suit upon the second policy, the plaintiffs may not be able to prove such circumstances as to

the weather, &c., as to satisfy the jury that they have proved the loss to have happened after the expiration of the first, and after the commencement of the second policy, and plaintiffs may lose the suit on that policy, and thus by establishing a rule that plaintiffs must prove not only that the ship is lost, (which loss is a presumption of law after a certain length of time of absence without being heard from,) but also the time of loss, the disastrous result may well be arrived at, that a party insured, although he constantly keeps an insurance on his ship, each policy of insurance taking effect at the moment the one before it expires, may not be able to prove enough to authorize a jury to find a loss in a suit on any one particular policy, although the ship may have been unheard of for any number of years, and without any fault of his own, he may lose both ship and insurance, though constantly insured; and, if his policies should happen to be in different offices he could not unite them in one suit, nor in such case would the verdict in one suit be evidence admissible on the trial of any other, and this disastrous result might also be arrived at, if defendants should be allowed to introduce evidence of circumstances, as the weather, &c., to rebut the legal presumption of loss. If the only mode by which a loss could occur, such as would render insurers liable, was by a violent storm extending so far that its existence must be known to some one by whom it could be proved, there would be more reason for the rule contended for by defendants; but this is only one among many possible modes of loss. A vessel may be lost by sudden springing of a leak in pleasant weather, by lightning, by fire, by a water-spout, by collision where both colliding vessels are lost with all on board, by a sudden squall of limited extent and short duration, by striking a ledge or rock the first day out, which resulted in her sinking that day or the next with the loss of all hands. There are many modes of loss in case of a ship not heard from, of the time of which loss no proof could be had, because the same proof that would establish such a loss, would also establish

the existence of the ship at time of loss, and she would be heard from.

The circumstances which defendants claim should or may be proved, only tend to prove that the vessel may or may not have probably been lost in some tempest or storm of sufficient duration and extent to be known at a distance from her, or, that as there was no storm known of that character, while she was under the first policy, she probably was not lost by any such storm. *But these circumstances do not in the least degree tend to prove that she might not have been lost, even the very day she was last heard of, by some one of the accidents above named, and it will be readily perceived that of such accidents no proof could possibly be had, without at same time proving the existence of the ship at time of the accident, and then she would not be a vessel of which there was no news.* And it would seem that, the legal presumption of loss existing, defendants should not be allowed to attempt to rebut the effect of that presumption, when it is self-evident that it is in the nature of things impossible to introduce any evidence tending even to prove that she was not lost before the policy expired, by some one of the great majority of the usual causes of loss. In the case at bar, the brig insured sailed from Boston either on the 4th or 9th day of January, 1856; the policy sued in this case expired January 13th, 1856. This policy was on her nine days, as plaintiffs contend, but at least four days, as defendants admit; within these nine or four days she may have been from 600 to 1300 miles distant from Boston, allowing her to have had only a six knot breeze.

Suppose, for the sake of the argument, that defendants could prove, with mathematical certainty, that she was not lost on or before the 13th day of January, 1856, by any storm or stress of weather (instead of only being able to introduce certain circumstances tending to prove this, which is all they claim to be able to do,) would such certain evidence in the least *tend* to prove that she was not lost by some one of the many other causes above named, and so

long as it is possible that an insured vessel, not heard from, may have been lost within the time covered by policy of insurance, by any cause which would render the insurer liable, but which cause could not possibly be proved without at same time proving existence of the vessel at time of loss, does it not follow by the most strict rules of logic that defendants shall not be allowed to rebut the legal presumption of loss, arising from lapse of time since heard from, by introducing testimony tending to show that she probably was not lost by some one or more of many possible modes of loss, they not contending that it was possible to introduce testimony even tending to show that there might not have been a loss occasioned by many of the causes, and indeed by a majority of the causes, that usually occasion loss. The impossibility of doing this in many instances is perfectly apparent.

Defendants should be able to prove that the loss of the brig could not possibly have been occasioned within the time covered by the first policy, by any cause of such a character as would render the insurers liable. To do this is *impossible;* therefore plaintiffs should have judgment.

To use the form of expression before quoted from the Guidon de la mer, the time of loss is to be proved "*if it may be*," and as is there stated, this "*if it may be* decides the question against the insurer."

If it were possible for the insured to prove the exact time of loss, he would be obliged so to do, he taking the onus probandi.

If it were possible for the insurers to prove, or even to produce testimony tending to prove that the vessel was not lost within the time covered by the policy, by any peril for which insurers would be liable, they would be allowed to prove it.

As both these propositions involve an impossibility, it may not be, and the proposed testimony as to time of loss is neither demanded nor to be allowed.

It will be noticed that the proof of loss when a vessel is not heard from, does not depend in any degree upon evi-

dence of storms, weather, &c., or of any such circumstances, which may or may not tend to show a loss by storms, or in any other way, at *any* time, but it is a legal presumption of loss arising *solely* from *lapse of time* since the vessel was last heard from.

Different rules have been adopted by different commercial countries, as to what length of time a vessel must be at sea and not heard from, in order to raise a legal presumption of loss. In Spain, if on a voyage to the East Indies, this time is a year and a half. In France, the time is one year on common voyages, and two years on distant voyages.

Emerigon states, p. 615,—"It suffices that after one year or two, the assured declares that there are no news of his vessel, to entitle him to claim payment, unless the insurers prove the contrary." It is evident that this proof of the contrary, the *onus* of which is on the insurers, must be proof of being heard from, not proof of weather, season, &c., as contended for by defendants.

In England and the United States, no certain time is fixed when a missing vessel shall be presumed to be lost. Phillips on Insurance, vol. 2, page 661, states the rule to be, "A vessel not heard from for some while after *reasonable time* for intelligence, is presumed to have been lost by perils of the sea."

It will be perceived that the presumption of loss depends upon *time alone* since heard from—either one and a half years, as in Spain, one or two years, as in France, or a reasonable time, as in England and the United States. How long a time would be a *reasonable time*, within which a vessel must be heard from, would of course depend much upon the length of her intended voyage. In the case at bar, defendants do not contend but that sufficient time had elapsed before the commencement of this suit, to raise the legal presumption of a loss of the brig. Nor can they contend that the law requires any further or other proof than of the lapse of time since heard from, to establish the loss, and it would seem that the loss being admitted, they should not be al-

lowed to say to plaintiffs in this suit, in addition to proof of loss by the legal presumption—you must also prove that the loss took place before January 13, 1856, to entitle you to recover. If defendants can take this position, what is the propriety, or what the use of proving the lapse of time since the vessel was heard from?

Such a position would in fact militate with and abrogate the principle that lapse of a reasonable time, since the vessel was heard from, proves the loss. This rule is well established, but of what benefit is it to the assured if he is also obliged to prove *when* the loss occurred, to entitle him to recover—or, if not exactly the *day* when, in the case at bar, that it occurred within the four or nine days before January 14, 1856, being a very small portion of the time necessary to raise the implication of loss.

The ruling contended for by defendants also contradicts Mr. Chancellor KENT'S statement of the rule, which is, that the loss is presumed to have happened immediately after the date of the last news.

It is much better to have a well established rule, preventing multiplicity of suits, rather than to leave each case to be settled upon a nice balancing of remote and uncertain circumstances and possible contingencies, when it is evident from the facts admitted, that no direct proof can be had, nor can any evidence be had of the most numerous class of causes which may have occasioned the loss—and this, too, when it may be, that although there is no doubt, by reason of lapse of time, that a ship is lost while under some one of many policies, it may be utterly impossible to prove any such circumstances as would authorize a verdict that she was lost within the time covered by any one insurance.

When a defendant admits that a fact is incapable of proof, we contend that he should not be allowed to attempt to prove it; nor should he be allowed to throw upon the plaintiff the *onus* of proving it.

In the case at bar, the insured vessel was known to be in existence when the first policy, being the one sued in this

case, was issued. The second policy, alluded to in the report of the facts in this case, but which is not included in this suit, was applied for January 26, 1856, and is dated January 28, 1856, and is for one year from January 13, 1856, at noon. The plaintiffs, therefore, can prove that the brig insured had an existence when the first policy attached, and that they had an insurable interest in her when she was insured—and then proving that she has not been heard from for a reasonable length of time, which is admitted, they make out their case and should recover. The brig had not been heard from since the 4th or 9th day of January, 1856; this was either four or nine days before the second policy attached, if it ever did attach, and nineteen or twenty-four days before its date, and it is impossible for plaintiffs to prove that the vessel had any existence, or that they had any insurable interest in her, either on the 28th or on the 13th day of January, 1856. In this particular it differs from a case where a second policy is taken out while the vessel is in port, or known to be in existence, which policy is to take effect at a future time when a prior policy will expire, and the vessel sails before the expiration of the first policy, and is never heard from after, of which character may be found one or two exceptional cases, but none in this State. The difference is, that in the cases supposed the second insurance was agreed upon and the second policy issued, while the vessel was in port.

I would call the attention of the Court to the fact, that the first policy in the case at bar is for $2000 on one quarter of the brig for Woodbridge Clifford and whom it may concern, being as the writ shows, Elbridge Huff and James Chase. The second policy is only on one-eighth of the brig, and is for $1000 only, and for Woodbridge Clifford alone, so that there is no second policy on one of the eighths of the brig which is included in the first policy; and the second policy is in no sense a renewal of the first policy.

It is, I contend, wholly immaterial in the decision of this case, whether or not there was any second policy; but

should the Court be of the opinion that this makes any difference, it will be seen that as to $1000, and as to one-eighth of the brig, there was no second insurance, and that Elbridge Huff and James Chase, two of the plaintiffs in this suit, had no second insurance on their interest in the brig.

The rule contended for by plaintiffs is in accordance with right reason and sound logic, and is demanded by public policy as preventing a multiplicity of suits, and setting at rest a question of doubt and uncertainty.

Gould, for the defendants.

This case is now presented to ascertain upon what principles the trial of it should proceed. Is there any rule of law which will determine it? Is proof of usage admissible to control it? Is there any presumption of loss in the case of missing vessels, and, if so, when will it arise? Is there anything which takes the case out of the general rule, that the burden is upon the plaintiff, to prove that the loss took place within the life of the policy? If not, what proof may be regarded as sufficient to authorize a jury to find a loss?

"When a missing vessel shall be presumed to have perished by perils of the sea depends upon circumstances, and there is no precise time fixed by the English law." 3 Kent's Com., 301. See, also, 2 Arnould's Ins., 793–4; *Greene* v. *Brown*, 2 Strange, 1199; *Houstman* v. *Thornton*, Holt's N. P., 242; *Newley* v. *Reed*, cited in Marshall's Ins., 490; *Koster* v. *Reed*, 6 Barn. & Cres., 19; *Brown & al.* v. *Neilson & al.*, 1 Caines, 525; *Gordon* v. *Brown*, 2 Johns., 150; *Paddock* v. *Franklin Ins. Co.*, 11 Pick., 237; *Cohen* v. *Hinkley*, 2 Camp., 51; 2 Greenl. Ev., § 386; 3 Starkie's Ev., 1165–6; Parks' Ins., (7th ed.,) 106; 2 Phillips' Ins., 465, (ed. of 1834.)

But all the cases furnish no definite aid in this case. No presumption of loss could arise from *lapse of time*, the policy having but four days to run, when the vessel sailed on a voyage of thirty or forty days, and, so far as is known, no such storm occurred during the first of the voyage, as to

render it *reasonably certain* that the vessel was lost during the life of the policy.

What will the jury be authorized to do? In *Coles* v. *Mar. Ins. Co.*, 3 Wash., C. C. R., 161, it is said that, "it is not enough for the assured to prove that there was a storm, or any other peril encountered by the ship during the voyage, but he must also show that the loss was caused thereby." See also, *Coffin* v. *Phœnix Ins. Co.*, 15 Pick. 291.

KENT, as cited by plaintiffs, is simply stating a rule of *foreign law*, (French,) while he expressly states that no such rule obtains in England or in this country.

The question is not, whether the vessel is lost, but was she lost within the life of the policy?

The present lapse of time, is, undoubtedly, sufficient to raise the presumption of loss; but did the lapse of *four days* after the vessel sailed, raise the presumption that she was lost within the life of the policy?

The opinion of the Court was drawn up by

MAY, J. — Insurance, for $2000, was effected by the plaintiffs, in the defendant company, by a policy upon one-fourth of the brig Hesperus for one year from the 13th day of January, 1855, at noon, upon which policy this action is brought. The brig sailed from Boston for the Lobos Islands not more than nine days before the expiration of said policy, the voyage, ordinarily, requiring from thirty to forty days, and has not been heard from since her departure. Subsequently, Woodbridge Clifford, one of the plaintiffs, effected another insurance in the same company, upon one-eighth of said brig, the risk commencing at the termination of the first policy.

It is conceded by the defendants that the brig had been missing for a period of time, sufficiently long to raise the presumption of her loss prior to the commencement of this suit; and the only question now raised, is, whether the common law which prevails in this State, has any fixed rule

by which the loss, in case of missing vessels, is to be presumed as having occurred immediately after the date of the last news, so that the loss must fall under the policy then in force, without regard to any evidence offered touching the state of the weather after sailing, the dangers of the voyage in its various parts, the season of the year, and other circumstances tending to show when the loss probably occurred. It is contended for the plaintiff, that such is the law.

The authorities cited by the counsel for the plaintiffs, in his very able argument upon the question presented, clearly show that the rule he contends for is the law of France; and the reasons which he presents, as tending to show the propriety and necessity of the rule, are not without great force. It appears, however, that this rule as stated by Emerigon, and other distinguished foreign writers, had its origin, not in the common law, but in an ancient ordinance of the French government. So, too, the same government, as well as Spain and, perhaps, some other European States, has its fixed rule as to what length of time a vessel must be at sea, without being heard from, in order to raise a presumption of loss. The time, however, differs in different countries and in different voyages. The commercial policy of each of the governments referred to, has, however, made the rule as to time, when a presumption of loss shall arise, absolute in each particular case.

No case has been cited, in this country or from England, in which it has been held that the common law has any *fixed time* within which the loss of a missing vessel, unheard from, is to be presumed, and, when presumed from the facts and circumstances of the case, no case is found fixing the precise time of the loss or that it occurred immediately after the latest news. On the contrary all the cases, so far as any have been cited or examined, show that the question *when* a presumption of loss arises, is a question of fact for the jury, to be determined in view of all the facts and circumstances in the case; and, when a presumption of loss

has arisen, the question as to the *precise time* when it occurred, is to be determined in the same way.

In the case of *Brown & al.* v. *Nielson & al.*, 1 Caines, 525, cited in defence, it appears that the missing vessel sailed from Norfolk, Va., for New York, March 4, 1801, the policy expiring the 28th of the same month; and the question, whether the loss happened within the life of the policy, was submitted to the jury under instructions from the presiding Judge, that they must determine the *time of the loss* from the evidence in the case, and this instruction was held to be correct.

In Arnould on Insurance, vol. 2, (Perkins' 2d ed.,) p. 797, the author, after stating the rule in France to be that, in the case of a missing ship, the loss will be presumed to have happened immediately after the last news, says that, "in our law *no fixed periods* are established after which a ship not heard of shall be deemed to have perished at sea, but each case is left to depend on its own circumstances and the judgment of practical men." As no authority is cited to the contrary from any court of common law, it may well be presumed that Chancellor KENT, in the extract cited from his Commentaries, vol. 3, page 301, had reference to the French rule before referred to; but, if it is not so, he is unsustained by any respectable authority. From the authorities which have been cited, and many others that might be, we have no hesitancy in coming to the conclusion that no such rule exists at common law as that for which the counsel for the plaintiffs contends.

It may not, however, be needless to remark, that the conclusion to which we have arrived is greatly strengthened by the decided cases in regard to the precise time of the death of a person, who has been absent from the place of his residence for seven years or more, without being heard from. The cases are uniform that, although the presumption of his death arises at the end of seven years, yet there is no presumption of law as to what precise time it occurred, and the time of his death is to be determined by a jury, upon the

circumstances of the case. See 1 Greenl. Ev., § 41, note 3, and cases there cited. In one of which, that of *Doe* v. *Nepean*, 5 B. & Ad., 86, it appears that the person, the time of whose death came in question, was last known to have sailed in a vessel which was never heard from, and yet the Court held that the precise time of his death was for the jury, upon the facts in the case. In this case, in the absence of all other facts, there could have been no reasonable doubt that the death of the person in question, and the loss of the vessel in which he sailed, were simultaneous, and yet no such rule as is now urged, was contended for. See, also, *Eagle* v. *Emmet*, 4 Brad., 117; *Spencer* v. *Roper*, 13 Iredell, 333. This class of cases are so analogous to the question before us, that no reason is perceived why the same rule should not apply to both classes of cases.

The question, as to the admissibility of proof to show an existing usage among insurance offices, in the case of missing vessels, to presume that the loss took place immediately after the last news, though somewhat discussed by the counsel for the plaintiffs, is not before us, and therefore is not considered. The result is, that, according to the agreement of the parties, the case is to stand for trial.

Action to stand for trial.

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

FREDERICK CASTNER *versus* WILLIAM SLATER *& al.*

Where A had agreed in writing to pay the debt of another, and B, in a postscript, subscribed by him, added, "I will be accountable with A, according to the above writing," an action lies against both as joint contractors.

The discontinuance of an action, by the plaintiff, against the debtor, and another as his trustee, in which there was a reasonable prospect of charging the trustee, was a sufficient consideration for the promise.

By the terms of the contract, the plaintiff was to be paid, when the debtor received his money, in the hands of the trustee. The trustee afterwards, with the debtor's consent, gave his promissory note to a third person, and took the debtor's receipt for the money: — *and it was held*, that, in legal contemplation, this was a payment to the debtor, by which the defendants' promise became absolute.

REPORTED from *Nisi Prius* by GOODENOW, J.

THIS was an action of ASSUMPSIT upon a contract which is described in the opinion of the Court.

The facts in the case are fully stated in the opinion.

S. S. Marble, for the plaintiff.

Gould, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—It appears that the plaintiff, having an unsatisfied judgment against one *Samuel Stickney*, on May 17, 1854, employed *A. P. Oakes*, an attorney at law, to commence a suit thereon against him and *John H. Kennedy, Esq.*, as his trustee; that, after due service and, while the suit was pending, viz., on August 5, 1854, *Slater*, one of the defendants, gave to *Oakes* the following memorandum, to wit:—

"Mr. Oakes, Sir:—I will be accountable to Mr. Castner for the amount of the execution in his favor v. Samuel Stickney, and will pay the same whenever Stickney's money is paid to him from Mr. Kennedy." To this is added a postscript by *Calvin Starret*, the other defendant, as follows:—

"Mr. Oakes, Sir:—I will be accountable with Mr. Slater

according to the above writing." Upon the reception of which, and in consideration thereof, the plaintiff's suit was discontinued.

It further appears that *Kennedy*, at the time service was made upon him as trustee, was the administrator of one *Jonathan Stickney*, deceased in 1850, leaving his father, *Samuel Stickney*, his sole heir; that *Kennedy*, in 1852, had received from the sale and earnings of the intestate's interest in the brig Denmark, between three and four hundred dollars; that, in 1856, he settled his administration account with the Judge of Probate, to whom he exhibited *Samuel Stickney's* receipt for the balance due after deducting his expenses, as a voucher; although the money was suffered to remain in his hands, he having given his note for the same to one *Christian Bornheimer*, who married *Samuel Stickney's* daughter; the note has never been paid, and there is no evidence that payment has ever been demanded.

In defence it is contended, *first*, that the memoranda, as signed by the defendants, do not constitute them joint promisors as alleged in the writ, but we think otherwise. *Slater* says:—"I will be accountable to Mr. Castner;" and *Starret* says:—"I will be accountable with Mr. Slater according to the above writing." If one man is accountable *with* another to perform a contract, it is difficult to perceive why they may not be legally considered as joint contractors. The legal effect of Starret's postscript is the same as if he had signed his name to the writing above, under Slater's, so far as it respects the plaintiff, who has declared accordingly.

In the *second* place, it is urged that there was no consideration for the promise. This point is entirely unsupported, because, upon the strength of that promise, the plaintiff discontinued his suit then pending against *Samuel Stickney* and his trustee, when, otherwise, he had a fair prospect of *ultimately* recovering his debt.

Thirdly, it is said that the agreement was to pay "whenever Stickney's money is paid to him from Mr. Kennedy," and that the money has never been so paid. The transac-

tions between *Stickney*, his son-in-law *Bornheimer*, and *Kennedy*, in relation to the funds in the hands of the latter, appear to have been an attempt to evade a legal responsibility; otherwise why should *Kennedy* give his note to the son and take the father's receipt as a voucher, and as such presented to and received by the Probate Judge in the settlement of his administration? But the reason assigned is, that the administrator was unwilling to pay the money over to the lawful heir, because he was an aged person and not capable of taking care of it; but, at the same time, he was willing to take his receipt acknowledging payment to him as conclusive evidence in the Probate Court of such fact. Such a reason, under all the circumstances, would seem to be more ostensible than real. The note given to the son instead of the money, with the consent of the father, as manifested by his receipt, was in legal contemplation a payment to the latter, and, on the happening of that event, the defendants' promise became absolute.

Defendants defaulted.

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

PRESIDENT, DIRECTORS & CO. OF NORTH BANK *versus* GEORGE W. BROWN *& Trustees.*

After the plaintiffs had commenced this action upon the notes declared on, they instituted another action, for the same cause, in another State, and caused personal service to be made on the defendant, who appeared and defended until judgment was rendered against him for the amount of the notes and for costs: — *and it was held* that the judgment thus rendered is a bar to their recovering in this suit.

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

THE material facts in the case appear from the opinion of the Court.

Ruggles, for the plaintiffs.

Gould and *Wm. Fessenden*, for the defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—This is an action against the defendant, as indorser of two negotiable promissory notes of hand. The defence is, that, after this suit was commenced, the plaintiffs caused another suit to be instituted in the State of New York, against the defendant for the same cause; that personal service was made upon him, and he appeared in court, answered to the action, and defended till judgment was rendered against him for the amount of the two notes declared, and for costs.

The doctrine is well established, that a judgment, between parties, both of whom are, and have been, resident in this State, of a Court having jurisdiction of the subject matter, of another of the United States, when personal service of the original writ was made on the defendant, who appeared in court, answered to the action and made defence, is valid and entitled to the same faith and credit that judgments rendered within our own jurisdiction are entitled to. *Bissell* v. *Briggs*, 9 Mass., 462; *Hall* v. *Williams*, 10 Maine, 278; *Hall & al.* v. *Williams & al.*, 6 Pick. 232; *Middlesex Bank* v. *Butman*, 29 Maine, 19; *Cleaves* v. *Lord*, 42 Maine, 290.

The plaintiffs instituted this suit on Jan. 11, 1858. And, on Jan. 21, 1858, they commenced a suit for the same cause, against the defendant, in New York, caused personal service to be made upon him, who appeared in court, answered to the action by counsel and defended the same till judgment was rendered, on August 14, 1858. No defence was made, on the ground of the pendency of the action in this State.

The question presented for our consideration is, whether the judgment, so obtained in the State of New York, was a nullity, or can be avoided, by proof that this action was

pending when the other was commenced and when judgment was rendered thereon.

It is hardly necessary to remark, that the facts, upon which it is insisted, for the plaintiffs, that the judgment is one which is void or can be avoided, not being in any manner made known to the Court in New York by them, during the pendency thereof, can have no effect by possibility to invalidate that judgment. It would certainly be a very novel mode of reversing a judgment rendered by a Court, having jurisdiction of the parties as well as the subject matter, and which the plaintiffs sought to obtain, and did obtain. If the pendency of the present action was known to the defendant at the time he had the right to file a plea in abatement for that cause, he could have done so, but, if he chose to waive that defence, the plaintiffs could not then or at this term complain, and invoke this waiver, to the prejudice of him. If they had not desired to prosecute that action to judgment, after it was commenced, they could at any moment have discontinued it.

That judgment must be treated as having every element, and all the effects of a judgment rendered within this State for the same cause, between the same parties. The contract upon which that judgment was recovered, is merged therein and extinguished thereby. It constitutes a new debt, having its first existence at the time it was rendered. *Holbrook* v. *Foss*, 27 Maine, 441; *Pike* v. *McDonald & al.*, 32 Maine, 418. An action may be maintained thereon in this State, and, if it should be treated as no bar to the present suit, the plaintiffs would have two judgments against the same defendant for the same cause of action.

Plaintiffs nonsuit.—Judgment for defendant.

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

STATE *versus* PLUMMER.

An indictment for perjury is fatally defective, from which it does not appear with certainty, that at the time the offence is charged, the tribunal, which administered the oath, and before which the testimony was given, had jurisdiction of the matter then on trial.

EXCEPTIONS from the ruling, *pro forma*, at *Nisi Prius*, of RICE, J.

THIS was an INDICTMENT for perjury, to which a general demurrer was filed, which was overruled, *pro forma*, by the presiding Judge, after joinder. The defendant excepted.

There were numerous causes of demurrer, relied on in the written arguments of *Gould* and *Hubbard*, for the defendant. *Drummond*, Attorney General, submitted the case on the argument furnished by the prosecuting officer for the county of Lincoln.

The case, so far as the Court found it necessary to consider it, will fully appear from their opinion, drawn up by

TENNEY, C. J.—Many defects in the indictment are relied upon, in the defendant's argument, as being sufficient to sustain the demurrer thereto. We propose to consider only one, as being decisive of the question presented.

R. S. of 1857, c. 122, § 1, defines the crime of perjury. There must be some proceeding, matter or thing, to which the oath was taken; and, by the common law, the indictment must set it forth so as to exhibit its character and the jurisdiction of it by the Court or magistrate. *State* v. *Hanson*, 39 Maine, 337; *State* v. *Thurstin*, 35 Maine, 205. It must appear with certainty, from the indictment, that, at the time of the false swearing alleged, the tribunal which administered the oath, and before which the testimony was given, had jurisdiction of the matter in the trial of which the offence is charged.

It is alleged in the indictment, that a certain action of debt had been brought and was pending in the Supreme

Judicial Court, &c., and which afterwards, to wit,—on the twenty-fifth day of April, in the year of our Lord, 1857, was depending and on trial before Samuel W. Jackson and Robert Murray, who had been appointed by said Supreme Judicial Court, referees, to hear and determine, &c., and who accepted the trust, &c., and that heretofore, to wit,—on the twenty-fifth day of March, in the year of our Lord, 1857, the said action being on trial, before said referees, at Damariscotta, &c., the said Plummer presented himself as a witness, &c, and was then and there duly and lawfully sworn in said cause, and took his corporal oath before the said referees, having jurisdiction of said action, that he would testify the truth, &c.

The twenty-fifth day of April, in the year of our Lord, 1857, is the earliest specified time alleged, that the action was depending and on trial before the referees, though it is stated, that they *had been appointed*, &c, with no indication of the time of such appointment. So far, the indictment fails to charge that the referees had jurisdiction of the action at the time a trial took place, and the oath was administered to the defendant in the manner required by the authorities cited.

It is suggested in the argument for the State, that if the time of "the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty-seven" should be stricken out, there may be sufficient allegations of jurisdiction in the referees, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven. The language, intended to show jurisdiction in the referees by an appointment by the Supreme Judicial Court, had relation to their power on April 25, 1857, to sit in the trial, and cannot be applied to March 25, 1857. The only allegation of jurisdiction of the referees over the matter, which was pending in the Supreme Judicial Court the day last named, is, "and took his corporal oath before said referees, having jurisdiction of said action." The words, "the twenty-fifth day of April, in the year of our Lord one

thousand eight hundred and fifty-seven," being stricken out, the indictment is fatally defective, according to doctrine of the adjudged cases, which have been cited.

Exceptions sustained.—Indictment adjudged bad.

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

WILLIAM F. STORER *& al. versus* GEORGE EATON.

If an agent neglects his directions, to insure a cargo shipped to him, and it arrives safely, although he would be liable to the owner for damages in case of loss, he cannot maintain an action against the owner for a premium on insurance.

REPORTED from *Nisi Prius* by CUTTING, J.

ASSUMPSIT to recover $48,18 premium on an alleged insurance of a cargo of lumber from St. John to Waldoboro'.

Plaintiffs offered to prove that defendant, who is a merchant in St. John, N. B., shipped to Waldoboro', where plaintiffs reside, a cargo of lumber consigned to plaintiffs. That when said vessel was ready for sea, defendant telegraphed to plaintiffs, who had, prior to that time, been his agents for the sale of lumber, to insure the cargo in some Marine Insurance Company.

Plaintiffs admit that they did not procure any insurance upon said cargo, and that it arrived safely at Waldoboro'. But they contend that they were liable to defendant for neglecting to insure, and thereby became themselves the insurers, and are entitled to the usual premium.

Kennedy, for the plaintiffs.

Gould, for the defendant.

The opinion of the Court was drawn up by

RICE, J.—The plaintiffs admit that it was their duty to

have procured insurance upon the cargo of the defendant, consigned to them, according to his instructions, and that they neglected so to do.

For such negligence, in case of loss, they would have been responsible to the defendant for all the losses sustained by want of insurance. Story's Agency, § 190.

But from such negligence no action could arise to them to recover the premium, for the reason that no contract of insurance existed between them and the defendant, either express or implied. 1 Duer on Ins., 61, c. 11.

On the contrary, in case of loss, they would have been liable to the defendant in damages for neglect of duty, to the full amount of the insurance which they should have effected for his benefit, less the premium. *De Tastett* v. *Cronsillut*, 2 Wash. C. C. R., 132. *Plaintiffs nonsuit.*

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

MARINERS' BANK *versus* SAMUEL J. SEWALL.

By an Act, accepting the surrender of the charter of a bank, its corporate powers were continued for a specified time, for the collection of debts then due the bank: — *Held*, that it was within the scope of its authority, to take a new note in payment of one then held by the bank, although the indorsers of the two notes were not the same.

REPORTED from *Nisi Prius*, TENNEY, C. J., presiding.

THIS was an action of ASSUMPSIT against the defendant as indorser of a promissory note.

Ingalls & Smith, for the plaintiffs.

R. K. Sewall, for the defendant.

The facts in the case sufficiently appear from the opinion of the Court, which was drawn up by

MAY, J. — It appears that prior to, and on the seventeenth

day of March, 1858, the plaintiffs held a note against R. K. Sewall, and Simeon Merrill, for the sum of $350. On that day the bank surrendered its charter, and the same was duly accepted by the State. See Special Laws of 1858, c. 207. This Act, § 2, also continued to the bank its corporate capacity for the term of three years from its date, with all the powers necessary for collecting the debts then due the corporation; selling and conveying its property, and finally closing its concerns. This time has been further extended by an Act passed in 1861, and has not yet expired. Special Laws of 1861.

On March 29, 1858, twelve days after the surrender of its charter, the bank took the note in suit in part payment of the note they held against R. K. Sewall and Merrill. The bank, within the scope of its authority to collect the debts due to them at the time its charter was surrendered, might well take the new note in part payment of the old one. The fact that the principal in the first note, procured the defendant to indorse the new note, instead of Merrill, does not take the transaction out of such authority. The transaction was manifestly an act done in the way of collecting the old debt. No unlawful purpose is to be presumed. All other grounds of defence are expressly waived, if any such exist. *Defendant defaulted.*

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

ELIZA M. GLEASON *versus* INHABITANTS OF BREMEN.

In an action against a town to recover for personal injuries occasioned by a defective highway, it must *affirmatively* appear, that ordinary care was exercised in passing over the highway; and if, on the whole testimony on this point, the weight of evidence is clearly against the plaintiff, a new trial will be granted.

Where the damages were assessed at $5525, which sum, in the opinion of the Court, exceeded the amount, for which the town should be held liable, although the injuries were serious, a new trial was granted.

THIS case was presented on defendants' motions to set aside the verdict, as being against law and the evidence; and that the damages assessed were excessive. The defendants subsequently filed an additional motion for a new trial on the ground of newly discovered evidence.

This was an action to recover for personal injuries, alleged to have been occasioned by a defective highway, in the defendant town. When the action was commenced, the plaintiff prosecuted it *by her next friend.*

The declaration in the writ alleges, that "the plaintiff, on the said twenty-fifth day of August, A. D., 1858, was necessarily passing along and upon said highway, riding in a chaise, using due and proper care, and possessed of a suitable and safe horse, harness and carriage; and, when at said point in said highway, [the defective place before described,] said chaise, by means of the said defects in said highway, struck its right wheel against said rock, and upset the chaise, and threw the plaintiff out upon the ground with great violence, by the force of which blow she was greatly bruised and injured; and, in the upsetting of said chaise, the fastenings of the boot thereof, or some other part of said chaise, to the plaintiff unknown, were forced into the lid and flesh surrounding the plaintiff's left eye, and by reason of the fall, as she was thrown upon the ground from the chaise, tore away the under eyelid and flesh surrounding said eye, and destroyed the lachrymal ducts thereof and the sac contain-

ing the lachrymal fluid of said eye, lacerated the ball of the eye, and greatly injured the sight of it, and destroyed or injured the muscles of the eye, so that the sight of it does not retain its natural location, whereby the eye is seriously and permanently injured; and cut, lacerated and bruised the plaintiff's head and face in various parts, by reason of which wounds and injuries the plaintiff at the time, and ever since hitherto, has suffered great bodily pain, has been compelled to submit to surgical operations and medical treatment; has been deprived of the use and benefit of the said eye, and is permanently disfigured, and permanently deprived of the use and benefit of said eye."

The case was tried before TENNEY, C. J. The jury assessed damages in the sum of $5525.

The evidence, as reported, upon the separate motions, is very voluminous. The facts in the case, so far as they relate to the points considered by the Court, will sufficiently appear in their opinion.

The motions were very fully argued by

Ruggles, for the defendants, in support of them, and by

Gould, for the plaintiff, *contra*.

The opinion of the Court was drawn up by

KENT, J.—The motion for a new trial on the ground of newly discovered evidence must be overruled. We are not satisfied that the proof offered sustains the allegations in the motion.

The defendants filed in due season a motion to set aside the verdict, on the grounds of excessive damages, and of its being against the weight of the evidence.

The damages are assessed in the verdict at five thousand, five hundred and twenty-five dollars.

The injuries were very serious, although they did not result in any loss of limb. The Court is satisfied on a full consideration of all the facts, bearing on this point of damages, that they are excessive and ought not to stand.

It is unnecessary to state minutely all the reasons which

lead to this conclusion. They may be found in the evidence as to the nature, extent and probable duration of the injury, and the large amount of the verdict.

The case is not one in which the Court deem it right or expedient to order a new trial, unless the plaintiff will remit a specified part of the amount of the verdict. The cause must be tried again without any expression of opinion on the part of the Court as to the exact amount of the damages; if the plaintiff, upon the evidence, shall be found entitled to any on the new trial.

If the Court should entertain any doubt of the propriety of setting aside the verdict on the ground of excessive damages, the defendants then urge that the verdict is clearly against evidence, on the point of ordinary care. This is undoubtedly an important point in the case. The law is clear and unquestioned, that the plaintiff must satisfy the jury, as an affirmative fact to be established by him as a necessary part of his case, that, at the time of the accident, the party, or, as in this case, the driver was in the exercise of ordinary care.

The evidence on this point is brief in comparison with the great mass of relevant and irrelevant testimony reported. The substance of it is contained in the testimony of the driver, Alphonso Robbins. The accident was caused by one wheel of the chaise passing over a rock on the side of the road, out of the usually travelled path, and causing the chaise to upset. The defect in the road relied upon is only that the space between the rock and a ledge on the other side of the way was too limited; that the road was too narrow, particularly as there was an angle or bend in the road at that spot. It is not contended that the travelled way was not sufficiently smooth to be safely passed. The rock over which the wheel passed was on the side of the road; whether placed there, as defendants contend, as a safeguard or railing against the danger of falling over the precipitous bank, or not, does not clearly appear. According to the testimony of Edwin Rose, introduced by plaintiff, the

rock is four feet across one way, and about three feet the other way. The top of the rock is about two feet higher than the part of the road where the wheels passed.

It is nearly perpendicular next to the road for about one foot, then it rounds off towards the top. When approached from the south it does not appear so high, as it does where the ground is worn away around it. It is about 14 inches higher on that side than the ground or bank on the side of the road. If the top of the rock is two feet from the wheel rut, the bank must rise ten inches from the road. The distance from the rock to the ledge opposite is seven feet. A traveller could not go safely more than 18 inches on to the ledge. This gives eight feet and one half as the width at that point. The wheels usually passed within about six inches of the rock.

The wheel of the chaise, in which the plaintiff was riding, is found on the top of this rock, or so high up on it, as to cause the chaise to upset. This unexplained would seem to indicate a want of ordinary care, and to call for proof to overcome the *prima facie* presumption of carelessness in the driver.

It was in the day time, the driver was acquainted with the road, and had passed over it a few hours before, and ordinary observation must have enabled him to see the portion of the rock and the ledge.

No part of the harness gave way. The horse was, according to the testimony, gentle and manageable, and obedient to the rein. No external cause operated to alarm the horse or driver. The rate at which he was traveling was moderate. Robbins, the driver, says that he "had a rein in each hand, and had them drawn up taut, and that there was no sudden sheering of the horse;" that he was "driving along carefully, paying no more attention to the road than he commonly did."

According to this testimony, if there was any want of care, it was in not observing the rock at all. He says that he did not see the rock before he struck it, but did observe

the ledge on the other side. But was he not bound to exercise that degree of observation that would inform him, if he did not remember from former observations, that the way was here narrow, with a turn in the road, and that it was incumbent on him to guide his horse between the rock and ledge with something more of care than was required in wider places? The slightest glance at the way, for this purpose, must have revealed this rock as well as the ledge, and if he had a tight rein in each hand, the horse could have been guided at once from the rock, if in his course he was tending towards it.

The traveller has duties as well as the town, and one of the most obvious is to use his eyes to see what is before him on the road or on its sides, which may require care in passing. If a rock, two or three feet in height, had fallen into the rut in which the wheels ordinarily passed, and had remained there after sufficient notice to the town, if a traveller passing after dark should run over it and be injured, the town might be liable to pay him his damages. But surely it would, to say the least, be *prima facie* evidence of want of care for such traveller to pass over it, in the day time, when there was sufficient room to pass it on either side. The town, in such a case, might well demand evidence of some sufficient excuse for the want of the most moderate degree of common care and observation. Is not the case still stronger when the rock is entirely outside of the travelled way, and there is sufficient room to pass without touching it? When the traveller with his horse and carriage is found out of the road, and driving over rocks or logs there deposited, he is clearly where he ought not to be, and unless he can prove in the first place that the rocks or logs unreasonably *straitened* or rendered the road unsafe, and in the second place, that he was thus outside notwithstanding the exercise of ordinary care and observation, he cannot recover damages against the town.

There was considerable evidence introduced by the defendants, tending to show that Robbins, soon after the acci-

dent, admitted that it was his carelessness that caused the injury. He says that he did not say this to these witnesses, but, that he did say, "that he run over the rock and they might call it carelessness or not." He now says that he thinks he was not careless. We do not regard these statements made to the witnesses, if established by satisfactory proof, as entitled to the same weight as the evidence of facts as they actually occurred. But a party, situated as this witness is, would be slow to admit that his conduct might be called "carelessness" by any one, if he was entirely free from any consciousness of having failed in this particular.

On a careful review of the whole evidence on this point, we are forced to the conviction, that the weight of evidence is clearly against the plaintiff, and, that for this cause, also, a new trial should be granted.

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

NANCY FORD *versus* CHRISTOPHER ERSKINE.

In an action for dower in woodland, if the demandant fails to show that the woodland is, in some way, connected with improved land in which she is dowable, so as to give her the right to take the wood therefrom, and that it is necessary that she should have and exercise that right, the action will not be sustained.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of DOWER. The principal question in controversy was, whether the premises, at the time the demandant's husband alienated them, were of the description which is subject to the claim of dower.

From the report of the case these facts appear; that the demandant became the wife of William Ford in the year 1817, at which time he was seized of a homestead farm containing about 250 acres, some portion of which had been cleared; that, in the year 1819, he sold and conveyed a

part of this farm, about 75 acres, in one parcel, which, some years afterwards, the defendant purchased of Ford's grantee. This parcel was then divided into three lots, by the defendant's selling the middlemost piece, containing fifteen acres. The two other lots, one of twenty and the other of forty acres, are the premises in which dower is claimed in this action.

Nathan Ford, a brother of said William, testified, in substance, that he has known the premises from boyhood — worked on them both before and after his brother was married to the demandant; that the seventy-five acres were improved and occupied by his brother before he sold them; the cultivation was of the twenty acre piece, which was fenced; the forty acre and fifteen acre lots were used by his brother as a wood lot in connection with his farm; that, after the sale of the seventy-five acres, his brother had an abundance of woodland left.

Ingalls & Smith, for the demandant.

The R. S. of 1841, c. 95, §§ 1 and 2, (R. S. of 1857, c. 103, §§ 1 and 2,) established a plain and simple rule to govern the rights of dower. The decisions, before the enactment of that statute, if not contradictory, laid down rules of so uncertain application, that an investigation of the facts in each case became necessary, before the question of dower could be determined. See *Conner* v. *Sheppard*, 15 Mass., 164; *White* v. *Willis*, 7 Pick., 143; *Kuhn* v. *Kaler*, 14 Maine, 409.

The statute is plain and explicit; is subject to no condition as to the quantity of woodland retained after the alienation by the husband. It provides that the widow shall not be barred of her right of dower in any woodland or other land used with the farm or dwellinghouse. Whether or not such lot was used with the farm would be a question that could be easily determined; but whether or not, in case of an alienation by the husband, he retained sufficient woodland, would be a matter of opinion, about which wit-

nesses might differ, and where the transaction was remote, might be attended with expensive litigation.

The demandant's right of dower in one piece is not controverted. Upon the authority of decided cases she should have dower in the other piece. At the time of the sale by her husband, both parcels, with another piece, sold out of the middle of the original tract by the grantee, constituted *one lot*. As one lot, her husband conveyed it. Dower is to be assigned, as if no part of the original tract had been sold, and dower was now claimed in the whole, as *one lot*. The right of dower depends upon the condition of *the entire estate*, at the time of the husband's seizin, and not upon the condition of the separate parcels of it, into which the immediate or subsequent grantees may have divided it.

A part of the lot, when alienated, was cultivated and enclosed; another part was woodland and not enclosed. A portion of the lot being then improved land, the widow is dowable in the entire lot. *Mosher* v. *Mosher*, 15 Maine, 371; *Stevens* v. *Owen*, 25 Maine, 94.

J. M. Carlton, for the tenant.

The opinion of the Court was drawn up by

Rice, J.—This is an action of dower. The marriage of the demandant, death of the husband, and seizure of the estate by him during coverture are admitted, as is, also, the fact that a demand for the assignment of dower has been made in due form. The only question presented is, whether the estate in which dower is demanded is, or was at the time of its alienation, of such character as to entitle the demandant to dower therein. The estate demanded, now consists of two parcels, one of which contains about twenty acres, of which ten, or thereabouts, was cultivated or meadow land, at the time the husband of the demandant conveyed the same. In this parcel the demandant is clearly entitled to have her dower assigned.

The other parcel consists of about forty acres of woodland, which, as the evidence shows, was before and at the

time of the conveyance by the demandant's husband, occupied by him, with other woodland, as a wood lot connected with his homestead, but was open and unenclosed. It also appears that, after this was conveyed, there was an abundance of woodland remaining for the ordinary uses of the homestead.

The R. S., c. 103, § 2, provides that a widow shall not be endowed of wild lands of which her husband died seized; nor of wild lands conveyed by him, though afterwards cleared; but she shall be in any wood lot or other land used with the farm or dwellinghouse, though not cleared. This has long been the settled law of this State and of Massachusetts. *Mosher* v. *Mosher*, 15 Maine, 371; *Conner* v. *Shepherd*, 15 Mass., 164; *Webb* v. *Townsend*, 1 Pick., 21; *White* v. *Willis*, 7 Pick., 143.

The reason for this rule is, that dower being an estate for life only, woodland can be of no practicable value to the tenant in dower, as it cannot be improved nor the wood cut off by her without liability for waste. As to woodland connected with the improved land, a different rule prevails, as in such case she would be entitled to wood necessary for fuel and for repairs of buildings, fences, &c. But, to be entitled to these rights, it must appear that she is dowable in an estate of which the woodland is part, on which there are buildings or fences, &c., to be repaired or supplied with fuel. *Fuller* v. *Wasson*, 7 N. H., 341.

It not appearing that the forty acre piece is in any way connected with any improved land in which the demandant is dowable, so as to give her a right to take wood from the same, and it not appearing that there is any necessity that she should have and exercise that right to take wood from this forty acre piece, she fails in that part of her case. *Kuhn* v. *Kaler*, 14 Maine, 409.

Judgment must be for demandant as per agreement of parties.

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

JOSEPH W. NEWBERT *versus* THOMAS CUNNINGHAM.

Until the rendition of judgment in an original suit, the attorney's lien does not attach; but when judgment has been obtained, an execution issued, and the lien has attached thereto, it extends to suits arising from, and incidental to the enforcement of the judgment.

In a replevin suit, in which judgment has been rendered for the defendant, the attorney has a lien on the execution in his hands, which issued thereon; and, *to the extent of the lien*, is to be regarded as an equitable assignee, with rights, co-extensive with those of his client, to any remedial suit to obtain satisfaction of the same.

The right to enforce the replevin bond arises from the judgment, for by enforcing it the judgment is made available; and the attorney, as an equitable assignee, has a right to enforce it, to the extent of his lien, which the obligee in the bond cannot defeat.

If the execution recovered against the makers of the bond cannot be collected or satisfied by reason of their insolvency, the officer will be liable for taking a bond with insufficient sureties, to the person to whose benefit, the bond, if good, would accrue.

And the attorney has the right to prosecute such action, in the name of the defendant in the replevin suit, to whom the bond was made; and his settlement with, and discharge of, the officer, will not defeat the attorney's right to recover.

The right of action against the officer does not accrue till after the lien of the attorney becomes perfected by the rendition of judgment in the replevin suit; and the statute of limitation in such case, does not, till then, commence to run.

If the judgment, in the first suit, is for costs only, the execution is a notice of the attorney's lien. But, in this State, the statute does not require the attorney to give notice that he claims his lien.

The attorney's lien extends only to such professional services as are taxed and included in the execution.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an action of the CASE, against the late sheriff of the county of Lincoln, for taking an insufficient replevin bond by one of his deputies.

Gould & Robinson, for the plaintiff in interest.

Bulfinch, for the defendant.

The material facts in the case appear in the opinion of the Court, which was drawn up by

APPLETON, C. J.—It appears, from the evidence in the case, that Philip Newbert commenced an action of replevin against Joseph W. Newbert, in which the defendant recovered judgment and for a return. The execution issuing thereon being returned unsatisfied, the present plaintiff commenced a suit on the replevin bond against Philip Newbert *& al.*, in which judgment was rendered in his favor. Philip Newbert and the surety on his bond being insolvent, this suit was commenced against the late sheriff of this county, for the default of one Cole, his deputy, in not taking a sufficient replevin bond. Since its commencement Cole has settled with the plaintiff of record and procured from him a discharge.

The replevin suit was defended and that on the replevin bond prosecuted, till final judgment was rendered in each case, by A. P. Gould, Esq., an attorney of this Court, who, having a lien on the judgments obtained in the above actions, claims by force thereof, and as assignee, to control this action and defeat the discharge the defendant has obtained.

The attorney has a lien on all papers of his client which come into his hands, which may be enforced by the retention thereof, until such lien is satisfied.

An attorney's lien does not attach in a suit until the rendition of judgment therein. But this principle applies only in the first instance. When judgment has been obtained, an execution issued and the lien has attached thereto, it extends to suits arising from and incidental to the enforcement of the judgment. Were it not so, the lien would obviously be of slight value.

Judgment, then, having been rendered in favor of the defendant in the replevin suit, the attorney, having in his hands the execution which issued, had a lien thereon. To the extent of such lien he is to be regarded as an equitable assignee, and, as such, entitled to the protection of the law

in the enforcement of his claims. To that extent his rights of action are co-extensive with those of his client. In *Martin* v. *Hawkes*, 15 Johns., 405, the attorney had a lien on a judgment recovered for his costs. The execution was placed in the sheriff's hands for collection, who voluntarily suffered the debtor to escape. The attorney brought an action for the escape against the sheriff, in the name of his client. It was held that the sheriff could not avail himself of a release from the original plaintiff in bar of the action, such release being a fraud upon the attorney, as it was executed with notice to all parties of his lien for costs. In *Wilkins* v. *Batterman*, 4 Barb., 48, a party was committed to jail upon a *ca. sa.*, which showed upon its face that the judgment was for costs alone. It was there held that this was notice to the sheriff of that fact, and that such judgment equitably belonged to the attorney; and that a permission given by the party in whose favor the judgment was recovered, to the prisoner to go at large beyond the jail liberties, was unauthorized and was no defence to an action brought against the sheriff for an escape. "An attorney," remarks PAIGE, J., "has a lien on a judgment recovered by him, for his costs. He is equitably entitled to the costs, as a compensation for his labor and expense of prosecuting or defending the suit. He is regarded as an assignee of the judgment, to the extent of the costs included therein." These views received the full sanction of this Court, in *Hobson* v. *Watson*, 34 Maine, 20, which was debt upon a poor debtor's bond, which the plaintiff claimed a right to discharge and thus defeat the lien of the attorney on the judgment he had aided in procuring; but the Court held that this lien was an ownership in the judgment, and of the same effect as if created by an assignment thereof for collateral security; and that the attorney was entitled to the use of all the remedies for the enforcement of his execution. "The debtor," observes WELLS, J., "has the right, without the consent of the creditor, to give a bond to release himself from arrest in execution. It does not depend upon the will of the cred-

itor. It is a legal incident attached to the judgment and execution. The creditor is compensated by the bond for the liberation of the debtor. The bond belongs to the owner of the judgment. If the whole amount due upon the judgment was costs upon which the attorney had a lien, would not he be entitled to the control of the bond? It would be his property in equity, and he would have a right to use the name of the nominal party in a suit upon it."

The statute of this State does not require the attorney to give notice of his intention to rely on his lien to render it available against the discharge of the creditor. *Gammon* v. *Chandler*, 30 Maine, 152; *Hobson* v. *Watson*, 34 Maine, 20. If notice were necessary, it would seem that the defendant is to be deemed as affected therewith. "In the present case," observes PAIGE, J., in *Wilkins* v. *Batterman*, "it appears on the face of the *ca. sa.*, that the judgment was for costs alone. This was notice to the sheriff of that fact. Wilkins and Baker, the parties to the suit, must have had full knowledge of this fact. The parties, as well as the sheriff must have known that the judgment, being for costs alone, equitably belonged to the attorneys of Wilkins." In this case, notice of the lien was likewise proved, and its existence was inferrible from the suit itself, which could only be brought by a successful defendant in replevin.

The attorney, being regarded as an equitable assignee of the judgment, has a right to the same remedial processes as his client to obtain satisfaction to the extent of his lien.

The replevin bond is a substitute for the property replevied and a security for the damages and costs arising in the prosecution of the suit. The right to enforce it is one of the fruits of the judgment. It accrues after its rendition. It is by its enforcement that the judgment is made available. The attorney, as incidental to the judgment, has a right to enforce it, which his client cannot defeat.

The bond is made running to the defendant in replevin. The attempt to collect it was ineffectual. The sureties were insolvent. But this will not discharge the sheriff. *Myers*

v. *Clark*, 3 W. & S., 535. Until the attempt was made and failed, he might have insisted that it would have been successful.

It being the duty of the sheriff to take a replevin bond with sufficient sureties, he is liable in case of their insufficiency. But to whom? Manifestly to the person to whose benefit the bond, if good, would accrue. The damages awarded for taking an insufficient bond are the compensation for the loss arising therefrom. The person holding the bond is the one, who suffers from the insolvency of the sureties. The defendant in replevin would primarily be entitled to the damages arising from an insufficient bond, if he obtained judgment, and as a consequence thereof. But the lien of the attorney is equivalent to an assignment of the judgment. The attorney, having a right to enforce the bond, has a right to the damages which may be given for and on account of its insufficiency. The assignment of the judgment carries with it the replevin bond and the right to enforce it—and, in case of failure to collect, the right of action to damages by way of compensation for such failure. The assignor has no right to the suit. The action exists by virtue of the judgment, and as a mode of making it available or of affording an adequate remedy to the party suffering through the neglect of the officer,—and that judgment, to the extent of his lien, belongs to the attorney.

The statute of limitations, against the sheriff for taking insufficient sureties in replevin, commences running from the time when the plaintiff in replevin, after judgment for a return, has failed to return upon demand the property replevied. *Harriman* v. *Wilkins*, 20 Maine, 93. The right of action for not taking a sufficient bond, therefore, did not accrue till after the lien of the attorney had become perfected by the rendition of judgment in the replevin action. This suit, therefore, is one of the recognized modes of rendering the judgment recovered available to the party in whose favor it was rendered, or to his assignee. The client is not to be allowed to deprive the attorney of his lien

any more than the assignor would be permitted to defeat his assignment.

This lien, by R. S., 1857, c. 84, § 27, is for "so much of the * * execution as is due to the attorney for fees and disbursements *therein*." The fees must be taxed and included in the execution and the disbursements must likewise be for taxable items included *therein*. *Ocean Ins. Co.* v. *Rider*, 22 Pick., 410; *Wood* v. *Verry*, 4 Gray, 357. But this lien does not extend to professional services other than those taxed and included in the execution.

Defendant defaulted.

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

SAMUEL TARBOX, *Appellant from a decree of the Judge of Probate, versus* JAMES J. FISHER, *Adm'r.*

An appeal from a decree of a Probate Court, like any other appeal, suspends or vacates the judgment or decree appealed from.

The death of a widow abates her petition for an allowance out of the personal estate of her husband, if no *final* decree for an allowance has been made.

The Court may in such case direct the costs of both the parties to be paid out of the estate, by the executor, he having appealed from the decree of the Judge of Probate.

REPORTED from *Nisi Prius*, RICE, J., presiding.

THIS was an APPEAL *from the decree for an allowance*, by the Judge of Probate for the county of Lincoln, to the widow of Samuel Tarbox, out of his personal estate, she having seasonably waived the provision made for her in his last will, which had been duly proved and allowed. The real estate of the testator was appraised at $3500, personal estate about $21,000.

Gould, for the appellant.

Ingalls & Smith, for the appellee.

The material facts in the case will appear from the opinion of the Court, which was drawn up by

DAVIS, J.—The widow of Samuel Tarbox duly waived the provision made for her by the will of her husband, and claimed an allowance out of his personal estate. The Judge of Probate allowed her the sum of $2000; and the executor of the will appealed from the decree. Before the next term of the Supreme Court of Probate the widow died. The executor entered his appeal; and an administrator upon the estate of the widow having been appointed, he now claims that the decree of the Probate Court should be affirmed, and the amount paid to him.

It is a general principle of law, that an appeal vacates the judgment or decree appealed from. And this applies to appeals from decrees of a Probate Court. *Paine* v. *Cowdin*, 17 Pick., 142. If only *suspended* by an appeal, their force and effect cannot antedate their affirmation. No decree for an allowance having been finally made at the time of the widow's decease, did her claim survive?

Such a claim does not come within any of the provisions of the statute relating to the survival of actions. If it survives, therefore, it must be on the ground that the right was *vested* in the widow in her lifetime.

Her right under the will, if she had not waived the provision, would have related back to the time of her husband's decease. So, if there had been no will, her right to one-third of the personal property, after the payment of the debts, would have been absolute on the death of her husband; and her death, before any decree for distribution, would not have prevented the right to it from vesting in her administrator. *Foster* v. *Fifield*, 20 Pick., 67. It is contended that her right to an allowance was of the same nature, and was vested in her upon the death of her husband.

The difference in the cases is apparent, at the very point upon which the *vesting* of the right depends. The right of a widow of an intestate to her *distributive share* of the personal estate, is made absolute by the *statute itself*, and is not

dependent upon any judgment or decree of any court. R. S., c. 75, § 9. It therefore vests in her at once, upon the death of the husband.

But her *allowance* is made dependent upon the decree of the Judge of Probate, who is to hear her claim, and order the administrator, or the executor, if she waives the provision made for her by the will, or the estate is insolvent, to pay her "so much of the personal estate *as he deems necessary*, according to the degree and estate of her husband, and the state of the family under her care." R. S., c. 65, § 13. Until there is a judicial determination, upon a hearing provided for by the statute, the claim is contingent and uncertain. Its allowance depends entirely upon the discretion of the Judge of Probate. The right to it cannot vest until a final decree is made. The decree in the case at bar having been vacated or suspended by the appeal, the right of the widow could not become absolute until it should be affirmed by the appellate Court. Her death before that time operated as a discontinuance of her petition. *Adams* v. *Adams*, 10 Met., 170.

Nor is there any injustice in this. The design of the statute is to furnish a temporary support for the widow, until she can obtain her distributive share of the personal estate, or realize something from her right of dower. *Brown* v. *Hodgdon*, 31 Maine, 65; *Washburn* v. *Washburn*, 10 Pick., 374. The necessity for such support no longer exists after her decease.

It is suggested that such a rule will encourage parties to contest and protract all such proceedings, if interested to defeat the claim of a widow, in order to avail themselves of the chances of her death before a final decree. If this be so, and any remedy is necessary, it is for the Legislature, and not for the Court, to supply it. Such parties have the same inducements to protract proceedings for the assignment of dower; but it has never been contended that such right in any specific property becomes vested before a final decree or judgment therefor. The death of the widow be-

fore such judgment or decree, defeats all right of dower; and until special provision was made therefor, in 1852, her death defeated her claim for damages for the detention of her dower. R. S., c. 103, § 24. No such provision is made by statute in claims for an allowance from the personal estate.

The petition has abated by the death of the widow. The case is remanded to the Probate Court, where its abatement will be entered of record. And the executor is ordered to pay the costs of both the parties out of the estate.

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

HARVEY G. LOVELL, *in Equity*, *v.* GEO. FARRINGTON *& al.*

It is not required to set forth minutely in a bill in equity the mode of proof of an alleged fact — a statement of the facts is sufficient, without stating the evidence by which it is expected to prove them.

Thus — where it is alleged that a mortgagee "*by his assignment* in writing on said deed, sealed with his seal," (date and consideration stated), "*conveyed and assigned* to the complainant all his right, title and interest in the same, together with the debt secured thereby and all his claims in and to the mortgage; *all which will more fully appear* by said deed and the assignment when produced in Court," — it was held sufficient on demurrer, although there is no allegation in the bill, that the assignment was acknowledged and recorded.

When one of the mortgagers refuses to join in a bill for the redemption of the mortgaged estate, he may be properly made a defendant party, if, from the allegations in the bill, it appears that he still has an interest.

And his demurrer, for wrong joinder, will not be sustained; — he should discharge himself by his answer and proofs.

BILL IN EQUITY. — The case was presented on the separate general demurrer of each of the respondents to the bill. The case was argued by

Ruggles, for the complainant, and by

Gould & Kennedy, for the respondents.

The opinion of the Court was drawn up by

KENT, J.—The bill sets forth in substance that John W. Tebbetts and William Fish, jr., being owners as tenants in common of a certain parcel of land, mortgaged the same, on the 28th of March, 1855, to John A. Parks to secure $2180. On the 25th of December, 1855, they made a second mortgage of the same premises to Spaulding Smith to secure $4000. Both these mortgages were assigned to the respondent, one in April, and the other in November, 1859, and both before the filing of this bill.

The plaintiff claims the right to redeem, and bases this right on a claim to represent the right of John W. Tebbetts, one of the mortgagers. The bill sets forth—that the right of equity to redeem, which was originally in Tebbetts & Fish, became divided by Tebbetts' mortgage deed to Philbrook of the one half of the premises in common, and also of another lot, to secure $1500 and other liabilities. The deed was given June 6, 1857, and the bill alleges that this mortgage was assigned to the complainant on May 14th, 1860, by Philbrook, and that, on the 16th of the same May, Tebbetts conveyed by quitclaim all his right in both parcels named in this latter mortgage to the complainant.

The bill also sets forth that Fish declines to join in the redemption, and in the prosecution of this bill therefor, and that therefore he is made a defendant. It also sets forth a demand for an account and a refusal to render any. The claim set forth is a right to redeem the whole premises, and to hold the same in default of contribution by Fish or his heirs or assigns.

The respondents severally enter a general demurrer to the bill.

There is another allegation in the bill in relation to the interest of Fish, showing the severance of his interest, by a deed to the defendant, Farrington, on the 12th of November, 1859, of all his interest in an undivided moiety of the premises, and a bond of same date to him from Farrington, conditioned to reconvey to Fish one half undivided of the

premises conveyed in the deed. It is contended that this still left Fish interested, so that he could properly be made a party to the bill.

Two questions are raised in the arguments—

1. Has the complainant set out such a right and interest in himself as enables him to redeem? The deed to Philbrook was clearly a mortgage, to secure $1500 and certain specified liabilities of Philbrook, assumed by him for Tebbett's use and benefit. We see nothing in the language of this deed to distinguish it from the usual form of mortgage deeds. But it is said that the complainant has not shown title in himself through this deed, as he does not in his bill allege that the assignment was acknowledged and recorded. The bill states that "Philbrook *by his assignment* in writing on said deed, sealed with his seal, dated May 14, 1860, in consideration of $6000 *conveyed* and *assigned* unto your orator all his right, title and interest in the same, together with the notes secured thereby and all liens on the premises, and all claims of the said Philbrook in and to the same. *All which will more fully appear* by said mortgage deed and the assignment thereon, when produced in Court."

We are at a loss to perceive why this language is not sufficient to set forth a claim of an assignment duly made. It is not necessary to set forth minutely the mode of proof of an alleged fact. It is necessary, in a bill or declaration, to state the facts, but not all the evidence by which it is expected to prove them. In this case, it is stated, in substance, that an assignment was made by which all the right and title of Philbrook was conveyed and assigned, and reference is made to the deed where that fact will fully appear, when produced in Court. If it does not appear in proof on the exhibits or otherwise, then the defendant may well object to any want of acknowledgment or recording which may be apparent. The complainant says that this mortgage has been assigned to him, and says he can and will prove it by his deed, when produced, at the proper time. We can-

not sustain the demurrers on this ground; but the complainant may, if so advised, amend by inserting a more full and exact statement in reference to the acknowledgment and recording.

2. It is objected that Fish is not properly made a party defendant. It is clear that, if he is a party at all, he must be as defendant, as the bill alleges that he refuses to join as complainant.

It is urged that, before the bill was filed, he had parted with all his interest to the defendant, by deed, and that the bond given back was not a defeasance, but simply a personal obligation, and left him without any right or interest in the premises or their redemption.

The argument is, that Fish having no interest in the matter was improperly made a party, and that as to him the demurrer must be sustained. It is not necessary, in the view we take, to decide absolutely at this time whether the bond creates a mortgage or not. The deed and bond, as set forth in the bill, clearly show an interest in Fish, and at least a right to a reconveyance of the land on a performance of the condition. The complainant alleges that he has not the bond or a copy, as the same has not been recorded. It is one of the things which he expects, we presume, to call out in the answer. If we regard the deed and bond as not constituting a mortgage, yet it may be true that Fish did within the year obtain a reconveyance, or since that time by consent of Farrington. We do not think that there is enough disclosed at present to show that Fish has no such interest as justifies the joining him in the bill. It may appear hereafter, when all the facts are developed, that he has no such interest. It is suggested in the argument of the defendants' counsel, that Fish did not fulfil the conditions of the bond within the year, and, considering his right lost, surrendered the bond. The plaintiff's counsel, on the other hand, says that Fish has redeemed and obtained a reconveyance to himself. We must take the allegations in the

bill only, in considering the questions on the demurrer. We think the facts stated are sufficient to call for answers, and therefore we overrule the demurrers.

Demurrers of both defendants overruled.

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

COUNTY OF KNOX.

DANIEL ROSE, *Petitioner for mandamus, versus* THE COUNTY COMMISSIONERS OF THE COUNTY OF KNOX.

The election or appointment of register of deeds depends wholly upon statute law, which provides that such officer shall be elected in the year 1857 and in every five years then following. R. S., c. 7, § 2.

When a vacancy occurs, the chairman of the County Commissioners is to issue his warrants to the municipal officers of the several towns, &c., of the registry district, to fill the vacancy.

Therefore, if the Commissioners shall neglect this duty, mandamus will lie to compel its performance.

But, without such warrants, the municipal officers of the towns cannot legally call meetings to fill such vacancy.

And a writ of mandamus will not be issued to the County Commissioners, to compare the returns of votes, made to them, to ascertain who has been chosen, at an election so held.

The petition for mandamus, in such a case, must allege affirmatively that a vacancy existed.

The Act of March 9, 1860, incorporating the county of Knox, (which was to take effect on the first day of April,) authorized the Governor to appoint a register of deeds and certain other officers for the county, who were to continue in office until their places were filled by an election, according to the laws; manifestly intending an election in the manner prescribed by the general law, and not that there should be special intermediate elections.

By the general law, the time for the election of registers of deeds would be in the year 1862. The register appointed by the Governor would hold until that time, and, while he thus continued to hold, there would be no vacancy.

Rose *v.* County Commissioners.

THIS was a petition for a rule, to issue to the County Commissioners to appear and show cause why a writ of MANDAMUS should not issue, commanding them to declare the petitioner Register of Deeds for the county of Knox.

The petitioner sets forth, in his petition, that, on the day of the annual election for officers in this State, in the year 1860, he was elected to that office by a majority of the votes of the legal voters of that county; that returns were duly made by the municipal officers of the several towns, &c.; but that the County Commissioners, disregarding their duty provided by statute in such case, neglected and refused to open and compare the votes thus returned.

It appears from the case, as stated by the parties, that George W. White was appointed and commissioned as register of deeds for that county, (under the provisions of the Acts establishing the county of Knox, passed in March, 1860,) to perform the duties of said office until another should be duly elected and qualified to fill his place, and that he entered upon said duties, April 1, 1860.

That the chairman of the County Commissioners did not issue his warrants to the municipal officers of the towns, &c., in said county, directing them to convene the qualified voters thereof, to choose some suitable person to fill the vacancy in said office of register of deeds by an election as provided by c. 7 of R. S., although requested so to do. But the municipal officers of all the cities, towns and plantations, in said county, acting upon their own motion, did duly convene the qualified voters thereof for that purpose, by their warrants duly executed and served, upon the day of the annual election for State and county officers, and that the legal voters of said county in all the cities, towns and plantations aforesaid, cast their votes for candidates for said office, and that said Rose had a majority thereof, as is stated in his petition.

Gould, for the petitioner.

Meserve, County Attorney, for the respondents.

The opinion of the Court was drawn up by

RICE, J. — The petitioner prays for a rule to issue to the respondents, to appear and show cause why a writ of mandamus should not issue, commanding them to declare the petitioner register of deeds for the county of Knox.

The case is presented on an agreed statement of the parties, in which the facts set forth in the petition are admitted to be true.

The petitioner claims to have been elected register of deeds for the county of Knox, at the annual election for State and county officers in Sept., 1860.

By the provisions of § 2, c. 7, R. S., registers of deeds, in each county and in each registry district, were to be elected on the second Monday of September, 1857, and in every five years thence following. The petitioner does not claim to have been elected under the provisions of this section, as the voting did not occur in any year therein indicated.

Section 10 of the same chapter provides that, in case of vacancy in the office of register of deeds, the clerk of the Judicial Courts shall perform all the duties and services of register of deeds during such vacancy.

For the purpose of supplying such vacancy, by a new election of a register, the chairman of the County Commissioners shall issue his warrants to the municipal officers in the towns in said county or registry district, directing them to convene the qualified voters thereof, to choose some suitable person to fill the vacancy. R. S., c. 7, § 13.

By section 14, the chairman of the Commissioners is directed to make his warrants returnable at a day certain, and notify the other County Commissioners to attend at the return day, and they shall then examine the returns made, as directed; and the person elected in manner as aforesaid, after being duly sworn and having given bond as aforesaid, shall be the register until the time when the register, elected at the next election of the registers throughout the State, enters upon the discharge of his duties.

The questions presented for consideration are, whether a vacancy existed in the office of register of deeds, and, if so, whether the petitioner was legally chosen to fill that place at the time he claims to have been elected. He does not, in direct affirmative language, allege in his petition that such a vacancy existed. To give this Court jurisdiction, that fact should be thus alleged. This, however, is a technical defect, not going to the merits of the controversy. We therefore pass it and proceed to consider other propositions in the case, and, for that purpose, assume for the moment that a vacancy in fact existed.

The constitution makes no provision for the election of register of deeds. The election or appointment of that officer, depends wholly upon statute provision. The statute, as we have seen, applicable to ordinary cases, provides for the election of that officer once in five years, the terms of office commencing in 1857. There are no other provisions for filling that office, by election, except those contained in sections 13 and 14 of chapter 7, in cases of vacancy. There must necessarily be some tribunal to determine when a vacancy exists, as well as to appoint the time for filling the same, and determining the result of the election. These duties are devolved upon the County Commissioners or their chairman, by positive statute provision, or necessary implication.

To refer these questions to the municipal officers of the several cities, towns and plantations, would lead to uncertainty and confusion, and is without any authority of law.

If it should be said that this construction will deprive citizens of a right to vote for register of deeds, when vacancies actually exist, unless the chairman of the County Commissioners may choose to issue his warrants for an election, the answer is, that the remedy consists in an application to this Court to compel that officer to perform his duty, and issue the warrants for any election, and not to compel him to perform an act not required by law.

But an examination of the facts in this case, in connec-

tion with the statutes bearing upon the subject matter, has satisfied us that there was in fact no vacancy existing in said office at the time the petitioner claims to have been elected. The R. S., c. 7, evidently contemplates a vacancy that may occur in the ordinary course of events, after counties have been organized and elections had been held. Hence the provision in section 13, for supplying such vacancies by a *new election*, language not appropriate in cases where there had been no previous election to the same office.

The Act of March 9, 1860, incorporating the county of Knox, took effect on the first day of April next following. By the 10th section of that Act, the Governor was authorized to appoint a register of deeds, with certain other officers, for the county, who were to continue in office until their places were filled by an election according to the constitution and the laws, unless sooner removed for cause.

It is, by this provision, manifestly intended that the officers thus appointed shall hold their offices until their places are filled by an election held at the time, and in the manner prescribed by the constitution and the general law, and not that there shall be special intermediate elections. This construction is strengthened by reference to the provisions of the additional Act of March 19, 1860.

Under the provisions of the Act of March 9, 1860, the case finds that George W. White was duly appointed and commissioned register of deeds for said county, to perform the duties thereof until January 1, 1861, or until another should be duly elected and qualified to fill his place; and that said White entered upon the duties of his office, April 1, 1860, and, so far as the case shows, has continued to discharge the duties of the office until the present day. Under that appointment he will be authorized to hold the office until after the election in 1862, unless removed therefrom for cause. *The petition must be dismissed.*

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

HORATIO N. JOSE, *Adm'r*, *versus* HUDSON J. HEWETT.

The statute forbids a director of a bank to sign as a surety the bond of its cashier, therefore his obligation to indemnify others against loss, to induce them to become sureties, is void.

So, too, a mortgage, to secure the performance of such an obligation, is invalid.

As no legal liability, on the part of the director, is created by his obligation, a conveyance of real estate, by him to the bank, based thereon, and to make good a defalcation of the cashier which had occurred, is without legal consideration; — a gift, fraudulent in law, as against prior creditors, unless it appears he has sufficient estate left to satisfy the claims of the creditors.

REPORTED from *Nisi Prius*, RICE, J., presiding.

WRIT OF ENTRY, to recover certain premises therein described, situated in Rockland.

The material facts are stated in the opinion of the Court.

The case was argued, on the report of the evidence, by

A. P. Gould, for the plaintiff, and by

P. Thacher, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J. — Writ of entry dated January 10th, 1859. Plea the general issue and brief statements. The demandant and tenant both claim the premises described in the writ under one *Henry C. Lowell*, whose title was admitted.

And it is further admitted, that the Shipbuilders' Bank was incorporated March 7th, 1853, and duly organized; that on April 29th, 1853, *Lowell* was duly chosen and qualified president and director; that on June 7th, 1853, one *William L. Pitts*, the son-in-law of *Lowell*, was duly elected and qualified cashier, who, on the same day, gave his official bond in the penal sum of $40,000, with *John Jones* and *Henry Ingraham*, two of his sureties with others not residents of this State, which bond was approved by the directors; that *Lowell*, at the same time, gave his bond in the penal sum of $40,000, to *Jones* and *Ingraham* to induce them to become such sureties, conditioned to save them

harmless; that, on Oct. 14th, 1854, *Lowell* ceased to be a director, and *I. K. Kimball* was chosen director and president in his stead; that, on the same day, *Pitts* became a defaulter as cashier for a sum exceeding the penal amount of his bond, and was superseded by *A. W. Kennedy* in that office, when *Lowell*, at the request of *Jones* and *Ingraham*, gave them a mortgage of certain real estate, a part of which is the demanded premises, to secure his performance of the condition in his bond to them; that, on Oct. 26th, 1854, *Lowell* gave to the bank his bond in the penal sum of $40,000, conditioned to convey to *Horace Merriam*, *Alden Ulmer*, *Edward A. Mansfield* and *George Thorndike*, directors of the bank, the real estate mortgaged to *Jones* and *Ingraham*, to indemnify the bank against loss on account of *Pitts'* default, *Lowell* not being otherwise indebted to the bank; and that he did on the same day, in accordance with the conditions of his bond, convey to them the real estate.

On Dec. 1st, 1854, one *Thomas W. Hooper* commenced an action against *Lowell* on his acceptance of a draft for $2500 before October, 1854, and attached all his real estate in the then county of Lincoln; that, on *Hooper's* decease, the demandant (*Horatio N. Jose*) was appointed administrator, who prosecuted the suit, and, at the January term, 1857, in Lincoln county, recovered judgment and execution for the amount of his claim and seasonably levied on the demanded premises.

On Dec. 4th, 1854, *Merriam* and others released the real estate, of which they had received a deed of *Lowell*, to the bank, to effectuate the purpose of the conveyance to them; that, January 1, 1855, *Jones* and *Ingraham*, on condition of being discharged by the bank from their suretyship on *Pitts'* bond, assigned their mortgage of Oct. 14th, 1854, to the bank, who, by their directors, on the same day, in consideration of the assignment and an obligation to indemnify them against *Hooper's* attachment and to procure a release of *Lowell's* wife's right to dower, did so discharge them, the directors well knowing the consideration of the mortgage

at the date of its assignment; that, on January 1st, 1855, *Lowell*, in pursuance of that arrangement, and at the request of *Jones* and *Ingraham*, released the mortgaged premises and his wife her right to dower therein to the bank. *Ingraham* was an original stockholder, and has continued to be such; otherwise with *Jones*.

On Oct. 26th, 1854, the bank suspended payment, and *Atwood Levensaler*, *Joseph Hewett* and *Abiel W. Kennedy* were appointed receivers by the Court, January 10th, 1855, who thereupon took possession of the demanded premises as the property of the bank, and duly sold the same, together with *Jones* and *Ingraham's* guaranty, July 8th, 1858, to the tenant (*Hudson J. Hewett*) for a sum less than $5000, leaving *Pitts* still a defaulter to a very large amount.

From the foregoing facts, it appears that both parties claim title to the demanded premises directly or indirectly under *Henry C. Lowell*, who was the undisputed owner of the same prior to Oct. 14th, 1854, the date of his mortgage to *Jones* and *Ingraham*, and Oct. 26th, 1854, the time of his release to *Merriam* and others, the directors of the bank. Upon the force and effect of those two conveyances the tenant's title principally depends, inasmuch as they were the only material transactions prior to the demandant's attachment, which was on Dec. 1st, 1854, made by his intestate on a writ founded on Lowell's acceptance before October of the same year. So that in order for the demandant to prevail he must successfully dispose of that mortgage and release. He attempts so to do.

And, *first*, he contends that the mortgage was void because it was given to secure an obligation executed in violation of the statute of 1841, (Act of Amendment, c. 1, § 24,) which provides that,—"The bond of the cashier shall be renewed every year, in the month of October, *and in no case shall the bond, given by the cashier, be signed by any director of the bank for which he is appointed.*"

Lowell, being a director at the date of the cashier's bond, could not, by the express language of the statute, have sign-

ed as one of the sureties thereon, and, in not doing so, he has complied with the letter. But, could he evade the spirit of the law, by doing indirectly what he was forbidden to do directly? If so, the statute becomes a dead letter; for directors might readily approve of sureties, who should be indemnified by themselves, trusting, perhaps, more to their own indemnity than to the responsibility of such sureties. The directors, when sitting in judgment on the bond, would only have to say, the sureties must be sufficient, for *we* are to save them harmless. Such directors, in case of the default of their cashier, might not be too expeditious or over anxious to put his bond in suit. One cannot readily perceive a distinction between directors signing directly as sureties, or indirectly by their friends, upon such directors' own responsibility; the two proceedings must amount to one and the same thing, and all the evils which the statute was intended to remedy would still exist. If any one shall have the curiosity to look at the recitals in *Lowell's* bond* to

* The condition of the bond is:—"that whereas one William L. Pitts of Rockland, aforesaid, had been elected cashier of the Shipbuilders' Bank, situated at said Rockland, and had made his bond conditioned as therein specified, that he would well and faithfully discharge all the duties of cashier of said bank, and with diligence and fidelity perform all the duties of that office, agreeably to the laws regulating banking in this State, which bond he has caused to be signed and executed by Richard Pitts, Nathaniel Brinley, and Edward Brinley, as his sureties, the same bearing even date herewith; and whereas additional sureties being required, the said Henry Ingraham and John Jones, at my request, and upon my promise, agreement and obligation to secure and protect them from all liability thereby incurred, and to hold them forever harmless in the premises, and to pay any and all sums of money that might become due to said bank, at any and all times by reason of the non-fulfilment or non-performance on his part of the conditions of said bond, have this day become sureties thereto by signing and executing the same, which bond was thereupon accepted and approved by the directors of said bank. The terms and conditions of said bond will more accurately appear upon inspection of the instrument itself, to which reference may be had.

"Now, if the said Henry C. Lowell shall forever protect the said Henry Ingraham and John Jones from all liability incurred by becoming sureties to the bond of said William L. Pitts, at his, the said Lowell's request, and shall hold them, and each of them, their heirs, executors and administrators, forever harmless in the premises, by paying himself, any and all sums of money that

Jones and *Ingraham*, he will perceive a bold attempt at evasion, "the fruit" of which, the stockholders may well exclaim, brought "all our woe."

The conclusion, then, to which we have arrived on this point, is, that the contract of indemnity, being in violation of law, was void and inoperative between the parties thereto, and the mortgage given to secure the same was equally so, both bearing such evident marks of suicide upon their face that no one could be reasonably deceived thereby.

The next apparent obstacle which precedes the demandant's attachment, is Lowell's release or quitclaim to the directors, of Oct. 26th, 1854. And it is contended, *secondly*, that it was without legal consideration, and void as against prior creditors. And it is clearly inferrible, from the evidence, that all the transfers from *Lowell* were for the purpose and with the design of securing his bond to the sureties or the bank against *Pitts'* liabilities as cashier, when no legal responsibility was ever created, for the case finds that *Lowell* was not indebted to the bank, and that all the transactions were based upon his bond of indemnity, which we have already considered. *Lowell* may have had honorary creditors and a friendly disposition to comply with their wishes, but such creditors must yield to legal ones. We consider, therefore, those conveyances to have been made without legal consideration and voluntary,—gifts, fraudulent in law as against prior creditors, unless it has been made to appear that the residue of Lowell's property was sufficient to respond such creditors' just claims. It not so appearing, the demandant's attachment and subsequent levy must prevail, and his action is maintained.

Tenant defaulted.

But, according to the agreement of the parties, "the ac-

may at any time be due to said bank, by reason of the non-performance on the part of said William L. Pitts, as cashier, of any of the conditions of his said bond, and shall secure and protect said Ingraham and Jones from all the legal consequences arising to them by reason of executing said bond at his said Lowell's request, then this obligation shall be void, otherwise remain in full force and virtue."

tion is to stand for trial for the assessment of damages for the detention."

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

JOHN P. ALLEN, *Petitioner for partition, versus* SILAS C. HALL *& persons unknown.*

On petitions for partition, all questions concerning the title of the parties, and the nature and proportions of their interests, are for the jury; and the interlocutory judgment, which is conclusive, should conform to the verdict.

Commissioners to make partition have no judicial powers, like referees, to determine any such question.

When an interlocutory judgment has been rendered for a fractional part of certain premises, described by boundaries, the petitioner is entitled to that proportion of all the *real estate* within the boundaries, unless specifically limited by exceptions or reservations.

Commissioners may determine the location and boundaries thereof; and, if such question arises, what the whole estate is, by distinguishing personal property from real estate.

If they err in deciding these questions, the Court will not accept their report, but will recommit the case to them.

The statute of 1855 (substantially the same in the revision of 1857) changed the relative rights of tenants in common, where one has occupied a part, in severalty, and has made improvements thereon.

It was intended by that statute to provide that if one had so held and made improvements *without* "the consent" of his co-tenants, he cannot claim to have his share so set out as to embrace such improvements, but may be compelled to take some other portion of the estate.

Still, he is to have the entire benefit of the improvements made by him; and if not assigned to him, specifically, he shall have their value over and above his share of the common property.

If he has had exclusive possession of any part of the premises "by the consent" of the co-tenants and has made improvements thereon, he is entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share.

The questions arising under this statute, as they refer to the individual interests and proportions of the parties, must be determined by the jury before the interlocutory judgment; and the result should be incorporated in the judgment, that the proper directions may be given in the warrant of partition.

Allen *v.* Hall.

If matters are submitted to the Commissioners under the instructions of the Court, which they have no authority to decide, exceptions cannot be taken thereto at a subsequent term.

The case of *Parsons* v. *Copeland*, 38 Maine, 537, as here explained, is not in conflict with the doctrine of this case.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was a PETITION FOR PARTITION, in which the petitioner prayed to have set off to him, to hold in severalty, one-tenth part of the premises described in his petition, (a tract of land in St. George of about 150 acres,) which he claimed in fee simple, and four-tenths of the same premises, for the life of one Mason.

The said Hall, and persons unknown, were alleged in the petition to be co-tenants. The said Hall appeared; and at the October term, 1858, the petitioner recovered judgment for partition, and commissioners were appointed to make partition accordingly.

The commissioners at a subsequent term made their report of the partition made by them; and the said Hall in writing set forth his objections to the acceptance of their report, and moved that it be recommitted. The Judge presiding at that term sustained the motion and ordered the report to be recommitted, "the commissioners to assign to each tenant, the improvements by him made, with the consent of his co-tenants, in addition to his share in the common estate, as it was without such improvements."

The report of the commissioners, under the order of the Court before named, was offered at the October term, 1860. In their report, they set forth, "we have examined the premises with the parties; and having heard the testimony of witnesses produced respecting separate occupation and improvements, we found as matter of fact, that no one of the tenants in common has had the exclusive possession of any part of the estate, and made improvements thereon by the mutual consent of the other co-tenants. Wherefore we do assign and set out to said James P. Allen," &c.

The said Hall filed objections to the acceptance of the re-

port, which were, that the assignment made to the petitioner is unjust and illegal, because, —

(1.) Isaiah Fogg, one of the tenants, and owners in common, with the petitioner and others, of the premises which are described in the petition, and of which partition is made by said report, being in possession of a portion of said premises, did, since the filing of the petition, rightfully erect, on that portion of the common property which was occupied by him, valuable buildings; to wit, — a dwelling-house and outbuildings thereunto attached, for his own use and benefit, of the value of $1500, and has also greatly improved the land and increased the value of that portion of the common property, building wall and fences thereon, and by bringing the soil up from a state of nature to a high state of cultivation, which buildings and improvements were the exclusive property of the said Fogg. Yet the said commissioners, disregarding or mistaking their duty under such circumstances, in estimating the value of the entire property of which they make partition, appraised the dwelling-house and buildings aforesaid, and the other improvements of said Fogg, thereby giving the petitioner a share of their value, and do, by their said report, assign to the said Allen, a portion of the value of said improvements, without leaving to the said Fogg or his grantees, or assigns, or the other owners in common with the petitioner, and especially this respondent, an equivalent therefor. Said commissioners having assigned to the petitioner one-tenth of said premises in fee and four-tenths of the same for the life of Jonas Mason, as said premises now are, including said improvements, instead of taking into account the value of said improvements made by said Fogg, and making the assignment in accordance therewith, as the law requires.

(2.) Because the portion of the premises which had been improved by said Fogg or his grantees, or assigns, were not reserved for, or assigned to him, but were in part assigned to the petitioner.

(3.) Because great injustice is done to the respondent

and the other tenants in common, by the assignment of too large and too valuable a share of the common property to the petitioner, which has been made in consequence of the appraisal of the improvements as aforesaid; by reason of which, in a future division of the residue of said premises, between said Fogg or his grantees, or assigns, and this respondent, a less share must be assigned to this respondent than he is justly entitled to, and less than would be, if no more than the petitioner's just share of the said premises had been assigned to him by the report.

(4.) Because said commissioners, in estimating the value of the property of which they make partition, appraised the dwellinghouse, which was erected by said Isaiah Fogg, of the value of $1500, within the exterior bounds of said premises, as described in the warrant, but not upon the land or soil of said premises, *nor in any way attached or affixed to them, as part of the freehold*, but which was erected upon a granite ledge, by the consent of the owner thereof, and which ledge was in no part owned by the petitioner, and in which he had no interest, and which dwellinghouse was the exclusive property of said Fogg and his grantees, and which is in no part the property of the petitioner. And the said commissioners assigned to the petitioner a share of the value of said dwellinghouse, not by assigning to him a part of the dwellinghouse itself, but by assigning to him a much larger proportion of the common property, by reason of their appraisal of the said house, as a part of said property; thereby doing great injustice to this respondent.

(5.) Because said commissioners, in their appraisal of the property and premises of which they make partition, included a dwellinghouse of the value of $1500, built by said Fogg, and other improvements made by him upon a specific proportion of said premises, which had been occupied and claimed by said Fogg and his grantees for more than six years, and in which improvements the complainant has no interest. Wherefore he prays that the report may be recommitted, &c.

At the May term, 1861, the petitioner's counsel moved that the report be accepted; and the counsel for Hall offered to prove the allegations contained in the objections filed, and also, further facts, showing the assignment illegal and inequitable. But the presiding Judge ruled that the evidence offered was inadmissible; that the objections made to the report, if sustained by proof, would not invalidate it; and ordered that the report be accepted.

The respondent, Hall excepted.

Gould, in support of the exceptions contended; in reference to the law as applicable to the facts of this case, under the statutes now in force, —

(1.) Whether Fogg's improvements were made by consent of the other co-tenants or not, it was the duty of the commissioners "to consider their value and make their assignment of shares in conformity therewith;" (R. S., c. 88, § 16;) whether they were made before or after the interlocutory judgment.

For the construction and purpose of this statute, it is well to look at its history. In 1854, the case of *Parsons* v. *Copeland*, (38 Maine, 537,) came before this Court. It was then made known to the public, that, — "if buildings are placed upon the land by one of the co-tenants before the petition is filed and no question is presented in the proceedings whether they are a part of the common property or not, the interlocutory judgment establishes the title of the petitioner to a share of them.

This would work no injustice if there was any mode in those proceedings by which a respondent, situated as Hall is, could put that question in issue in a trial on the petition. But how is this to be done? The respondent does not claim them. He cannot plead title in *himself*. They belong to another co-tenant, who is not made a party.

Again: — the Court in that case intimate that, if improvements are made, a house is built, by one of the co-tenants, at any time during the pendency of the petition, so that the

question of title to such house could not be settled by the interlocutory judgment, for that settles title at the time of petition only; and it may be subsequent even to it, and before the partition, *then* the improvements go to the petitioner, unless the person making them, can show the petitioner's consent.

Thereupon the Legislature intervened, to provide against injustice in "all cases."

Laws of 1855, c. 157. "In all cases of partition where there shall have been a sole and exclusive possession and occupation of a part of the land or real estate to be divided, by any one or more of the tenants in common, by mutual consent; and improvements shall have been made by buildings or otherwise by such tenant or tenants on the parts so occupied by them exclusively, the commissioners appointed to make partition, shall assign to each tenant so making improvements, the portion on which he or they shall have made the same. And in all cases of partition, the commissioners shall take into consideration the value of improvements made by *any tenant in common*, and make their assignments in conformity therewith."

Here are two distinct provisions. The first relates to a particular class of cases; and the other to all cases.

The latter relates, not merely to improvements on land occupied by "mutual consent," but to "improvements" made by "any tenant in common," and not to a limited class, but to "all cases of partition."

The last clause of the section is distinct from and independent of the first, separated from it by a period.

It would do violence to every rule of construction, to make it dependent upon the first, and limit it by the class of cases there described.

Sect. 16, R. S., is the same in effect; condensed, to be sure, but containing distinctly both elements of the law of 1855.

But it may be argued that the commissioners cannot settle *title*. What then? Is the respondent to have his pro-

perty taken away from him and given to the petitioner? Has he lost it by neglecting to have that question settled on the trial of the partition? That he could not do. This dwellinghouse was put upon the premises after the petition was filed, and "the judgment for partition must be based upon the petition and the estate therein described." *Parsons* v. *Copeland*, before cited. And, according to the decision in that case, this fact was to be determined by the commissioners.

The only decision the commissioners have to make is, whether the particular piece of property in controversy is included in their commission. It is simply the performance of their duty, to find the property which they are to divide; to identify it. In doing this, they cast out that which they are satisfied was no part of the property described in the petition. In one sense, *this* is a determination of the "*right*" of property, but an *indispensable* one; a power always and long exercised.

I submit, that the last clause of the opinion in *Ham* v. *Ham*, 39 Maine, 219, was not well considered. It is a *dictum* merely, the point not arising in the case, as the statute of 1855 was not enacted until after it was made up.

It is not consistent with the decision in *Parsons* v. *Copeland*, already cited, as, in that case, the *duty* of the commissioners to determine whether a building was put upon the premises after the filing of the petition—and, if so, whether under such circumstances as to become a part of the freehold, is clearly recognized.

But, in no case, can this question be tried on the trial of the petition. No mode is provided. That decision was in 1854. By the law, as it then stood, buildings attached to the freehold, though erected by one tenant, became the common property of all. If erected *after* the petition was filed, the commissioners were to determine whether so as to become common property. If attached to the freehold, *then* they *did*. If *not*, then the question of *consent* was to be

decided by the commissioners, and their appraisal made accordingly.

Under the law of 1855, re-enacted in R. S., the *facts* which are to govern the rights of the parties are changed; but the means of ascertaining them remain the same.

Those improvements made before the petition is filed, it is said, must be determined at the trial on the petition. But, if this be true, which I contest, those made *afterwards* cannot be adjudged on that trial, because they are not alleged to be of the common property; they were not *in esse*, at the time of the allegation.

But, if it be urged, that this is determining a right of property, in which the parties are entitled to a jury trial, I reply, that the objection is as *broad* as it is *long*. If it cannot be done against the petitioner, it cannot be done against the respondent.

Fogg's house was not a part of the common property at the time the petition was filed; its title is not, therefore, settled by the interlocutory judgment. And, if the commissioners cannot *exclude* it from the common property, because it would diminish the *petitioner's* right, they cannot *include* it, because it would diminish the *respondent's* right.

But there are a great many rights of property, incidentally settled in judicial proceedings, without the privilege of jury trial. The case of partition of real estate is one of them. The "writ of partition" is older than the constitution. The practice had always been for the committee appointed to set out the proportions of each, by metes and bounds; to do many things which affected and indirectly *decided* rights of property. Trial by jury can only be demanded where it has not been "*heretofore otherwise practiced.*" (Sect. 20, Art. 1, Const. of Maine.)

(2.) As to the fifth objection, the respondent can have no part of these betterments of Fogg, even if the judgment in this case affects him as though he were a party to the record. *Baylies* v. *Bussey*, 5 Maine, 153.

Even if legally competent under *any circumstances*, there was no possible way in which the question of these betterments could have been put in issue, on the trial of the petition, for they were all made since the petition was filed, though more than six years before the assignment. The petition was filed in 1849.

(3.) The fourth objection to the report should have been sustained. That portion of the premises where Fogg built his house, was a *bare ledge*, upon which he erected it.

May not one, owning all the *granite ledge*, or the lime rock, or slate, or coal, in certain premises, erect buildings upon them for his own use, while *quarrying*, without the buildings becoming the property of the owners of the *soil*, whether they are erected with or *without* the consent of such owners?

Here is a kind of *divided* title, one set of owners to the *soil*, another to the *quarries*.

Quarries are a part of the *realty*, they pass by deed, and a widow may have *dower* in them, though her husband did not own the soil under them.

If it be said, that the interlocutory judgment settled the title to *soil* and *quarries*, *land* and *ledge*, I reply, that this is the case as to *these parties only*. It does not affect *Fogg's rights*.

Ruggles, *contra*, argued: —

1. That the subject matter of the objections taken to the report has been before presented, and a full hearing had on testimony and argument, (in behalf of the objections,) and, under *special instructions* of record, the commissioners have made this report, *specially* finding that they have conformed to the instructions.

2. That no objections or exceptions having been taken *when* the *decision was made and so entered of record* on the docket, it is too late now to entertain exceptions taken at a *subsequent term*.

3. That the matter having been so passed upon by the

commissioners it is *conclusive*,—the objections and exceptions being an *appeal* from the *judgment of the commissioners* in *matter of fact*, to the judgment *of the Court*.

4. That the *supposed* outstanding title to all the *ledges* underlying the whole farm, cannot be referred to, or decided by *the commissioners*.

5. That the interlocutory judgment is conclusive upon all rights and title, as between the tenants in common, and so far as any legitimate action of the commissioners is concerned, and so far as they may, in any way, be involved in *this process of partition*.

6. That no tenant in common, after process served, or at any time after petition filed, (or before,) can secure to himself an exclusive right to a *particular part* of the premises, against his co-tenants, by any *erections* or *adverse* exclusive possession, against their will and without their consent.

7. That, if he claims any such acquisition, he must present it and have it decided before the interlocutory judgment.

8. That the statute, authorizing the tenants in common to plead separately by brief statement, without any general issue, gives them the opportunity to have *all* their *separate rights* and *interests* determined by *Court and jury* prior to the interlocutory judgment; and it is too late to make any separate claim of right or title after such judgment.

9. That the statute, prescribing the duties of commissioners in respect to the disposition of separate "improvements," was not intended, "in disregard of an important constitutional guaranty," to authorize the *commissioners* to determine such rights of property, but is only *directory* to them as to *what disposition* they shall make *of such improvements*.

10. That if, in *some instances*, such rights of property have been referred to *commissioners without objection*, it cannot take away the constitutional rights of others, when they choose to invoke its aid for their protection.

The opinion of the Court was drawn up by

DAVIS, J.—In England, a person having an interest in

lands as a joint tenant, or a tenant in common, may compel a partition by a bill in equity, or by a writ of partition at common law. The same remedies obtain in this country, in those States where the courts have general equity jurisdiction. 4 Kent's Com., 364. But there are serious difficulties attending both of these remedies. If there is any doubt about the legal title, a bill in equity cannot be maintained until that title is determined by a suit at law. *Cartwright* v. *Pultney*, 2 Atk., 380; *Wilkin* v. *Wilkin*, 1 Johns. Chan., 111. And, in a writ of partition, all the co-tenants must be named, and their shares stated, so that the jury may determine the proportion to which each one is entitled. *Cook* v. *Allen*, 2 Mass., 462. To obviate these difficulties, provision was early made in Massachusetts for a partition upon petition of one or more of the co-tenants, whether all the other co-tenants were known or not. Laws of Mass., 1783, 1784. Our present statute is similar, though it affirms the right to a writ of partition at common law.

This process is designed simply to establish the legal *right* of possession in severalty. No writ of possession issues, as in a real action. If the party whose right is thus established cannot otherwise obtain possession, he must resort to his action at law for that purpose. *Baylies* v. *Bussey*, 5 Greenl., 153.

All questions concerning the title of the parties, and the nature and proportions of their interests, are to be determined by the jury; and their verdict is the basis of the interlocutory judgment, which must therefore conform to it. Upon all these matters the interlocutory judgment is conclusive. And this judgment relates to the petition, and is limited and explained by it, except as it is modified by the pleadings and the verdict.

Nothing can be embraced in the petition, or the judgment, but real estate. When a petitioner claims and obtains judgment for a fractional part of certain premises, described by boundaries, unless specifically limited by exceptions or reservations, he is entitled to such a proportion of *all the*

real estate within the boundaries named. This right cannot be diminished, unless the judgment is vacated, or reversed.

After the judgment is entered, commissioners are appointed by the Court to make the partition among the parties, in conformity with it. They act under a warrant, which, following the terms of the judgment, should describe the estate to be divided, and the proportions to be assigned to each of the parties, or to them collectively, if that is the prayer of the petition. If the petition does not particularly describe the estate, so that the commissioners can determine its locality and boundaries, it will be dismissed upon demurrer. *Miller* v. *Miller*, 16 Pick., 215. But, if judgment is entered on such a petition, the Court may order a survey under the direction of the commissioners. *Mitchell* v. *Starbuck*, 10 Mass., 5.

The commissioners have no judicial power, like referees, to determine any questions between the parties, relating to their respective proportions, titles, or interests. All these questions are for the jury, and must be settled before the interlocutory judgment, in order to determine what that judgment shall be. The statute gives the commissioners no power to decide them. *Ham* v. *Ham*, 39 Maine, 216. "When the interlocutory judgment is entered," says MERRICK, J., in *Brown* v. *Bulkeley*, 11 Cush., 168, "it is a conclusive determination of the rights of all the parties to the proceedings; and no question any longer remains open concerning their ownership, or title, or their individual shares and interests. The commissioners have no other duty to perform, or authority to act, than to divide the estate according to the directions contained in the warrant."

Nor is this case, or that of *Ham* v. *Ham*, in conflict with the case of *Parsons* v. *Copeland*, 38 Maine, 537. In that case, which was not presented on exceptions, but by a report, the parties agreed to submit it to the Court, as to a jury. It was competent for the parties thus to present the case. One of the questions in that case was, whether certain buildings were erected by one of the co-tenants alone,

and after the petition was filed. This was a question for the jury. It should have been presented by proper pleadings, before the interlocutory judgment. Not having been so presented, the parties submitted it to the Court by agreement. The other question in that case, — whether certain buildings were personal property, or real estate, — was a question for the commissioners to decide. An interlocutory judgment, in which there are no exceptions, covers all the *real estate* within the specified boundaries. The commissioners are to find the property, and determine *where* and *what* it is. This is implied in their warrant, and is indispensable to their execution of it. They must determine the location and boundaries; and, if the question arises, they must determine what the whole estate is, by distinguishing personal property from real estate. *Rice* v. *Freeland*, 12 Cush., 170. These questions are entirely different from those relating to the title, interests, and proportions of individual parties. They are not questions for the jury, in any event, unless they arise in other cases, between other parties. If the commissioners err in deciding these questions, the Court may refuse to accept their report, and recommit the case to them.

The statute of 1855 changed the relative rights of tenants in common, in two important particulars, in all cases where one has occupied any part of the premises in severalty, and has made any improvements thereon.

If he has done this *without* "the consent" of his co-tenants, he cannot claim to have his share so set out as to embrace such improvements. He may be compelled to take some other portion of the estate. But he is entitled to have the improvements made by him "considered," and the assignment made "in conformity therewith." This language, though somewhat indefinite, is without meaning, unless it means that he shall have the entire benefit of the improvements made by him. If not assigned to him specifically, he shall have their value, over and above his share of the common property.

But, if he has had exclusive possession of any part of the premises "by the mutual consent" of the co-tenants, and has made improvements thereon, he is entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share.

Such we believe to be the meaning of the statute of 1855; and, though condensed in the revision of 1857, taking the former as explanatory of the latter, which is a proper rule of construction, the meaning is obviously the same.

But the questions arising under this statute, as they refer entirely to the individual interests and proportions of the parties, must be determined by the jury before the interlocutory judgment. *Ham* v. *Ham*, 39 Maine, 216. If a dwellinghouse is to be excepted from the partition, and the land upon which it stands is to be assigned to one of the parties who built it; or, if a dwellinghouse built by one of the parties is *not* excepted, but the one who built it is entitled to the value of it, more than his share in the common property, exclusive of it; these facts should be determined by the jury, and be incorporated into the interlocutory judgment, that the proper directions may be given therefor in the warrant.

These principles have been stated at some length, as they are important for the proper determination of this class of cases. In the case at bar, the counsel, and, to some extent, the Court, seem to have mistaken the proper course of proceeding. Matters were submitted to commissioners, under the instructions of the Court, which they had no authority to decide. No exceptions were taken by the respondent at that term. But when the commissioners made their report, at a subsequent term, the objection was made. It was too late to make it at either term. It is true the report of the commissioners shows that they heard the parties, and decided between them, upon a question over which they had no jurisdiction. But it is too late to raise that question in this case, unless a new trial should be granted. The petitioner has recovered a judgment for one half of the entire proper-

ty described in the petition. This the commissioners have assigned to him. The partition, being in conformity with the judgment, is not invalidated or otherwise affected by the unauthorized proceedings of the commissioners. It was proper for the Court to disregard this portion of their report. *Brown* v. *Bulkeley*, 11 Cush., 168. The ruling of the presiding Judge, "that the objections to the report, if sustained by proof, would not invalidate it," was correct.

Exceptions overruled.

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

LIME ROCK BANK *versus* JOSEPH HEWETT.

In an action by a bank against the maker of a negotiable note, evidence is not inadmissible to prove, that the note was given by him, with the express understanding with the officers of the bank, that it should be used only for exhibition to the Bank Commissioners to increase the apparent assets of the bank, and was to be used for no other purpose.

And this may be shown by the maker himself in a suit by the bank, he being a competent witness to prove the facts.

The opinion of the cashier as to the consideration of the note, based upon the coincidence of figures made by a former cashier upon the books of the bank, cannot be admitted in evidence.

EXCEPTIONS from the ruling of GOODENOW, J., at *Nisi Prius*.

ONLY two of the various questions, raised by the bill of exceptions, and argued by the counsel, are considered in the opinion; and the facts in the case, so far as they bear upon these questions, therein appear.

Ruggles, in support of the exceptions.

Gould, contra.

The opinion of the Court was drawn up by

MAY, J. — Assumpsit upon a note for $9350,99, payable

to the plaintiffs and dated May 31, 1856. The note in suit appears to have been given for a former note dated April 1, 1854. The defence is a want of consideration, and that the note is void, it having been given for an illegal purpose and in violation of our statutes.

The defendant was a witness, and while upon the stand was asked by his counsel, "for what purpose the said note of 1854 was given and taken?" This question being objected to, the presiding Judge ruled it to be inadmissible, if the purpose was to show the note was given to increase the apparent assets of the bank. The counsel in defence had before stated that they proposed to prove that the note was given without any consideration, and for the purpose of increasing the apparent assets of the bank, and to exhibit to the Bank Commissioners as assets, whereas it had no foundation in fact, and was to be given up to the defendant. This testimony was rejected. The defendant's counsel then offered to prove by the defendant, among other things, that he made the note of April 1, 1854, and gave it to Mr. Crockett, (who was then the president of the bank, and acting as its agent,) with the *express* understanding that it was to be used only to exhibit to the Bank Commissioners, and not be regarded in payment of any notes, or for other consideration. This testimony was also rejected. That the testimony offered, as well as that sought by the preceding question, would have tended strongly to show not only a want of consideration for the note, but that it was given in fraud of the law, and for an illegal purpose, cannot for a moment be doubted. That such a transaction would be against public policy, and in violation of our statutes relating to the management of our banking institutions, is equally clear. That a note so given and received would be without consideration and void as between the parties to it, is beyond all question.

It was held by this Court, in the case of the *Agricultural Bank* v. *Robinson & al.*, 24 Maine, 274, that a note made to a bank without consideration, for the purpose of enabling

the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual condition, was void, and an action could not be maintained upon it by the promisees. An agreement between two parties to deceive and defraud a third, does not constitute a valuable consideration between themselves.

The facts, then, which were attempted and offered to be proved, were clearly admissible, and the only question is, whether the defendant was a competent witness to testify to them. It is suggested that the note in suit, as well as the one for which it was given, being negotiable, the law will not permit the maker to show by his own testimony, that these notes were originally given for an illegal purpose, or consideration. If the note of April 1, 1854, was given for an illegal purpose, or without consideration, then the note in suit must be affected with the same infirmity. The first was the only consideration for the last. But the rule, that the maker of a negotiable note shall not be permitted to show by his own testimony that the note, or its consideration, was illegal at its inception, does not apply to cases like the present, where the action is brought by a party to the note with whom the illegal contract was made. The rule was adopted from principles of public policy and for the protection of innocent holders for value; but so long as the note is in the hands of the original payee, or other person who was a party to the fraud or illegality, the maker is a competent witness to prove the facts. *Van Shaack* v. *Stafford*, 12 Pick., 565; *Darling* v. *March, Ex'r*, 22 Maine, 184. The presiding Judge, therefore, erred in rejecting such evidence of the defendant as tended to show a corrupt agreement between Crockett, as the agent of the bank, and the defendant, alleged to have been made when the note of April 1, 1854, was given, for the purpose of deceiving the Bank Commissioners, and stockholders and bill holders of the bank.

It further appears from the case, as made up, that the plaintiffs put in evidence certain books of theirs, which had

been kept by one William L. Pitts, while he was their cashier, and upon which were certain figurings and pencillings in the handwriting of said Pitts. They also called one A. D. Nichols, their present cashier, and asked him to point out in the books, to the jury, what notes made up the sum of $5183,01, being the amount of a check drawn by the defendant on his deposits, May 2d, 1849, to pay his notes in the bank. The witness replied that he could not tell, except by inference and presumption arising from coincidence of figures. The testimony asked was objected to, but admitted, and the witness was thereupon permitted to make the statements desired. This was irregular. It was wholly inadmissible for the witness to state his inferences and presumptions, arising from what appeared upon the books. By the well established rules of law, these were exclusively for the jury.

There are many other questions, raised upon the exceptions, mostly relating to the admissibility of certain evidence, which have been argued by the counsel on both sides, but, inasmuch as it appears from the points already considered, that a new trial must be granted, we deem it unnecessary to discuss them at this time.

Exceptions sustained.—New trial granted.

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

JOSEPH HEWETT *& als., Receivers, &c., in Equity, versus* JOHN H. ADAMS *& als.*

Cases in equity, on demurrer to the bill, are for hearing by the law Courts. (R. S., c. 77, § 17.)

Leave to amend the bill should be moved for at *Nisi Prius*, the amendments presented and acted upon, that the aggrieved party may have opportunity to except to the decision.

A bill in equity instituted against the stockholders of a bank, by three persons who had been appointed receivers of the bank, may be amended, by striking out the name of one of them, who was a stockholder, and inserting it as a defendant party.

In such a bill, if the liability claimed against the stockholders extended to the amount of the stock, but no specific ground for that liability was stated, an amendment may be allowed, alleging loss by the official mismanagement of the directors, (R. S. of 1841, c. 77, § 44) which may properly be regarded as a specification of the claim.

But before a bill can be maintained against the stockholders under the provisions of that statute, it must be judicially determined that there has been a loss thus occasioned in the capital stock, and that the directors are unable to make good the loss.

The provisions of § 47, c. 47, expressly authorize an individual creditor of the bank to maintain a suit to determine these questions.

When the claim in the bill, by the receivers against the stockholders, was for contribution for the payment of the claimants against the bank, their liability *as stockholders* is the basis of the claim; and an amendment founded on § 45 of c. 47 of R. S., which made more specific the ground of their liability, was allowed.

The bill may be maintained against *cestuis que trusts*, notwithstanding the trustees also are parties.

So, as to wives holding in trust for their husbands.

BILL IN EQUITY, instituted by Joseph Hewett, Atwood Levensaler and Abiel W. Kennedy, as receivers of the Shipbuilders' Bank of Rockland, but in behalf of the claimants of said bank, against the persons liable as stockholders thereof, to contribute to the payment of their claims.

Several of the respondents filed separate general demurrers to the bill. The case was also presented on the report of GOODENOW, J., from which it appears, that, upon the complainants' motion for leave to amend their bill, an

entry upon the docket was made for "leave to amend according to the motion, the amendment to be subject to the opinion of the law Court as to whether competent; and, if made, upon what terms it shall be made."

"The plaintiffs moved for leave to amend by striking out the name of Abiel W. Kennedy, as plaintiff, and inserting him a defendant, which motion the defendants resisted, and claimed that such amendment could not be made according to law, and, if allowed, it should only be on payment of costs, being made after demurrer filed."

"The plaintiffs also moved for leave to amend amendments to be filed within twenty days; such leave was entered on the docket; the amendments and terms of amendment are submitted to the decision of the law Court."

The facts in the case, and the questions of law which were argued by the counsel and considered by the Court, will appear from their opinion.

The case was argued in writing, by

A. P. Gould, for Adams and others of the respondents, by

W. G. Crosby, for Erskine and others, and by

J. H. Drummond, for Bean and others, and by

P. Thacher, for the complainants.

The opinion of the Court was drawn up by

RICE, J.—By the provisions of § 17, c. 77, R. S., cases in equity, presented on demurrer to the bill, or when prepared for final hearing, come before the law Court. This case comes up on demurrer, and is therefore legitimately in this Court. But a question has been raised as to the condition of the bill at the time of the joinder in demurrer. The respondents contend that the pleadings apply to the bill as originally filed in the Court below; while the complainants maintain that they are now applicable only to the bill in its amended form.

There seems to have been some irregularity in the pro-

ceedings below. Appropriately, the amendments should have been presented to the Court below, and have been distinctly acted upon by that Court. Then, in case either party had been aggrieved by such action, they should have alleged their exceptions thereto. But for reasons, the soundness of which we do not now propose to consider, the amendments, informally presented by the complainant's solicitors, and ordered to be filed with the clerk on a day certain, were allowed by the Court below, if, in the opinion of the law Court, it was competent thus to amend; and the question of terms was also submitted to the law Court. This appears by the report signed by the presiding Justice. Though irregular in form, for the purpose of giving progress to the bill, we treat the proceeding below as though the amendments had been allowed absolutely, and the questions of law thereon had been raised on exceptions; and, also, as though the question of terms had been reserved for the future consideration of the Court. In this way the rights of parties will be preserved.

Were, then, the amendments allowable, within the rules of practice in equity?

The first amendment, of which complaint is made, consists in striking out the name of Kennedy, as a plaintiff, and inserting it as a defendant. The bill was originally commenced by three persons, of whom Kennedy was one, in the capacity of receivers of the Shipbuilders' Bank. It appeared that Kennedy was a stockholder in the bank and necessarily should have been made a defendant. *Wiswell & al.* v. *Starr*, 48 Maine, 401.

It will be seen that amendments to a bill are of two kinds, those which relate to parties and those which affect the substance of the bill. And amendments that relate to parties are by the addition or omission of them. There is also another class of amendments relating to parties; to wit, the changing of their situation by striking out the name of a co-complainant and making him a defendant. Amendments being regarded with reference to the furtherance of justice,

they are, as a general rule, in the discretion of the Court, especially in matters of mere form. 1 Barb. Chan., 206.

The name of one co-plaintiff may be stricken out and the party made a defendant, when justice will not be done without the change. 1 Dan. Chan. Prac., 457.

The next amendment, to which particular objection is made, is in the stating part of the bill, wherein the ground of the defendants' liability is set out.

In the original bill it is alleged in substance, that, on the twenty-sixth day of October, A. D., 1854, said bank suspended and refused payment of its bills, styled bank notes, which it had issued and by law was bound to pay, and the complainants claim that those who were stockholders on that day, or their legal representatives, are by law liable to contribute to the payment of the deficiency of the assets of said bank, to the amount of the stock then owned by them respectively, or such portion thereof as shall be necessary to make such deficiency good.

In the bill as amended, the allegation of refusal to pay its bills, is made substantially as in the original bill; it also contains an allegation of deficiency, or loss of capital stock, and the insolvency of the bank by reason of the official mismanagement of the directors, before and on the 26th day of October, 1854, and of the inability of said directors to pay such loss or deficiency, by reason whereof the stockholders became liable to contribute to the payment of such loss and deficiency, to the amount of their stock.

The amended bill also alleges that, at the expiration of the charter of said bank, to wit, on the tenth day of January, A. D., 1855, that being the day on which the injunction against said bank was made perpetual, and on which receivers were appointed, there was outstanding and unpaid a large amount of the bills of the said bank, which had been issued thereby, and for the redemption and payment of which the stockholders were by law liable to contribute, in proportion to the stock held by them respectively at the time of the dissolution of the charter of said bank.

The substantial difference between the original and the amended bill consists in the fact that, in the original bill, the liability claimed against the stockholders extended to the amount of their stock, but no specific ground on which that liability rested was stated. In the amended bill the ground of that liability is alleged to be the loss and deficiency in the capital stock, in consequence of the official mismanagement of the directors, and of their inability to pay this loss or make good the deficiency.

The bill, as amended, also contains an allegation of liability on the part of the stockholders to contribute to the redemption of the bills of the bank, which were unpaid at the time of the dissolution of its charter, in proportion to the amount of stock held by them respectively at that time. The original bill contained no such allegation.

These amendments, it is contended, are inadmissible, because they introduce a new cause of action, which, if introduced would make the bill multifarious, and therefore bad on demurrer.

To determine whether these objections are well taken, it may be well to examine the statutes on which the liabilities of stockholders in banks are founded.

Sect. 41 of c. 77, R. S. of 1841, provides that stockholders shall be liable, to the amount of their shares, in case payment of any bill, note, check, or draft, issued by any bank and which it is liable to pay shall be delayed or refused for the term of fifteen days.

Sect. 44 provides for the liability of stockholders to the amount of their stock, to pay any loss or deficiency in the capital stock of any bank occasioned by the official mismanagement of the directors, in case of the inability of the directors to pay such loss or deficiency. This liability attaches to stockholders who are such at the time of the official mismanagement of the directors.

Sect. 45 provides for the liability of stockholders for the redemption of the unpaid bills of the bank, at the time of

the expiration or *dissolution* of its charter, in proportion to the amount of stock then held by them.

It will be perceived that the liability of stockholders under §§ 41 and 44 are to the same extent, though for different causes, to wit: to the amount of the shares held by them; but under § 45 the liability is only limited by the amount of unpaid bills.

The amendment alleging loss by the official mismanagement of the directors, as the ground of liability, is not inconsistent with the allegations in the original bill, so far as the extent of liability, or the ground of that liability is concerned, and may therefore properly be deemed a specification of that claim. A declaration so defective that it would exhibit no sufficient cause of action, may be cured by an amendment without introducing any new cause of action. This is often the very purpose of the law authorizing amendments. *Pullen* v. *Hutchinson*, 25 Maine, 249. Courts of equity are even more liberal in allowing amendments than courts of law.

It is also suggested that, in this amendment, the cause of action or ground of liability is not set out with sufficient distinctness. The proposed amendment may not be as specific as could be desired. But it is not fatally defective on that ground. The general obligation of liability, its extent and the grounds on which it rests, are distinctly made. This is sufficient. A general charge, or statement of the matter of fact, is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence which need not be charged, to let them in as proofs. Story's Eq. Pl., 24; 2 Dan. Ch. Prac., 994; *Wheeler* v. *Trotter*, 3 Swanst., 174, n.

It is also contended that the stockholders cannot be held to answer to the individual creditors of the bank, under the provisions of § 44, and the case of *Baker* v. *Atlas Bank*, 9 Met., 182, is relied upon as authority upon that point.

The statute on which that decision was based, § 30 of c. 36, R. S. of Mass., is similar in its provisions to § 44 of c. 77, R. S., 1841. The Court, in that case, were of opinion that an individual creditor of the bank could not maintain a suit in equity against a stockholder, to recover payment of his demands against the bank, under that section of the statute, and that the liability of stockholders, under that section, could only be enforced by the bank itself, to make good any loss or deficiency in the capital stock while the bank was in operation. Without intending to question the soundness of that decision or to criticise the reasons on which it is based, it is sufficient to remark that our statute, § 46, c. 77, R. S. of 1841, and § 47 of c. 47, R. S., 1857, in express terms, gives the creditor of any bank, which may have sustained a loss or deficiency through the official mismanagement of the directors, the right to pursue his remedy directly against the stockholders, in case of the inability of the directors to pay such loss or deficiency. This provision is very broad in its terms, covering all the creditors of the bank, whether depositors, bill holders or other parties. Nor is there anything in the statute which limits this remedy to parties who were creditors at that precise moment of time when the official mismanagement of the directors occurred. Such construction would deprive the provision of its most salutary element and render it practically nugatory. The capital stock of the bank is the foundation of its credit. The public, who are its creditors, have a right to expect that that capital will be kept good by an honest administration of its affairs by the directors who are selected by the stockholders for that purpose, and it cannot justly be deemed a hardship to require that banks shall be in fact, what they are held out to be by their agents and stockholders. The provision simply requires the stockholders to make good losses arising from the official mismanagement of their agents, the directors, in case these agents are unable to respond to such losses.

It is also objected that this amendment, if made and al-

lowed, would be wholly unavailing, for the reason that it has not been ascertained that there is, or has been a loss or deficiency in the capital stock of the bank, originating in the official mismanagement of the directors, nor has the inability of the directors to pay such loss, if any, been in any manner determined. That these facts must exist, and be proved, before the liability of the stockholders attaches, under this provision of the statute, is clearly manifest.

A majority of the Court are of opinion that these facts must be judicially determined as an independent preliminary proceeding, before a bill can be maintained against stockholders under the provision of the statute. This amendment is therefore denied.

The amendment based on § 45, is also objected to, on the ground that it introduces a new cause of action. The original bill was brought by the receivers in their own names, but in behalf of the claimants of said bank, against the persons liable as stockholders thereof, to contribute to the payment of said claims. The substance of the claim is the liability of the defendants *as stockholders*. The specific grounds of that liability and its extent are imperfectly set forth in the original bill. It was, however, based upon the statute, and must be controlled and limited thereby. The amendment in this case seeks to make more specific and definite the ground of the defendants' liabilities, and at the early stage of the proceedings in which the amendment was introduced, and in view of the authorities already cited, no valid objection is perceived to its allowance, on the ground that a new cause of action is thereby introduced. No answer has yet been made, and the defendants cannot be holden beyond their statute liabilities, by reason of the amendment.

But it is said that the amendment will be unavailing if allowed, for the reason that no demand is alleged to have been made for the payment of these unpaid bills, either at the bank, or its last and usual place of transacting business, as provided in § 46. The proceedings now under consider-

ation have reference to liabilities for unpaid bills, at the expiration of the charter of the bank. That event occurred, in legal contemplation, when the injunction was made perpetual and receivers were appointed. *Wiswell & al.* v. *Starr*, 48 Maine, 401; *Crease* v. *Babcock*, 23 Pick., 334. To have demanded payment at the bank at that time, of such unpaid bills, would have been an idle ceremony. It had then been enjoined and prohibited from doing business. The amended bill alleges that these unpaid bills have been presented to, and allowed by, the receivers. This is a substantial compliance with the statute, as the receivers are the legal representatives of the bank, and their place of official business must be deemed to be the place of business of the bank, for the purpose of presenting claims against it. The amendments, therefore, based upon the provisions of sections 45 and 46, are allowed.

No claim is made under § 41.

The legal capacity of the plaintiffs to prosecute this bill has also been called in question, on the ground that the board of receivers was never legally constituted; that the statute requires the appointment of three disinterested persons as receivers, and that Kennedy, being a stockholder, was not a disinterested person within the meaning of the law. The fact that Kennedy was a stockholder was not known to the Judge by whom he was appointed, nor did the fact come to the knowledge of the Court until it was asserted in the bill now before us. But does this fact render the proceedings of the receivers void? We think not.

In the case of *Wiswell & al.* v. *Starr*, already cited, the same objection existed, but was not held fatal. It does not appear, however, that the point was distinctly taken in that case, or that it received the particular attention of the Court. That case, therefore, may not be deemed conclusive or a precedent. But, on principle, the objection cannot prevail. First, for the reason, that the interest of Kennedy, if any he had, was in favor of the respondents, and not prejudicial to them. Therefore *they* are not in a condi-

tion to complain. Next, his interest, whatever it might have been, so far as he has been permitted to act, was not fixed and certain, but so remote, contingent and uncertain, as not to disqualify him. He was appointed under the provisions of § 62, R. S., 1841, by a Justice of this Court, on application of the Bank Commissioners, and had no authority to proceed against the stockholders of the bank, nor to do any act by which they could be rendered liable to a personal action. He and his co-receivers were only authorized to take possession of the property and effects of the corporation, subject to such rules and orders as should be from time to time prescribed by the Court, or some Justice thereof, in vacation. As a receiver, he was an officer and representative of the Court and subject to its directions. 2 Story's Eq., §831; R. S., 1841, c. 77, § 62. This section of the statute does not limit the number of receivers, nor prescribe the qualifications, nor define their powers. The whole matter is within the sound discretion of the Court, and all the acts of the receivers are subject to the supervision and control of the Court.

The receivers provided for, in § 67, are to be appointed on the application of bill holders or depositors, and the succeeding sections of the Act apply to them, and not to receivers appointed under § 62, unless so prescribed by the Court. In one case, the application is to be made when, in the opinion of the Bank Commissioners, the bank is insolvent, or its condition is such as to render its further progress hazardous to the public, in which case the action contemplates the closing up of the affairs of the bank. In the other case, the application is by a bill holder or a depositor to whom payment has been refused for the space of fifteen days after demand, and the action contemplates holding the assets of the bank by the receivers until such bills or deposits have been paid, and then a surrender of the balance to the bank. The proceedings have a different origin and contemplate different results.

It was not until the passage of the Act of 1855, c. 164,

that receivers have any authority to proceed against stockholders; and, under that Act, they are merely nominal parties, acting for and in behalf of the claimants against the stockholders. It was only at the institution of this bill that the official position of Kennedy became adverse to his interest as a stockholder. Until he was required to proceed under the Act of 1855, § 73, c. 47, R. S., his interest was not only remote, uncertain and contingent, but even that interest, as has been already remarked, was in favor of the stockholders; and, being until that time, merely a ministerial officer or servant of the Court, he was not disqualified to act as far as his duties required.

When his legal position became incompatible with his private relations, and that fact became known to the Court, it became not only a matter of right to other parties to have his position changed, but a matter of duty on the part of the Court to see that such change was made. By allowing the amendment, by which his name was stricken out as plaintiff and inserted as defendant, his appointment as receiver was in effect revoked. The statute, § 62, requiring no specific number of receivers, the suit may properly proceed in the name of the remaining plaintiffs of record.

It is contended that this bill cannot be maintained against certain parties thereto, who are charged as *cestuis que trust*, the trustees also being parties. In the case of *Crease* v. *Babcock*, 10 Met., 525, the Court decided the trustees must be parties, and, from the language used, the implication is strong that the *cestuis que trust* should not be, or need not be parties, though there was no express decision on the latter point. The general rule is, that all *cestuis que trust* are necessary parties to suits against the trustees, by which their rights are likely to be affected. 1 Dan. Ch. Prac., 303; Story's Eq. Pl., §§ 192, 193, 207; *Helm* v. *Hardin*, 2 B. Monroe, 231.

In the case, in this bill, in which the trustees are alleged to be wives holding in trust for their husbands, the application of the general rule appears to be eminently proper.

The authority under the statute, to bring this bill, is very full. If it appears to the Court that the assets are insufficient to pay the *claims* against the bank, said receivers shall forthwith file their bill in equity, in their own names, but in behalf of the claimants, against the persons liable as stockholders of the bank, to contribute to the payment of its debts. R. S., § 73, c. 47. The intention of the Legislature manifestly was to give the specific remedy of a bill in equity, to all parties who had claims against a bank which should be placed in the hands of receivers, and that the term *debts* is used as the synonym of *claims* in the same sentence.

This construction is the more apparent in view of the provisions of § 75, of the same chapter, wherein it is provided that no action shall be maintained against any bank after the appointment of receivers thereof, but all its creditors must seek their remedy under the provisions of the five preceding sections. *Creditors*, here, being used in the same sense as claimants in § 73.

In view of these considerations, we come to the conclusion that the demurrer must be overruled, and that the question of costs, to be imposed as terms for amendment, will be reserved for the future consideration of the Court.

Demurrer overruled.—Defendants to answer.

APPLETON, C. J., KENT, and WALTON, JJ., concurred.

CUTTING, J., concurred in overruling the demurrer.

KENT, J.—The only method by which stockholders in a bank can be reached, and their liability enforced against them, "after the appointment of receivers," is by a bill in equity, like this,—instituted by the receivers. R. S., c. 47, § 75. Actions pending die, under the provision that "no action can be *maintained*." Costs in pending actions, which thus die, may be allowed as claims against the bank.

The right and duty of receivers to commence this process is specified in § 73. Before the statute of 1855, re-enacted as above, no such provision existed. Suits and actions and

bills in equity could be brought only by individual creditors. c. 77, § 41 to 47, R. S., 1841. It is evident that it was the intention of the Legislature to condense into one suit, or bill, the claims of all the creditors, and to enable the receivers, representing all, to hold the stockholders to contribute to the payment of the debts of the bank, according to the legal liability imposed on them. All that seems to be required of the receivers is to bring their bill, therein alleging those facts which show a deficiency for which the stockholders are liable. This bill can be brought after it appears to the Court that the assets are insufficient to pay the claims against the bank. The question is, against whom and for what causes or liabilities can this bill be brought? The statute answers,—"against the persons liable as stockholders of the bank to contribute to the payment of its debts," § 73. This must mean the liability which then exists,—*i. e.*, the liability of stockholders at the time when its charter expired. When the injunction was granted, and receivers were appointed, the charter expired, in contemplation of law. *Crease* v. *Babcock*, 23 Pick., 384; *Wiswell* v. *Starr*, 48 Maine, 401. The two grounds of liability of stockholders, at the expiration of the charter, are for all unpaid bills, and for loss or deficiency of the capital stock, arising from the official mismanagement of the directors. §§ 44, 45, c. 77, R. S., 1841. There is another liability specified in § 41, but that arises only when a special demand for payment of bills has been made, and a suit at law (not a bill in equity) has been commenced against the bank. This liability may be laid out of this case.

It seems to be contended, that, as by § 46, authority is given to a creditor of the bank, who is a holder of any unpaid bill, to bring a bill in equity against the stockholders, *if the bill has been duly presented and demanded of the bank, at its last place of business*, that no bill by the receivers can be sustained without proof of such prior demand. But it is manifest that the liability for unpaid bills, at the *expiration of the charter*, is expressly imposed on

stockholders by § 45, without any limitation or qualification. In that section there is no requirement that a demand should be made. Indeed, it is little short of an absurdity to require it, in case of a failure of the bank, and after the appointment of receivers, and after the bank has been peremptorily enjoined not to pay any bills or debts. We so determined in the case of *Clark* v. *Bank of Hallowell*, recently decided.*

It is true, that according to a strict and literal construction of § 47, when a creditor himself institutes a bill, he must allege and prove such demand, however useless or absurd it may be. But the general liability of the stockholder is created by § 45, and that is distinctly stated to be for the payment of all unpaid bills, at the *time of the expiration of the charter*, and nothing is there said about a demand. The receivers are to institute a bill against all persons liable as stockholders, and this, whether an individual creditor or bill holder might or might not sustain such a bill. The question is, does the law impose the liability? Nothing but the most imperative language, used in such connection with the declared liability that it could not be separated, would lead us to hold a demand necessary, when so manifestly useless, if not absurd.

It seems to me, that the stockholders are to be held for the bills, if the bill alleges and the allegations are sustained by proof of the three following propositions. *First*—that the charter has expired, either by limitation or by injunction, and that receivers have been appointed. *Secondly*—that bills issued remain unpaid, and that there are not sufficient assets to pay them. *Thirdly*—that the respondents named were stockholders within the contemplation of law at the time of the expiration of the charter. The *liability* arises from these facts. The *rule of apportionment* and assessment by this section is declared by the statute, to be according to the *number of shares* held by each stockholder.

It appears, on inspection of the original bill, that the

* The opinion is not in the hands of the Reporter.

above facts, necessary to charge the respondents, are substantially set forth. The rule of apportionment, or the extent of the liability, is stated to be a contribution to the *amount* of the stock then owned. The amendment, which simply changes the rule, and gives the one named and fixed in the statute, and recognized by the Court in *Wiswell* v. *Starr*, may well be allowed. The liability, and the grounds on which it rests, are substantially set out in the original bill. There was a mistake made in setting out the exact extent of the legal consequences of such holding of shares. The amendment introduces no new cause of action.

We are not to regard the bill with the strictness with which we should pass upon a declaration for a *qui tam* penalty. The amendment comes within the rules of equity on that subject. Story's Eq. Pl., § 885. The only essential alteration is in the rule of assessment. The amendment will be made before any plea or answer to the merits is required, and cannot injuriously affect the respondents. They will have every reasonable opportunity to meet the allegations in the bill. It would be useless to dismiss this bill for this error, and to require the receivers to file a new one, on the ground of a mistake in stating the exact extent of the liability, when its nature and the grounds on which it rests are set out. It is but the common case of a good case defectively set out.

If this amendment is allowed, it covers the unpaid bills, and would seem to be sufficient to charge the stockholders to the extent of such bills remaining unpaid, but not for the other debts of the bank. It would seem that these bills constitute the principal part of the debts of the bank.

2. There is, however, another amendment proposed, based on the assumed liability of the stockholders for the loss or deficiency in the capital stock, occasioned by the official mismanagement of the directors. This amendment, if allowed, may cover, to the extent of the stock owned, *all* the debts of the bank. In case of unpaid bills, the stockholders are held liable to pay them all, in proportion to the stock owned by each stockholder. This may be a sum beyond

the par value of his stock. But in case of a loss of the capital stock, or its diminution, by the official mismanagement of the directors, for which the stockholders may be held responsible, the liability is limited to the amount of his stock, held at the time when the default occurred. *Wiswell* v. *Starr.*

It is manifest, that, in order to hold a stockholder for such loss of capital stock, certain facts must first be established; to wit—that there had been a loss or deficiency in the capital stock; that it was occasioned by the official mismanagement of the directors; that the directors, who were guilty, and who were liable to pay the same in the first instance, were unable to pay or to make good the deficiency.

The question is, how are these facts to be determined? Can the receivers, representing the creditors, insert in the bill, they are authorized and required to bring, a claim against the *stockholders*, based on this section of the statute? It was decided in Massachusetts, in a case involving the construction of a section of a statute, almost identical with our § 44 of c. 73, stat. 1841, that a creditor of a bank could not sustain a bill on this ground; that the bank alone could maintain a claim against the stockholders or the directors, to make good such deficiency, in the capital stock. This decision might be satisfactory with us, if there were no other provisions in our statute. But, as shown in the opinion of Judge RICE, there is a positive and distinct provision in § 46, authorizing "any creditor of any bank, which may have sustained a loss or deficiency of its capital stock, through the official mismanagement of its directors, * * * to pursue his remedy, and avail himself of the liabilities of its directors and stockholders, specified in the two preceding sections, by a *bill in equity* in the Supreme Judicial Court." This seems to give a creditor a clear right to bring such a bill, however difficult it may be to make it practically effective. By the existing law the receivers are to bring a bill, after their appointment, in their own name, instead of creditors, but in behalf of the *claimants* (not merely bill holders) against the persons liable as *stockholders*, to "contribute to

the payment of *its debts.*" This gives an action against stockholders, but does not include directors, and covers all existing liabilities of the bank.

It is to be observed, that whilst, in case of unpaid bills, the liability is immediate and absolute, resting on the simple fact of ownership of stock, in case of deficiency of capital stock, the liability of stockholders is contingent, and dependent upon certain preliminary facts — a loss of such capital — that it was occasioned by the mismanagement of the directors, and that the directors liable are unable to pay, or to make good such loss. How can these facts be determined in a bill, in which the directors, as directors, are not parties?

The allegation must be of culpable mismanagement — official delinquency — involving charges which seriously affect character. It would be unjust, and contrary to the genius of our institutions, for the Court to proceed to adjudicate upon such grave matters, without notice to the persons directly implicated.

If the directors are made parties to this bill, for the purpose of trying these issues, it may be insisted that such issues can only be tried by a jury, in a court of law. It is true that the statute, before referred to, giving a right to a *creditor* to bring a bill, authorizes *him* to pursue by such bill his remedy against the directors as well as stockholders. But the statute, authorizing *receivers* to bring a bill in equity, does not, in terms, give any right to *them* to bring such bill against *directors*.

There is another difficulty. It is clearly not enough, in order to charge the stockholders, to show a loss of capital stock, and that it was occasioned by official mismanagement of the directors. There is another fact to be established, before a stockholder is liable therefor, viz., — that the directors, who are liable, are *unable* to pay such loss or deficiency. Now, before it can be judicially determined, that a person is unable to pay or make good a loss, for which he is liable, the fact and the exact amount of such liability,

must be fixed and determined by some legal and binding judgment or decree. It may well be questioned, whether anything short of such judgment against the directors, for a sum certain, based on a decision against them individually, for official neglect and misconduct, and an execution returned unsatisfied, with proof of entire inability on the part of such judgment debtor and director, would be sufficient to charge the stockholders.

It is true, that the receivers are to institute their bill on behalf of all claimants,—*i. e.*, of all who are creditors of the bank. But against *whom* is it to be brought? The statute answers; "against the persons liable as *stockholders* of the bank to contribute to the payment of its debts." There is no authority given the *receivers* to institute a bill against the *directors*, for the loss of capital stock. But a creditor may bring such bill, and the provision in § 74, c. 47, R. S., 1857, that no action shall be maintained, after the appointment of receivers, against *the bank*, does not repeal the provision giving a creditor a right to institute process against the culpable directors, even after the appointment of receivers. Such suit would not be an action against the bank, and such actions only are prohibited or discontinued by this section of the statute. The claim or right of action, given to a creditor against a delinquent director, is not a claim against the bank, but primarily a personal liability of the director, which may be enforced against him, and, if he is able, may be collected from his property, without any action against the bank or the stockholders. But, if a creditor had instituted such proceedings in equity, before the appointment of receivers, and had obtained a judgment or decree against the directors, for a certain amount, and thereupon had taken out an execution against them, which had been returned *nulla bona*, before the receivers had filed their bill, and the inability of the directors had been legally established, we see no reason why the receivers might not properly set out in their bill these facts, as grounds for the stockholders' liability under the statute. And perhaps all

this might be done by the creditor, after the filing of the bill by the receivers, and an amendment to that bill might be allowed, setting forth such facts, by which the liability and inability of the directors had been established, if such amendment was made before a hearing on the merits. However this may be, it is evident that the provision in favor of creditors contemplates that the proceedings against the directors must precede any decree against the stockholders. The language is, that the creditor "may pursue his remedy, and avail himself of the liability of its directors and stockholders, by a bill in equity." It is expressly declared, in § 76, that the Legislature did not intend to increase or diminish the liabilities of stockholders or directors by the provision authorizing receivers to bring a bill in equity. It is further provided, in the same section, that, "in assessing the amount for stockholders to pay, the Court may have reference to *such* liability of the directors." What liability? Clearly that which may be established by proof of a decree or judgment, against such directors, and of their inability to pay — as before explained. Until these points are established, the stockholders are free from liability. They are not required to answer for the directors, in the first instance, and to be at the expense and cost of a trial of those issues, which may involve great expense. A stockholder may well say, to a creditor, first establish the culpable mismanagement of the directors, by which there has been a loss of capital, and their inability, and then I will answer as to my individual liability to make good the loss. This is in accordance with the decisions, in cases whereby stockholders were held by statute for the debts of the corporations. *Longley* v. *Little*, 26 Maine, 166; *Grose* v. *Hilt*, 36 Maine, 22. The result on this point is, that the proposed amendment in relation to the directors should not be allowed, as there is no allegation of any prior proceedings by a creditor against them.

I do not deem it necessary to discuss any other questions than those relating to the proposed amendments.

THOMAS W. HIX, *Warden, versus* DAVID H. SUMNER.

By statute provision the warden and deputy warden of the State Prison may serve legal processes *within* the "precincts" of the prison. The precincts embrace not only the prison building, but the grounds connected therewith.

The service of a writ, within the precincts, by the deputy warden, will be valid, although brought in the name of the warden; — for neither acts as the agent of the other, but both as agents of the State.

The submission of an action to referees is a waiver of all formal defects in the writ, and in the service thereof.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action of ASSUMPSIT. On the return day, the defendant's counsel entered upon the docket a special appearance, to move to dismiss the action, filed a written motion to dismiss, for the want of legal service of the writ, and also filed an account in set-off to plaintiff's action.

The writ was directed to the warden of the State Prison or his deputy, and was served by the deputy by the attachment of 700 tons of lime rock, and giving the defendant a summons in hand. He does not state in his return that such service was made, or the property attached within the precincts of the prison.

The action was entered May term, 1860, when, on motion of the plaintiff, leave was given to the officer to amend his return, according to the fact.

At May term, 1861, by consent of parties, the action was referred, and the reference entered upon the docket. At the time of this entry, the defendant's counsel stated to the Court that the preliminary motion to dismiss was to be acted upon, before the reference was to take effect. Subsequently, but on the same day, the defendant's counsel moved as matter of indulgence, that the entry of reference be stricken off, as having been erroneously made; the counsel for the plaintiff objecting, the Court declined to interfere.

No action was had upon the motion to dismiss until this

term; when the Court ruled that the filing of set-off was a waiver of the motion and refused to dismiss the action.

The defendant excepted.

Ruggles, for the plaintiff.

Gould, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The suit in this case is in favor of the warden of the State Prison, against a contractor for the labor of the convicts. The writ was directed to the deputy warden, and was served by him; but his return does not show whether the service was made within the precincts of the prison.

The defendant appeared at the term of Court to which the writ was returnable, and, on the first day of the term, filed a motion in abatement, for want of sufficient service. He also filed an account in set-off on the same day.

The motion in abatement denies the authority of the warden, or his deputy, to serve the writ in this case. The return does not show *the place* of service, except that it was in the county of Lincoln. If insufficient, it might have been amended according to the fact, so as to show whether the writ was served within the precincts of the prison.

The "precincts" embrace not only the prison buildings, but the grounds connected therewith, purchased by the State, under the Act of Feb. 8, 1823. The prisoners are not sentenced to solitary confinement. The statute provided that they should "be imprisoned, restrained, and employed, within the *precincts* of the prison." Laws of 1824, c. 282. For the purposes of such employment, the warden may permit or require them to go to any part of the premises connected with the prison. Beyond these limits he has no right to let them pass, for any purpose; and, if he should do so, he would be liable to suffer the penalty for their escape.

It is within these *precincts*, thus defined, that the warden and his deputy have power to execute legal processes. Outside of these limits, they can neither attach property, make an arrest, nor deliver a summons.

Originally the warden had no power to appoint a deputy, except for the single purpose of *executing and serving processes*. Laws of 1824, c. 282, § 7. Such deputy had no authority to act for the warden in any other matter. But, subsequently, provision was made for a deputy warden, with general powers, to be appointed by the warden, subject to the "approval" of the prison inspectors. The deputy so appointed was required to give bonds to the State for the faithful performance of his duty. Laws of 1830, c. 477. The statute is the same at the present time. The deputy warden is an officer of the State, as much as the warden. Though the warden appoints him, and is responsible for his acts, they both derive their authority from the same source. Neither acts as the agent of the other, but both as agents of the State.

But, if the warden had served the writ in this case himself, we are not prepared to say that the service would not have been good,—though of this it is unnecessary for us to express any opinion. It seems that, at common law, a sheriff might serve a writ in a suit in which he was the plaintiff; and such a service would be valid now, were it not for the statute prohibition. *Merchants' Bank* v. *Cook*, 4 Pick., 405. Our statute gives the warden and his deputy power to serve *all* processes within the precincts of the prison; and no exception is made of suits in which either is a party. If this power should be abused, it is for the Legislature to revoke it, or limit its exercise.

It is claimed that the statute was intended to authorize the warden and his deputy to execute processes only upon the inmates of the prison. But the power is not restricted as to the persons upon whom service can be made. The only limitation is one of locality; and, as in the case of a constable, service may be made upon any person within the prescribed limits. *Blanchard* v. *Day*, 31 Maine, 494.

We have thus given our opinion upon the general question of service by the warden and his deputy, as both parties have requested it, though it was not necessary in this

case. If the sufficiency of the service had arisen in a collateral proceeding, the return would have shown a service *prima facie* sufficient. *Richardson* v. *Smith*, 1 Allen, 541. But, if the service was defective, and the filing of the account in set-off was no waiver of the plea in abatement, of which we express no opinion, still, the subsequent agreement to submit the case to a referee, was a waiver of all formal defects in the writ, and in the service thereof. *Forseth* v. *Shaw*, 10 Mass., 253; *Waterman* v. *Conn. Railroad Co.*, 30 Vermont, 610.

After the reference was entered, the counsel for the defendant stated that the motion to dismiss was still to be heard by the Court. But such a statement could avail nothing. It does not appear that the counsel for the plaintiff assented to it. The agreement to refer was made a matter of record, unrestricted by any precedent motion, and uncontrolled by it. The defendant was bound by it; and the refusal of the presiding Judge, upon motion afterwards made, to discharge the rule, was an exercise of judicial discretion to which no exceptions could be taken.

The case must stand for a hearing before the referee agreed upon by the parties.

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

WILBUR DAVIS *& al. versus* JOB M. CASWELL.

An action against two or more for a joint trespass cannot be sustained by evidence of acts committed by one of them; and a judgment against both is not a bar to another action brought against one of them for a several trespass.

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

TRESPASS *quare clausum*, brought before a justice of the peace, alleging a breaking, entering, &c., on the 14th April, 1855. The writ is dated September, 1855. Plea, general issue, and a brief statement of title. When this action was brought into this Court, there was pending another action of trespass, commenced June, 1855, by same plaintiffs against same defendant, and one Fuller, for breaking and entering the same close on the first day of January, 1855, and on divers other days and times between that day and the date of the writ, and committing divers trespasses therein. In that action the plaintiffs recovered judgment for one dollar as damages, with costs.

At May term, 1862, the defendant pleaded such former recovery, since the last continuance, waiving other defence. Evidence was introduced tending to prove, that, at the former trial, there was much evidence touching the running of lines by said Caswell, and the cutting and marking of trees thereon, and setting up stakes, and that plaintiffs' counsel, in that case, introduced evidence of the running by said Caswell of one line on April 14th, 1855, and setting up a stake or stakes, and inquired of the witness if said Caswell cut away trees or bushes thereon; and it was testified, in this case, that the said evidence was received on that trial, without objection on the part of the defendants, although it did appear that said Fuller was not present, at such running or setting up stakes or cutting or marking of trees on that line, and had nothing to do with it.

The evidence offered in support of the action was of the same running of said line on the 14th April, 1855, and of

setting up stakes thereon and marking trees thereon. And evidence was offered tending to show that the question of title was the main subject of inquiry on said former trial.

Whereupon the Judge ruled that the trespass in this case, having been committed by defendant alone, it could not legally have been passed upon by the jury in the former suit, nor could judgment have been legally rendered for the same; therefore the former judgment could not be and was not legally a bar to the present suit. Thereupon the action was defaulted for one dollar damages, which is to be taken off, if the aforesaid ruling was incorrect, and a nonsuit entered.

Gould, for the plaintiffs.

Ruggles, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—This is an action of trespass *quare clausum fregit*. The commission of the trespass sued for is not contested, nor that it was committed by the defendant *alone*. The defence is, that damages were recovered therefor in a suit between this plaintiff and the defendant and Henry D. Fuller, and that consequently this action cannot be maintained, whether such judgment was satisfied or not.

But in the action of trespass, commenced by this plaintiff against Job M. Caswell & al., for a joint trespass by them committed, the jury could legally have assessed damages only for their joint acts against them jointly. *White* v. *Demary*, 2 N. H., 546. "The result of the authorities, which are numerous," says the Court, in *Halsey* v. *Woodruff*, 9 Pick., 565, "is, that when a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages." If proof was received of a several trespass by either, it was not sufficient to charge both for a joint offence. *Williams* v. *Sheldon*, 10 Wend., 654.

Though the evidence was received, it does not follow that the defendant has thereby been injured. He does not prove, nor offer to prove, even if it were admissible, that the verdict in the action, *Davis* v. *Caswell & al.*, was rendered for the several trespass of Caswell. It is to be presumed, proper instructions were given upon the trial of that cause and that the verdict was in accordance therewith. If so, damages for the trespass in suit were not included in the judgment which the defendant sets up as a bar to this action.

If the instructions were erroneous, or, being correct, were disregarded, of all which there is no proof, no one knows better than the learned and astute counsel for the defendant how those errors are to be corrected. They are not shown to have existed. They are not to be presumed to have existed. And if they existed, their correction should have been made in the suit in which they occurred.

Default to stand.

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

SAMUEL BRYANT *versus* ANDREW J. ERSKINE and WILLIAM McLOON, *Trustee.*

M. promised to pay E. his account against a third person, if it should be adjudged a lien claim upon a certain ship: — until some competent tribunal has adjudged the claim, a lien, the demand against M. is "contingent" and he cannot be held as the trustee of E. in a suit by a creditor of E. (R. S., c. 86, § 55.)

EXCEPTIONS from the adjudication of RICE, J., discharging the trustee.

Isaac Ames, and Erskine, the principal defendant, as partners, claimed to have furnished materials of the value of $330, for a ship built at Rockland by one Rhodes, in the year 1854, for which amount they claimed to have a lien upon the ship, under the statute.

The trustee purchased the ship of Rhodes, who died before it was launched. No suits could be brought to preserve the lien claims, no administrator having been appointed on Rhodes' estate. Several claimants filed libels in the District Court of the United States against the ship.

The trustee, in his disclosure, says,—"Ames said to me that he had a bill against Rhodes for materials that went into the ship. I told him if it was a lien claim, I would give him a writing agreeing to pay the same; and, in February, 1855, I signed a paper agreeing to pay him, or Ames and Erskine, so much of said bill as should be adjudged a lien claim on said ship, provided the U. S. Court should decide that a libel for any lien claim on the ship should be sustained in that Court," &c. * * * * * * "I afterwards learned that the bill of Ames and Erskine was not a legal lien claim on the ship."

The plaintiff filed allegations, as is provided for by the statute, and took testimony to support them,—but the view of the case taken by the Court renders it unnecessary to state here the substance thereof.

L. W. Howes, for the plaintiff.

H. Stevens, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The liability of the alleged trustee, to the principal defendant, was a collateral one, for the debt of another. His contract was in writing, no copy of which is in the case. Though proved by parol, in part, we can come to no definite conclusion in regard to its terms, except that it was an agreement to pay whatever part of the principal defendant's bill "should be adjudged by the United States Court to be a lien claim on the ship built by Francis Rhodes."

The disclosure is very indefinite in other respects. The counsel for the plaintiff claims by it, that Rhodes, the original debtor being dead, the question, whether *any libel* could be sustained, was to be determined by the United States

Court; but that the question, whether the principal defendant's demand was *a lien claim*, is now to be "adjudged" by this Court. We do not think the terms of the contract are sufficiently proved to authorize us to come to such a conclusion. But, if they had been, it would then appear that, at the time of the service of the plaintiff's writ, it was uncertain, and contingent, whether the alleged trustee would ever be liable upon his contract. No suit could have been maintained upon it, until some tribunal had "adjudged" Erskine's bill to be "a lien claim." Until then, it was a "contingent" demand. Such an adjudication has never yet been made. The case, giving the contract the construction claimed by the plaintiff, is within one of the exceptions stated in section 55 of chapter 86 of the Revised Statutes; and the trustee was properly discharged.

Exceptions overruled.

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

EZEKIEL D. DEMUTH *versus* JOHN L. CUTLER.

The law is now well settled, that an action on an indorsed note or bill of exchange may be maintained in the name of a nominal plaintiff with his consent.

If an action be brought in a wrong county, that fact should be pleaded in abatement, or taken advantage of on motion. The general issue is a waiver of the objection.

EXCEPTIONS from the ruling of TENNEY, C. J., presiding at *Nisi Prius*.

THIS was an action of ASSUMPSIT against the defendant as indorser of a promissory note of the following tenor:— "Augusta, 24th May, 1854. For value received, I promise, as treasurer of Vassalboro' Company, to pay to the order of James Bridge, fifteen hundred dollars in eighteen months, with interest annually. (Signed,) James Bridge, Treasurer V. Co." Indorsed, "James Bridge, Reuel Williams, J. L. Cutler, Gilbert Hillman." Plea, general issue.

The plaintiff called Gilbert Hillman, who testified that he received the note in suit at or about the time it bears date, from the defendant, in consideration of the sum of fifteen hundred dollars, which he then had in his possession, belonging to his son, Robert Hillman, who was then in California, and who had remitted it to him for investment on his account; that he informed the defendant that the money belonged to his son, that Mr. Cutler had applied to him for a loan on behalf of the Vassalboro' Company, that all the names were on the note except his own, when it was first offered to him. He further testified that he was then acting as the agent or attorney of his son, under a written power of attorney to transact all his business, that his son was still in California, not having been in Maine since, and had no knowledge of this suit and had given no consent to it; that he, as attorney of his son, had commenced it in Demuth's name, Demuth having consented to it, also, at Mr. Gould's request, as he supposed. He further testified that he had no interest in the note, but that in all that he had done he was acting for his son, by virtue of the power of attorney which he held.

The defendant then offered to prove that Demuth was wholly irresponsible and unable to pay the costs, which would be recovered against him, if the defendant should prevail.

The defendant contended that this action could not be maintained by the plaintiff, he having no interest in the suit, and because Robert Hillman had given no consent that it should be brought in Demuth's name, and because, even with his consent, no action could be maintained in this county, the defendant being a resident of Augusta, in Kennebec county, and so alleged to be in the writ. The presiding Judge, in order to settle other questions in the case, ruled that the action was maintainable.

The defendant objected further, that no title to the note in suit passed by the indorsement of Gilbert Hillman to the plaintiff; that the indorsement by the defendant was to Robert Hillman, who was still the owner of the note, and

that for that reason the action could not be maintained. But the Judge overruled the objection, and decided that the action might be maintained upon the indorsement of Gilbert Hillman to the plaintiff. The jury returned a verdict, under the instructions of the Court, in favor of the plaintiff.

The defendant excepted.

Gould, for the plaintiff.

Evans & Thacher, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — The note in suit was indorsed in blank. The law is too well settled to be longer a matter of controversy, that an action on an indorsed note or bill of exchange may be maintained in the name of a nominal plaintiff, with his consent. *Golder* v. *Foss*, 43 Maine, 364; *Granite Bank* v. *Ellis*, 43 Maine, 367. In *Craig* v. *Twomey*, 14 Gray, 486, the plaintiff testified that the suit was not conducted for his benefit, but for that of a third person, who, on his part, denied having anything to do with it; yet the plaintiff, subsequently adopting the action, it was allowed to proceed. "Courts will never inquire," remarks CHAMBERS, J., in *Whiteford* v. *Burckmyor*, 1 Gill, 127, "whether a plaintiff sues for himself or as trustee for another; nor into the right of possession, unless on an allegation of *mala fides;* and the blank indorsements may be filled up at the moment of trial." But this will not be permitted to prejudice the defendant, by depriving him of any just ground of defence.

If an action be brought in the wrong county, that fact may be pleaded in abatement or taken advantage of by motion. But the general issue is a waiver of whatever might have been so pleaded or taken advantage of by motion. *Webb* v. *Goddard*, 46 Maine, 505.

Exceptions overruled.

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

COUNTY OF SAGADAHOC.

MAINE MUTUAL MARINE INS. CO. *versus* BARKER A. NEAL.

Where an insurance company was authorized to cancel such of its stock notes as the company should deem to be worthless, if all its corporate powers had been vested in a board of directors, the cancellation of such notes, by the *directors*, was held to be equally effectual; and an assessment made upon the amount of the remaining notes, a valid assessment.

Where its by-laws provide for an assessment for the payment of losses "after the earned premiums shall have been used up," if there be earned premiums that are uncollectable and worthless, they may properly be regarded as "used up;" and whether the claims were worthless was a question of fact for the jury.

And an instruction to the jury that — "if the company had not assets enough on hand unappropriated, and dues collectable, to pay these losses, they could make the assessment, to the amount of such deficiency and not otherwise," affords the defendant, in a suit to recover the assessment upon his note, no ground for exception.

Nor has he any just ground for complaint, that the directors did not strictly comply with the by-laws, and credit to the makers of the notes the nett profits of a certain year, it appearing that both for the year preceding and that subsequent, the losses greatly exceeded the profits; for thereby he sustained no damage, his assessment being so much less.

EXCEPTIONS from the ruling of CUTTING, J., at *Nisi Prius*.

THIS was an action of ASSUMPSIT to recover an assessment upon a stock note dated February 27, 1856, for $2000, payable in two months after demand, — on which is indorsed the sum of $250, paid Nov. 23, 1859, the amount of a prior assessment paid by the defendant. At the time the defendant gave the note, he received a writing signed by the officers of the company, acknowledging that it was given for security of the policy holders, — and it was therein "agreed that said note shall be subject to assessments to pay losses, and other claims, when the premium shall have been used up, at an equal per cent. with all other advance notes; and shall re-

ceive such annual compensation as the by-laws shall prescribe, out of the profits of the business; and also, shall have an equal share with premiums earned, and paid, of the nett profits of the business, at the end of each year, in scrip, agreeably to the provisions of the by-laws. The company having the right at any time to surrender and cancel said note, after giving notice. And, whenever the reserved profits of the company shall amount to two hundred thousand dollars, said note shall be cancelled and given up."

The plaintiffs put into the case the by-laws of the company,—the portions thereof bearing upon the case will appear from the opinion of the Court.

It was in evidence from the records of the company that, on March 13, 1860, it was "voted that the next assessment on advance notes be ten per cent." That at a meeting held on April 2d, 1860, it was voted, "that the next assessment be made payable in two months from the 9th instant, and notice be given to the stockholders accordingly." And F. Reed, the secretary, testified that he seasonably gave the notice:—to those not living in Bath, he sent notice by mail, and paid the postage. The secretary further testified, that the assessment was made to pay losses,—which amounted to $44,463,56, at the close of April, 1860. Had been secretary since March, 1856. Did not know that these claims had been acted on and allowed. The amount of premiums earned the first year, ending with January, 1857, was $11,752. No part of this was credited to stock notes; nor of the premiums of next year, which amounted to $89,516. So, of the third year, amount $73,977; and of fourth year, amount of premiums earned, $72,493. The year ending with January, 1861, there were no earned premiums, and no credit on stock notes. In the monthly report of February, 1860, the premiums earned and not paid, amounted to $2439.

By vote of the directors at various meetings from Sept., 1856, to and including Feb. 23, 1857, advance notes had been cancelled amounting to $30,000; deducting that sum,

there still remained, on March 13, 1860, advance notes amounting to $225,000.

The nett loss for the year ending with January, 1857, was $41,844, gross loss $53,596; 1858, nett $5979, gross $95,496; 1860, nett $37,975, gross $84,653. The nett *earnings* for the year 1859, were $2208; amount of losses $51,968.

The losses happening in the year 1857, which have been paid, amount to $14,300, not paid $21,146; for the year ending January, 1858, paid $37,130, not paid $52,157; for the year 1859, paid $32,101, not paid $15,656; for the year 1860, paid $35,276, not paid $37,197.

The amount of the assessment was ten per cent. upon $225,000 of the stock notes.

At the close of February, 1860, the company owed $49,438 on account of losses and expenses; amount of premium notes for earned premiums then on hand, $25,827. The other earned premiums had been applied to the payment of losses.

The whole of the first assessment made in August, 1859, 12½ per cent. of $225,000, did not cover all the losses up to that time. At the time of the second assessment, the first had not been paid in full. The amount unpaid was $8330.

Between the first and second assessments the deficiency had increased about $20,000.

The defendant's counsel requested the Court to instruct the jury:—

That neither the vote of the directors, of March 13th, 1860, nor that of April 2d, 1860, make an assessment on the stock notes, and these votes are the only evidence of a legal assessment:—

That neither the receipt nor the note can be affected by any vote of the company subsequent to their dates, unless by consent of the defendants:—

That the liabilities of the defendant cannot be changed or altered by any vote of the company, after the giving of the note:—

That this action cannot be maintained before the expiration of two months after demand:—

That no legal assessment can be made on this note while the company had earned premium not used up or appropriated.

These requested instructions were not given, except as they are embraced in the following:—

Among other things, the Court instructed the jury that the directors of the company, by their vote, had a right to cancel the advance notes, and that the $225,000 was a proper basis for the assessment:—

That, as a matter of law, based upon the records exhibited, the jury were instructed that the assessment was legally made:—

That no demand was necessary before bringing this action:—

That it was not necessary to the validity of the present assessment, that there should be any credits to the stock notes.

If the company had not assets enough on hand, unappropriated, and dues collectable, to pay their losses, they could make the assessments to the amount of such deficiency and not otherwise.

The verdict was for the plaintiffs. The defendant excepted.

Gilbert & Sewall, for the plaintiffs.

Tallman & Larrabee, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—The case finds that this is an "action of *assumpsit*, brought to recover an assessment on a stock note, dated February 29th, 1856, for the sum of $2000, payable in two months after demand."

It was tried on the general issue and certain specifications filed in defence, which resulted in a verdict for the plaintiffs, exceptions to the rulings of the presiding Judge, and a motion to set aside the verdict as against evidence.

The motion has not been argued, and therefore may properly be considered as abandoned. The exceptions only, then, remain to be considered.

In the course of the trial it became necessary for the plaintiffs to prove that the assessment sought to be recovered was legally made, and, for that purpose, they introduced their charter, by-laws and the records of the proceedings of their directors; upon the inspection of which, the Judge ruled and instructed the jury that the assessment was valid, to which instruction the defendant's counsel have raised objection for several reasons.

First, because all the stock notes were not assessed. It appeared *that* the plaintiffs, by a special Act, approved Feb. 8, 1856, were created a corporation by the name of *The Maine Mutual Marine Insurance Company*, to be established at Bath, in the county of Sagadahoc, with power and authority to transact the business of marine insurance upon the principle of mutual insurance; to provide by their by-laws for the number of directors, and the investment of their capital or guaranty fund, in notes. *That* the plaintiffs duly organized under their charter and adopted a code of by-laws, of which § 4 is as follows; viz.,—"All the corporate powers of this company shall be vested in a board of directors, to consist of not less than seven, nor over fifteen members, to be chosen by ballot, at the annual meeting, for the term of one year, and until others are elected in their stead." § 5. "For greater security to the policy holders, no insurance shall be made, or policy executed for insurance in this company, until the sum of one hundred thousand dollars shall have been taken in advance notes, on the following conditions:—1st, The notes to be made payable in two months after demand. 2d, The notes to be subject to equal assessments to pay losses and other claims against the company, after the earned premiums shall have been used up. 5th, Any or all of the notes to be cancelled, or given up, or exchanged for other good notes, whenever the company shall so decide. Any note or notes may be given up,

and the receipt therefor required to be returned, whenever the company shall deem it for their interest to do so," &c.

It further appeared that, at a time prior to the assessment, the capital stock of the company consisted of stock notes, (sometimes denominated advance notes,) to the amount of $255,000, including the defendant's note, of which $30,000 had been cancelled by the directors, so that the assessment was based on the stock notes then available, amounting to the sum of $225,000.

Upon the record evidence, thus exhibited, the defendant's counsel contended that the assessment should have been made on the original amount of the stock notes, and not on the amount after the reduction; not because the notes, so cancelled, were worthless, but because the cancellation was by the *directors* instead of the *company*. Such an objection would have merited consideration, provided the company had not by their by-laws delegated that power to the directors. But when it appears that "*all the corporate powers of this company shall be vested in a board of directors*," and those directors have rejected certain worthless and insolvent members, no solvent member has reason to complain; for his burdens are not thereby increased, nor his delegated authority abused.

The basis of the assessment being a legal one, the next question presented by the exceptions is, whether any assessment was necessary, and, if any, whether it was not an over assessment. Upon this point the defendant invokes that portion of the by-laws which provides that "the notes shall be subject to equal assessments to pay losses and other claims against the company *after the earned premiums shall have been used up*," which provision was virtually inserted in the receipt to the defendant for his stock note, signed by the president and countersigned by the secretary of the company. It is contended, under that clause of the by-laws, that certain premiums had been earned and not *used up*, which were not taken into consideration in reduction of the amount assessed. A premium earned may be said to be

used up, when the claim is worthless and uncollectable; otherwise one such claim outstanding would exonerate the company from any assessments and consequently from the payment of any losses. Whether such dues were collectable was a question of fact presented to the jury under the following instruction; viz.:—"If the company had not assets enough on hand unappropriated and dues collectable to pay their losses, they could make the assessment to the amount of such deficiency and not otherwise." This instruction opened a door and permitted the defendant to enter in, and to inspect the records of his own agents, and to rebut any inferences legally deducible therefrom. This ruling was most favorable for the defendant, for it permitted him to impeach the doings of his own selected agents, while at the same time it authorized the company to collect of its several members their just contribution in payment of losses by them assumed in consideration of anticipated profits.

Again, it is contended that the directors failed to comply with the by-laws, because they did not credit to the makers of the notes three per cent., "out of the profits of the business when earned by the company," and we are referred to clause 3d of section 5, which purports to be adopted "for greater security to policy holders." It appears from the records, that for the year ending January, 1859, the profits exceeded the losses by some thousand dollars, and that no such credit was entered. It also appears that during the years both prior and subsequent the losses greatly exceeded the profits. Now, suppose the directors erred in not entering the credit for that one successful year according to the strict letter of the by-law; such omission was excusable and even justifiable, neutralized as such profit was by prior and subsequent losses. The defendant sustains no damage, for, if the profit had been credited, his present assessment must have been increased so much the more. Besides, the objection comes without equity from the defendant, when it appears that, at the subsequent annual meeting of the members of the corporation held, according to the by-laws, "on the

fourth Monday of February, in each year," no action was had in relation to any of the prior proceedings of their directors.

Finally, it is contended that this action cannot be maintained, because payment of the note was not demanded two months prior to its commencement. The payment of the note is not sought to be recovered in this suit as provided in clause 1st of § 5 of the by-laws, but an assessment thereon "to pay losses and other claims against the company," under the 2d clause of the same section. Such the case finds and the second count in the plaintiff's declaration discloses. *Motion and exceptions overruled.*

Judgment on the verdict.

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

JOHN H. KIMBALL *versus* CHARLES N. BATES.

Where one was arrested on a criminal process, in which he was falsely charged with fraud, *for the purpose* of coercing him to surrender to the prosecutor certain promissory notes of which each of them was a part owner, — such a prosecution was held to be without probable cause, and, in legal contemplation, malicious.

In such a case, the verdict for the defendant was set aside.

THIS was an action on the CASE for a malicious prosecution commenced by the defendant against the plaintiff, and causing him to be arrested on a warrant, in which he was falsely charged with having fraudulently obtained the possession of certain promissory notes.

The verdict was for the defendant. The case was presented to the whole Court on the plaintiff's *motion to set aside the verdict*, as against the law and evidence in the case; and also upon *exceptions* to certain rulings of MAY, J., presiding at the trial.

The nature of the evidence, as reported to sustain the plaintiff's motion, is sufficiently indicated in the opinion of the Court.

Gilbert & Sewall, argued in support of the motion and exceptions.

Tallman & Larrabee, contra.

The opinion of the Court was drawn up by

WALTON, J.—Upon the evidence as reported it seems to us that the verdict in this case is clearly wrong. When the defendant made oath before the magistrate that Kimball had obtained the notes in question by false and fraudulent pretences, he made oath to what appears not to have been true in fact, and to what he had not the slightest reason to believe was true; and his only object for making such a charge, as he himself admits, was to obtain possession of the notes. "My object was to get the notes; I was satisfied when the notes were out of his possession." The prosecution was adopted as a means of coercing the plaintiff to surrender them. A prosecution thus commenced is malicious and without probable cause. The term *malice* does not necessarily imply spite or hatred against an individual. "In a legal sense, any unlawful act, done wilfully and purposely, to the injury of another, is, as against that person, malicious." 2 Green. on Ev., § 453, and authorities there cited. "Prosecuting without a legal cause, in order to obtain payment of a debt, or restitution of property unlawfully detained, is a malicious prosecution." *Brooks* v. *Warwick*, 2 Stark., 393; *McDonald* v. *Rooke*, 2 Bing. N. C., 219. It is evidence of "a heart regardless of social duty, and fatally bent on mischief." That evil quality of the heart which prompts a man to make a false charge against another, for purposes of private gain or advantage, is legal malice.

The notes in question were first in the possession of the defendant. They were afterwards put, with the consent of both parties, into the hands of a broker to be discounted.

Both parties were present at the time. When the broker returned from an unsuccessful effort to get them discounted he handed the notes to the plaintiff. It does not appear that any fraud or artifice was used by him to obtain possession of them, or that he made any effort at all. They were given for freight. The plaintiff, and those for whom he acted, owned five-eighths of the vessel which earned the freight, while the defendant, and those for whom he acted, owned only three-eighths. Certainly the defendant's right to the possession of these notes was in no respect superior to the plaintiff's. The defendant claimed that the vessel was indebted to him, but a subsequent adjustment of his account shows that the claim was unfounded.

The plaintiff was arrested in New York as a fugitive from justice and carried to Baltimore, and held under arrest, till, to gain his liberty, he was compelled to surrender the possession of these notes. The charge against him was that he had obtained possession of them by false and fraudulent pretences. We think the evidence shows conclusively that the prosecution was instituted maliciously and without probable cause; and that the verdict was clearly wrong. This view of the case renders a consideration of the exceptions unnecessary. *Verdict set aside. — New trial granted.*

Appleton, C. J., Rice, Davis and Kent, JJ., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT.

1862.

COUNTY OF AROOSTOOK.

EBENEZER C. BLAKE *versus* SOLOMON HAM.

Where the title to separate and distinct parcels of land has become united in one person, by purchase from their various owners, and the purchaser afterwards conveys certain described portions of the whole, the rights of his grantees will depend upon the unambiguous language of their respective deeds, unaffected by the previous occupation of former owners, or by previous conversations or vague understandings.

If a part of the premises demanded is a passage way, to the line of which the tenant is bounded, the demandant will be entitled to recover, the fee of the land being in him, notwithstanding the tenant may have an easement in the passage way.

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

REAL ACTION to recover a portion of lot No. 38 in the town of Houlton.

The explanatory sketch, page 314, may be accurate enough to aid in understanding more readily the matters in controversy. The land claimed in the demandant's suit is indicated by the lines B, A, D, C. The tenant disclaimed all east of the line E, F; but claimed the remainder, being a strip about three rods in width.

The diagram is intended to represent the western portion of lot No. 38. In the year 1824, Amos Putnam, who owned the whole lot, conveyed to Leonard Wilson a part thereof, described thus:—"Beginning at the S. E. corner of lot No. 38, thence N. 77° W. 16 rods; thence N. 41° W. 14 rods, [see plan C to A]; thence N. 13° E. to the Creek, [A to D]; thence down the Creek to the line of No. 32; thence," &c.,—containing five acres, more or less.

Subsequently, in the same year, said Putnam conveyed the residue of lot No. 38, on the east side of Meduxnekeag stream, to Jay S. Putnam, which was called the "Mill lot."

In 1825, Wilson conveyed to Peleg Lander the western-most part of his lot, describing it thus:—"beginning * * * on the south line of the lot I purchased of Amos Putnam, [on plan B]; thence N. 41° W. nine rods to a stake [A]; thence N. 13° E. four rods to the Creek [D]; thence," (to G and to B, as indicated by the plan.)

On May 19th, 1834, said Lander conveyed to Edward Kelleran the western part of his lot, beginning on a line nine feet west of the west end of his dwellinghouse (line I, K, on the plan) "containing one acre, more or less."

Kelleran also purchased the mill lot, described in the deed before mentioned of Amos Putnam to Jay S. Putnam. In 1852, Rufus Mansur obtained Kelleran's title to both lots. Lander had before that time released to Mansur the part of the premises conveyed to him by Wilson, which he had not before conveyed to Kelleran.

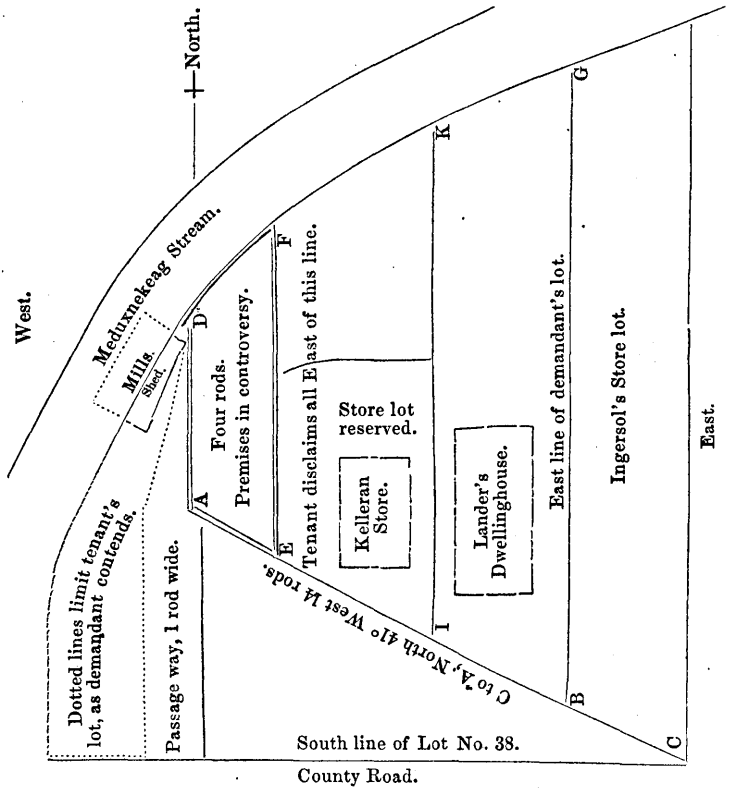
Both parties concur that Mansur then had the title to both lots. On the 16th of May, 1857, he conveyed the two tracts to Henry Sincock, describing them thus:—"the following described parcels of land, being parts of lots numbered *thirty-eight* on the east side of Meduxnekeag Creek in the village of said Houlton; to wit: that parcel of land formerly occupied by Peleg Lander as a residence, and that parcel adjoining the same now occupied by my store, and bounded as follows:—"beginning on the west line of Ingersoll's store lot, and on the south-west line of the said Lander lot; thence north, forty-one degrees west, nine and

$\frac{78}{100}$ rods, to land belonging to the mill privilege of said Mansur; thence north 13° east, four rods to the creek; thence down said creek to the said west line of the Ingersoll store lot; thence south 16° west, on the said west line twenty-eight rods to the place of beginning." Sincock conveys by this description to one Lovering, and Lovering to the demandant.

In the same deed of Mansur to Sincock, the mill lot is thus described, "also all that part of the land and mill privilege lying west of the passage way, which is reserved in the partition between Edward Kelleran and John Lovering, for a particular description of which reference is made to the registry of deeds, &c.; and west of the west line of the parcel of land hereinbefore described, and which was conveyed by Lysander Putnam and Jay S. Putnam to Edward Kelleran, as per their deed dated Nov. 21, 1834, and recorded, &c., and bounded as follows, to wit:—beginning on the said creek at the north-west angle of the first above described parcels of land; thence up said creek to the south line of said lot numbered thirty-eight; thence easterly on said south line to the west line of said reserved passage way; and thence northerly on said west line and the west line of said first described parcel of land to the place of beginning, with the mills thereon, together with all my right, title, and interest in the reserved passage way, dams, and right of water belonging to said privilege."

The description in the deed, Sincock to Ham, the tenant, is as follows, viz.:—"beginning on the south line of said lot No. 38, and on the lower or west line of a one rod passage way as laid out by P. P. Burleigh near the bank of the stream; thence northerly on the lower line of said passage way to the west line of the store lot formerly owned and occupied by Edward Kelleran, which was conveyed to me in the aforementioned [deed] by said Mansur; thence continuing northerly on said west line to the Meduxnekeag stream; thence up said stream to the south line of said lot No. 38; and thence easterly on said south line to the place

of beginning, together with all my right, title, claim, and interest in said reserved passage way, dam, and right of water belonging to said privilege.



In the deed of Kelleran to Frothingham and others, given in 1835, the south part of the land between the lines E, F, and I, K, was reserved; being the land on which his store stood.

Evidence was introduced by the tenant, subject to objection, to show that for a period of more than thirty years the space between Kelleran's store and the mill had been used for piling lumber thereon, and as a passage way to and from the mill; that except this, there was no other way of getting to the mills in front.

Leonard Pierce testified that he drafted the deed of Aug. 27th, 1859, from Sincock to Ham; thinks it was not copied from another deed; does not recollect whether the deed from Mansur to Sincock was present or not.

Witness further testified:—"I thought the line of the Kelleran store lot, was near the top of the bank, and supposed, that by following the lower line of the passage way, it would not strike the west line of the store lot, until it came near the top of the bank, which is near the store. I had no idea of any other west line of the store lot but that one."

The case was argued by

Granger & Herrin, for the demandant, and by

Blake & Garnsey, & Burnham, for the tenant.

The opinion of the Court was drawn up by

APPLETON, J.—On the sixth day of May, 1857, Rufus Mansur was the undisputed owner of the premises claimed by both parties, and, being such owner, on the same day conveyed them to Henry Sincock. As the title was thus perfect in him, he and his grantee might convey in such terms as they should deem expedient, and the rights of the parties deriving their titles from and through them are to be determined by the language used in the conveyances, under which they respectively claim.

The deed from Mansur to Sincock conveys two tracts of land, separate and distinct, one of which is bounded by the other.

The first described tract embraces by course and distance, length of line and monument, the premises in controversy, and is conveyed in the same language by Sincock to Lovering and by him to the demandant.

The second tract, in the deed from Mansur to Sincock, is land and a mill privilege "west of the west line of the parcel of land herein before described," and, after referring to previous deed, and to other lines, the deed concludes—

"thence easterly, on said south line, to the west line of said reserved passage way and thence northerly, on said west line and the *west line of the said first described* parcel of land, to the place of beginning, with the mills thereon," &c. It is apparent, therefore, that there can be no possible conflict of line between these different tracts. Each are described in clear and unmistakeable terms; and the second is bounded by the first, so that if it is possible to ascertain the boundaries of the first, those of the second tract are necessarily bounded thereby.

On the 27th Aug., 1859, Sincock conveyed to the tenant "one half in common and undivided of the following described real estate, situated on a part of lot numbered thirty-eight, in said Houlton, being the mills and privileges conveyed to me by Rufus Mansur, by his deed dated May 16, 1859, and bounded as follows, to wit:—beginning on the south line of said lot numbered thirty-eight, and on the lower or west line of a one rod passage way, as laid out by P. P. Burleigh, near the bank of the stream, thence northerly, on the lower line of said passage way, to the west line of the store lot formerly owned and occupied by Edward Kelleran, and *which was conveyed to me in the aforementioned* (deed) by said Mansur, thence continuing northerly, on said west line, to the Meduxnekeag stream, thence up said stream to the south line of said lot numbered thirty-eight, and thence easterly, on said south line, to the place of beginning, together with all my right, title and interest in said reserved passage way, dams and right of water belonging to said privilege," &c.

This deed purports to convey only the title conveyed by Rufus Mansur, by deed of May 16, 1859. If so, it is not in conflict with the claim of the demandant, for the second tract, described in his deed to Sincock, is bounded by the first.

It appears that, on May 19, 1834, Peleg Lander conveyed a part of his lot (being part of lot 38) to Edward Kelleran, being less than half an acre, upon which he had built and

occupied a store, and that, on Nov. 17, 1835, Kelleran conveyed the same to Henry Frothingham and others, "excepting therefrom the lot on which my store now stands, &c., beginning at a point eight feet west of a line drawn parallel with the west side of said store, and thence running northerly on a line parallel with and eight feet from said store, to a point eight feet west of the north-west corner of said store," &c.

It is urged that "the store lot, owned and occupied by Edward Kelleran," is the lot as excepted in the deed last referred to, and not the store lot, as occupied before and as originally conveyed.

But this construction fails to answer the calls of the tenant's deeds. The passage way, as laid out by Burleigh, is not in dispute. The lower line of the passage way does not touch the Kelleran store lot, as claimed by the tenant, nor does its west line touch the Meduxnekeag stream.

On the other hand, the passage does not touch the Kelleran store lot, as claimed by the demandant, and its west line runs to the Meduxnekeag stream.

"The store lot, formerly owned and occupied by Edward Kelleran," is the one "which was conveyed to me (Sincock) in the aforementioned (deed) by said Mansur." But the lot thus conveyed was the lot conveyed by Lander to Kelleran, not the lot as described in the exception in the deed of the latter to Frothingham. Mansur had, or purported to have, the original Kelleran title, and might, if he chose, convey it. That he did so, is clear from the language of his deed. Equally clear is it, that he neither conveyed, nor intended to convey the Kelleran lot as excepted.

The title to the premises conveyed to both parties having become vested in Mansur, and, after his conveyance, in Sincock, the previous occupation of either portion of the premises becomes immaterial. The rights of the parties must depend upon the plain and unambiguous language of the deeds under which they respectively derive their titles, and not upon previous conversations or vague expectations or understandings.

The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one and the easement in another. The demandant, having the fee, is entitled to recover, notwithstanding the tenant may have an easement in the passage way for the use of the mill. But, of the rights of either party to the passage way, it is not necessary to give an opinion in this case.

Defendant defaulted.

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

WASHINGTON LONG *& al. versus* DANIEL HOPKINS.

The plaintiffs represented to the defendant that they had "a permit" from the Agent of the State, to cut the birch timber on a certain township by paying "stumpage," and the defendant gave them his note for a specified sum, "for their right." The Land Agent seized the timber when cut, and the defendant was obliged to settle therefor as a trespasser. In an action on the note, *it was held*, that, as the State Agent had no authority to give the plaintiffs a license to cut the timber, there was no legal consideration for the defendant's promise.

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

ASSUMPSIT upon a contract of the following tenor and date:—"October 30, 1856. I agree to pay Long & Drew for their right to cut birch timber the present lumbering season in letter F, range 1, eighty dollars to be paid the first day of June next." (Signed,) "Daniel Hopkins."

The defendant was called as a witness and testified,—that prior to the date of the agreement the plaintiffs informed him they owned the birch timber—*that* there would be some more stumpage to be paid to the State, than the charge they were making to him. They at first asked $100, which he refused to give, and they finally agreed upon $80 as the price. Went on to the township and commenced to operate; was notified by the agent of the State, that he was a tres-

passer. He seized the timber; informed witness that plaintiffs had no permit. I afterwards settled with the agent for the stumpage. "When I gave the note I supposed it was for the right to cut the timber, and that they had a right."

On *cross-examination* witness testified,—"Long & Drew at first declined to sell me the timber, for, as they said, they were going to operate themselves. They said, over and above what they asked, would be a mere trifle to pay the State. I supposed I should have to pay the State something."

At the time of giving the note, the plaintiffs gave the defendant a writing in these words,—"We agree to let Daniel Hopkins have all the right we have on letter F, range 1, to cut all the birch timber the present lumbering season, by his paying to us eighty dollars." (Signed,) "Long & Drew."

Jesse Drew (plaintiff) testified that "in 1856 I applied to Walker, the Land Agent, for permission to cut the birch and hackmatack. He told me he could not give me a permit, as the Legislature had repealed the law; that if we operated should have to pay only a fair price for stumpage; that he would allow no one to disturb us. I told Long I had a permit from Land Agent, I told defendant it was not a written permit as the Agent could not give any; that if we sold him our right for the birch, we should put no one else there; that if there should be a new Land Agent we would write to him who was there and how he was there. And we did so. Saw defendant after the note became due; he said he had not then sold the timber,—would pay the note when he sold it."

The plaintiff Long testified that, the defendant asked me "if we had a permit—I told him we had a verbal permit for birch—that the Land Agent could not give a written one—that I had as lief have a verbal permit as a written one. He offered $80 for our right. He said he could not give our price ($100) and pay the State what he would have to pay."

If, in the opinion of the Court, the evidence shows a suf-

ficient consideration for the note, the action is to stand for trial—otherwise, the plaintiffs are to become nonsuit.

Granger & Madigan, for the plaintiffs, argued that the evidence disclosed several distinct and sufficient grounds of consideration to support the express promise of the defendant:—the written agreement given by the plaintiffs to the defendant; their promise not to cut the birch timber themselves, nor to authorize others to interfere with the defendant; their promise to aid the defendant in adjusting the claims of the State,—which they performed,—the defendant obtaining all he expected to get from the contract with the plaintiffs, and his subsequent promise to pay the note, after the settlement of the claims of the State.

The defendant was not deceived. The case discloses that he was fully informed of the claim of the State.

It may be likened to a case where a man promises to pay a sum of money for a quitclaim deed, when it is well known to both parties that the grantor has no title, but the grantee is willing to pay something for the chance of deriving some advantage from the conveyance. *Bean* v. *Flint*, 30 Maine, 224; *Sawyer* v. *Vaughan*, 25 Maine, 337; *Clark* v. *Peabody*, 22 Maine, 500; 2 Parsons on Contracts, 369.

Blake & Garnsey, for the defendant.

The opinion of the Court was drawn up by

KENT, J.—The note or memorandum, on which this action is based, expresses distinctly the consideration for the promise to pay. It is the *right* of the payee "to cut birch timber, the present lumbering season, on Letter F, R. 1." This is the only consideration set forth. The defendant insists that the plaintiffs never had any such right and, that he acquired nothing by the contract, and therefore his promise was without legal consideration.

It is evident, from the testimony of the plaintiff Drew, that the payees had no legal right, as against the State, to cut birch timber on the township in question. The conver-

sation with the Land Agent negatives such an idea. The Land Agent, as he says, informed him that he could not give him a permit—that the Legislature had repealed the law. The subsequent declarations gave no *right*, they, at most, amounted only to intimations that, if the plaintiffs did cut, a fair stumpage only would be exacted, and that no other person would be allowed to disturb them. The Land Agent had no legal right to give such assurances, and they could not create any *right* which could be asserted by the plaintiffs, much less, be sold and assigned by them.

The plaintiffs both admit that they told the defendant that they had "a *permit*" to cut this birch timber. They say they told him that it was not a written permit but a verbal one; but Mr. Long says he told the defendant, that he "had as lief have it as a written one."

After a full and fair examination of the whole testimony, we are satisfied that the plaintiffs undertook to sell and assign to the defendant a legal right which would protect him in cutting. It is undoubtedly true, that both parties understood that stumpage was to be paid to the State, and that the right to be transferred was only a right to enter and cut unmolested; subject to payment of stumpage to the State—not fixed at the time. But what the defendant understood he was purchasing, was a right, which would protect him from being regarded and treated as a trespasser by the State. It was in the nature of a *bonus* for a permit by the State, to cut the birch timber. This right was not acquired; the timber was seized by the officers of the State, and the defendant was treated as a trespasser, and the assumed right was denied and disregarded, and the defendant was obliged to pay whatever was demanded or lose his timber. He was thus placed in a very different position from the one he would have been in, if the plaintiffs had had the right, which they assumed to convey, to cut the birch timber. There was no legal consideration for the promise.

The other considerations suggested are not sufficient in

law and are none of them stated in the contract. The only consideration alluded to is the right to cut.

Plaintiffs nonsuit.

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

SHEPARD CARY *versus* JEREMIAH WHITNEY.

In a real action in which the tenant claimed betterments, the value of the improvements, and also of the land without any improvements, both at the time of the entry thereon, and at the time of the trial was ascertained; and the demandant afterwards elected to abandon to the tenant: *it was held*, that the sum to be paid by the tenant was the ascertained value of the premises, at the time of trial and not at the time of entry.

EXCEPTIONS from the ruling of CUTTING, J., at *Nisi Prius*.

Granger & Madigan, argued in support of the exceptions.

Blake & Garnsey, & Herrin, contra.

The opinion of the Court was drawn up by

CUTTING, J.—In this suit, at a former term, it was agreed by the parties, upon a report of the evidence, that "the full Court should determine the respective rights of the parties, and enter such judgment as the law requires." And, on the evidence so reported, this Court has heretofore determined that the demandant was entitled to possession of the demanded premises, subject, however, to his election, either to pay the estimated value of the improvements or to abandon to the tenant upon payment of the value of the land. The question now presented is, as to the time when the value was to be determined. The referees, to whom the question of value was submitted, have reported it to be, at the time of the trial, one thousand dollars; but that at the time

one Dennis Fairbanks went into possession, only of the value of four dollars. The demandant having abandoned, the Judge ruled, at *Nisi Prius*, that the tenant should pay the larger sum, to which ruling an exception is taken.

It appears that *Dennis Fairbanks*, under whom the tenant claims, went into possession more than twenty years before the commencement of this action, and his counsel relies on the provision of R. S. of 1857, c. 104, § 25, which provides that—"If the tenant, so claiming, alleges and proves that he, and those under whom he claims, have had the premises in actual possession, for more than twenty years prior to the commencement of the action, the jury may find that fact and estimate the value of the land at that time. The sum so found, (that is, when the tenant, or those under whom he claims, first entered thereon,) shall be deemed the estimated value of the premises."

The tenant's counsel contends that the evidence, as reported, brings him not only within the *letter*, but also within the *spirit* of the foregoing provision, while he cannot deny that both must coöperate to sustain his proposition. If the *letter* is to control, then it would become immaterial as to the nature of the possession, whether it has been a rightful or wrongful possession. If the action was against the tenant, for holding over under a lease of twenty years, his proposition would come within the letter, but no one would urge that it was within the spirit of the provision. We have decided heretofore that the evidence did not bring the defence within the spirit, otherwise the tenant would have had judgment in his favor. But in that opinion, which we here refer to, it was decided, upon the evidence reported, that there had been no twenty years *adverse possession* prior to the commencement of the suit. In *Pratt* v. *Churchill*, 42 Maine, 471, it was held, that—"to entitle the tenant to betterments, under R. S. of 1841, c. 145, § 23, his possession must be such, that—"if prolonged for a period of twenty years, it would, by disseizin, give him the fee. It must be open, notorious, exclusive and adverse." The

phraseology of the section *then* was similar to the one *now* under consideration, with the exception of the period of six instead of twenty years possession.

But, it may be asked with much propriety, if twenty years adverse possession carries the fee and establishes the title in the tenant, why the question of value could subsequently arise, unless under a more friendly occupation. And, again, why was it enacted in § 45, of c. 104, that—"in all real and mixed actions, in which the tenant proves that he, and those under whom he claims, have been in the open, notorious, adverse, and exclusive possession of the demanded premises, claiming in fee simple, for forty years next before the commencement of the action, and the jury so find, the demandant shall recover no costs."

But, in referring to the subsequent statute, c. 105, entitled, "limitation of real actions, and rights of entry," we find the solution. Section 1 limits the commencement of the action, or the right of entry, to a period not exceeding twenty years after seizin. Section 2 provides that—"If such right or title first accrued to an ancestor, predecessor, or other person under whom the demandant claims, *said twenty years* shall be computed from the time when the right or title first accrued to such ancestor, predecessor, or other person." So that an adverse possession of twenty years may avail the tenant, so far as it regards the estimate of the value of the land at the commencement of such possession, but not as to title. *Exceptions overruled.*

APPLETON, C. J., RICE, DAVIS, KENT and WALTON, JJ., concurred.

HIRAM ESTY *versus* RICHARD L. BAKER.

If a deed contains two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold under that which will be most beneficial to him.

If some of the particulars of the description of land conveyed do not agree, those which are uncertain, and liable to error or mistake, must be governed by those which are more certain.

In a deed conveying a gristmill, with the land and privileges where it is situated, "necessary for and attached to said gristmill, hereby meaning to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege," the effect is to convey all the land and privilege not before sold by the grantor, and connected with the mill and privilege, and not merely what is strictly necessary for and attached to the mill.

But if the parties have, by their acts and occupation, treated the grant as embracing, not all the lands and privilege *on the dam* not previously sold, but all the lands and privilege *connected with the gristmill* not previously sold, the Court will not interfere to control their construction.

A tenancy at will is, by alienation of the estate by the landlord, changed into a tenancy at sufferance; and, although the tenant had occupied the premises for a series of years, by consent of successive owners, the last alienation would effect the same change.

The statute providing for the termination of tenancies at will by notice in writing served on the occupant a certain period before the time fixed for such termination, does not provide that such tenancies cannot be terminated in any other way; and, even if this is implied as to tenancies at will under the statute, tenancies at will at common law may be terminated in the same manner as before the statute.

The decision in the case of *Young* v. *Young*, 36 Maine, 133, where the tenant was in possession under a parol lease at an agreed rent, which was a tenancy at will *by statute*, does not apply to a tenancy *by common law*, where the tenant merely occupied by consent of the owner, without rent.

A tenant *at sufferance* cannot maintain trespass *quare clausum* for a peaceable entry.

TRESPASS *quare clausum*. Plea general issue, with brief statement.

It appeared that the plaintiff occupied a carding mill and privilege in Houlton, under a lease for twenty years, from J. S. and A. R. Putnam, to S. Houlton, dated March 15, 1841, assigned to the plaintiff by deed of S. Houlton in

1851, adjoining said Putnam's gristmill, with "the privilege of making a road at the south end of said gristmill, not obstructing the privilege of water to said gristmill." The plaintiff also claimed the premises under a deed from said Putnams to Rufus Mansur, dated April 29, 1844, and intervening conveyances. The plaintiff had erected a platform and passage way for a road to his mill, as authorized by the lease to Houlton.

The Putnams, May 13, 1843, conveyed to Batchelor Hussey, by mortgage deed, "the gristmill in Houlton, on the Meduxnekeag stream, now owned and occupied by us, with all the appurtenances and machinery thereto belonging, together with the land and privileges where the same is situated, hereby meaning and intending to convey all of the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege," &c. This mortgage was subsequently foreclosed. In 1857, William Mays and J. M. Vanwart, having, through intervening conveyances, become the owners of the premises, leased them to the defendants for fifteen years; and they erected a building for a cabinet shop on the opposite side of the passage way from the gristmill, and run a shaft from the shop to the gristmill, under and across the platform built and used by the plaintiff for a passage way. By means of this shaft, the machinery in the defendant's shop was carried.

The plaintiff testified, that he repeatedly forbid the defendant erecting the building, and placing the shaft under the platform. The defendant testified, that the plaintiff at first gave his consent to both, but afterwards objected. On this point, there was much conflicting evidence adduced.

The plaintiff requested the presiding Judge, CUTTING, J., to instruct the jury, *that* the deed to Hussey conveyed only the land where the gristmill stood, and connected therewith, and not any land disconnected with the gristmill by the passage way; *that* the land under the defendant's shop cannot be regarded as attached to the gristmill; *that*, if the plaintiff was in possession of the land on which the shop was

built by permission of the Putnams, and if Hussey acquired a title to said land by his deed from the Putnams, the plaintiff was the tenant at will of Hussey and those claiming under him, and could not be dispossessed without notice to quit; and *that*, in this State, a tenancy at will can be terminated only by a written notice, and the tenant at will may maintain trespass *quare clausum* against the owner of the land for an entry on him without such notice.

The Court, amongst other things, instructed the jury as follows:—*that* the plaintiff, in order to maintain this action, must have the fee of the land, or possession and control of the fee; *that*, if he had only an easement, trespass *quare clausum* is not an appropriate remedy; *that* the Putnams, having owned the land in dispute, conveyed the fee in the passage way by their deed to Mansur, unless they had before conveyed it by their deed to Hussey; and *that*, if not so conveyed to Hussey, the fee passed to Mansur, and from him to the plaintiff, and the act of the defendant, in placing the shaft across the passage way, was unauthorized, and this action can be maintained.

And, for the purposes of this trial, the Court further instructed the jury, *that* the plaintiff's deed conveyed only the gristmill owned by the grantor, with the land and privilege where the mill was situated, necessary for and attached thereto, exclusive of anything embraced in that description which the grantor had previously sold; *that*, if the land covered by the passage way, and that on which the defendant's shop was erected, were, on May 13, 1843, necessary for and attached to said gristmill, then it passed to Hussey, and this action cannot be maintained; or, if the land necessary for and attached to said gristmill embraced said passage way, then this action cannot be maintained for placing the shaft across it, as the fee would be in Hussey and his grantors, and the plaintiff would have only an easement.

And *that*, if the plaintiff was in possession by permission of the Putnams, and as their tenant at will, such tenancy was terminated by the deed to Hussey, if that deed em-

braced the land in dispute, and the tenancy at will was thereby changed to a tenancy at sufferance, and a tenant at sufferance is not entitled to notice to quit.

The verdict of the jury was "not guilty." Before the verdict was affirmed, the Court inquired of the foreman, if the jury found that the defendant erected the building with the plaintiff's consent. The foreman answered that they had.

The plaintiff filed exceptions to the rulings of the Judge, and also a motion to set aside the verdict as against evidence, and the evidence was reported by CUTTING, J., to the full Court.

J. Granger, for the plaintiff, argued that he had an exclusive right to the passage way, under the Houlton lease, and that, although he did not own the soil, this would give him a right to maintain an action of trespass against the defendant. *Spooner* v. *Brewster*, 3 Bing., 136; S. C., 2 C. & P., 34; *Northampton* v. *Ward*, 1 Wils., 110; 3 Burr, 1566, 1824; 5 East, 480, 485; Cro. Eliz., 421; 2 Salk., 638; 2 M. & S., 499; *Crosby* v. *Wadsworth*, 6 East, 602; 5 T. R., 333; Bac. Ab., title Trespass, c. 3.

The ruling of the Court, referring to the jury the question what land was necessary for and attached to the gristmill, was erroneous. That was a question for the Court. The legal construction of a deed is always a question of law. If left to a jury, one jury may decide to-day one way, and another may to-morrow decide the same question differently.

The plaintiff being in possession by permission of the Putnams, was a tenant at will of said Putnams, and therefore, after the deed of Putnams to Hussey, tenant at will of Hussey, and, after the deed to Mays and Vanwart, tenant at will to them, if their deed embraced the land. In this State, nothing but a written notice to quit, under the statute, will terminate a tenancy at will. *Young* v. *Young*, 36 Maine, 133; *Smith* v. *Rose*, 31 Maine, 212; 1 Cruise Dig., 282, estate at will, c. 1, § 16.

A tenant at sufferance is one who comes into possession lawfully, and holds over wrongfully, after his estate is determined. But a tenancy at sufferance soon ripens into a tenancy at will; delay of the landlord in taking possession or in taking steps to remove the tenant raises a presumption of acquiescence. *Chesley* v. *Welch*, 37 Maine, 106; 5 Cush., 571. Even if alienation of the estate changed the tenancy at will to tenancy at sufferance, sufficient time had elapsed to change it to a tenancy at will again.

In support of the motion to set aside the verdict, the counsel argued that the evidence was confused, and threw but little light on the subject. But the finding of the jury, that the building was erected by the defendant by consent of the plaintiff, if not the mere opinion of the foreman, was manifestly against the evidence. Even the defendant admits that the plaintiff objected to the building being erected, although he alleges that he consented at first.

Bradbury, Blake, Garnsey & Madigan, for the defendant.

That land necessary for, and attached to, and ordinarily used with a mill, will pass by the grant of the mill, is well settled. *Blake* v. *Clark*, 4 Maine, 436; *Maddox* v. *Goddard*, 15 Maine, 218; *Forbish* v. *Lombard*, 13 Met., 114; *Whitney* v. *Olney*, 3 Mason, 280; *Johnson* v. *Raynor*, 6 Gray, 111.

It is right for the jury, as in the case at bar, to find by their verdict, as a matter of fact, what land is included, after being instructed as to the law applicable. This was done in 3 Mason, 280, just cited, under the instructions of Judge STORY. We find no case where there has been a different practice.

The instruction as to tenancies at will was correct. *Moore* v. *Boyd*, 24 Maine, 242; *Howard* v. *Merriam*, 5 Cush., 575. But this became immaterial, as, by the special finding of the jury, the erections were made by the consent of the plaintiff.

The plaintiff, in fact, was a tenant at sufferance, and not at will. Taylor's Landl. and Tenant, 2d ed., 32, § 64.

The deed to Hussey passes all the lands and mill privilege *on the dam* connected with the gristmill, not before sold, as well as all necessary for the mill.

The opinion of the Court was drawn up by

DAVIS, J.—This case has been presented to the Court before, (48 Maine, 495,) upon a report of the evidence differing in many respects from that now reported. It was then ordered to be tried by a jury; and, upon that trial, new questions of law were raised. The verdict being for the defendant, the plaintiff now presents the case again, upon exceptions and a motion for a new trial.

The plaintiff owned a mill and privilege on the Meduxnekeag stream, in Houlton; and he occupied a passage way and platform adjacent thereto. He derived his title to the premises, through mesne conveyances, from J. S. and A. R. Putnam, by their deed to Rufus Mansur, dated April 29, 1844.

In the summer of 1857, the defendant entered upon a portion of the passage way, and erected a shop thereon, in part; and he placed a shaft across the passage way, to connect the machinery in the shop with the water wheel of a grist mill. For that entry this action of trespass *quare clausum* was brought by the plaintiff.

The defendant entered under a lease from the owners of the gristmill, who also derived their title, through mesne conveyances, from the Putnams, by their deed to Batchelor Hussey, dated May 13, 1843. The description of the premises conveyed by this deed is as follows:—

"The gristmill in said Houlton, on the Meduxnekeag stream, now owned and occupied by us, together with the land and privileges where the same is situated, necessary for and attached to said gristmill; hereby meaning and intending to convey all the lands and mill privilege, (not here-

tofore sold by us,) on the dam connected with said gristmill and privilege."

This was a mortgage deed; and the debt secured by it not being paid, it was afterwards foreclosed. The validity of the foreclosure is not questioned.

The defendant contends that the deed to Hussey embraced "all the lands and privilege" owned at the time by the Putnams "on the dam connected with the gristmill."

The plaintiff contends that nothing passed by the deed except what was "necessary for and attached to said gristmill."

An explanatory clause, added to the clause containing the grant, sometimes has the effect to diminish, and sometimes to enlarge the grant; and sometimes it is rejected as repugnant to the grant. *Forbish* v. *Lombard*, 13 Met., 109; *Chesley* v. *Holmes*, 40 Maine, 536; *Pike* v. *Munroe*, 36 Maine, 309. The authorities on this subject are collected in the case of *Melvin* v. *Proprietors of Locks, &c.*, 5 Met., 15; and the following general rules are deduced:—

"If there be two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold that which will be most beneficial to him."

"If some of the particulars of the description of the estate conveyed do not agree, those which are uncertain and liable to errors and mistakes, must be governed by those which are more certain."

If the deed of the Putnams to Hussey, by the explanatory clause, commencing with the words "hereby meaning and intending to convey," embraces all the lands and privilege on the dam, not previously sold by them, such a construction is not only more beneficial to the grantee, but more definite and certain than a grant of what was necessary for and attached to the mill. The former is susceptible of actual demonstration and proof, by fixed boundaries. The latter can be determined only by the varying opinions and imperfect judgment of men.

But does the explanatory clause in that deed embrace all

the lands not previously sold by the grantors? This raises a question of verbal construction, of no little difficulty. For the clause may be analyzed, and the words supplied which are not expressed, in two ways, without doing any violence to the language.

Thus,—"hereby meaning and intending to convey all lands and mill privilege (not heretofore sold by us) on the dam (which is) connected with said gristmill and privilege."

Or,—"hereby meaning and intending to convey all the lands and mill privilege, (not heretofore sold by us) on the dam, (which are) connected with said gristmill and privilege."

So far as appears in the evidence reported, the parties themselves, by their subsequent acts and occupation, seem to have adopted the latter construction, treating the grant as embracing,—not *all the lands and privilege on the dam*, not previously sold,—but *all the lands and privilege connected with the gristmill*. This construction is most favorable to the plaintiff, and is in harmony with the instructions given to the jury. He therefore has no reason to complain; and it is unnecessary for us to express any opinion in regard to its correctness.

The plaintiff contended, at the trial, that if the passage way was not embraced in the deed from the Putnams, he had occupied it for a long time with their consent; that he was therefore a tenant at will; and that until the tenancy should be terminated by a notice to quit, according to the statute, the defendant, or his lessors, had no right of entry. But the jury were instructed "that, if the plaintiff was the tenant at will of the Putnams, that tenancy was terminated by the sale to Hussey; that the alienation of the estate changed the tenancy at will to a tenancy at sufferance."

The plaintiff appears to have occupied with the consent of the subsequent owners, as much as of the Putnams, until the defendant took his lease for a term of years, in 1857. But the principle would apply to the last alienation, as well as to the first. It is not claimed that the *defendant* ever gave such consent.

The statute in force at the time provided that "tenancies at will might be terminated by notice in writing served upon the occupant thirty days before the time fixed in said notice for the termination thereof." Law of 1853, c. 39, § 1.

This statute, and the one which preceded it, requiring a longer notice, enabled a landlord to terminate such a tenancy, without entry therefor, or alienation. It does not provide that such tenancies cannot be terminated in any other way. And even if this is implied in tenancies at will under the statute, such tenancies at common law may be terminated in the same manner as before.

"If the landlord enters on the land and cuts down the trees demised, or makes a feoffment, or a lease for years to commence immediately, the estate at will is thereby determined." 1 Cruise, title 9, c. 1, § 18. "It is an intrinsic quality of an estate at will," says SHAW, C. J., "that it is personal, and cannot pass to an assignee; and that, by an alienation in fee or for years, the estate at will is *ipso facto* determined, and cannot subsist longer. This is a limitation of the estate which is incident to its very nature. When, therefore, it is determined by operation of law, it is determined by its own limitation, without notice." *Howard* v. *Merriam*, 5 Cush., 563. And in *Curtis* v. *Galvin*, 1 Allen, 215, the same doctrine is stated by BIGELOW, C. J. "The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated, as by a notice to quit, given according to the requisitions of the statute." *McFarland* v. *Chase*, 7 Gray, 462.

This might seem, at first view, to be in conflict with the case of *Young* v. *Young*, 36 Maine, 133. But that decision, if correct, does not apply to the case at bar. The tenant in that case was in possession under a parol lease, at an agreed rent. Except by special provision of statute, it would have been a valid lease from year to year. It was a tenancy at will *by statute*. And it is expressly declared in

the opinion of the Court, that tenancies at will *by the common law* might be determined without notice to quit.

If the plaintiff was a tenant at will, it was by the common law. He occupied merely by the consent of the owner, without paying or agreeing to pay any rent. By the conveyance of the premises to the defendant he became a tenant at sufferance. *Benedict* v. *Morse*, 10 Met., 223. Such a tenant cannot maintain trespass *quare clausum* for a peaceable entry. *Motion and exceptions overruled.*

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

JOHN LOVERING *versus* SAMUEL LAMSON *& al.*

A justice selected by a poor debtor to hear his disclosure, if he is not related by consanguinity or affinity, and has no pecuniary interest in the result, may be considered "disinterested;" and his official act will not be rendered void, because he had counselled and aided the debtor in preparing for his disclosure, — although this should have deterred him from acting as one of the justices.

EXCEPTIONS from the ruling of CUTTING, J.

THIS was an action of DEBT upon a poor debtor's bond. The defence was performance by the debtor's taking the oath as provided by the statute. The certificate of discharge by two justices of the peace and of the quorum was introduced.

For the plaintiff it was contended that one of the justices was not *disinterested.* The material portion of the evidence offered on this point will appear from the opinion of the Court. The presiding Judge ruled, that upon the evidence, the action could not be maintained; to which ruling the plaintiff excepted.

C. M. Herrin, argued in support of the exceptions.

Burnham, contra.

The opinion of the Court was drawn up by

DAVIS, J. — It is objected, in this case, that one of the justices, before whom the debtor made his disclosure, was not "disinterested;" and that they therefore had no jurisdiction.

It appears from the deposition of Trueworthy, that Lamson applied to him for a citation; that he made it, and procured it to be served; that he advised him in regard to the mode of proceeding; and that he employed and paid counsel for him to attend to the disclosure. It is evident that the relations between them were such that he ought not to have acted as one of the magistrates; and a proper self-respect would have deterred him from it.

But he was not related to the debtor, by blood or marriage; nor had he any *pecuniary* interest in the matter to be determined. The repayment of the money advanced by him did not depend on the result. He had been the friend and legal adviser of the debtor, in the matter; and he may be presumed, whether conscious of it or not, to have been subject to the usual influences of that relation. If we had the power, as in jury trials, to send the case to another hearing, we should not hesitate to do so. But we have no such discretion. The question is simply one of legal jurisdiction. And however improper it was for him to sit as one of the justices in taking the disclosure, we cannot say that he had any such interest as to deprive him of jurisdiction, and render his official acts void. *Cottle's case*, 5 Pick., 483.

Exceptions overruled.

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

THE INHABITANTS OF HOULTON *versus* JAMES MARTIN.

In an action commenced in this Court to recover a penalty, which is "not to exceed one hundred dollars," the jury assessed damages for the plaintiffs at one cent — one-fourth of which sum only, the plaintiffs are entitled to, as costs.

EXCEPTIONS from the ruling of CUTTING, J.

Burnham, for the plaintiffs.

Blake & Garnsey, & Herrin, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — This is an action of debt for the penalty given by R. S. 1857, c. 24, § 38, for bringing a pauper into the plaintiff town, contrary to the prohibitions of this section. The penalty is not to exceed one hundred dollars. The jury in the present case, assessed the damages sustained by the plaintiffs at one cent. The plaintiffs claimed full costs, which were denied by the presiding Judge.

By R. S. 1857, c. 83, § 1, every justice of the peace may "have original, exclusive jurisdiction of all civil actions, including prosecutions for penalties in which his town is interested, where the debt or damages demanded do not exceed twenty dollars," with certain exceptions not material to the question before us. Notwithstanding the amount of the penalty may exceed the jurisdiction of a justice of the peace, still it has long been held that the action might be brought before him, if the damages claimed did not exceed such jurisdiction. *Carroll* v. *Richardson*, 9 Mass, 329.

The plaintiffs sought for higher damages than those recoverable before a magistrate. They had the unquestioned right so to do, but they did it at the risk of costs. By R. S. 1857, c. 82, § 97, "in actions commenced in the Supreme Judicial Court, except those by or against towns for the support of paupers, if it appears on the rendition of judgment that the action should have been commenced before a

municipal or police court or a justice of the peace, the plaintiff shall not recover for costs more than the quarter of his debt or damage." The plaintiffs are not within any of the exceptions made by the statute. The damages we must presume rightly assessed. If so, no reason existed for bringing the suit in this Court, and a very slight one for bringing it in any. Bringing it here, the plaintiffs must submit to such restrictions upon cost as the Legislature have deemed it wise to impose. Whenever there is a claim for unliquidated damages, the party suing must incur the hazard of such liquidation, however the amount recovered may affect the costs consequent upon such recovery. *Badlam* v. *Field*, 7 Met., 271. *Exceptions overruled.*

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

SHEPARD CARY *versus* JEREMIAH WHITNEY.

Where the parties agree upon certain persons to ascertain the value of improvements on land demanded, and also the value of the land, as provided by § 3, c. 104 of R. S., and exceptions are taken to the acceptance of their report, which are overruled, interest will be allowed on the sum from the time of the acceptance of the report at *Nisi Prius*.

EXCEPTIONS from the ruling of DICKERSON, J.

Granger & Madigan, in support of the exceptions.

Blake & Garnsey, & Herrin, contra.

The opinion of the Court was drawn up by

APPLETON, C. J.—By R. S., c. 104, § 3, "when the parties agree that the value of the buildings and improvements on the land demanded, and the value of the land shall be ascertained by persons named on the record for that purpose, their estimate, as reported by them and recorded, shall be

equal in its effect to the verdict of a jury." In pursuance of this section an estimate of the value of the buildings and improvements on the land demanded, and of the land was made, and the report of the persons appointed for that purpose was accepted, to the acceptance of which exceptions were alleged but subsequently overruled.

The presiding Judge allowed interest on the value of the land from the time the report was offered and accepted. If the value had been ascertained by a verdict, interest would have been allowed, notwithstanding exceptions might have been filed. *Winthrop* v. *Curtis*, 4 Maine, 297. Whatever might have been the law formerly, interest is now to be allowed upon the reports of referees, after their acceptance, by the special provisions of R. S., 1857, c. 77, § 29. The presiding Judge allowed interest from the acceptance of the report at *Nisi Prius*. This was in strict accordance with the statute. *Exceptions overruled.*

CUTTING, DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

COUNTY OF WASHINGTON.

George R. Tarbox *& al. versus* Eastern Steamboat Company.

The owner of property, in order to recover of a common carrier for hire, damages for loss or injury to the property, — after proving a contract, express or implied, for the carriage of the goods, and the delivery of them to the carrier, — needs only to show further that the goods have not arrived or have received injury, unless the carrier proves the performance of his contract.

A bill of lading signed by the carrier, acknowledging the receipt of the goods, "to be delivered in good order to A at B," is *prima facie* evidence that they were in good condition when received by the carrier, but is not conclusive, and the carrier may prove that the goods were damaged before they came into his possession.

In such a case, the burden is on the carrier to exhibit such proof.

It is not important whether the words "in good order," or "well conditioned," or both, are used in the receipt or bill of lading, the phrases being substantially synonimous.

Where the burden of proof is thrown upon one of the parties by the state of facts presented, it does not shift from one to the other as the weight of evidence varies by the introduction of fresh testimony, but rests on the same party on whom it was thrown at first, until the proof is such as to present a new and distinct question.

In a suit against a common carrier for hire, for loss or injury to goods delivered to him to carry, the burden is not on the owner to show affirmatively that the loss or damage was occasioned by neglect or want of diligence on the part of the carrier, as would be required in the case of an ordinary bailee.

On Exceptions to the ruling of Goodenow, J.

Case against the defendants as common carriers for alleged damages to 100 barrels of calcined plaster by their negligence in transporting the same from Eastport to Portland in the steamer Admiral. Plea, general issue.

It appeared that the plaintiffs are manufacturers of calcined plaster at Calais, and, in May, 1857, shipped 100 barrels by a small schooner to Eastport, to be forwarded to S. N. Beals & Co., Portland.

Evidence was introduced by the plaintiffs, tending to show that the plaster was carefully headed up in suitable casks, was dry when put on board the schooner, and was not exposed to wet until it was delivered to the defendants, except that a part of the casks were on the schooner's deck covered with a tarpaulin, during a very slight shower, while discharging at Eastport; that it appeared to be dry when handled at Eastport, and that the defendants' agent received it on board the steamer without objection, and signed a bill of lading, a copy of which will be seen in the opinion of the Court; that, after the plaster was delivered to the consignees in Portland, it was found to have been wet and damaged; that the defendants' agent was notified of the fact, J. C. Noyes was called in to examine the plaster, and estimate the damage, and fifty dollars damage was claimed, and was allowed by the plaintiffs.

The defendants introduced testimony, tending to prove that the plaster was placed in their storehouse at Eastport as soon as received; that it was transferred to the steamer next morning, and placed on skids under cover; that the passage was very pleasant, and not at all stormy or wet; that it was landed on the wharf in Portland in the same condition as when received, and that, although they had a sail for the purpose of covering freight on the wharf when necessary, they had no occasion to use it, the weather being pleasant.

It further appeared that some of the barrels were opened on the wharf by one of the firm of Beals & Co., and the plaster found to have been wet and hardened or set, next to the heads and staves, some more and some less. Beals & Co. objected to receiving it, but, after some conversation with the agent of the defendants, did receive it, and paid the freight, reserving the question of damages to be settled subsequently.

The defendants contended that the burden of proof was on the plaintiffs to show that the plaster was damaged while in the possession of the defendants as common carriers;

that the phrase "in good order" in the receipt signed by Hays referred to the external appearance of the packages, and was not even *prima facie* evidence in relation to the condition of the contents; and that the plaintiffs, in order to recover, must show affirmatively that the injury occurred through want of diligence or neglect of the defendants. The defendants further requested the Court to instruct the jury, that unless they were satisfied by the evidence that the injury occurred while the plaster was in their possession, or that of their agents, their verdict should be for the defendants.

The Court did not so instruct, but instructed the jury, that the burden of proof was on the plaintiffs; that the receipt or bill signed by George Hayes, dated May 27, 1857, was *prima facie* evidence that the plaster was in good condition when received by the defendants, but that it was not conclusive; and that it was competent for the defendants to prove that the plaster was damaged before it came into their possession.

The verdict was for the plaintiffs and the defendants excepted.

Hayden, for the defendants, in support of the exceptions, argued that the words "good order" referred exclusively to the external condition and appearance of the barrels at the time they were received, and were in no sense an admission or warranty of the quality or condition of the contents. The defendants are liable for injury happening to the contents while in their possession; but the receipt is not an agreement that the contents were uninjured when received.

Admitting that signing a bill of lading acknowledging the goods to have been received "in good order and well conditioned," raises a presumption that the loss or damage was occasioned by the default of the carrier, as decided in *Hastings* v. *Pepper*, 11 Pick., 41, the burden of proof is on him to show that it arose from a cause existing before his receipt of the goods, or a cause for which he is not re-

sponsible. But we submit that this liability, in regard to the *contents* of packages not open to inspection, comes from the words "well conditioned," and not from the words "good order." "Good order" relates to that which is seen and open to inspection; "well conditioned" may refer to the condition of the contents. These words are not found in Hayes' receipt.

The use of the words "good condition" in the Judge's instructions may have misled the jury, as the words "condition" and "order" are not synonimous. If the Judge had left it to the jury to determine when and how the plaster came to be damaged, with the burden on the plaintiffs to show fault on the part of the defendants, or without regard to the burden of proof, they must have found a verdict for the defendants.

The Judge, in effect, charged the jury that the defendants, having signed the receipt, were bound to show by positive and direct testimony that the injury did not occur through causes for which they were liable, whereas, he should have stated that it was for the plaintiff, aided by the receipt, to show that it did occur through such causes. *Ross* v. *Gould*, 5 Maine, 204; *State* v. *Flye*, 26 Maine, 312; *Stone* v. *Gowen*, 18 Maine, 174; *Perry* v. *Russell*, 13 Pick., 69.

F. A. Pike, for the plaintiffs, *contra*, argued that the words "good order" and "well conditioned" were synonimous. The forms of bills of lading vary. In the reported cases, no distinction is made. *Clark* v. *Barnwell*, 12 Howard, 293; *Barrett* v. *Rogers*, 7 Mass., 297; *Hastings* v. *Pepper*, 11 Pick., 41. The words "well conditioned" are now generally omitted as redundant.

The words of the contract should have their full force, according to their ordinary signification. In *Clark* v. *Barnwell*, the master of the vessel added to the bill the words "contents unknown," and this was held to limit its effect to the external condition of the package.

2. The plaintiffs alleged negligence on the part of the defendants. Of course, the burden of proof is on them to show negligence. The Judge so instructed the jury.

The evidence is, that the plaster, when it arrived at Portland, was wet to the extent of one-third of its value, and not only so, but the casks were wet outside. It is equally well proved that the casks were not wet when they left Eastport. The inference is plain, that the casks must have become wet on their passage in the steamer.

The Judge would have erred, if he had instructed the jury that it was the duty of the plaintiffs to "satisfy" the jury that the damage happened by the defendants' default. It is not the part of the plaintiff to "satisfy" the jury. Even in criminal cases, the State is not required to "satisfy" a jury absolutely, but only beyond a reasonable doubt, that the prisoner is guilty. *State* v. *Webster*, 5 Cush., 319. In civil cases, the duty of the jury is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although not free from reasonable doubt. 3 Greenl. Ev., § 29; 1 Greenl. Ev., § 2; *Thayer* v. *Boyle*, 30 Maine, 483.

The opinion of the Court was drawn up by

TENNEY, C. J.—This action is against the defendants as common carriers for hire, on account of their alleged failure to deliver one hundred casks of calcined plaster, in good order, at the place to which they engaged to carry it. It is not denied, that the defendants were common carriers for hire, and generally subject to the responsibilities which the law imposes upon persons so engaged.

In order that the owner of property may recover damages of a common carrier for hire, for loss or injury of goods committed to him to be carried to a given place, it is necessary that he should prove a contract, express or implied, for their carriage; the delivery of the goods to the carrier; and the breach of the contract. 2 Stark. Ev., 330.

An implied promise is usually relied upon, arising from

the receipt of the goods for carriage, by the carrier, or by one acting for him, at his office or place of business. *Ibid*, 330.

The foregoing facts being established, it is incumbent on the carrier to prove performance. And, to support an averment of loss or injury, it is enough to show that the goods have not arrived or have received an injury. *Ibid*, 335.

At common law, a common carrier for hire is responsible for all losses, excepting those occasioned by the act of God, or the enemies of the king. By the act of God is meant inevitable accident, and is distinguished from an accident, which arises from some act of man. By king's enemies are meant public enemies, with whom the nation is at open war. *Ibid*, 335.

So stringent is the law, touching common carriers, that it treats them as insurers against all, but the excepted perils, upon that distrust, which an ancient writer has called the sinew of wisdom. Story on Bailments, § 490; *Forward* v. *Pittard*, 1 T. R., 27; *Riley* v. *Horn*, 5 Bing., 217. The law of this country is the same as that of England. 2 Kent's Com., 470.

The agent of the defendants gave to the plaintiffs a bill of lading in the following words and figures:—"Red Beach, Me., May 27, 1857. Received from George R. Tarbox & Co., one hundred bbls. of calcined plaster, to be delivered in good order to Messrs. S. N. Beals & Co., Portland, by steamer." (Signed,) "George Hayes."

The plaster in question was damaged on its arrival in Portland, but whether before or after its delivery to the defendants, was a question in the case, and evidence was offered thereupon, by one side and the other.

It was contended on the part of the defendants, that the burden of proof was on the plaintiffs, to show that the plaster was damaged, while in the possession of the defendants. That, as common carriers, the phrase "good order" in the receipt given by the defendants' agent, referred to the external appearance of the packages, and was not even *prima*

facie evidence in relation to the quality of the contents; and that the plaintiffs, in order to recover, must show affirmatively that the injury occurred through want of diligence or neglect of the defendants; and the defendants also requested the Court to instruct the jury that, unless they were satisfied by the evidence that the injury occurred while the plaster was in the possession of the defendants or their agents, the verdict should be for the defendants.

The Court did not so instruct the jury, but instructed them, that the burden of proof was on the plaintiffs, and that the receipt or bill of lading, signed by George Hayes, dated May 27, 1857, was *prima facie* evidence that the plaster was in good condition when received by the defendants, but that it was not conclusive; that it was competent for the defendants to prove that the plaster was damaged before it came into their possession.

The burden of proof does not shift from the party upon whom it was originally thrown, upon the production of evidence sufficient to make out a *prima facie* case, unless the other party defends under a new and distinct proposition, having no connection with the first, attempted to be sustained by the other side. If the result of the case depends upon the establishment of the proposition, on whom the burden was first cast, the burden remains with him throughout, though the weight of evidence may be one side or the other, according as each may from time to time have introduced fresh proof. *State* v. *Flye*, 26 Maine, 312.

If, after the plaintiffs had offered the bill of lading, and the defendants had introduced evidence to show that the plaster was damaged before it was received by them, but failed to establish to the satisfaction of the jury that fact, but still such was the evidence in the case that the jury were not satisfied that the plaster was in good order when the defendants received it, the jury were required by the instruction, touching the burden of proof, to find for the defendants.

This was more favorable to the defendants than the law

in decided cases. In the case of *Hastings* v. *Pepper*, 11 Pick., 41, it is said, that "the signing of a bill of lading, acknowledging to have received the goods in question in good order and well conditioned," is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order, but it does not preclude the carrier from showing, in case of loss or damage, that the loss produced from some cause, which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and, of course, the burden of proof is upon him, to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible.

It was contended, for the defendants, that the phrase "good order," in the receipt, referred to external appearances of the packages alone. No case has been cited where this distinction between this phrase and "well conditioned" has been recognized, but they have been treated as substantially the same. In the quotation, which we have just made from the opinion in *Hastings* v. *Pepper*, both phrases were used in the receipt, and it was regarded as *prima facie* evidence, that, as to all circumstances which were open to inspection and visible, the goods were in "good order," and to show that they were not in "good order," the burden was on the carrier.

If we consider the precise meaning of the two phrases, independent of their respective relations to the subject matter in question, we cannot regard the phrase "well conditioned," as having reference to the contents of the casks, more than the phrase "good order."

The last clause of the defendants' proposition, the first of which we have just considered, that in order to recover, the plaintiff must show that the loss was by want of diligence or neglect of the defendants, is placing the liability of a

common carrier in the same category of an ordinary bailee. This is entirely inconsistent with the principles applicable to the former, and cannot be admitted.

Exceptions overruled, judgment on the verdict.

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

INHABITANTS OF TRESCOTT *versus* LORENZO W. MOAN *& als.*

Although the proceedings of a town are very irregular and informal, at a meeting where assessors, treasurer and collector of taxes are elected, and taxes voted to be assessed, yet the collector is legally bound to pay over to the treasurer *de facto* all taxes voluntarily paid to him by the tax payers.

Although the collector's bond is inartificially drawn, and is vague, indefinite and uncertain, yet it is not void, if, when taken in connection with the tax bills and other evidence in the case, it contains sufficient to give it force and validity.

A collector's bond dated August 15, 1854, and reciting that he was "chosen collector of taxes for the year next ensuing," it appearing that he was chosen in 1854, that his tax bills bear date that year, and that he collected that year's taxes, will be deemed to have reference to the municipal year 1854.

A bond obligating the collector "faithfully to discharge his duty as collector," although otherwise defective, is sufficient to hold him to pay over money which he has actually collected, and which in equity belongs to the town.

ON EXCEPTIONS to the ruling of CUTTING, J.

DEBT on a bond purporting to have been given by Moan as collector of taxes in Trescott, dated August 15, 1854. Plea *non est factum*, with a brief statement.

The plaintiffs introduced the bond as evidence, signed by Joseph W. Moan as principal, and J. M. Bell and W. H. Leighton as sureties; also a book purporting to be the assessors' record of taxes for the town, from which it appeared that state, county and town taxes were assessed, and committed to Moan as collector, by a warrant dated June 10, 1854, and signed by J. M. Bell and W. H. Leighton as assessors. The amount assessed was $1577,69.

Here the plaintiffs rested their case. The defendants objected, that the plaintiffs had shown no breach of the condition of the bond. But the Court ruled that the plaintiffs had presented a *prima facie* case.

The defendants thereupon introduced in evidence the town records of Trescott for the year 1854, by which it appeared that the annual meeting, in March, 1854, was not called or notified according to the requirements of law; and that no town clerk, selectmen, assessors, treasurer, constable or collector of taxes for said year were chosen, qualified and sworn, as required by law. The records showed that James May, Peter Caraher and Stewart McFadden were elected assessors; and that Caraher and McFadden were sworn; also, that Joseph M. Bell, Wm. H. Leighton and Stephen A. Wilcox were chosen as selectmen, and sworn; but they did not show that Bell and Leighton were chosen or sworn as assessors. They showed that James Saunders was chosen treasurer, and sworn; and that Lorenzo W. Moan was chosen collector of taxes, and sworn. But they did not show in what manner they were chosen; or that the oath required by law was administered to either of them; or that either Saunders or Moan had given the bond required by law. They showed that another town meeting was called, notified and held, July 8, 1854, and that, at that meeting, Joseph M. Bell was chosen collector of taxes; but it did not appear that he was sworn as collector, or acted as collector for that year.

The defendants introduced Moan, the principal defendant, as a witness, and he testified, amongst other things, that many refused to pay their taxes as illegal, and denied that he was a legal collector; that he collected in all $1080,64, and paid the State tax $126,08, the county tax $121,22, and about $800 to Saunders, acting treasurer; that he was to have six per cent. of his collections as his compensation, which, on the amount collected, would be $64,83, making in all $1112,13.

Joseph H. Calkins, the town agent, James Saunders, act-

ing treasurer for 1854, Isaac H. Esty, acting treasurer for 1859 and 1860, with the treasurer's book of accounts, containing the account with Moan for 1854, were introduced by the plaintiffs as evidence; and tended to show that Moan had not paid on the town taxes so large a sum as he claimed to have paid, and that he had not paid all the State tax.

The material parts of the bond are given in the opinion of the Court.

The defendants' counsel objected, that the bond in suit was not in the form required by law; that it was never approved by the municipal officers; that it had been mutilated or altered, and was void for its uncertainty.

But the Court, for the purposes of this trial, overruled the objections; and decided that the bond, if there was proof of its delivery, was binding on the defendants.

There was no proof that Saunders had given the bond required by law, as treasurer for 1854. And the defendants' counsel contended that Saunders was not a legal treasurer, or authorized by law to receive the money collected by Moan; that Moan was not a legal collector of taxes, and was not authorized by law to collect them.

But the Court instructed the jury, amongst other things, that, as the bond recites that Moan was legally elected collector of taxes, the defendants are estopped from denying it; that, by the records of the annual meeting in March, the meeting was not legally called and warned, the town officers not legally chosen and qualified, and that there were no legal assessors or treasurer for that year. But, if the taxpayers voluntarily paid their taxes to the collector, he is bound to pay to the treasurer *de facto* the sums collected; that they should look at the town records, the treasurer's book containing the account with Moan, the evidence of Saunders, Calkins and Moan, and judge whether there was anything due on the bond; and, if anything, how much. And on whatever sum they found due, if any, to allow interest from the time of demand, if any were made; and, if no demand were made, then from the date of the writ.

The jury returned a verdict for the plaintiffs for $196,46; and the defendants excepted.

J. A. Lowell, for the defendants, in support of the exceptions.

1. The Court erred in ruling that the plaintiffs had made out a *prima facie* case, and that the defendants must show performance of condition of the bond. The plaintiffs, in their declaration, allege a breach, which the defendants, in their specifications of defence, deny. The plaintiffs must then produce such evidence as will show a breach, before the defendants can be held to show performance. A denial on the part of the defendants is sufficient, until the plaintiffs support their allegation by proof.

2. The bond was not in legal form, and was vague, indefinite and ambiguous. For what year was the collector chosen? What year was "next ensuing" to August 15, 1854? The meeting in March, at which Moan was chosen collector, was illegally notified, and no officers were then legally elected. At a subsequent meeting, another collector was chosen.

3. It appeared that, at the March meeting, two assessors were chosen and sworn, and yet the taxes were not assessed by them, nor the tax lists signed by either of them.

4. There was no proof that Saunders gave bond as treasurer for 1854, or was authorized to receive the money collected by Moan, or that Moan was authorized to collect it. The acting collector was not bound to pay over money collected by him, to a person who was not legally authorized to receive it. *Smith* v. *Readfield*, 27 Maine, 145; *Bearce* v. *Fossett*, 34 Maine, 575; *Mitchell* v. *Rockland*, 41 Maine, 363.

B. Bradbury, for the plaintiffs, in reply.

1. The defendants pleaded the general issue, and performance of the conditions of the bond. The plea of performance is an affirmative plea, and imposes the burden of proof on the defendants.

2. No form is prescribed for a collector's bond. He is "to give a bond for the faithful discharge of his duty." The bond of Moan conformed to this requirement. The bond was, in effect, approved by the selectmen, and, if not, the defendants have no right to complain.

3. This action on the bond can be maintained, although the tax was raised at an illegal meeting, *Ford* v. *Clough*, 8 Greenl., 335; and although the assessors were illegally chosen. *Johnson* v. *Goodrich*, 15 Maine, 29.

4. Moan's bond bound him to pay the money he collected "to the treasurer named in his warrant" James Saunders was named in his warrant as treasurer. To him, Moan paid in part the money he had collected, thereby recognizing his authority. *Kellar* v. *Savage*, 20 Maine, 199; *Orono* v. *Wedgewood*, 44 Maine, 50.

The opinion of the Court was drawn up by

RICE, J.—Debt on a collector's bond. The bond, the execution of which does not seem to have been contested, bears date August 15, 1854, and, among other things, recites that, "whereas the said Lorenzo W. Moan was duly chosen collector of taxes for the year next ensuing, and make up his collections complete.

"Now if the said Lorenzo W. Moan shall faithfully discharge his duty as collector, and pay in to the treasurer named in his warrant from the assessors, the sums therein named, at the times specified, then this obligation to be void."

Evidence was also introduced by the plaintiffs, tending to show that a warrant, purporting to have been issued by the assessors, was put into the hands of the collector, containing a list of the state, county and town taxes, amounting in the aggregate to $1577,69. The record of the assessment was dated June 10, 1854.

Here the plaintiffs stopped, the Court ruling, against the objections of the defendants, that a *prima facie* case had been made for the plaintiffs. It may well be doubted, had

the case rested here, whether the action could have been maintained. The plaintiffs had then shown no money in the hands of the collector which had been paid voluntarily by the citizens; nor had they shown that he had been furnished with such a warrant as would authorize him to enforce the collection of taxes. To render him liable upon his bond for omitting to act, they must show that he had been armed with a legal warrant, by which collection could be enforced. When they rested their case, they had done neither that nor shown money in his hands.

The defendants, however, being under no legal compulsion to move, having had no testimony excluded, voluntarily introduced testimony by which it appeared that Moan had, as matter of fact, received the bills of assessment and had proceeded and collected large sums of money thereon, by the voluntary payments of the citizens, which he contended had been duly accounted for with the town. This presented the parties in a new attitude. The question now presented was, whether the money thus voluntarily paid by the citizens in discharge of their taxes, had been paid over according to the conditions of the bond. On this point the case finds there was testimony on both sides. And the Judge, in view of that evidence, instructed the jury that, if the tax payers voluntarily paid their taxes to the collector, he is bound to pay the treasurer *de facto* the sums collected, and that they should look at the town records, the treasurer's book containing the account with Moan, the evidence of Saunders, Calkins and Moan, and judge whether there was anything due on the bond; and, if anything, how much?

This instruction, in view of the whole evidence, is unobjectionable.

But it is contended that the proceedings of the town were irregular, informal and illegal. This is manifestly true. It is not often that such a medley of irregularities are exhibited in the proceedings of our municipal corporations. But the question is, are these irregularities of such a character as

to exonerate the defendants from paying over money which they have collected by virtue of those proceedings, from the citizens, and to which they have no title, equitable or legal? The authorities, as well as every moral principle, negative such a proposition. *Ford* v. *Clough*, 8 Maine, 334; *Johnson* v. *Goodrich*, 15 Maine, 29; *Kellar* v. *Savage*, 20 Maine, 199; *Orono* v. *Wedgewood*, 44 Maine, 49.

But, again, it is said that the bond itself is void, being so vague, indefinite and uncertain that no legal rights or liabilities can be predicated upon it. That the bond is inartificially drawn is manifest; but we think it contains elements sufficient to give it force and validity, especially when taken in connection with the tax bills and other evidence in the case. It bears date Aug. 15, 1854, and recites that Moan was duly chosen collector of taxes for the year next ensuing. The tax bills bear date in 1854, and this evidence tends to show that he was elected in 1854. He also collected the tax of that year. The bond, therefore, must be deemed to have reference to the municipal year 1854. By the terms of the bond he was "faithfully to discharge his duty as collector." This required him to pay over the money which he actually collected, and which in equity and good conscience belonged to the town. The defence is technical in its character, and though the defects in the proceedings of the town are numerous, they are not of such a character as will authorize the defendants to take refuge behind them and thereby enable their principal to hold money to which he is not entitled. There is no evidence that the bond has been altered since its execution. Indeed that ground of defence as contained in the specifications has been erased.

Exceptions overruled.—Judgment on verdict.

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

EBED WILDER *versus* ANDREW SPRAGUE.

The defendant accepted an order for the payment of a specified sum "*when* he sold certain wharf logs." Three years after its acceptance, a suit was brought upon the order, and the defendant was permitted to show his inability to effect a sale of the logs, notwithstanding he had used all common and ordinary means to do so.

The question of unreasonable delay in making the sale was properly submitted to the jury.

EXCEPTIONS from the ruling of CUTTING, J.,—and on motion to set aside the verdict as being against law, &c.

THIS was an action of ASSUMPSIT, against the defendant as acceptor of an order drawn by one Wilbur in favor of Bela Wilder & Co., payable when he shall sell certain specified wharf logs.

This suit was commenced by the plaintiff, as surviving partner, more than three years after the defendant's acceptance.

At the trial, in defence, it was contended that the logs had not been sold, although the defendant had used all common and ordinary means to sell them, and testimony was admitted, subject to objection, tending to prove such to be the fact.

The plaintiff's objection to the admission of such testimony was upon the ground that the order was payable absolutely, and that the lapse of time, between the date of the order and that of the writ, was sufficient to exclude such testimony. The verdict was for the defendant.

Bradbury & Smart, for the plaintiff, cited in argument *Sawyer* v. *Hammatt*, 15 Maine, 40; *Howe* v. *Huntington*, 15 Maine, 350; *Sears* v. *Wright*, 24 Maine, 278.

C. R. Whidden, for the defendant, argued that the cases cited from 15th Maine Reports were not in conflict with the ruling in the case at bar; that the case of *Sears* v. *Wright* was distinguishable from this, in this important partic-

ular, that there the logs had been sold and the only point decided related to the admissibility of parol testimony to explain and vary the written agreement.

That the questions at issue involved matters of fact, he cited 1 Stark. Ev., 452, 454. The case was properly submitted to the jury. *Howe* v. *Huntington*, 15 Maine, 350; *Hill* v. *Hobart*, 16 Maine, 164; *Porter* v. *Blood*, 5 Pick., 54; *Bradford* v. *Drew*, 5 Met., 188.

The opinion of the Court was drawn up by

APPLETON, C. J.—This is an action of assumpsit against the defendant upon his acceptance of an order of the following tenor. "Pembroke, Feb. 25, 1856.

"Mr. Andrew Sprague:—Please pay to Bela Wilder & Co., or order, thirty-one dollars, *when* you sell the wharf logs I have hauled for you this winter.

"Josiah E. Wilbur.

"Accepted.—Andrew Sprague."

This action was commenced Sept. 20, 1859. More than three years had elapsed between the date of the defendant's acceptance and the bringing of this suit. Had the case rested here, the plaintiff would have been entitled to recover. The remarks of Mr. Justice COLERIDGE, in *Doe* v. *Ulph*, 66 E. C. L., 208, where the Court, thinking the delay unreasonable, ordered judgment for the plaintiff, would not have been inapplicable. "*Prima facie* that was an unreasonable delay; and it lay upon the defendant to account for it. He did not do it; and there being no evidence to show that the delay was reasonable, the jury should have been directed to find for the plaintiff; and the verdict must be entered for him accordingly."

The defendant was permitted to show that the logs had not been sold, and that, notwithstanding he had used all common and ordinary means to sell them, he had been unable to effect a sale. To the introduction of this proof exceptions were taken.

The promise was to pay *when* the logs should be sold.

The defendant cannot be permitted to escape liability by refusing to sell, or by the neglect of the common or ordinary means to effect a sale. This, too, should be done in a reasonable time. But the Court cannot know the limit of time within which, by the exercise of common and ordinary care, a quantity of wharf logs could be sold. The circumstances of each year may vary. What is a reasonable time must depend upon the fluctuating contingencies of commerce. The market may vary. The demand, for the time being, may cease. Inability to sell, accompanied with reasonable efforts to effect a sale, by the very terms of the acceptance, cannot and do not make the defendant liable. The failure to sell, to charge him, must have been through his default. The defendant did not agree to pay, if, using all reasonable means, he could not effect a sale, nor could the plaintiff have expected he should.

The Court cannot define the precise termination of what would be a reasonable time in which to have sold. What is a reasonable time is a variable quantity. Upon the facts before the jury, the instructions given were correct. At any rate they are not the subject of exception.

The case of *Sears* v. *Wright*, 24 Maine, 278, varies in very material respects from the one now before us. There the logs had been manufactured into boards and the boards had been sold before the suit was commenced. Parol evidence was offered to vary the meaning of the written contract entered into by the defendant and was excluded. The exclusion was adjudged proper. As the defendant, in that case, had long before manufactured the logs into boards, it was impossible to show the logs could not have been sold, if they had not been manufactured. The similarity between the cases is apparent rather than real.

Exceptions and motion overruled.

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

RENDOL WHIDDEN *versus* JAMES BELMORE *& al.*

The parties entered into a written contract, by which the plaintiff *agreed* to saw a certain quantity of logs "as fast as they came into the boom and can be sawed," at a specified price per M feet; "to be sawed the present season." And the defendants *agreed to pay* therefor the price above named, the plaintiff "to have all the slabs:" in a suit by him for damages occasioned by the non-delivery of a portion of the logs to be sawed, — *it was held*, that it was not optional with the defendants to deliver a part only of the logs, if the whole came into the boom; but that it was obviously *implied* by the terms of the contract, that the whole number named therein should be delivered.

EXCEPTIONS from the ruling of DAVIS, J.

THE CONTRACT sued on in this action (the substance of which is indicated in the above note) appears entire in the opinion of the Court.

From the bill of exceptions, it appears that the defendants had a gang sawmill on the English side of the river, and that, at least three hundred thousand feet of spruce, pine, and hemlock logs belonging to them, suitable to be sawed in a single sawmill, came into the boom.

A witness called by the defendants testified that they directed him to turn out logs for Whidden to saw — enough to keep the mill running. He turned logs into the side boom on the American side, enough, as he supposed, to keep the mill employed. The defendants had a stock of logs all that season in the boom; the mill would saw, in a season, from 500 M to 700 M. It laid still that season for want of logs.

There was evidence tending to show that the quantity of logs sawed by the plaintiff under the contract was from 127 M to 180 M, — for which he had been paid. That plaintiff's mill was in good order and properly manned during sawing season; that the defendants did actually furnish the 300 M feet of logs according to the contract, and that they were not all sawed. Also, evidence tending to prove that the facts were otherwise.

The jury were instructed that, under the contract, the plaintiff could recover in this action, as now brought, only for the quantity of logs actually sawed by him for the defendants; but that he might recover an additional price for the sawing and was not restricted to the contract price, if the defendants had not performed their contract, by furnishing the logs as was contemplated by the parties in accordance with the usual course of business; but that no damages could be recovered in this action, for the failure of the defendants to deliver the whole quantity of 300 M feet of logs named in the contract.

The plaintiff not being satisfied with the amount of damages assessed for him by the jury, excepted to the foregoing instructions.

Bradbury, for the plaintiff.

F. A. Pike, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—This suit is brought to recover damages for the non-performance of a contract which is in the following terms.

"This agreement between Rendol Whidden on the one part and Belmore & Young on the other part, witnesseth, that said Whidden *agrees* to saw three hundred thousand feet of spruce, pine and hemlock logs, *as fast as they come into the boom and can be sawed*, as well as any such logs are sawed on the river, and in such dimensions as said Belmore & Young direct, at the rate of one dollar and twenty-five cents per M feet. Said *logs to be sawed the present season*, by the single saw. And said Belmore & Young *agree to pay* said Whidden one dollar and $\frac{25}{100}$ per M *as above*, payable at the time each hundred thousand is sawed, in a three months draft. It is understood also that *all the slabs shall belong to the said Whidden*.

"Belmore & Young,
"Rendol Whidden.

"Calais, March 29, '53.
"Witness—Wm. Kinney."

There was evidence tending to show that the quantity of logs specified in the contract came into the boom. A portion of those were delivered to the plaintiff to be sawed, and the non-delivery of the residue constitutes an alleged breach of the contract.

The presiding Judge, (among other instructions not excepted to,) instructed the jury "that, under the contract in suit, the plaintiff could recover, in this action, as now brought, only for the quantity of logs actually sawed by him for the defendants; but that he might recover an additional price for the sawing, and *was not restricted to the contract* price if the defendants had not performed their contract, by furnishing the logs at such a place as was contemplated by the parties in accordance with the usual course of business; but that no damages could be recovered in this action for the failure of the defendants to deliver the whole quantity of 300 M feet of logs named in the contract."

If it was at the option of the defendants to deliver such portion of the logs as they should choose, they would not violate their contract by omitting to deliver. The plaintiff would not therefore be entitled to extra compensation for that cause. The material and controlling question is, whether or not the defendants were bound to *deliver the whole* of 300 M feet of logs named in the contract.

By the agreement between the parties, Whidden agreed to saw three hundred thousand feet of spruce, pine and hemlock logs, "*as fast as they came into the boom and can be sawed.*" He must have his men and mill ready to perform this contract. He could not perform it without a corresponding delivery of the logs. The plaintiff was to have "all the slabs." But to give him the slabs, the logs must be sawed in his mill. It was never the understanding that he was to go elsewhere to procure them. Now was this contract unilateral? Was Whidden under obligation to be at all times ready to saw, and the defendants to be under no obligation to furnish the logs to be sawed? Or was the

contract reciprocal—the plaintiff to saw and the defendants to furnish the logs to be sawed?

The necessary implication from the whole contract is, that the defendants should deliver the logs to be sawed "as fast as they came into the boom," as without such delivery the plaintiff could not perform his part of the agreement. In *Pordage* v. *Cole*, (1 Saund., 319,) the marginal abstract is as follows:—"If it be *agreed* between A and B that B shall pay A a sum of money *for* his lands, and *on a particular day*, these words amount to a covenant by A to convey the lands; for *agreed* is the word of both," &c. In *Barton* v. *McLane*, 5 Hill, 256, F agreed to let B have privilege for a specified time of cleansing ore at F's forge, and of using a certain amount of surplus water for that purpose; B agreeing to erect machinery therefor, and to *furnish* F with so much cleansed ore as might be wanted in stocking his forge at a price stated. It was held that the latter clause of the agreement was mutually binding, and that F could not legally refuse to *accept* and pay for the ore contemplated by it. The word *agreement* necessarily imports two parties; and when one party *agrees* to sell his farm to another for a stipulated price, and both parties sign the agreement, there is a promise by the purchaser to purchase the farm and pay for it, the consideration specified, as clearly implied as though it were expressed in words. *Richards* v. *Edick*, 17 Barb., 261. "The first objection to the first count in the complaint," observes GRIDLEY, J., in delivering the opinion of the Court, "is founded on the allegation that the agreement contains no promise or engagement of the defendant to purchase or to pay for the plaintiff's farm. It is true there is no *express contract* to that effect found in the agreement; but in my opinion there is a clear implication of one. * * Now this is an agreement *inter partes* and is signed by both. The word *agreement* necessarily imports *two parties*, one to sell and one to buy, and when Richards *agrees* to sell his farm to Edick for $1700, and 240 acres of land owned

by Edick in the State of Illinois, and Edick signs the agreement, there is a promise to purchase and pay for the farm, the consideration expressed, as clearly implied as though it were expressed in words." So, in *Sampson* v. *Easterby*, 17 E. C. L., 428, when a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two-thirds, for pulling down an old smelting mill and building another of larger dimensions, and the lease contained a covenant to keep the new mill in repair, and so leave it at the expiration of the term, *but did not contain a covenant to build it:*—Held, that such covenant was to be implied.

The defendants "agree to pay said Whidden one dollar $\frac{25}{100}$ per M *as above*, payable at the time each hundred thousand is sawed." This implies the lumber was to be delivered *as above*—that is, "*as fast as* they come into the boom and can be sawed." It could never have been the meaning of the parties that Whidden was to be in readiness to saw, and the defendants were to be at liberty to deliver any logs, or none at all, as they should deem advisable. The quantity to be sawed, the price per thousand feet, and the time of payment, are all set forth in the agreement. The defendants had exacted certain obligations from the plaintiff which he could not perform without certain acts on their part. We think the defendants have agreed to deliver the plaintiff to saw, "three hundred thousand feet of pine, spruce and hemlock logs as fast as they come into the boom and can be sawed." This is obviously implied by the terms of the contract and the parties must so have intended.

Exceptions sustained.

CUTTING, DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

TITUS P. FENLASON *versus* BENJAMIN R. RACKLIFF.

In an action for trover, the mere denial of conversion in the specifications of defence is only equivalent to a plea of the general issue, and is not sufficient; but if facts are alleged, which, if proved, would support such plea, the plaintiff will be required to prove the conversion: —

As, — where the specifications set forth that the buildings which are the subjects of controversy, "were at the time of the alleged conversion, the property of R., and a part of his real estate."

Having contracted to purchase a farm, F. erected buildings thereon; and after thirteen years occupation, abandoned the farm, which the owner afterwards sold and conveyed to R., against whom F. brought trover for conversion of the buildings, R. having sold and conveyed the farm to another person: — *held*, that the buildings passed to R. as a part of the real estate, notwithstanding R.'s grantor may have verbally agreed with F. that they were personal property; — for the title to real estate, of a subsequent purchaser, cannot be affected by such a verbal agreement.

EXCEPTIONS from the ruling of RICE, J., — also on motion to set aside the verdict.

Walker, for the plaintiff.

G. F. Talbot, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J. — In 1846 the plaintiff contracted for the purchase of a farm, on which there was a house and a barn. He afterwards sold and removed the barn, and erected another in its place; and another small house was purchased by him, moved upon the farm, and left standing upon blocks, but not otherwise attached to the soil.

After twelve or thirteen years, the plaintiff being unable to pay for the farm, voluntarily abandoned it, still claiming to own the buildings as personal property. The owner of the land thereupon sold the premises to the defendant, Benjamin R. Rackliff, by his deed dated Nov. 12, 1858; and the defendant sold to Philip H. Rackliff, Nov. 25, 1859. The plaintiff claims that this sale was a conversion of the buildings; and he has brought this action of trover therefor. Upon the trial the verdict was for the defendant.

The defendant in his specifications alleged "that the buildings, at the time of the alleged conversion, were the property of Philip H. Rackliff, and a part of his real estate." The plaintiff claimed that this was no denial of the conversion, and that it was not incumbent on him to prove it; but the Court ruled otherwise.

It is not necessary that specifications of defence should be equivalent in terms to a technical plea, though they state the grounds of defence more particularly. What would be sufficient for a plea might be insufficient for specifications of defence. *Hart* v. *Hardy*, 42 Maine, 196. And it is equally true that what would be bad as a plea might be good as a specification of the defence. The allegation that the plaintiff did not own the property sued for, but that it was the property of Philip H. Rackliff, and a part of his real estate, is a specification of facts to support a plea denying a conversion, rather than such a denial. That they would, if proved, sustain such a plea, there can be no doubt. If the specifications had merely denied the alleged conversion, they would have been insufficient, as being merely equivalent to a plea of the general issue. But, as they set out the facts to be proved in support of such a plea, they are sufficient; and the ruling of the Court was correct.

The counsel for the plaintiff requested the Court to instruct the jury that, if any of the "buildings were placed on the land without the consent of the owner, yet if he and the owner of the buildings agreed that the buildings were personal property, they would become so; and the owner's deed of the land would not pass the title to the buildings."

There was no evidence in the case to warrant any such instruction. The most that can be claimed, upon the plaintiff's own testimony, is, that the grantor of the defendant assented to the opinion that he did not own the buildings, because they were personal property, belonging to the plaintiff.

But the requested instruction was intrinsically unsound and erroneous. Real estate cannot be converted into personal property by a mere parol agreement, so as to defeat

the title of a subsequent purchaser. If one having a good record title to a dwellinghouse could have it taken from him and removed, upon proof that a prior owner had sold it as personal property, when in fact it was not personal property, it would overturn all security in such titles.

Motion and exceptions overruled.

APPLETON, C. J., CUTTING, KENT and WALTON, JJ., concurred.

COUNTY OF HANCOCK.

GEORGE N. BLACK *versus* JOSEPH T. GRANT.

Where a deed of part of a township refers to a survey and plan of the township by A and B, surveyors, and it appears that A and B have never made any survey and plan jointly, but after A had surveyed the exterior lines of the township, B took A's field notes, surveyed the interior lines, and made a plan of the township, and it is shown that other deeds have been made by the same grantor, with a similar reference under like circumstances, the plan and survey made by B, with the help of A's field notes, may be regarded as the one referred to in the deed.

Where a deed conveys the south half of a lot of land in a township, "butted and bounded as follows," and then proceeds to describe the whole of the south half of the township, up to the south line of land deeded to G, (the owner of the north half,) it will be construed to convey the south half of the township, as, in a case of doubtful construction, a deed is to be construed most strongly against the grantor, and in favor of the grantee.

A tenant who has been in possession for years, may maintain an action of trespass against an intruder who has no title.

TRESPASS *quare clausum*, for cutting trees on part of township No. 21, Middle division, Hancock county. Plea general issue.

The plaintiff claims the southerly half of said township, under a deed to him by Joseph R. Ingersoll and others,

trustees, by their attorney, John Black, dated Sept. 8, 1853, conveying to him "the south half of a certain lot" of land, lying in township No. 21, "and butted and bounded as follows:"—the boundaries given are the exterior lines of the township on three sides, and on the fourth (north) side by "land sold to James Grant."

The defendant, as heir of James Grant, deceased, owns the northerly half of the same township, under deed of the same trustees, dated Dec. 1, 1847. The description is given in the opinion of the Court.

The evidence with regard to the plans and surveys will be seen in the opinion, so far as important.

The defendant testified as to conversations he had with Col. John Black, about the time the deed was made; Black told him the minutes of Dodge's survey had not been returned to him. Defendant did not know of Dodge's survey, until after his father took a bond for the conveyance of the land, and had made some payments; did not know of a plan until the trial; discovered that Dodge's center line did not give them half of the township in 1859, and told the plaintiff of it; the plaintiff said there was a discount made on the notes, and the defendant had all he paid for.

The alleged trespass was by cutting trees on land south of the center line marked out by Dodge's survey and plan, but not south of the true center of the township.

The case was heard before RICE, J., at *Nisi Prius*, and the facts reported for the full Court to determine, upon the law and facts, what the rights of the parties are, the defendant, if defaulted, to be heard in damages.

Peters and *Hale*, for the plaintiff.

The plan made by Dodge, according to his own survey of the middle or partition line of the township, and the previous surveys by Peters of the exterior lines, is the one referred to in the deed to Grant. Although not a joint survey by Peters and Dodge, it was their survey in effect, and the only survey and plan of the township which was ever made by any such parties.

The deed of Grant bounds his land by the Dodge and Peters line, and he can claim no more than his deed gives him. It is of no consequence what Black said about the line or the township. The line of boundary is a fact, and must control. Grant saw how his land was limited and bounded by his deed, and he cannot enlarge or contradict its terms. The center line marked by Dodge on the face of the earth must govern. *Williams* v. *Spaulding*, 29 Maine, 112. Even the plan, being but evidence of the survey, must yield to the line as spotted and marked. As evidence, it however becomes important, for it shows that a line was run, and how, and when, and where.

The question is not whether Dodge's plan was a handsome one, an accurate one, or what kind of a plan it was; but was it *the plan* referred to? If so, it decides the controversy.

Dodge's line gives the plaintiff 6 or 700 acres the most land. But, suppose it had given the defendant the most, would it not have been binding?

If Dodge's line does not govern, a new one must be run. But an exact division of the township is impracticable. No two surveys of lines in the woods are alike. No two surveyors would agree in surveying the same line. Col. Black saw the force of this, and would never allow an established line to be changed.

Rowe, for the defendant.

The deed of the plaintiff conveys to him only the south half of the land described. The description embraces the south half of the township to Grant's line on the north. Hence the plaintiff can have only the south half of the south half of the township, and does not own the land on which the alleged trespass was committed.

The defendant's deed was prior to that of the plaintiff, and is recognized in the plaintiff's deed as a valid existing conveyance. It conveyed to Grant the northerly half of the town, from the north line to the true centre line. There is no reference to any plan as a part of or to qualify the

description. After describing the land conveyed, the grantors give their estimate of the number of acres, and refer to the survey and plan of Peters and Dodge as the basis of their estimate.

The plan referred to in the defendant's deed is evidently a joint plan of Peters and Dodge, not a survey by one and a plan by the other. The plan introduced by the plaintiff, is not a plan of the township, and does not purport to be, but is imperfect and indefinite. It does not mark out all the exterior bounds, except by dotted lines in part, and does not contain the streams, ponds or lots.

The case fails to show that this is the plan referred to, and it does not appear, by any positive proof, that the township was ever surveyed at all. The defendant never saw or heard of this plan until it was produced at this trial. If Col. Black knew of it, he would have described it with some approach to accuracy. No man of his precision in business matters would have called this a plan of the township, or a plan by Peters and Dodge. The plan he referred to was a plan of a township six miles square, divided into equal halves, one of which, after deducting the reservations, would contain 9120 acres. Dodge's plan does not answer the call of the deed in a single particular.

Grant's line then extends to the exact center of the town. That center has not been precisely ascertained, but is south of the location of the alleged trespass.

It is only when the grant is made according to a plan distinctly and certainly designated by the deed, that the plan becomes a part of the deed; and, in such case, it is subject to no other explanations, than the other parts of the deed. *Chesley* v. *Holmes*, 40 Maine, 546. The plan of Dodge does not fill this description.

Monuments control plans. The intention governs all. The deed to Grant describes the township fully and completely, by monuments, and the lines of three adjoining townships, already ascertained and fixed, and a line to be run from the south-west corner of No. 28 to the north-east

corner of No. 15. This plainly varied from the old line surveyed by Peters, and run south-west, instead of north and south.

It is not pretended that Dodge made a division of the township so described. Such a division is yet to be made, and the line thus found will be the true center line of No. 21, and the southerly boundary of Grant's land.

The opinion of the Court was drawn up by

CUTTING, J.—The plaintiff owns the south, and the defendant the north half of township numbered twenty-one, Middle Division, in Hancock County, and the principal controversy is, as to the divisional line.

Both parties claim under the devisees in trust of the estate of the late *William Bingham;* the defendant by a deed to his father, James Grant, deceased, (under whom he claims as heir,) prior in time to that of the plaintiff, whose deed describes his northern boundary (the line in dispute) as identical with the southern boundary of the defendant's grant. So that the principal inquiry involves the construction of certain portions of Grant's deed.

That deed, after describing the exterior lines of the township, concludes as follows: viz.—"The part of said township intended to be conveyed by this deed, is the north half thereof, reserving therefrom two lots of three hundred twenty acres each, for public uses in said town, three lottery lots containing eight hundred acres, and six lots of one hundred sixty acres each, sold to settlers, leaving and containing nine thousand one hundred and twenty acres, more or less, *according to a survey and plan of said town by Peters and Dodge, surveyors.*"

It is contended by defendant's counsel, that the reference to the survey and plan was confined to the reservations. Had the acres in the reservations, instead of those conveyed, been referred to, there would have been force in the argument. But the question returns, was there a survey and

plan of *Peters* and *Dodge* existing at the time of the conveyance?

Inasmuch as the defendant was entitled by his deed to the north half of the township, if no plan had been mentioned, and the plaintiff seeks to diminish that quantity by the exhibition of a plan, the burden is on him to prove it to be the plan referred to in the deed. This can be done by parole testimony, since the plan was not named as a matter of record. There was no survey and plan made jointly by Peters and Dodge exhibited, or any proof that such ever existed, but the contrary. Still, there must have been some survey and plan recognized by both parties to the conveyance, although, perhaps, designated by a wrong name. Hence, we may, as between these litigants, resort to the parol proof in order to ascertain that fact. Upon this subject, the testimony of *Addison Dodge* is, that, in August, 1852, (which was prior to the delivery of the deed, although antedated for cause as explained by other portions of the evidence,) he surveyed the township, the exterior lines of which were originally run — east line by *John Peters, senior* — south and north lines by *John Peters, jr.* — the west line, north half, by James Peters — the south half by John Peters — that he always had their field notes when he retraced their lines, which were kept at *Col. Black's* office — that his directions were, invariably, to take Peters' minutes, examine them, and to follow their lines — that by the request of *Black* he run the divisional line parallel with and three miles south of the north line of the township, and, by bushing and spotting, well defined it — that soon after, he made a plan of his survey and delivered it to *Black*, (which plan was introduced and identified by him at the trial,) — that he made the divisional line and projected on the plan the other lines from Peters' survey. And *George S. Smith* swears that he wrote the deed as dictated by *Black*, this plan being then in his office. Other deeds were introduced, made about the same time by *Black*, as agent of the proprietors, of portions of other townships, as also the plaintiff's

deed, referring to the survey and plan of *John Peters* and *Addison Dodge* and *Peters* and *Dodge;* whereas, *Dodge* states that he never surveyed conjointly with either *Peters*, but only run interior lines in other townships as in this and made and returned similar plans. Upon such evidence, not materially impeached, we, to whom was referred the question of fact, are of the opinion that the survey and plan of *Dodge* was the one referred to in the deed. It was virtually the survey and plan of *Peters* and *Dodge*, not jointly, it is true, for the exterior lines were run and planned by *Peters*, and the interior by *Dodge*, but the parties might well characterize their several operations as a joint one, especially when exhibited on one plan.

There has been no suggestion of fraud, (and the reputation of the proprietor's agent for honor and integrity forbid the idea,) and, had the township been six miles square, as it was supposed to be, the defendant would have received his just proportion, or, had it exceeded six miles from east to west, as it did from north to south, he would have been entitled to the surplus, in the same manner as the plaintiff now is in the diminution of that distance and the excess in the other direction. As it is, the defendant's loss is less than two hundred acres, which, by the immutable rules of law, he must endure, rather than to lose the whole hereafter by an unauthorized and arbitrary change of long and well established legal principles.

But, assuming that the Court might arrive at the foregoing conclusion, it is further urged by defendant's counsel, that the plaintiff has no cause of action, for his deed gives him no title to the premises on which the alleged trespass was committed. Or, in other words, that his deed conveys only the south half of the south half of the township, leaving a quarter of the township south of the divisional line still in the trustees.

It is true that the deed conveys the south half of a lot of land in the township — "butted and bounded as follows" — describing the whole south half of the township

and up to the south line of land deeded to *Grant*. But the boundaries must refer to the land conveyed and not to one half of it. If the construction be doubtful, it should be against the grantor and in favor of the grantee. Besides, it appears that the plaintiff was in possession for years previous to the defendant's alleged trespass by lumbering thereon, up to the line, which gives a good title as against one who has none.

According to the agreement of the parties, the Defendant is to be defaulted, and heard in damages.

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

GROVES S. ALLEN *versus* ROSELLA H. HOOPER.

Since the Act of 1852, c. 227, the wife may deed directly to her husband.

Where the right of redeeming a levy is in the husband, the wife, in the absence of proof, is presumed to occupy the estate levied upon in subordination to the legal title, and not adversely thereto.

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

FORCIBLE ENTRY AND DETAINER. The respondent, at the hearing before the magistrate, pleaded the general issue, and in her brief statement alleged title in herself.

On the trial in this Court, the complainant offered in evidence the levy of an execution in his favor against Quincy A. Hooper, upon the premises, dated Dec. 7, 1857; a notice to the respondent to quit, dated Dec. 8, 1858; a deed of the respondent conveying the premises to said Quincy A. Hooper, her husband, dated Sept. 29, 1856, and recorded on the 8th day of October following.

There was evidence tending to show, that the money paid for the premises which were conveyed to the respondent, was furnished by her husband; also evidence tending to show that the money, or a portion of it, so paid, belonged

to the respondent. That since the conveyance of the premises to the respondent, she has been in possession of them, her husband having been absent at sea, most of the time; that the house was repaired and the expense of the repairs was paid by the husband. The case was withdrawn from the jury, to be presented to the full Court on a report of the evidence.

There was evidence reported bearing upon other points, but the view of the case taken by the Court renders it unimportant.

The case was argued in 1862, by

Wiswell, for the complainant, and by

B. W. Hinckley, for the respondent.

The opinion of the Court was drawn up by

APPLETON, C. J. — By the common law the husband cannot convey by deed to the wife. He must do it by the intervention of a third person. *Martin* v. *Martin*, 1 Greenl., 394. Nor can the wife convey to the husband. *Rowe* v. *Hamilton*, 3 Greenl., 63. She is deemed *sub potestate viri* and incapable of contracting with him. All contracts between them were void.

By Act of 1847, c. 27, a conveyance of land by a husband to his wife directly passes the title, except as against the creditors of the husband. *Johnson* v. *Stillings*, 35 Maine, 427.

The deed from the defendant to her husband, bears date 29th Sept., 1856.

The question first presented is, whether a wife can convey by deed directly to her husband, as, it has been seen, he can to her. The common law forbids and annuls such a conveyance. Is it authorized by any statutory enactment?

By the Act of 1844, c. 117, § 2, it is enacted that "when any woman possessed of property, real or personal, shall marry, such property shall continue to her, notwithstanding the coverture, and she shall have, hold and possess the same,

as her separate property, exempt from any liability for the debts or contracts of her husband." By § 3, "any married woman possessing property by virtue of this Act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties."

By the common law, the husband becomes entitled to the goods and chattels of the wife and the rents and profits of her lands. This statute was designed to protect the wife in the enjoyment of her separate estate. The wife could not constitute an attorney or appoint an agent. *Whitman* v. *Delano*, 6 N. H., 543; *Sumner* v. *Conant*, 10 Vt., 9. But she may need the aid of her husband in the management and contract of her estate. She is enabled to confer on him a limited control over her property by ch. 117, § 3. This simply permits the wife to release to the husband the control of her property and the disposition of its income *so long* as he shall appropriate the same for the mutual benefit of the parties, and by necessary implication, *no longer*.

So by the common law, if the wife at the time of marriage was seized of an estate of inheritance, the husband upon marriage becomes seized of the freehold *jure uxoris*, and takes the rents and profits during their joint lives. 2 Kent's Com., 110. He sues in his own name for an injury to the profits, in his own name and in that of his wife's for an injury to the inheritance. A lease by a married woman of land, held in her own right, is void. *Murray* v. *Emmons*, 19 N. H., 483. She cannot bind herself by an executory contract to convey land, though her husband join with her. *Ex parte Thomes*, 3 Greenl., 150. The husband's life estate in his wife's land may be levied upon. *Litchfield* v. *Cudworth*, 15 Pick., 23; *Babb* v. *Perley*, 1 Greenl., 16. The husband by marriage becomes entitled to a freehold estate in the lands owned by the wife, and that estate he can convey by deed. *Trask* v. *Patterson*, 29 Maine, 499. The deed of a married woman, in which her husband does not

join, is a nullity, and conveys no estate. *Ela* v. *Card*, 2 N. H., 175; *Matthews* v. *Puffer*, 19 N. H., 448.

The husband upon marriage becomes possessed of the chattels real of the wife, which he may sell, assign, mortgage or otherwise dispose of, as he pleases, without her consent, by any act in his life time. Her chattels real may be sold for his debts. The personal property of the wife in her possession at the time of the marriage vests absolutely and immediately in the husband, who could dispose of them as he pleases, and on his death they go to his representatives.

It was on account of these common law disabilities of the wife, thus briefly indicated, that further and more extensive power was conferred upon her by the Act of 1852, c. 227, which provides 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 and convey* and *dispose* of the same *and to execute all papers necessary thereto in her own name as if she were unmarried*, and no action shall be maintained by the husband for the possession or value of any property held or disposed of by her in manner aforesaid." The Act of 1855, ch. 120, re-enacts the above provisions, prohibiting a right of action to any person claiming under or through the husband.

The general power to lease, sell, convey or dispose of her estate, is given to the married woman, "*as if she were unmarried.*" Stronger or more explicit language can hardly be imagined. No restriction is imposed upon the power of leasing, selling or conveying. If unmarried, she could convey to the person, whom she might thereafter marry. But the marriage is no impediment to the exercise of the new powers thus given her. Her right to convey remains thereby unaffected.

The actions, which are prohibited, are those which by the common law, a husband might bring to vindicate his rights of possession or his claims for damage, in case the wife had undertaken previous to the passage of the above Acts to do,

what therein and thereby, she is authorized to do. These Acts have conferred new and extensive powers on the wife. They enlarge her rights. They restrict and destroy those of the husband. The real and personal estate of the wife is liberated from the control of the husband. The disposition of it, without reference to his wishes, is given to the wife. She may transfer to a stranger. She is equally at liberty to convey it to her husband. If she could not, there would be a restriction upon her power of disposal, as "if she were unmarried." But none such is to be found.

The result is that the common law has been changed, and that henceforth the wife may deed directly to her husband.

The defendant denies that she was ever the tenant of the plaintiff. The facts before us do not sufficiently prove, that the relation of landlord and tenant ever existed between them, or any such relation on her part to the plaintiff as will authorize this process.

The husband being in possession by virtue of his wife, her occupancy and that of her family is to be regarded as in subserviency to his superior rights. The fee was in him. The occupancy of the family is the possession of the husband. He was at home when the land was conveyed to him. His occasional absence at sea, for longer or shorter periods of time, does not affect the legal rights of the parties.

The levy was made Dec. 7, 1857. It does not appear whether he was present or not. After the levy the occupancy was as before. The time for redemption expired Dec. 7, 1858—but during the previous year the husband must be regarded as tenant of the premises, of which he had been previously seized in fee. Nothing indicates an usurpation of the fee on the part of the wife—or that new relations, variant from those, which the law would presume, had arisen.

The notice was made Dec. 8, 1858, and process served the next day on the wife. The husband's right to redeem had only expired the day before. No sufficient reason has been disclosed by the proof why process should be issued

against the wife for lands, which, if she occupied according to her legal rights, she had occupied as a part of her husband's estate, and was so occupying when the notice was served on her. *Plaintiff nonsuit.*

RICE, DAVIS, KENT and WALTON, JJ., concurred.
CUTTING and DICKERSON, JJ., dissented.

WALES E. PACKARD *versus* SETH TISDALE.

A collector of taxes cannot compel payment by suit, except in those cases in which the statute expressly confers that right.

An action cannot be maintained by a town collector, upon a promise to pay him a tax, in consideration that he will forbear to collect the same in the manner required by law, although by such neglect he becomes liable to account for the tax and actually pays it to the town.

EXCEPTIONS from the ruling of APPLETON, J.

THIS was an action of ASSUMPSIT, by the plaintiff as collector of taxes for the town of Ellsworth, to recover of the defendant $286, the balance of his tax remaining unpaid.

The plaintiff had leave to amend, subject to the defendant's objection, by the addition of another count as follows: "also, for that said plaintiff was collector of taxes for said town of Ellsworth, and acting in said capacity for the year of our Lord 1856, and as such, had in his hands for collection, a tax assessed for said year upon real estate, taxed to said Tisdale in said town of Ellsworth, and in pursuance of the authority to him given, was about advertising said real estate for the non-payment of taxes, in the month of October, A. D. 1857, and within the time prescribed by law for the advertisement thereof: and said defendant then and there requested said plaintiff to forbear advertising the same, and to put himself to no trouble about the same, and then and there promised said plaintiff that he would pay

him the said tax on demand, and now said plaintiff avers that, relying on said promise, he forbore, as requested, to advertise said taxes upon said real estate, and the lien became absolved from the same, and he became liable to pay the same to the town, and assumed the same to himself to pay, and did pay and account therefor, to wit—the sum of $286, by means of which said defendant became liable to pay the plaintiff the said sum on demand, and yet, though requested," &c.

The presiding Judge ruled that proof of a promise to pay a collector a tax, in consideration of his forbearance to take the necessary steps toward a collection, as the statute required, would not sustain the action, and directed a *nonsuit;* to which ruling the plaintiff excepted.

The questions raised by the exceptions were argued by

Wiswell & Madox, for the plaintiff, and by

Drinkwater, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—The general rule is well established that the collector of taxes cannot compel their payment by suit except in those cases in which the right of action is given by statute. *Andover Turnpike* v. *Gould*, 6 Mass., 4; *Crapo* v. *Stetson*, 8 Met., 393; *Shaw* v. *Peckett*, 26 Vermont, 482.

If the plaintiff had paid the defendant's taxes at his previous request, he might have recovered the amount thus paid. So, if taxes are paid by mistake, by one not the owner of the land taxed, and the owner promise to pay, the promise and the benefit will be held equivalent to a previous request and the action will be maintained for their repayment. *Nixon* v. *Jenkins*, 1 Hilton, 318.

But, in the present case, the foundation of the plaintiff's claim rests upon his omission to do his duty. It is the only consideration of the plaintiff's promise. An agreement by a third person to indemnify an officer for neglecting his duty

in the service of a precept, being founded on an illegal consideration, is void. *Hodsdon* v. *Wilkins*, 7 Greenl., 113. So, a promise to deliver the debtor at a certain time, if the officer will not arrest him. "An express promise to indemnify him against the consequences of his own breach of duty," remarks PARSONS, C. J., in *Denny* v. *Lincoln*, 5 Mass., 385, "cannot be valid, neither will the law imply a promise on an illegal consideration." So a bond given to an officer to induce him to do an act which the law requires of him as a part of his duty, is void. *Mitchell* v. *Vance*, 5 Monroe, 529. The consideration of the defendant's promise was the plaintiff's neglect to perform his duty.

Whether the collector may not still enforce the payment of the tax by arrest, is a question not now before us.

Exceptions overruled.

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

WILLIAM HEATH *versus* LEWIS NUTTER *& al.*

The authority in a power of attorney "to grant any and all *discharges* by deed or otherwise, both personal or real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by deed of warranty the real estate of his principal.

And where the agent has assumed so to convey, the principal cannot afterwards ratify it by parol, or by a writing not under seal.

If a person, with a full knowledge of the equitable title of such a grantee, obtains a quitclaim from the principal, which is effectual at common law to vest the title in him, a court of equity can alone afford protection to the former grantee.

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

WRIT OF ENTRY. Plea, general issue.

Both parties claim under Charles D. Robbins;—the demandant under his deed dated Feb. 17th, 1858, duly acknowledged and recorded; the tenants under the deed of said Robbins, by Samuel G. Rich, his attorney, to the in-

habitants of the town of Tremont, dated May 3d, 1854, who, on 21st of Dec., 1856, conveyed to said Lewis Nutter. The other defendant holds under Nutter.

The power of attorney from Robbins to Rich was duly recorded and is as follows:—

"Know all men by these presents, that I, Charles D. Robbins of Tremont, in the county of Hancock, and State of Maine, mariner, do appoint Samuel G. Rich of said Tremont, for me and in my name and to my use, to demand, recover and receive of the overseers of the poor of the town of Tremont, or any other person or persons authorized by said town of Tremont to settle the same, all such sums of money as are due me from the town aforesaid, or any other persons for the support and maintenance of Benjamin Robbins and wife, of said Tremont, and all debts due me from said Benjamin, and to settle and compromise all matters in dispute in said premises, and for me and in my name to grant any and all discharges by deed or otherwise, both personal and real, as he, my said attorney, shall deem proper, and to do all other things concerning the premises as fully as I myself could do if I were personally present, hereby ratifying and confirming all the lawful acts of him, the said attorney, or of his substitute, by virtue of these presents. In testimony whereof, I have hereunto set my hand and seal, this tenth day of March, in the year of our Lord one thousand eight hundred and fifty-four. Signed, sealed," &c.

The tenant offered to prove by said Rich, that the power of attorney was given to him by Robbins for the purpose of conveying the real estate to the town of Tremont, and receiving such sum as they would pay in addition to their taking care of his father and mother; that, after the bargain with the town, he informed Robbins what the town had agreed to pay and to do, and Robbins wrote him back agreeing to it; that when Robbins returned he received $50 as part of the consideration of the deed, the balance of the consideration of the deed being the agreement to support

his father and mother. The tenant further offered to prove by said Robbins, that, before he gave the quitclaim to plaintiff, before referred to, he informed plaintiff he did not consider that he had any interest in the premises; that he had given a power of attorney to Samuel G. Rich for the purpose of conveying the same premises to the inhabitants of Tremont, and that said conveyance had been made by virtue of said power of attorney; that, after said conveyance by said Rich, he ratified the doings of his attorney Rich, by letter and verbally, and received fifty dollars as part of the consideration from the town; that said Heath induced him to believe there would be no impropriety in giving him (the plaintiff) said quitclaim deed; that he did not consider he had any right or interest in the premises, having deeded the same and removed from the premises some four or five years previously, and that said premises since then have been occupied by Nutter, the grantee of the town. The presiding Judge ruled that the power of attorney to Rich did not authorize him to convey the premises in question; and excluded the evidence offered. If either of these rulings are erroneous the cause is to stand for trial, otherwise a default is to be entered.

The case was argued by

Hathaway & Drinkwater, for the demandant, and by

Wiswell, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — The power of attorney to Rich did not empower him to convey the demanded premises to the inhabitants of Tremont. The authority "to grant any and all *discharges* by deed or otherwise, both personal and real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by bill of sale, or by deed of warranty, all the personal and real estate of his principal. Nor can the authority to convey by deed be found elsewhere.

Whenever any act of agency is required to be done in the

name of the principal under seal, the authority to do the act must be conferred by an instrument under seal. A power to convey lands must possess the same requisites, and observe the same solemnities as are necessary in a deed directly conveying the land. *Gage* v. *Gage*, 10 N. H., 424; Story on Agency, §§ 49, 50; *Montgomery* v. *Dorion*, 6 N. H., 250. So the ratification of an unauthorized conveyance by deed must be by an instrument under seal. Story on Agency, § 252. A parol ratification is not sufficient. *Stetson* v. *Patten*, 2 Greenl., 359; *Paine* v. *Tucker*, 21 Maine, 138; *Hanford* v. *McNair*, 9 Wend., 54; *Despatch Line Co.* v. *Bellamy Man. Co.*, 12 N. H., 205.

The plaintiff received his conveyance with a full knowledge of the equitable rights of the tenants. The remedial processes of a court of equity may perhaps afford protection to the defendants. At common law their defence fails.

Defendants defaulted.

RICE, CUTTING, DAVIS and WALTON, JJ., concurred.

ARNO WISWELL *& al., Receivers of Ellsworth Bank, in Equity, versus* JOHN N. STARR *& als., stockholders.*

Where a bill in equity was filed before the R. S. of 1857 went into effect, by § 2 of the repealing Act of that year, the statutes of 1841 are continued in force for the prosecution by such suit of all rights and remedies existing by those statutes.

By the Act of amendment, § 62 of R. S. of 1841, the number of receivers to be appointed by the Court, to take possession of the property of a bank, on application of the Bank Commissioners in case they deem the bank unsafe, is left to the discretion of the Court, or of the Justice by whom the appointment is made.

If one of three receivers is removed, or resigns, it is discretionary with the Court, to appoint another person in his stead, or allow the two remaining to act without the appointment of another.

If evidence of the truth of facts alleged in a motion to dismiss a bill in equity is not furnished, the sufficiency of the facts to support the motion will not be considered by the Court.

On suggestion, that certain stockholders, who were defendants, were not residents of this State, and therefore, the Court had not jurisdiction as to them, *it was held*, that the bill could not be dismissed on a mere suggestion.

When receivers are appointed in any case, a lien is created by statute (c. 47, § 74, R. S. of 1857) upon the real estate, situate in this State, of the stockholders liable for claims which exist against the bank; therefore, the Court has jurisdiction over the real estate of non-resident stockholders.

THIS WAS A SUIT IN EQUITY, and has before been presented to this Court, *vide* 48th Maine Reports, p. 400. It is again presented on demurrer to the bill.

Rowe & Wiswell, for the plaintiffs.

J. A. Peters & Hale, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—The original proceedings in this case were instituted by the Bank Commissioners of this State, upon application to Mr. Justice CUTTING, who appointed three receivers, by whom this bill was commenced. The appointment of receivers was in pursuance of R. S., 1841, Act of amendment, § 62, by which it is provided, that any Justice of this Court, upon application by the Bank Commissioners, in case they deem a bank unsafe, "at his discretion, may appoint agents or receivers to take possession of the property and effects of the corporation, subject to such rules and orders as may, from time to time, be prescribed by the Supreme Judicial Court, or any Justice thereof, in vacation."

Under this Act, the number of receivers to be appointed in such case is left to the discretion of the Court or of the Justice by whom the appointment is made.

A demurrer was filed to the bill because Samuel Waterhouse, one of the receivers, was a stockholder and a party defendant. As the rule is inflexible that one cannot be complainant and defendant in the same bill, the demurrer was sustained.

Upon leave to amend being granted, the name of Waterhouse was stricken out, he being removed or having resigned his trust.

These proceedings having been commenced before the Revised Statutes of 1857 went into effect, by § 2 of the repealing Act of that year, "the Acts declared to be repealed, remain in force * * for the preservation of all rights and remedies existing by virtue of them; and so far as they apply to any * * * right, contract, limitation, or event, already affected by them." The statutes of 1841 are therefore to control us.

The main question to be determined, is, whether a new receiver should be appointed in the place of Waterhouse, who has ceased to be one, or the bill should be permitted to proceed without such appointment.

By § 62, the persons to be appointed, and their number, is left discretionary with the Court. If any emergency should require it, the number of receivers may be increased or diminished. One may be removed and a substitute appointed, as may be deemed expedient. The power of the Court over this subject matter is not exhausted by the first appointment. The discretionary powers of the Court continue through all the stages of the procedure. It is not limited to their first exercise. No necessity is shown, or even pretended to exist, for the appointment of a substitute for Waterhouse. The presiding Justice by whom the amendment was permitted, by which his name was stricken out, made none, because we must presume he did not deem it expedient. The bill is consequently sustained and the demurrer must be overruled.

A motion is made to dismiss the bill as to Nathan Walker, because the service on him was made by one of his deputies, he being the sheriff of this county. But this does not appear to be the case upon examining any of the papers before us, nor has any evidence of its truth been furnished us.

A motion is likewise filed on the part of Samuel P. Brown, that the bill be dismissed as to him. But the truth of the facts upon which the motion is predicated, is not sustained by any testimony whatsoever.

It is not necessary to determine whether these motions

were seasonably filed or are sufficient in form and substance, inasmuch as their truth has not been established. They must both be overruled.

A suggestion is made by Eugene Hale, Esq., as *amicus curiae*, that David Dyer and Charles Buck, parties defendant, are not residents of this State, and therefore that this Court has no jurisdiction. The motion does not allege that they have no real estate here. Upon this point we are referred to *Spurr* v. *Scovill & al.*, 3 Cush., 578, as conclusive. But, by the Act of 1855, respecting banks, c. 164, § 7, substantially re-enacted in the revision of 1857, c. 47, § 74, it is provided that, "upon the appointment of receivers in *any case, a lien shall exist upon all real estate of each and all* of the stockholders, liable for claims against such bank, situate within the State, as fully as if the same were attached under due process of law, which lien shall remain and continue to the end that such real estate, or any interest of such stockholder therein may be seized on execution, or other process granted by the Court and sold or set off in satisfaction of the claims aforesaid, or until such stockholders shall have paid over to, or deposited with the receivers an amount of money equal to his liability." The Court therefore have jurisdiction over the real estate of non-resident stockholders to enforce its decrees against such real estate. It is eminently just it should be so. It is admitted by the motion that service of the bill has been made upon them. This Court thus has jurisdiction over the subject matter, and over the real estate of all the defendants. The bill cannot be dismissed upon a mere suggestion.

If the non-resident defendants, in reference to whom the suggestion is made, have real estate within this State, that fact may be inserted by way of amendment, if deemed necessary. *Demurrer overruled.*

Defendants to answer.

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

COUNTY OF WALDO.

CALEB HOLYOKE *& al. versus* JOHN K. MAYO.

One co-partner cannot maintain assumpsit against another, unless for a specific sum found due the former on a settlement made.

In case of fraud or mistake in the settlement of partnership accounts, the remedy of the aggrieved partner is by bill in equity.

Although partners may adjust one partnership transaction separately, leaving all others unsettled, and an action would lie for a balance found due to one of them in that particular transaction; yet, if there are various unadjusted matters between the partners, the Court will not allow an action to be maintained for the ascertained balance, leaving the other matters to be settled by a suit in equity, but all the mistakes or errors must be heard and adjudicated by the same Court, and that a court of equity.

If it appears that, on a general settlement of partnership accounts, one partner remitted a certain sum due him on the books, and afterwards an error is discovered of a less amount, if its correction would reduce the sum remitted, it will be considered as offset, and an action to recover the amount will not be sustained.

Where a settlement was made of a partnership account at a certain date, both parties being present, and having the partnership books before them, one partner will not be allowed to come into Court afterwards with a claim that the settlement was made only to a date a month or two prior, and that the charges and credits between the two dates were by mistake or fraud omitted.

If co-partners enter into a contract for a settlement to be made at a subsequent date on certain terms, and one of them fails to fulfil his contract, the other may maintain an action at common law for damages for the breach.

But whether such a contract be performed or not, the remedy of one aggrieved is by action at common law or suit in equity, and not by assumpsit.

ASSUMPSIT. The plaintiffs and the defendant were co-partners in the lumbering business, in Weymouth, N. S., for some years prior to August, 1858. The defendant had the management of the business at a fixed salary. In Aug., 1858, the co-partners had a meeting, and voted to dissolve the company, Mayo objecting, and to reduce his salary to $600, until another agent was appointed. F. W. Goodwin

was appointed agent, Mayo resisted, and, for some months, each carried on the business separately in the name of the partnership.

On April 22, 1859, an agreement was made by all parties as to the terms of dissolution, and, after the books had been examined, and the items contained on Mayo's books transferred to the company's books, Mayo consented to convey his interest in the real estate for $3000, and in the accounts and other assets for $4000. In June following, Mayo gave a deed to his co-partners of his interest in the real estate, and a release of his claim on all partnership assets, and received $3000 cash, and notes and mortgage for $4000. All the partners were present at this settlement or represented.

The notes for $4000 were charged to Mayo's account on the company's books, and there being still a nominal balance of some $225 due Mayo on the account, as it stood on the book, he charged himself with that amount to balance the account. The notes referred to were afterwards paid.

Afterwards, on a more thorough examination of Mayo's books, the plaintiffs claim to have discovered sundry errors and omissions, amounting in all to $4289,90. This included an item of $100 paid to J. C. Wade, charged to the company, but which was, the plaintiffs allege, for services rendered to the defendant himself.

This action was brought to recover the said sum of $4289,90, with an account annexed, the money counts, and a count for deceit.

At *Nisi Prius*, APPLETON, J., presiding, after hearing the evidence, ordered a nonsuit, and the evidence was reported for the full Court to determine whether the nonsuit should stand, or be taken off and the action stand for trial.

Peters, for the plaintiffs, argued that the contract made April 22, 1859, for a final settlement, was binding, and had been executed by the plaintiffs, except so far as the defendant had waived its execution; but the defendant had omit-

ted to perform the stipulations on his part. He was to receive $4000 in full for his interest in the accounts at that date. But, in the account he has charged, after that date, for services he performed previously, and credited money subsequently received; by which process he receives more than the $4000 agreed upon. The money credited belonged to his co-partners under the agreement. *Haynes* v. *Fuller*, 40 Maine, 162; *Drummond* v. *Churchill*, 17 Maine, 325; *Halsted* v. *Little*, 25 Maine, 325; *Caughlin* v. *Knowles*, 7 Met., 57. This money can be recovered in this action under the money counts. *Gilman* v. *Cunningham*, 42 Maine, 98; *Fanning* v. *Chadwick*, 3 Pick., 420; *Williams* v. *Henshaw*, 11 Pick., 79.

An action will lie by one partner against another, to recover a balance due on an implied promise. *Welby* v. *Phinney*, 15 Mass., 116.

The defendant was to have had $4000; he had received $1000, and there was due him when the notes were given but $3000. But $4000 was paid. Cannot the amount overpaid be recovered back as paid by mistake?

The $100 charged to the partnership by the defendant, which was paid for services performed by Wade for the defendant in his private capacity, presents a still stronger case. It is said this is in offset for what the defendant "gave in" on the settlement. If he "gave in" a sum, it was a gift, and admits of no offset. Besides, he had already received more than $1000 of the plaintiffs' money.

Rowe & Bartlett, for the defendant, contended that the plaintiff could not be allowed to prove by parol an extension of time to fulfil the contract of April 22. *Goss* v. *Nugent*, 5 Barn. & Adol., 58; 1 Sugden on Vendors, 6th Am. ed., § 8, art. 43, 44; *Stowell* v. *Robinson*, 3 Bing., 928; *Harvey* v. *Grabham*, 5 Adol. & Ell., 61; *Wheeler* v. *Cowan*, 25 Maine, 283; 9 Wend., 68. Nor was the time extended by part performance on the part of the defendant.

The fact is, that that contract was not part performed, but

a subsequent contract was wholly performed. The plaintiffs well knew that the account did not stand in June as in April, but that Mayo had in the meantime taken a cargo of lumber. The books were before them, and they footed up Mayo's account themselves. If they made a mistake, they did it with their eyes open. All parties united in the settlement made in June, with the books and accounts before them, and irrespective of any previous contract.

As to the charge of $100, it was paid to the general counsel of the firm for services rendered. And, if not, it is covered by the $226 given in by the defendant.

If the case presents anything for which the plaintiffs are entitled to a remedy, it is to be found in a suit in equity, and not in an action of assumpsit.

The opinion of the Court was drawn up by

APPLETON, J. — The plaintiffs' claim can be supported upon no known or recognized principles of the common law as heretofore administered in England or on this continent.

The plaintiffs and defendant were partners. After much negotiation the partnership was dissolved, and a settlement of its affairs concluded on 15th June, 1859. The plaintiffs were to pay the defendant three thousand dollars for his interest in the real estate, mills, &c., of the firm, and to give him four thousand dollars for "*the estimated balance of his account.*" At that date (15th June) the apparent amount due the defendant on the books of the company was $4221,50. The defendant on that day was charged with three notes to the amount in the aggregate of $4000, but as with this sum there would be an apparent balance in his favor, at the instance of the plaintiffs, he further charged himself with $225,79, as "amount given in on settlement." The items of debt and credit (save one) appear on the company books, and on the account of the defendant up to and on the 15th June, when the last entries were made. The proper entries having been made upon the partnership books, and the money paid, the defendant, on the same day, deliv-

ered his deed conveying his interest in the real estate of the firm, and an assignment of all his interest in the notes, accounts, mortgages, &c., of the firm.

The plaintiffs now claim that in this settlement there were various errors—in the charges made—in the credits given—and in the interest account—and they bring this action of assumpsit to correct these various errors to the amount, as it appears by their bill of particulars, of $4289,90.

1. There is no principle of law better settled than that a partner can *only* maintain assumpsit against his partner or partners when a final balance is agreed upon; and in case of a special item, when such item is separable and separated from the general account, and admitted to be correct. But here no balance is conceded, no specific item admitted. The plaintiffs cannot select one or many items included in a partnership account which has been settled, and make them the special subject of litigation, and leave the rest as settled. If there has been mistake or fraud, and he desires for such cause to set aside the settlement, his remedy is in equity.

The case of *Chase* v. *Garvin*, 19 Maine, 211, is directly in point. The plaintiff there alleged fraud and concealment in the settlement of the affairs of the firm, and sought to maintain assumpsit for their correction, but the Court decided it would not lie. One partner cannot maintain a suit against the other, unless upon settlement of the partnership accounts, a specific sum be found due him. *Burley* v. *Harris*, 8 N. H., 236.

The only remedy in the case of fraud or mistake in the adjustment of a partnership account is by bill in equity. *Chase* v. *Garvin*, 19 Maine, 211. A stated account may be impeached in whole or in part, on the ground of fraud or mistake. The whole account may be opened and a new account be directed to be taken. If the mistakes do not affect the whole account, then the account will be acted upon as correct, except as to those particulars with which the

party is dissatisfied. These proceedings are only by bill in equity. Lindley on Partnership, 825.

2. All the items sought to be recovered appear on the books of the firm at the time of the settlement, except the claim of $100 paid by Wade to the defendant, and it is insisted that, at any rate, this action is maintainable for that sum.

Partners may separate one partnership transaction from the rest and adjust it, and, if thereupon a sum be found due from one to the other, a promise to pay it will be binding, and an action will lie thereupon, although the rest of the affairs remain unadjusted. *Gibson* v. *Moore*, 6 N. H., 547. But here there was no separation of a partnership transaction, no adjustment of it and no promise to pay it. No promise is implied between partners to pay each other in a partnership transaction, and no action lies by either in such case, unless the transaction has been settled and a promise of payment made. *Wright* v. *Cobleigh*, 1 Foster, 339.

The sum total of error sought to be corrected, is $4289,90. This Court will not permit one item of $100 to be settled here and the rest to be adjusted by a court of equity. The accounts are not to be settled in part before one tribunal and in part before another, and the plaintiffs to determine where each separate portion is to be heard and tried. If there are mistakes and errors to be corrected, they must *all* be heard and adjudicated upon by one and the same Court, and that is a court of equity. *Lane* v. *Tyler & al.*

If the other items are all correct, save the payment by Wade to the defendant, then it is clear that no action can be maintained for that.

The plaintiffs claim $100 paid by Wade to the defendant and omitted to be by him credited to the firm.

If the settlement was made upon the actual balance, the plaintiffs cannot prevail, because they have been credited $225,79 as "given in on settlement" and have not paid the actual balance. The omission of this sum could only be

properly rectified by reducing by that amount the sum given in. It could never have been the understanding of the parties that, if a sum be given in on settlement and it should afterwards appear that a much less sum were omitted in such settlement, that this omitted sum should be paid as a debt and the sum given in remain in its entirety as a gift.

If, as the plaintiffs contend, they were to give the defendant $4000 for "the estimated balance of his account," then both parties ran the risk of the actual balance, and, whether it exceed or fall short of the estimate, neither party can complain.

In *Knight* v. *Majoribanks*, 11 Beav., 322, and 2 Mac. & G., 10, certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of £5000 was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but assented to its correctness and never examined, nor sought to examine, any books or accounts; and, in consideration of the sum so alleged to be due, and of £250 cash, he assigned all his interest in the concern to his partners and released them from all demands. The speculation afterwards proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But, as no fraud was proved, and, as the plaintiff knew well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his co-partners knew it, yet they had taken no unfair advantage of that circumstance, it was held, both by Lord LANGDALE and Lord COLTENHAM, on appeal, that the transaction was binding and could not be impeached. Lindley on Partnership, 792.

But, in this settlement, the plaintiffs were the gainers.

The allowance of the sum in question will not reduce the balance to the amount estimated. They cannot, therefore, if the settlement was made upon an estimate, by any possibility, have been wronged.

3. The plaintiffs further pretend that the settlement made on June 15 was as of April 22, and the accounts, both debt and credit, intervening between those dates, should have been included—that the defendant should be allowed his debits as against the firm, and that he should be charged with the credits accruing since April 22.

If this were so, it would present the case of a settlement where, as the plaintiffs allege, there are various mistakes of debt and credit, and of interest account, all of which the defendant denies. But, if it were so, it has already been seen that these various errors can only be corrected in equity.

4. But the plaintiffs' proof most conclusively negatives any mistake of fact in the settlement.

It seems that the plaintiffs and defendant on 22d April, 1859, entered into a contract under seal by which, upon the performance of certain conditions by the plaintiffs, within thirty days therefrom, the firm was to be dissolved, and its affairs to be settled. The defendant was to convey his interest in the mill and certain real estate of the firm for the sum of $3000, to be paid in thirty days—and the plaintiffs were further to give the defendant $4000 for "*the estimated balance of his account*," the payment to be secured as therein provided.

The plaintiffs failed to comply with the terms proposed within the time limited. The defendant gave notice on the last day that he should no longer consider the contract in force. Notwithstanding this, these negotiations continued till 15th June, when the settlement now sought to be set aside, was effected—and a conveyance of the real estate and personal estate made by the defendant to these plaintiffs and the stipulated consideration therefor paid by them to him.

The plaintiffs will hardly deny that they have a moderate

share of common sense, intelligence and business capacity. Allowing them credit for this much, it is difficult to imagine a more preposterous claim than the one suggested, or more at variance with their proofs and acts.

The books of the firm, introduced by the plaintiffs, show the state of the account between the defendant and the firm. They show a settlement on 15th June, and the items included therein The debits and credits are duly set forth, and they reach to that date. They include the various sums embraced in this suit save one already considered. They were added up. Nothing was concealed. The plaintiffs, knowing the several sums by which the balance was found, and aiding in ascertaining it, have received the entire interest of the defendant in the firm property upon the settlement thus effected. The proof negatives fraud, for the items were all patent and apparent to the inspection of the plaintiffs. It negatives mistake, for they aided in the addition of the sums before them. The settlement, as they allege, was upon "an estimated balance." If so, they must abide the result. Nothing shows, as the accounts then stood, that they have been injured.

The plaintiffs pretend that the settlement was to have been of the accounts as they stood at an earlier date — that is, that neglecting to perform their part of the contract of April 22, without performing, they were to have all the benefits of its entire performance; that the settlement should have been as if then (April 22) made, and that the defendant should be charged with all moneys *since* received, and denied all claims since accruing. If such was the bargain, the most obvious course would have been to have thus made the settlement, and the entries corresponding thereto. It is not readily perceived how men of even moderate sagacity could have participated in and assented to a settlement carrying down the account to a date nearly three months later than it should have been. The books show the now disputed items and their settlement, and one capable of their addition could hardly have been ignorant of what the sums

were for, when he thus added them, or was present at and assisted in their addition.

That the defendant claimed the debits and credits now disputed, and that the settlement was based on their allowance, is very apparent. The accounts were settled as the parties intended, — without fraud and without mistake, and all this is manifest by the plaintiffs' own showing.

5. If the contract of April 22 were by any legerdemain to be regarded in force on 15th June, when the settlement was made, then, if the defendant has not performed the contract on his part, the plaintiffs have a remedy for its non-performance upon the contract.

They may maintain an action at common law and receive compensation in damages. Or they may, by bill in equity, set aside the settlement, if fraudulent, and enforce the performance of the contract.

But nothing is clearer than that, if the contract was in force on the day of the settlement, June 15, that the remedy for any failure in performance is upon the contract, either at common law or in equity, and not by action of assumpsit.

Nonsuit confirmed and exceptions overruled.

TENNEY, C. J., and RICE, J., concurred in the result on the ground that the facts show no cause of action; — DAVIS and KENT, JJ., that the remedy of plaintiffs was by suit in equity.

LATHLY RICH *versus* SYLVANUS J. ROBERTS.

A mortgage of chattels, made by joint owners residing in different towns, is invalid as against other persons than the mortgagers, unless it has been recorded in each of the towns where the mortgagers reside.

Where a creditor of one of the mortgagers has attached the mortgaged property, the holder of a second mortgage of the same property, which has been duly recorded, but not until after the attachment, cannot maintain an action against the attaching officer until the attachment is released or dissolved.

CASE against the defendant, as sheriff of the county, for alleged default of his deputy. Writ dated Oct. 18, 1860. The parties submitted the case to the Court upon the following statement of facts: — September 18th, 1855, Andrew R. Grant, of Frankfort, in the county of Waldo, and John Batchelder, of Oldtown, in the county of Penobscot, mortgaged to the plaintiff three pairs of oxen, one horse and two sets of double harness, to secure the payment of a note of $800, payable in nine months, which mortgage was legally recorded in Frankfort on the same day, but was never recorded in Oldtown. On Sept. 21st, 1855, Washington Carlton, then a deputy of the defendant, duly qualified, attached and took into his possession said property, (and has retained the same to this time,) by virtue of two writs of attachment in favor of Jonathan A. Cushing, one against said Grant and Batchelder, the other against said Grant, both returnable to the Supreme Judicial Court for Penobscot county, January term, 1856. Both writs were duly returned and entered; the one against Grant and Batchelder was entered "neither party," and dismissed from the docket, January term, 1857, and the one against Grant is still pending. The plaintiff demanded the property of Carlton, after the suit against Grant and Batchelder was dismissed, and before bringing the present action. October 24th, 1856, said Grant and Batchelder gave the plaintiff another mortgage of the same property, to secure the same debt as the former mortgage, which was duly recorded in Frankfort, Oct. 25, 1856, and in Oldtown, Jan. 16, 1857.

It was agreed that the Court should render judgment upon the foregoing statement, according to the legal rights of the parties, and, if for the plaintiff, assess the damages upon the depositions accompanying the statement of facts.

N. H. Hubbard, for the plaintiff, argued that the attachment of the chattels, in the action against Grant and Batchelder, having been dissolved, the sheriff should have given up the property at once. The pendency of the action against Grant is no bar to the present action, as the first mortgage to the plaintiff was recorded in Frankfort, where Grant resides, three days before the attachment of Cushing was made, which was all the statute required so far as Grant was concerned, and was ample notice to the attaching creditor.

C. H. Pierce, for the defendant, to the point that Grant's interest was legally attached, cited R. S., c. 81, § 59, *et seq.; Paine* v. *Jackson*, 6 Mass., 242; *Gardner* v. *Dutch*, 9 Mass., 427.

The opinion of the Court was drawn up by

KENT, J.—In a former case between these parties, we decided that the mortgage to the plaintiff was invalid as against other persons than the mortgagers, because it had not been recorded in each town where one of the mortgagers resided. *Rich* v. *Roberts*, 48 Maine, 548. The plaintiff in that suit became nonsuit,—and this new action has been instituted, and comes before us on an agreed statement of facts, somewhat different from the former case. It now appears that the attachment made on the writ against *both* the mortgagers has been released. The sheriff, therefore, has no longer any right to hold, or to seize for sale this property by reason or by virtue of *that* attachment. But it is also agreed, that the action against Grant alone is still pending, and the attachment on that writ is still in force. The officer, on that writ, was authorized to attach, and did attach and hold the undivided interest of Grant.

It is well settled law that when personal property, owned by tenants in common, is attached in a suit against one of

them, the officer is entitled to the possession and control of the whole, during the pendency of the attachment, although, on the levy of the execution, he sells only the share or interest of the judgment debtor, and the purchaser acquires only the right of a part owner. *Reed* v. *Howard*, 2 Met., 36.

The provision of the statute, c. 81, § 59, that a part owner who is not sued may have the property delivered to him on giving bond, recognizes the principle above stated.

In this case, the mortgage, not being recorded according to law, is not valid against subsequent attaching creditors, but is valid against the mortgagers. When the lien created by the attachment is released or dissolved, the right of the mortgagee revives, and he may assert his claim and title to the property. But so long as the officer has a right to retain the property, he cannot be liable to the mortgager—in an action for its value.

If judgment is recovered in the suit now pending against Grant, the officer may proceed to seize and sell his undivided interest, and, in case he does so legally, the purchaser will take Grant's place, and become a joint owner with the plaintiff. If that attachment against Grant should be released or dissolved, then the officer may be bound to restore the property, or account for its value to the plaintiff as owner. However this may be, we do not see that the officer can be liable in this suit, as he appears as yet to have done nothing which he was not by law authorized and bound to do.

Plaintiff nonsuit.

Rice, Appleton, Cutting, Davis and Walton, JJ., concurred.

JOSIAH A. COLCORD *versus* CRAWFORD S. FLETCHER.

When two parties submit a matter in controversy to arbitrators, although in terms somewhat vague and indefinite, they have power to determine both the validity and the amount of the claim in dispute, unless restricted by the terms of the submission.

But the award of arbitrators, being in the nature of a judgment, in order to be valid, must ascertain and decide as to the matters submitted, so that it shall not be the cause in itself of a new controversy.

Thus where, in case of a claim by one part owner of a vessel against another part owner, for insurance collected by the latter, the award was, that "there is due to C. the amount collected on policy of insurance held by F., for his, (C.'s) sixteenth part of barque S.," it was held to be invalid, as not determining that F. had received any money on the policy, nor, if any, how much.

ASSUMPSIT on an award, with counts for the original causes of action.

THE plaintiff and defendant were part owners of the barque Spirit of the Sea. It was in evidence that the defendant had obtained policies of insurance on five-eighths of said barque in three companies, and had received and collected money from each for losses, amounting to $8871,86; that the plaintiff claimed to recover of the defendant the amount received by him for insurance of one-sixteenth; and that they had mutually referred this claim to Ira Blanchard and Henry McGilvery, who heard the parties, and made a written award, that "there is due Capt. Josiah A. Colcord the amount collected on policy of insurance, as held by C. S. Fletcher for his, J. A. Colcord's, one-sixteenth of barque Spirit of the Sea."

The case was taken from the jury, and referred to the full Court, to determine whether the plaintiff is entitled to recover on the award; if so, the defendant to be defaulted, but, if not, the case to stand for trial.

J. G. Dickerson, for the plaintiff, argued that it is the policy of the law to construe awards liberally, so as to give effect to the intention of parties, and prevent protracted

litigation. The award is certain to a common intent. The matter referred was a "claim for insurance collected." It was a question of right to the money collected, and not of the amount, which could be ascertained at the insurance offices. In law, that is certain which can be made certain. The case shows that, on the insurance of five-eighths, the amount collected was $8871,86. The plaintiff, on one-sixteenth, would be entitled to $887,18.

On a submission respecting the title to a yoke of oxen, an award that one party should pay the other so much money, without determining in terms the title to the oxen, has been held good. *Hanson* v. *Webber*, 40 Maine, 194.

Jewett & Chase, for the defendant.

1. The award does not decide the issue presented in the submission. The controversy was as to the amount, if anything, of insurance collected by the defendant for the plaintiff. The award is silent as to the amount.

2. The award is uncertain. An award must leave no reasonable doubt as to its meaning or effect, or the rights and duties of the parties under it. 2 Parsons on Cont., 204; *Schuyler* v. *Van Der Veer*, 2 Caines, 235. The testimony presented, if admissible, does not show the amount awarded, so that it can be ascertained. If the plaintiff can be admitted to show what the defendant received from the companies, the defendant may adduce evidence to prove that no part of it belonged to the plaintiff, or a less part than the plaintiff claims. An award is not to be the cause of a new controversy. *Lincoln* v. *Whittenton*, 12 Met., 31; *Waite* v. *Barry*, 12 Wend., 377.

3. The declaration is not sustained by the proof. The submission declared on is oral; the one proved, is in writing.

If the defendant has any of the plaintiff's money, the plaintiff can recover it on a trial of this suit, on his money counts, without giving effect to this defective award.

W. G. Crosby, for the plaintiff, in reply.

1. The award conforms substantially to the submission.

In interpreting a submission, regard is to be had mainly to the intention of the parties. Caldwell on Arbitration, 25.

It was the validity, and not the amount, of the plaintiff's claim which was submitted. This is shown by the language of the submission. The referees have determined that the claim is valid.

2. The award is so expressed that no reasonable doubt can be entertained as to its meaning or effect, or the rights and duties of the parties. It decides that the plaintiff's claim is valid. That was the question submitted, and it is the one determined by the arbitrators.

And it is sufficiently certain as to the amount of the claim. It awards to the plaintiff the amount of insurance collected by the defendant on the plaintiff's sixteenth. The amount so collected was a fixed fact. The award contains a standard or rule by which the plaintiff's proportion can be ascertained, the proportion of one-sixteenth to the five-eighths insured.

3. Nor is the objection well founded, that the award was not final. The point submitted, the validity of the claim, was fully and finally decided. When the words of the award are less comprehensive than the submission, it is to be understood that what is omitted was not controverted, unless the contrary is shown. 2 Parsons on Cont., 211.

4. The declaration sets forth the award substantially. But, if there is any technical defect in this respect, it may be amended, so that the substantial rights of parties may not be sacrificed to forms.

The opinion of the Court was drawn up by

KENT, J.—The first question in this case, is, what was referred under the submission? It is contended by the plaintiff that the only matter submitted was the *validity* of his claim, and not the amount. We cannot concur in this view. It is apparent that the parties intended to refer for final determination and adjustment a claim, which plaintiff made against the defendant for money which he had received for

insurance, and not merely the abstract question, whether there was any indebtedness, leaving the amount to be otherwise determined. When "a claim" is submitted to any judicial tribunal, it involves necessarily the determination of the legality and the amount, unless there is an express limitation of the power to adjudicate.

The defendant insists that the *award* cannot be made the basis of an action, because it does not conform to the submission, and is not final between the parties.

It is well settled, that it is essential to the validity of an award that it should make a *final* disposition of the matters embraced in the submission. What is a final disposition? It is such a disposition that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it, without any further ascertainment of rights or duties. It is not absolutely necessary that the award should state in figures the exact amount to be paid. It is sufficient if there is such reference in the award to documents or other matters, that nothing remains but mere arithmetical computation, to render the award final and conclusive. *Waite* v. *Barry*, 12 Wend., 377; *Lincoln* v. *Whittenton Mills*, 12 Met., 31.

The award is in writing, and is as follows:—"that there is due Capt. J. A. Colcord, (plaintiff,) the amount collected on policy of insurance as held by C. S. Fletcher, (defendant,) for his, J. A. Colcord's, one-sixteenth of barque Spirit of the Sea."

The defendant contends that the award does not, in its terms, decide that the plaintiff had, in fact, collected any sum for the defendant's one-sixteenth—that it, at most, decides that there is due from defendant whatever amount he has in fact received or collected for the one-sixteenth belonging to plaintiff, without affirming that he has collected anything to which plaintiff is entitled.

It is apparent that the principal question between the par-

ties was, whether the insurance that the defendant obtained on five-eighths of the vessel, included the plaintiff's one-sixteenth, or any part of it. The award does not very clearly determine this preliminary question. It holds the defendant responsible for the amount collected for the plaintiff's portion, but does not in terms affirm that the defendant had collected any money for that one-sixteenth, which was the question in dispute.

But the fatal defect in the award, taken in its most favorable aspect for the plaintiff, is, that it does not make a final disposition of the matters referred, within the rules before stated. "An award is in the nature of a judgment, and, to be valid, must be certain and decisive as to the matters submitted, so that it shall not be a cause of a new controversy." 12 Met., before cited.

It is clear that no final judgment could be rendered on this award, without further examination and trial. No amount is stated, and none could be fixed without proof of matters not stated or referred to in the award. The question of amount presents a disputable fact, even if it is admitted that the award is sufficiently clear as to the general fact of indebtedness. In this case, plaintiff did not, and could not safely rely upon the submission and award, but called witnesses to prove the receipt of money from several insurance offices. Whether a portion of all these sums or only of a part was received for plaintiff's use, was one question to be determined, and it could be determined only by further litigation. A verdict could not be found for plaintiff on the submission and award alone, as the award makes no reference to any fact or document, from which a judgment could be made up. *Schuyler* v. *Van Der Veer*, 2 Caines, 235. The award is invalid. According to agreement of the parties, the case must stand for trial upon the counts, other than the one upon the submission and award.

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

Israel S. Woodbury *versus* Benjamin Willis.

A had a mill on C stream. B built a mill below, on M stream into which C stream flows, and, to secure a supply of water, erected a reservoir dam on C stream above A's mill. In an action by A to recover damages of B for detention of water from his mill, it is not admissible to introduce evidence as to how the reservoir dam affected the operation of the mills below A's, or whether, by reason, in whole or in part, of the erection of said dam, the mills below were enabled to run a longer part of the year than before the dam was erected.

Where, in such a case, it appears that A's mill was leased for a certain portion of the time covered by the suit, this will not prevent his recovering damages for that part of the time, unless it is shown that the dam caused no injury to his reversion, and did not diminish his profits during the lease.

On Exceptions to the ruling of Rice, J.

Case for alleged injury by detention of water from the plaintiff's mill by the defendant's dam.

The plaintiff owned a mill on Chase stream in Monroe, erected in 1857. The defendant, in 1859, built a mill on Marsh stream, into which Chase stream flows, below the plaintiff's mill, and a reservoir dam on Chase stream, above the plaintiff's mill, by means of which dam he flowed 600 acres of bog land. The dam was under the sole control of the defendant. One Tasker had a lease of the plaintiff's mill, and occupied it, from Nov. 4, 1859, to March 25, 1860.

There was evidence tending to show that the plaintiff had been damaged by the defendant's dam, and evidence to the contrary.

The defendant contended that the plaintiff was not entitled to recover for any injury to his mill by detention of water while the lease was in force; but the Court declined so to instruct the jury.

During the progress of the trial, the defendant put the following questions to witnesses:—"How did the reservoir dam affect the operation of the mills below the plaintiff's? Did, or did not, said mills run a longer part of the year next succeeding the erection of the reservoir dam than the year

preceding? And, if so, were they not enabled so to do by reason, in whole or in part, of the reservoir dam?" The plaintiff objected, and the Court ruled that the questions were inadmissible.

The verdict was for the plaintiff. The defendant excepted.

W. G. Crosby, in support of the exceptions.

Jewett & Chase, contra.

The opinion of the Court was drawn up by

MAY, J.—In 1857 the plaintiff built his mill upon Chase stream. In 1859 the defendant built his mill upon Marsh stream, below the plaintiff's, into which Chase stream runs; and, for its more advantageous working, erected a reservoir dam upon Chase stream, above the plaintiff's mill, by the erection of which the plaintiff claims that he has been injured. In the language of the counsel for the defendant, in his argument, "it was certainly competent for the defendant to introduce testimony tending to show that the injury complained of was not occasioned by the detention of the water, but was attributable to other causes." For this purpose, during the progress of the trial, several witnesses were inquired of as follows:—"How did the reservoir dam affect the operation of the mills below the plaintiff's? Did, or not, said mills run a longer part of the year next succeeding the erection of the reservoir dam than the year preceding? And, if so, were they not enabled so to do by reason, in whole or in part, of the reservoir dam?" These questions being objected to by the plaintiff were excluded.

It does not appear in the exceptions that there was any mill, upon either stream, except those erected by the parties as above stated. But, if there were other mills below the plaintiff's, upon Marsh stream, the admissibility of the evidence sought would not be affected thereby, because the effect of the reservoir dam would, other things being equal, be precisely the same upon all mills situated there. But its effect upon the plaintiff's mill, and any other mill situated

upon Marsh stream, would not necessarily be the same; and, before the jury could properly infer from the effect produced upon the latter, whether belonging to the plaintiff or any other person, that the same effects must have been produced in any degree upon the plaintiff's mill, it must have been made to appear that the condition and circumstances of the two mills were identical, so far as their connection with the water and its application was concerned. This was not shown, but, on the contrary, it appears that they were not so. The case finds that the mill situated upon Marsh stream had other sources for a supply of water beside the reservoir dam, and Chase stream, which must have affected the time and speed of their running, more or less. To have permitted the jury, under such circumstances, to have drawn inferences prejudicial to the plaintiff from the effects produced by the reservoir dam upon the mills below, would have been manifestly unjust. Suppose the reservation of the water by means of the defendant's dam upon Chase stream, through the spring and summer, had prolonged the running of his mill, and at the same time had prevented or impeded the running of the plaintiff's mill, while the water was reserved, would such extension of the time of the running of the defendant's mill be any evidence that the plaintiff was not injured by his reservoir dam? The fact that the longer running of the defendant's mill was occasioned wholly, or in part, by such dam, unexplained by proof of the surrounding circumstances, would have a tendency to confuse and mislead the jury, rather than to aid them in arriving at a just conclusion. It does not appear that such explanation was made or expected to be made. The facts sought by the several inquiries before stated, being, for the reasons given, inadmissible, the questions were properly excluded. See *Clark* v. *Rockland Water Co.*, not yet reported.

It appears that, during a portion of the time covered by the plaintiff's declaration, his mill was in the actual possession of one Tasker, under an agreement, in writing, to saw

shingles night and day, when there was plenty of water and lumber, for which he was to pay twenty-five cents per thousand as the rent of the mill. It was contended that the plaintiff was not entitled to recover damages during this period. The Judge refused such instruction and, we think, properly. The rule, that a lessee in the possession of mills is alone entitled to recover damages, for a temporary diversion of the water, or obstruction to the mill during such possession, does not apply to a case where the cause of injury affects the inheritance or reversion, or diminishes the profits of the lessor during the lease. It applies only to cases where the lessee alone is injured. If the injury is to both the lessee and the lessor, as may have been the fact in this case, then each may have his action for the damages which he has sustained. Angell on Water Powers, 82, and cases there cited. The requested instruction was rightly withheld. *Exceptions overruled.*

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

KENT, J.—If there were any other mills, or any other mill on Chase stream below the reservoir dam on plaintiff's mill, the questions propounded, or some of them, were clearly admissible. If there were no such mills on Chase stream, they would not be, for the reasons given in the opinion. Can one assume that there were such mills, when the case is silent on that point? The question is general and applies to all mills below the plaintiff's, and is not confined to mills on Chase stream. The defendant should either have confined his question to such mills on Chase stream, or have affirmatively shown that there were such mills to which his question could apply.

MOSES BRADSTREET *versus* ABIAL W. ERSKINE.

The law does not require that referees, whom the parties have agreed upon, should be sworn; notwithstanding the agreement to refer confers upon them the powers of commissioners, who by law must act and determine on their oaths.

In a complaint for *flowage* it was held to be no objection that the damages for three years were assessed in one aggregate sum.

Execution may issue for damages to the time of the finding of the verdict; and, when the case has been referred, to the time of making the award.

EXCEPTIONS from the ruling of DAVIS, J., at *Nisi Prius*.

THIS was a complaint under the statute for FLOWAGE. The bill of exceptions is not among the papers in the case; but, from the arguments of the counsel, it appears, that while the complaint was pending, the parties appeared and agreed to refer the whole matter to the determination of N. H. Hubbard, Esq., conferring on him all the powers which are by the statute conferred upon Court, jury and commissioners.

His report was duly made in favor of the complainant. The respondent filed objections to the acceptance of the report, which were, by the Court overruled, and the report was accepted; to the ruling of the presiding Judge the respondent filed exceptions.

Dickerson, for the respondent, argued in support of the exceptions.

W. G. Crosby, for the complainant, *contra*.

The alleged causes for exception appear from the opinion of the Court, which was drawn up by

KENT, J.—The objection to the acceptance of the report, on the ground that the referee was not sworn, cannot prevail. There is no principle of the common law and no provision of the statute which requires this. The statute which authorizes parties to refer their disputes, by an agreement,

signed and acknowledged before a justice of the peace, does not require that the referees should be under oath. An obvious reason for this is,—that the parties, by mutual consent, agree upon the persons who are to determine their case, and by this act of selection they express their confidence in them, and a willingness to abide their decision without an oath. Where the Court, jury or commissioners, or any other body or persons are authorized by a general law to act judicially, and their appointment or selection is without the act or assent of the parties, whose rights they are to determine, the law usually requires an oath.

But the counsel for the defendant insists, that, as the referee, by the special agreement, was clothed "with all the powers conferred on commissioners,"—and, as by law, the commissioners must act under oath,—the referee must be sworn before acting. The answer to this is,—that he was not a commissioner, but a referee, clothed with certain powers; and in defining them a reference was made to the powers of the commissioners. He also, by the same agreement, was to have and exercise all the powers conferred on the Court and jury by the statute. The Court and jury are both under oath, and it might as well be contended that therefore the referee must be sworn. Indeed the argument, if sound, would apply to all cases of reference under a rule of Court. The referee, in such cases, has all the powers of a Court and jury in determining the matter referred to him. But he is not the Court or the jury. He is a *referee* with the powers conferred upon him by agreement of the parties, and by the rule of Court, and we have seen that, neither by usage, nor by any principle of the law, is it required that he should be under oath.

The award is correct in assessing the damages for the three years before the complaint was filed, in one aggregate sum. *Bryant* v. *Glidden*, 36 Maine, 45. It is also correct in assessing the *yearly* damages after the filing of the complaint. *Ibid.*

It is the rule to issue execution for the damages to the time of finding the verdict. *Commonwealth* v. *Ellis*, 11 Mass., 462. The award is in the place of the verdict.

Exceptions overruled.—Judgment on the award.

RICE, APPLETON, CUTTING, DAVIS and WALTON, JJ., concurred.

COUNTY OF PENOBSCOT.

STATE *versus* KIMBALL.

On the trial of an indictment for making and uttering a forged deposition, to procure a divorce by the respondent from his wife; —

1. No exceptions lie to the refusal of the presiding Judge to allow the respondent, on cross-examination of the person whose signature to the deposition is alleged to be forged, to ask whether the statements in the deposition are not true. (KENT, J., dissenting.)

2. The jury are authorized to infer an intent to defraud from the character of the instrument, if they find it to be forged; and a refusal to instruct the jury that "intent to defraud cannot be presumed from the simple fact of manufacturing or forging such deposition," is not erroneous.

3. The presiding Judge properly declined to allow the jury, at the request of the respondent, to take with them to their room the Revised Statutes, and his requested instructions, which had been given no further than they were embraced in the general charge.

4. It is not necessary to allege in such indictment an intent to defraud any one *of property*, nor on the trial to prove that the respondent intended "to defraud his wife of money, or other property, or to do an injury unnecessarily to her character." The statute against forgery is not so limited.

5. The belief of the respondent in the truth of the statements in the deposition, and the fact, that his object in forging it was to procure a divorce, to which he believed himself legally entitled, are no defence.

6. A requested instruction, that the respondent could commit no fraud in law *upon his wife*, was properly refused.

7. A deposition taken out of this State by a justice of the peace or notary of the State where it is taken, or any other person lawfully empowered, is legally receivable in evidence, at the discretion of the Court, under our statute, although the caption does not conform in all respects to the statute

requirements for depositions taken in the State. And the certificate of the justice, &c., of his official character, is *prima facie* evidence of his qualification.

8. When the caption of such a deposition states that "it was written down by the authority of the undersigned, justice of the peace," and omits to state that it was written by him, or in his presence and under his direction, and there is a clerical error in the name of the Court to which the deposition is returnable, it, nevertheless, may, at the discretion of the Court, be received as evidence.

9. The indictment need not allege who was intended to be defrauded; nor the means to be used in the commission of the fraud; nor the object to be accomplished thereby; nor contain the full contents of the libel for divorce.

The forging of any writing, by which a person might be prejudiced, is forgery at common law.

Our statute in relation to forgery and counterfeiting does not repeal the common law, but merely prescribes a different punishment in the cases enumerated in it, from that provided by the common law.

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

INDICTMENT containing two counts under the statute, and two at common law, for forging and uttering a deposition, used on the trial of a libel for divorce from the bonds of matrimony, in which the respondent was libellant.

The respondent moved to quash the indictment, and, the motion being overruled, he excepted.

He also excepted to the exclusion of certain testimony:—the question raised is fully stated in the opinion of the Court.

He also excepted to the following instructions of the presiding Judge.

"I instruct you, as matter of law; that, at the time the deposition was introduced, it appears from the records, that the libel was pending in Court.

"It has been contended that the deposition and caption, although forged, are illegally taken, because the caption does not conform to the statutes, because the magistrate in New Hampshire had no authority to take it, because, when received in Court, it was illegally received, &c., and, consequently, could not be the proper subject of forgery. But I instruct you that the deposition and caption were legally before the Court and legally taken.

"From the character of the instrument, you must judge whether it was prejudicial to his wife. The paper is a judicial one, with a magistrate's caption, purporting to be legal evidence, given before a magistrate, and I instruct you that you are authorized to infer an intent to defraud, from the character of the instrument, if you find it was forged, and I might say that it was your duty so to infer, but I will not go so far."

There were other exceptions to the charge, which are fully stated in the opinion.

The respondent presented a request for numerous instructions, which were all refused, except as embraced in the general charge. A portion of them were objections to the indictment, identical with those contained in the motion to quash, and in the motion in arrest of judgment. Those relied upon at the argument, were the fourteenth, fifteenth and seventeenth. The two latter are stated in the opinion; and the fourteenth was as follows:—"That if they are satisfied that the respondent believed the evidence contained in the deposition was true, or substantially so, and had no object in view but simply to obtain an equitable decree of divorce, and believed he was entitled to it, and his only object was to relieve himself from the inconvenience and odium of living in society separate from his wife, with whom he had no hope of a reconciliation, and did not intend to defraud her of her money or other property, or unnecessarily injure her name or character, he would not be guilty of forgery, although he might have manufactured the deposition and uttered the same; and that, in such case, they would be bound to acquit; and that, before they could render a verdict of guilty, they must be satisfied, beyond a reasonable doubt, that he had a different intention."

After the charge, the respondent requested the Court to allow the jury to take to their room the Revised Statutes, and his written requested instructions, but the Judge declined to grant the request.

After verdict against him, the respondent filed a motion in arrest of judgment, for the following reasons:—

First:—Because the deposition, alleged to have been forged and uttered, was not and did not purport to be one "receivable" as "legal proof" in the courts of this State; because it is not stated in the caption, or certificate, by whom it was written down, whether it was done by a disinterested person or not, or whether or not, it was done "in the presence and under the direction" of the magistrate as by law required.

Second:—Because the deposition purporting to have been taken by a justice of the peace of another State, holding no commission under the laws of this State, if it had been in due form, could not have been received, except at the discretion of the Court, and hence is not such a one as is contemplated by statute.

Third:—Because a justice of the peace in the State of New Hampshire has no authority to take depositions to be used in the State of Maine, and because it does not appear from the certificate that the justice was "lawfully empowered" to take the same.

Fourth:—Because the deposition in question does not purport to be proof in relation to any pecuniary matter, and because no "pecuniary demand or obligation, or any right in any property, is, or purports to be, created, increased, conveyed, transferred, diminished or discharged."

Fifth:—Because the indictment does not allege in either count under the statute, whom the respondent intended to defraud, or the means to be used in the commission of the fraud, or the object to be accomplished by the same.

Sixth:—Because it does not appear from the indictment that the libel or petition for divorce was legally pending in the Supreme Judicial Court at the time the deposition purports to have been taken, and is alleged to have been uttered.

Seventh:—Because the full contents of the libel or petition for divorce are not set forth in the indictment, so that

the Court can judge whether said deposition would have been "receivable" as "legal proof" in support of the same.

Eighth: — Because the deposition in question did not purport to be one returnable to any term of the Supreme Judicial Court for the trial of civil causes, it purporting to have been taken for a May term, 1859, which did not exist as a matter of law.

The motion in arrest of judgment was overruled. The case was thereupon reported to the law Court with the stipulation, that, if it should be decided that any of the rulings, or instructions to the jury, or refusals to instruct, were erroneous, the verdict was to be set aside and a new trial granted, unless it should further be determined, that the indictment was fatally defective, in which case it was to be quashed; otherwise judgment to be rendered on the verdict.

Kimball, for the respondent.

Drummond, Attorney General, for the State.

The opinion of the Court was drawn up by

TENNEY, C. J. — The defendant was indicted for having forged a deposition, purporting to have been signed by one Joseph Greely, jr., and the certificate of caption thereto, purporting to have been signed by one James M. Sargent, a justice of the peace for the county of Merrimack, in the State of New Hampshire; — and also, for causing the same forged deposition and certificate of caption to be read to the Court, as true, on the trial of a libel for divorce of the defendant, from the bonds of matrimony with one Marilla Kimball, his wife. The jury having returned a verdict of guilty, the defendant takes exception, first to the ruling of the presiding Judge, upon certain evidence offered during the trial, instructions to the jury, and refusals to instruct them as by him requested; and second, in declining to quash the indictment on his motion, and refusing to arrest the judgment after verdict.

Many points were presented at the trial, which do not

seem to be relied upon by the defendant in his argument before the law Court; upon an examination of these points, we perceive no error in the disposition thereof by the Judge presiding, and they will not be further considered.

Joseph Greely, jr., whose name is affixed to the deposition, alleged to be forged, was examined as a witness at the trial, after the deposition was read to the jury; and, among other things, in the direct examination, he testified that he did not sign the name of "Joseph Greely, jr.," thereto, or authorize any one to do it; that it was not done with his knowledge or consent, nor did he send it to the defendant, or to any one. After a cross-examination somewhat extended, the exceptions state,—"The defendant here offered to show by the witness, that the facts stated in the deposition were true, which being objected to, were excluded."

No evidence coming from this witness, in the direct examination, before the cross-examination, tended in any manner to show that the statements in the deposition, in support of the charge in the libel as the cause of the divorce prayed for, were true, nor was there any evidence from him, on the point, whether they were true or otherwise, in any way elicited. If the defendant had any motive in the offer of this evidence, it may be supposed to have been for the purpose of obtaining something from the witness called by the State, which might operate in some manner in his favor. Could this have been done under the circumstances, as matter of right?

"It is a well established rule, that the evidence offered must correspond with the allegations and be confined to the point in issue." 1 Greenl. Ev., § 51. "And the rule excludes all evidence of collateral facts." *Ibid*, 448. "In cross-examination, however, the rule is not applied with the same strictness; on the other hand great latitude is allowed by the Judge, in the exercise of his discretion, when, from the temper and conduct of the witness, such course seems essential to the discovery of truth." "And, as the general course of cross-examination of witnesses, is subject to

this discretion of the Judge, it is not easy to establish a rule which shall do more than guide, without imperatively controlling the exercise of this discretion. A party, however, who has not opened his own case, will not be allowed to introduce it to the jury, by cross-examining the witnesses of the adverse party, though, after opening it, he may recal them for that purpose." "And it is a well established rule, that a witness cannot be cross-examined, as to any fact, which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony." *Ibid*, §§ 447, 449.

In commenting upon the cross-examination of witnesses, by Mr. Starkie, in 1 Stark. Ev., § 19, p. 132, it is said, "the mode of examination is in truth regulated by the discretion of the Court."

It is very apparent that the exclusion of the evidence offered was not erroneous, when the question is tested by the principles just stated.

But, on other grounds, the fact offered in evidence by the defendant was inadmissible. The issue before the jury, on the trial of the defendant for the forgery of the deposition, as alleged, did not involve the question, whether Marilla Kimball was guilty of the charge contained in the libel of her husband, the defendant, or not. And if he had called a witness, not before called by the State, to establish such fact, it is not, and cannot be reasonably maintained, that such evidence would be competent. But it is insisted, that the fact offered to be proved was admissible in cross-examination, as having a tendency to show that the defendant was not influenced by fraudulent intentions, in placing the name of the witness, who knew the truth of the statements therein contained, to the forged deposition. But it may be remarked, in reference to this argument, that it often happens, that a litigating party may rely on certain facts, known to exist by one who can be a witness, which standing alone, might establish the issue on his part; but these facts might

be essentially qualified, or entirely controlled, by others equally within the knowledge of the witness, or which might be affected in the same manner by other testimony; and hence a motive to manufacture testimony without the knowledge of the other party, and thereby escape the effects of a cross-examination of his own witness, and the direct evidence of those who might be called to testify in Court, or give their depositions in behalf of his adversary.

The right secured to a party, of applying the efficacious test of cross-examination for the discovery of truth, should not be unreasonably abridged. It may, however, be extended so far, that the Court in its discretion may properly arrest it, as we have already seen. And when it is actually used for the purpose of bringing out, "the situation of the witness, with respect to the parties, and to the subject of litigation, his interest, his motives, his inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description," it becomes important, to enable the jury to judge how far they can rely upon the principal facts disclosed in the direct examination. But when this privilege is resorted to, with the design to introduce irrelevant and objectionable facts, having no connection with those called out in direct examination, in order to make an illegitimate impression upon the minds of the jury, which may favor the party so intending, or create a prejudice injurious to the other, it cannot be regarded as anything short of an abuse of the privilege, and it becomes worse in its consequences than collateral facts, called out for the purpose of contradicting the witness, and more improper, than the introduction of evidence in support of the case of the party, who offers such evidence, before he has opened his own case. Such a course is unwarranted by legal rules, and may produce great injustice; and it is the duty of the Court to interfere.

It is difficult to perceive, that matter not pertinent to the

issue, can be introduced in the cross-examination of an adversary's witness, having no relation to the inquiries and testimony in the direct examination, when the same evidence is wholly inadmissible, when coming from the witness called by the party making the offer.

It is further contended by the defendant, that he was entitled to show the fact proposed on the cross-examination, as having a tendency of itself to discredit the witness. The evidence does not appear to have been offered for this purpose. But were it otherwise, it is not perceived that the fact, if proved, could have any direct tendency to impeach the witness, so far as to entitle the defendant to pursue the inquiry as a matter of right; on the contrary, it is not only purely collateral, but so remote, if it could have any possible tendency in the supposed direction, as to be clearly within the discretion of the presiding Judge to determine whether it should be admitted or excluded.

The Judge instructed the jury, that "a point had been made, that if the defendant had prepared the deposition and caption, and signed them, and sent them to the witnesses as matter of form, and that if they gave their sanction to the instrument, and returned it to him, and he supposed it was so ratified, it does away the intent to defraud. I instruct you, if the respondent really believed such to have been the facts, it would negative a fraudulent intent. But upon this point you must examine the testimony." After this, the Judge remarked to the jury, "then another important question arises, 'with what intent was it done?' For it must have been intended to defraud some one. Was it done with an intent to defraud his wife? For I believe it is not contended that it was a fraud upon any one else."

It is insisted in argument by the defendant, that the Judge instructed the jury that the making of the deposition and affixing the name of Greely thereto, and making the caption, and putting to it the attestation of the magistrate, was a fraud upon some one, thus making that, which was for the jury to settle, a matter of law. It is quite manifest that the

defendant has mistaken the true character of the instruction. By reading the alleged erroneous proposition, in connection with what he before said, which is herein recited, it is very obvious, that the Judge did not intend to assert that the acts of making the deposition, caption, &c., must have been intended to defraud some one, but that the jury must find, in order to convict the defendant, that it must have been done to defraud some one. In this view, which is the true one, the instruction was correct.

The jury were informed by the Judge, that they would be authorized to infer an intent to defraud, from the character of the instrument, if they should find it forged. Every person is supposed to intend that which is the natural and ordinary result of the acts done by him, in the absence of all evidence to the contrary. The instruction was a statement of that rule, and, by a consideration of all the evidence derived from the deposition, they might apply it with propriety, if they were satisfied it was applicable.

The additional remark, connected with that just considered, was certainly the expression of an opinion in a matter of fact, but he abstained from giving them an imperative direction as legally binding. This was not erroneous.

The Judge declined to allow the jury to take with them to their room the Revised Statutes, and the requests for instructions made by the defendant, and which were given no further than the same were embraced in the general charge.

It is the duty of the Judge to give the principles of law, which he regards as applicable to the facts, as the jury may find them. And, if he omits to do this, so far as the parties may deem important, in view of the evidence, further instructions may be demanded with propriety. But a party has not the right to require the Judge to furnish the statutes for the jury, and allow them therefrom to ascertain the law, and judge of its applicability to the facts presented. The construction of statutes is often much aided by general principles, not laid down therein, and can only be known by careful study of elementary treatises and reports of deci-

sions, requiring much and long labor. The simple statement of the defendant's proposition upon this point, cannot fail to impress the mind, well informed on legal subjects, with its utter impracticability, uncertainty, danger and absurdity.

The only object in permitting the jury to see and have with them the instructions requested by the defendant, and refused by the Court, would be to enable them to analyze them, and apply their own knowledge of the law, and make the proper and legal corrections, in their verdict. In the course taken by the Judge, he did not err.

The defendant relies upon the refusal of the Judge to give to the jury the fourteenth, fifteenth and seventeenth instructions requested.

The legal proposition embraced in the first of these is,— that if the defendant believed substantially the evidence in the deposition, and his object was only to obtain an equitable divorce, believing himself entitled thereto, and his sole object was to relieve himself from the inconvenience and odium of living in society, separate from his wife, without the hope of reconciliation; and he did not intend to defraud her of money or other property, or injure her character unnecessarily, he would not be guilty of forgery, though he might manufacture the deposition and utter the same; and that before the jury could convict, they must be satisfied beyond a reasonable doubt of a different intention. We cannot give so limited a construction to the statute, as to hold that the fraud contemplated thereby, as an element in the crime of forgery, or in the uttering of a counterfeit instrument, was confined to the design of taking money, or other property, or doing an injury unnecessarily to the character of the party attempted to be defrauded. And the sincerity of the belief of the defendant of the truth of the facts stated in the counterfeit deposition, and the objects sought by him, as stated in the request, cannot take away the legal guilt which would attach to him, if this belief and these objects were wanting.

The fifteenth requested instruction was, — "that it is incumbent on the government, to satisfy the jury beyond a reasonable doubt, of the criminal intent of a prisoner, in a case of this kind, as much as it is to satisfy them of the manufacturing of the deposition, and, unless they do so, they must acquit; for intent to defraud cannot be presumed from the simple act of the manufacturing, or forging said deposition." This instruction was given in the general instructions, so far as it could be legally required. The principle disclosed by the last clause in the request, by a fair construction thereof, cannot be regarded correct. Though a fraud is not to be presumed, yet, as in numerous other cases, the intention of the one doing such an act may be inferred. And if one, who shall counterfeit and utter a forged instrument, can give no explanation of the act, the jury may infer the design to defraud.

The seventeenth instruction requested, — "that no fraud in law, could have been committed upon Marilla Kimball at the time of the alleged forgery and uttering, if she was the lawful wife of the respondent," is supported by no authority cited, by no common sense or moral principle, and is manifestly absurd.

The objections to the indictment, presented to the Court, in the defendant's motion to quash the same, are substantially embraced in the motion to arrest the judgment, and may well be considered under the latter.

One ground taken in support of the motion is, — that the person, whose name purports to be signed to the caption of the deposition, as a justice of the peace, does not appear to have had authority, under the laws of this State; or to have been "lawfully empowered," to take the deposition, by anything appearing in the certificate. And it is insisted, that those depositions alone, which are taken out of the State, can be received in the discretion of the Court, which are in the form prescribed by the statute, for the certificate, and taken by a person "lawfully empowered" to take them.

By R. S., c. 107, § 20, "the Court may admit or reject

depositions taken out of the State by a justice of the peace, notary, or other person lawfully empowered to take them." "Justice of the peace," in this provision, it cannot be doubted, was intended to apply to such magistrate, commissioned by the authority of the laws of the State of his residence. And when he affixes to his name, in the certificate, his official character, it is *prima facie* evidence of qualification to act in that capacity.

The provision, that the Court may exercise a discretion in admitting or rejecting a deposition taken out of the State, has not been regarded as restrictive in the sense contended for by the defendant; but that the Court might admit the deposition, notwithstanding an omission of some things in the certificate, deemed essential, in depositions taken in the State, provided it was taken by a justice of the peace, or a notary, or other person, not a justice of the peace or notary, and provided such other person was lawfully empowered to take it. We do not intend to say that a deposition, taken out of the State, according to the requirements of the statute of this State, may not be rejected by the Court, for reasons which satisfy it that it would tend to promote injustice; but of this, we here give no opinion.

The reason, that the judgment should be arrested because the deposition does not purport to be proof in relation to any pecuniary demand or matter, has been incidentally adverted to before, in the consideration of instructions requested to be given to the jury. The statute certainly does not admit of the limited construction contended for. A person may be defrauded of the dearest rights, besides those appertaining to property of pecuniary value. Good name, liberty and life are secured to every individual by the constitution; and a deposition, counterfeited, and purporting to be so taken, attested and certified, as to constitute legal proof, if genuine, with the intent to deprive him of either, we cannot doubt, would bring the one who made it within the provision of the statute.

It is contended that the indictment is insufficient, because

the counts under the statute have therein no allegation who the party was whom the defendant intended to defraud;— or the means to be used in the commission of the fraud, or the object to be accomplished by the same. The statute does not require that the name of the person to be defrauded should be alleged; and this allegation may be regarded as unnecessary. It is clearly alleged, in the indictment, that the defendant "did feloniously make, forge and counterfeit a deposition, with the caption thereto annexed, which false, forged and counterfeit deposition, with the caption thereto annexed, is of the tenor following, that is to say," &c. "with intent thereby to injure and defraud," &c. The matter in which the deposition was used is fully stated in the count under the statute for uttering the counterfeit deposition. And it has not been usual to set out the definite object to be accomplished, in making the counterfeit instrument; in fact, the object may not have been definitely fixed in the mind of the accused. If the instrument has been made with intent to defraud, it is sufficient.

Another ground of the motion in arrest, is, because it does not appear from the indictment that the libel, or petition for divorce, was legally pending in this Court at the time the deposition purports to have been uttered. This is not true in fact. The indictment alleges, that the defendant heretofore, to wit, "on the 29th day of January, A. D. 1859, petitioned in writing this Court, then and there in session," &c. "to be divorced from the bonds of matrimony then existing between him and Marilla Kimball, his wife," &c., and that "said petition for divorce was entered at said January term of this Court, 1859, and that the same was continued to the then next April term of the same, at which term the said petition for divorce came up for trial, and the same was tried on the 18th day of June, in the year aforesaid, before said Court, then and there being in session." And it is further alleged that, "on June 15, A. D. 1859, the defendant did feloniously make, forge and counterfeit a certain false, forged and counterfeit deposition," &c., and that he

"did, on said 18th day of June, A. D. 1859, utter and publish the same," &c. These allegations show that the libel was pending, when the counterfeit deposition was made and uttered, in a Court which must take judicial notice of its jurisdiction.

Another objection to the sufficiency of the indictment, made in the motion in arrest, is, that the full contents of the libel, or petition for divorce, is not set forth therein, so that the Court can judge whether the deposition is receivable as legal proof in support of the same. It is alleged in the indictment, that the defendant petitioned in writing this Court, then in session, [Jan. 9, 1859,] to be divorced from the bonds of matrimony, &c., for desertion without justifiable cause, by Marilla Kimball, his wife, of the defendant for more than five years, then last past. The ground for the divorce, thus alleged in the petition, was one recognized by the practice of the Court as being sufficient to entitle the libellant to a decree therefor, on the introduction of satisfactory evidence; and the indictment was sufficiently explicit and full, to show that the deposition, if genuine, would have been receivable in evidence on the trial of the libel.

A further reason, as stated in the motion, is, that it is not stated, in what purports to be the caption of the deposition, by whom the deposition was written, as required in R. S., c. 107, § 15, head 2. And that the deposition does not purport to be one returnable to any term of this Court, for the trial of civil causes, purporting to have been taken for a May term, 1859, which did not exist as a matter of law.

If the deposition had been genuine, and could not have been received legally as evidence, in the trial of the libel, being void upon its face, it is properly conceded by the attorney general that the judgment must be arrested.

It appears, on inspection, that the deposition purports to have been "written down by the authority of the undersigned justice of the peace." The statute requires that the justice or notary shall make out the certificate, and annex it

to the deposition, therein stating, "by whom the deposition was written; if by the deponent, or some disinterested person, he must name him, and that it was written in his presence, and under his direction." It is quite obvious, that this requirement has not been observed, in the caption of the instrument in question.

Under the 5th head of the section last referred to, another fact required to be stated in the certificate is,—"the Court or tribunal, in which it is to be tried, and the time and place of trial." In the certificate, it is manifest that it was intended that these should be stated, but the time of the session of the Court, to which the deposition purports to be returnable, is the "May term of said Court, in the year of our Lord one thousand eight hundred and fifty-nine," which is a term that does not exist in the county of Penobscot for the trial of issues of facts.

These errors, if they occurred in the caption of a genuine deposition taken in the State by a justice of the peace, and to be used therein, would make it inadmissible. But if taken out of the State, would it be admissible, in the discretion of the Court under the provision in statute, c. 107, § 20? We think it clear, that by the authority of decisions, in analagous cases, this question must be answered in the affirmative.

By the statute of 1821, c. 85, § 3, it was made necessary that deponents should be cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, before they should give their testimony. And it was decided, in the year 1839, that a deposition, taken out of the State, could be used under a provision in the statutes of 1821, c. 85, § 6, similar to that of 1841, c. 133, § 22, and of 1857, c. 107, § 20, notwithstanding the oath was not administered to the deponent before giving his testimony. *Blake* v. *Blossom*, 15 Maine, 394. This construction was adopted by the Legislature by incorporating substantially the provisions of the statute of 1821, into the two revisions made afterwards.

We think the omission to administer the oath to the deponent before he gave his testimony, making the deposition merely an affidavit of the facts stated in direct examination, was quite as important as the omission to state by whom the deposition was written, when it was "written down under the authority of the justice of the peace who took it."

The error in misstating the session of the Court, was unquestionably one of clerical character. Notwithstanding the error, if the deposition had been given by Joseph Greeley, jr., and certified by James M. Sargent, as the one in question purports to have been done, it certainly would have all the real sanctions of truth as much when made returnable to a Court which should commence its session in May as in April. If the deposition had been actually taken as it purports to have been, we cannot doubt that, in the exercise of a discretion under the statute, it might have been admitted.

The forging of any writing, by which a person might be prejudiced, is punishable as a forgery at common law. *State* v. *Ames & al.*, 2 Maine, 365; 3 Chitty's Crim. Law, 1022. It is said, in *Commonwealth* v. *Ayer*, 3 Cush., 150, that "forgery at common law is defined to be a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit."

The indictment in the case before us contains a count for forging the deposition and the caption thereto annexed, and another for uttering the same with intent to defraud Marilla Kimball, at common law. Some of the objections to the counts in the indictment under the statute are avoided.

The statute on the subject of forging and counterfeiting, c. 121, § 1, was obviously designed to prescribe the punishment, different from that provided by the common law, rather than to revise the whole subject matter as it stood by the common law. The latter would, by implication, repeal the common law. *Commonwealth* v. *Ayer*, before cited.

The first section of chapter 121, in the R. S. of 1857, and of chapter 157, sections 1 and 2 of the revision of 1841, are substantially the same as chapter 11, sections 1 and 2 of

the statute of 1821. Under the provision last referred to, the indictment in the case of *State* v. *Ames & al.*, which was at common law, was sustained. Hence that decision is now the law by Legislative adoption.

Motion in arrest of judgment overruled.

The rulings of the presiding Judge, together with his instructions to the jury, and his refusals to instruct them, are legally correct. *Judgment on the verdict.*

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

KENT, J., dissented upon the first point decided, but concurred in the remainder of the opinion of the Chief Justice.

KENT, J.—The prisoner was on trial, charged with having forged the signature of the apparent deponent to a deposition. The person, whose name it was alleged was thus forged, was called as a witness by the government, and he testified positively that he never saw the deposition, and never signed his name thereto. In cross-examination the prisoner desired to ask the witness, (in substance,) if he did not know of his own knowledge that the facts stated in the deposition were true. The Judge excluded the testimony.

No one would for a moment contend that it would be a defence to the charge, to show that the facts stated in the deposition were true. The offence consisted in falsely placing the name of an apparent deponent to a deposition, which he never saw. Whether that deposition stated facts or falsehoods, in this view, is immaterial. The prisoner, if he thus forged the name, is guilty, although every sentence contained an undoubted fact.

The question, however, at the time of trial, was, whether or not the prisoner did in fact falsely make and utter the instrument. He denied the fact charged. He insisted that the witness, notwithstanding his denial, did in fact give the deposition and sign his name to it.

The prisoner had a right to set up this denial in his defence. He also had the right to establish by proof any fact

legitimately bearing on this issue, — although such fact might be in itself apparently weak and inconclusive. He had a right to say — this witness did sign that paper. In the cross-examination he had a right to ask the witness in relation to all the facts and circumstances surrounding the matter and connected with it, or bearing upon it.

It is apparent that if the witness did know the facts, and *could have testified* to all the matters contained in the deposition, that it would be more probable that he did in fact give the deposition, than if he was entirely ignorant of the facts stated. In order to lay the foundation for the theory or allegation that the signature was genuine, the first step would be to show that it might have been given truly and according to the knowledge of the assumed deponent. The prisoner had a right to the fact, to argue therefrom that the witness was the person of all others to apply to for such deposition — as he knew all the facts. If a person is on trial for forging a note for one hundred dollars, and the person whose name appears thereon is a witness and swears that he did not sign it, and never gave it, cannot the prisoner in cross-examination ask him if he did not owe the accused that sum at the date of the note?

If he did owe him that sum, but did not give the note, it is clearly no defence. But it is a fact, which, in the controversy, may be quite material in determining from all the circumstances and probabilities the guilt of the prisoner. It would be quite probable that a man who in fact owed the exact sum had given such a note. So in this case, the accused sets up in defence the theory that the deposition was in fact given, or assented to, and, in my opinion, he had a legal right to have an answer from the witness as desired, that he might urge it, for what it might avail, in determining from all the circumstances belonging to the case, the probabilities and improbabilities surrounding it, the guilt or innocence of the prisoner.

I do not regard this as such a collateral matter, that it was within the discretion of the Judge to admit or reject it.

I have no doubt that such discretion is in some cases allowed. But they are cases where the matter is entirely collateral, and the proposed examination is not to elicit facts which bear upon the issue and which can be fairly used to establish or overthrow theories which are legitimate for consideration, but to establish facts which in themselves, when proved, are foreign to the issue, and can be used only to test the memory or impeach the veracity of the witness as to such foreign matters.

The evidence offered was as to facts stated in the deposition, and bore directly upon the question in issue, however feeble the fact of knowledge might prove to be.

I have never understood that, in our practice, the defendant was prohibited from introducing new facts, important for his defence, by the cross-examination of a witness of the other party. It may be a useful rule, but it has not been adopted by this Court, and ought not to be applied for the first time in a criminal case. I do not, however, understand that the majority of the Court place the decision of this case on that point—or decide that the rule is adopted in this State. In my opinion the exception to the ruling of the Judge on the point above stated should be sustained.

JAMES THOMPSON *versus* CHARLES D. GILMORE.

In a suit, under the statute, to enforce a laborer's lien on logs, *not belonging to the persons for whom the services were rendered,* a valid judgment *in rem* must be obtained against the property.

The record of a judgment, in such a case, must show that the logs, upon which the labor was expended, are the same, which, in the writ were commanded to be attached, and which *were* attached and returned by the officer.

The officer's return on such writ does not establish the fact, that the logs attached are identical with those upon which the services were rendered, although having marks in common with them; but it must be shown *aliunde.*

Thompson *v.* Gilmore.

In a case where the writ contained an allegation that labor was expended on logs of a certain mark, a default merely admits that fact, but does not establish the fact, that the logs described in the writ are the *same* logs which were attached and returned by the officer.

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

THIS was an action of CASE against the late sheriff of the county of Penobscot, for the alleged default of his deputy, in not keeping and delivering over, to be taken on execution, certain logs by him attached on a writ in favor of the plaintiff against Lambert and Cowan, claiming a lien on said logs for labor thereon in driving.

The writ in the original action was dated Aug. 13, 1855, and judgment rendered May 30, 1857. The writ in this case was dated Sept. 15, 1857. Plea, general issue, with a denial that plaintiff had established any lien on the logs, but merely drove them under a contract with the owners.

No notice was given the owners of the logs in the proceedings in the original suit, but G. W. Ingersoll appeared upon the docket "for log owners, namely, Smith & Co.; Carlton; E. S. Coe; A. Rogers; A. Ingalls, and John Ross." There were ten marks of logs attached. It appeared in the evidence that one *Leadbetter* owned two of said marks, and no one appeared for him. All the other facts appear clearly in the opinions of the Court.

A default was entered, subject to the opinion of the Court, whether a defence could be maintained upon the case, as reported.

Rowe & Bartlett, for the plaintiff.

J. A. Peters, for the defendant.

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

TENNEY, C. J.—The plaintiff seeks to obtain a judgment against the defendant, as the former sheriff of the county of Penobscot, for the default of Daniel Jacobs, his deputy, for not delivering, on a demand made by a person legally authorized to receive them, certain logs attached on the

plaintiff's writ, by said deputy, and returned thereon by him, against William L. Lambert and Stephen L. Cowan, on which he claimed to have a lien for services, in driving the same from Eagle lake, so that they could be seized and sold by the officer, who had the execution recovered in the action in which the attachment was made.

Many objections are made by the defendant to the maintenance of this suit, which appertain to the proceedings in the original action against Lambert and Cowan, while it was pending in this Court; one of which is a denial of any valid judgment against the logs in question, on the ground that the record furnishes no evidence that the owners of the logs were notified of the pendency of the suit in which the logs were claimed by virtue of a lien, excepting by the appearance of an attorney for certain persons, represented by him, as claiming to be owners. If the attempt to remove this objection by the plaintiff's counsel by argument were successful, another matter disclosed in the case deserves consideration.

The case finds that the alleged debtors of the plaintiff in the suit did not own the logs in question. And a very material point involved in the case, is, whether the record shows a valid judgment *in rem* against the logs, so that the defendant's deputy, Jacobs, was legally bound to deliver them on the demand made within thirty days after judgment, by the officer who had the execution. In ordinary actions of assumpsit against a party, to obtain a judgment, *in personam*, the plaintiff alleges in his writ, in legal form, certain facts touching the contract and its non-performance, &c., by the defendant. A default of the defendant is an admission of the defendant that the facts alleged are true, and that thereon the law awards judgment in that suit. 3 Black. Com., 396. If the plaintiff, in addition to the judgment *in personam*, seeks a judgment *in rem* by virtue of a lien, under the statute, which is invoked in this case, on account of having performed labor upon the property, on which the lien is claimed, it can be done only by an attachment which

he causes to be made of the property upon which his services were rendered, and upon a writ which he sues out for the double purpose of obtaining a judgment against his alleged debtors, and against the property itself. And the settled construction of the statute, as declared in the case of *Bicknell* v. *Trickey*, 34 Maine, 273, is,—"No other property is liable, except that upon which the lien attaches."—"The identity of the claim and the property must co-exist, and must be traceable till the fruits of the judgment have been obtained by a satisfaction of the execution. The identity of the property must be established, else the lien cannot attach; the labor must be shown to have been done upon the specific property raised, for provision is made for nothing else."

What then must be established as the basis of a judgment *in rem*, in such cases? It cannot be doubted that it must be made to appear in some mode that the labor has been performed by the plaintiff in the case, under a contract, express or implied, with the other contracting party, the debtor, and whatever may be necessary to entitle him to a judgment *in personam;* and that this labor has been done upon the property directed to be attached, and which has been attached on his writ, and a return thereof made upon the same by the officer, who had it for service. Whatever is alleged in the writ, which is material and properly stated, by the alleged debtor's default, he having had legal notice of the suit, is admitted to be true. But no presumption arises from the default, whether the defendant has appeared or not, that he admits the existence of other facts, not in any manner stated in the writ. And, from the provisions of the statute which we are considering, it is manifest, under the construction already referred to, that a judgment *in rem* cannot be rendered against the property, without proof of other facts, which, from the nature of the case, cannot be alleged in the writ. The attachment of the property is necessarily subsequent to the purchase of the writ. Whether the property attached and returned is identical with that, in

all respects, on which the labor was performed, as the basis of the lien, although it may have marks in common with that which is not attached, the officer's return has no tendency to establish. The identity must be proved *aliunde*. Hence this latter proof cannot be supplied by a default of any one, who can be treated as a party, at any stage of the proceedings.

In the writ in favor of the plaintiff against Lambert and Cowan, the party with whom he contracted to drive certain logs, there is the direction to attach the property of the latter, and also ten lots of logs, described by their several marks, lying in the Allegash and Penobscot rivers, to the value of one hundred and eighty dollars, &c. After the usual part of the writ, follows,—"to answer unto James Thompson in a plea of the case, for that the plaintiff heretofore, to wit, during the summer and spring of the year 1854, at the request of said defendants, labored in said State of Maine, at driving on the Allegash and Penobscot rivers, and their tributaries, towards the Penobscot boom, *certain logs and lumber*, of the following marks, to wit," [marks similar to those on the logs which the officer was directed to attach,] "and the sum and balance actually due, and unpaid of the amount stipulated, by the defendant to be paid to the plaintiff, for his personal service thereon was and is the sum of eighty dollars and thirty-nine cents, as specified in the annexed account, and, in consideration of the premises, said defendants, at said Bangor, on the day of the purchase of this writ, promised the plaintiff to pay him said last named sum on demand; and the plaintiff claims a lien upon said logs and lumber, under the laws of this State, for said sum, so due, and brings this suit, to enforce, and secure the same."

The record, after reciting the allegations in the writ, and that, at the term of the Court when the writ was returned and action entered, notice was ordered, &c., and that an appearance was entered at a subsequent term by an attorney of the Court, for certain persons named, it proceeds,—

"Now the plaintiff appears, but the defendants, although called to come into Court, &c., do not appear, but make default. It is therefore considered by the Court, that the said James Thompson recover against the said William L. Lambert and Stephen L. Cowan, and against said logs, the sum of eighty-eight dollars and seventy cents, debt or damage, and costs of suit, taxed at twenty-nine dollars and ninety cents."

The defendant insists, that the call of the "defendants" and their non-appearance thereon, can apply only to the debtors—and can have no reference to the logs or their owners. It is true that the term "defendants," as used in the writ, in other parts thereof, is manifestly restricted in meaning to those against whom the plaintiff brought his suit, as on a promise—and whether it can with propriety have a more enlarged signification, when it is used in the record, to show a default, may not be clear. But whether this would be a fatal objection, if everything else required was correct, we do not decide.

Assuming that the logs and their owners are embraced in the term "defendants," and that the default applies to them as well as to the alleged debtors, does the record show a valid judgment *in rem*, against the logs? After the record of the default of the "defendants," it proceeds immediately, "therefore," it is considered by the Court, &c. The definition of the word "therefore" in such connection, in Worcester's Dictionary is, "for this reason;" "consequently;" and in Webster's Dictionary, "for that; for that or this reason, referring to something previously stated."

The record taken in its broadest sense, from all the allegations in the writ copied therein, is only a *sentence* against logs described as having certain marks upon them, with no statement of or reference to any fact or evidence, touching the logs. No presumption of any proof can legally arise, that the logs attached and returned were identical with those, on which the plaintiff's labor was alleged in the writ, to have been done, without something in the record to show

it. If such presumption could ever arise, it is repelled in this case, by the affirmation, that the facts stated in the record included those alleged in the writ, and the default of the defendants are alone the basis of the judgment.

The default, if applicable to the log owners, may be considered as their admission, that a lien was *claimed* upon the logs, described in the writ, and that labor was performed upon certain logs, having such marks. But the record is silent in every respect, touching the logs, returned as attached by the officer who served the writ. The latter, are those only, upon which the judgment could by possibility operate, according to the law and the facts of the case; they alone were in the custody of the law; they must have been proved to be identical with those on which the labor was performed, so far as the former extends. But this identity is not shown by the record to have been established or decreed by the Court; and the default cannot by possibility be construed into an admission on the part of the log owners, beyond the allegation in the writ, which is simply that the plaintiff *claimed* a lien upon logs, having certain marks. It could be no more than a claim before the attachment. The logs, which should be attached afterwards, might be different from those on which plaintiff's labor was alleged to have been expended. The establishment of a lien, upon the logs attached, could not be implied, or inferred from the record, when the property on which it could be secured by the attachment made, is not referred to therein.

A judgment is defined by Blackstone to be a sentence of the law, pronounced by the Court upon matters contained in the record, and, though pronounced or awarded by the Court, it is not the determination or sentence of the judges, but the determination and sentence of the *laws*. It is the conclusion that naturally and regularly follows from the premises of law and fact. 3 Cow., 395 and 396. If anything be entered in a judgment which is not mentioned in the plaintiff's declaration, the judgment is not good. 2 Litt., 104. And when it appears upon the record that the

plaintiff hath no cause of action, he shall never have judgment. 8 Rep., 120.

It is regarded as essential that the record should set out at length the cause of action as contained in the writ, the verdict of the jury, if the facts were disputed in an issue to the country, or a default of the defendant to authorize a judgment thereon. Were it otherwise, the judgment in one action would be no bar to another which was really for the same cause.

In courts of general jurisdiction, certain presumptions touching jurisdiction and proceedings may be made, so that the judgment is treated as valid, till reversed for error. But it does not follow from this, that there may not be records, even of the highest courts, so grossly erroneous, that they are not treated as having any validity, although purporting to be judgments of the Court. When there is a sentence of a Court of the most enlarged jurisdiction in an action, where the writ is found to contain no declaration to show the nature of the claim, and consequently, there can be no record to supply this defect, it would not be said that a judgment pronounced for the plaintiff in such a case, was valid till reversed. It would have none of the elements of a judgment in judicial proceedings.

In a suit like that presented in the proceeding in favor of the plaintiff, against his alleged debtors, to obtain satisfaction of his debt in a personal action, by means of property in which the debtor had no interest, through a judgment *in personam* against the debtor and *in rem* against the property, it is essential to the validity of the latter judgment, that the record should exhibit all which is essential as a foundation for the sentence of the law pronounced.

After the default of the defendants in the action in favor of the plaintiff, in which the lien was claimed, as in ordinary cases, it was supposed by the counsel for him that nothing further was required to perfect his judgment in all respects, and that, on being recorded according to the proceedings in Court, it would be sufficient. But, as we have

seen, the admission by the default was but a small portion of the facts necessary to a judgment *in rem*. If this admission could apply to the log owners, or their property, these owners might, or might not have had the right to be heard further; of this we are not called upon for an opinion. But, without a hearing and adjudication thereon, no judgment *in rem* could have been rendered. The record exhibiting nothing of this kind, affords no basis for the sentence against the logs, and the sentence itself is invalid.

According to the agreement of the parties; the default is to be taken off and the action to stand for trial.

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

CUTTING, J, concurred in the result in the following opinion:—

The record in the present case shows that a notice was ordered, but it does not show that such notice was ever given, whereas the statute is *imperative* that it "*shall be given to the owners of the lumber, as the Court shall order.*"

It is contended that service of notice was waived by the appearance of Mr. *Ingersoll*, as counsel for certain individuals, "log owners." Under such an entry it cannot be pretended that he appeared, in the language of the statute, for "*the owners of the lumber.*" But can it be argued that an appearance for certain persons, pretending to be the owners, shall subsequently preclude the real owners from showing such fact? Whereas, if the *statute notice* had been given, and the real owners had neglected to appear and claim their rights, they would be precluded from afterwards asserting them. It appears from the record that ten lots of pine mill logs had been seized, bearing each its respective marks, indicating as many individual owners. If *Ingersoll's* appearance for a portion was sufficient to bind the whole, then it would inevitably follow that nine distinct owners would be wholly at the mercy of the tenth, who might, perhaps, only own the hundredth part of the lumber attached.

It is said, if there were other owners beside such as were represented, their property is not embraced in the judgment, but only the property of such as did appear by counsel. But what marks did those appearing represent? The judgment embraces the ten lots, and under it the lumber of those who did not appear could not be sold to satisfy the lien on the lumber of those who did appear, yet the judgment makes no discrimination. The officer having the execution ought not legally to be compelled to make the discrimination at his peril, which he would be under the necessity of doing if he obeyed its commands.

Besides, the statute contemplates that all questions in relation to the lien and the ownership shall be settled under the original process, and thus avoid any controversy which otherwise might subsequently arise between the officer and the owner, as decided in the case of *Redington* v. *Fry*, 43 Maine, 578. Hence, it was intended by the statute that the same notice should be given to the owners or persons interested as in a libel *in rem* in Admiralty.

NOTE. — See statute passed since this case was determined, ch. 131 of the Acts of 1862.—*Reporter*.

AUGUSTUS S. FRENCH *versus* JOSIAH ALLEN.

Under the provisions of the Revised Statutes of 1841, and of stat. 1856, c. 278, § 1, relating to levies on real estate, the return of an officer that, on a day and hour named, he "seized and took in execution" certain lands of the debtor, and set off the same by metes and bounds to the creditor in satisfaction of an execution, referring to the annexed certificate of the appraisers for a description of the premises set off, is sufficiently definite.

The time named in the officer's return when he "seized and took in execution" the lands, was the commencement of the service of the execution, and all subsequent proceedings relate back to that time.

Such a levy takes precedence of a mortgage recorded the day after the time named when the officer "seized and took" the land in execution.

French *v.* Allen.

Where the officer's return, *as recorded*, states that one "was chosen an appraiser by *me* in behalf of the within named creditor E. P., and I was then notified of the same," and the original, on inspection, leaves it in doubt whether the word written was *me* or *and*, it is to be regarded at most as a clerical error, and the rest of the sentence as showing that the creditor, and not the officer, must have selected the appraiser referred to.

It was not necessary that the nature of the estate appraised should be described in the officer's return under R. S. of 1841, c. 94, § 7.

WRIT OF ENTRY to recover lot No. 11, 10th range, in Garland. Plea, general issue.

THE case was agreed to be submitted to the full Court, on a statement of facts agreed upon, a synopsis of which is given in the opinion of the Court, and it is unnecessary to repeat them here.

J. Crosby, for the demandant.

A. Sanborn, for the tenant.

The opinion of the Court was drawn up by

CUTTING, J. — Writ of entry to recover title and possession of lot No. 11, range 10th, in Garland, containing 160 acres. Both parties claim under one *John L. Leighton;* the demandant, as assignee of his mortgage to *Nathan Wyman*, dated Feb. 2d, 1857, and recorded "Feb. 3d, 1857, 1 h., 25 m., P. M.;" the tenant, as grantee of Ezekiel Page, who, by a levy on the same estate, seized it on execution, as contended, on "Feb. 2d, 1857, at 9 o'clock, A. M." But the seizin on that day or at any other time before the recording of the mortgage is controverted, hence arises the first point presented.

The officer, having the execution, returns thereon as follows: — "Penobscot, ss., February 2d, 1857, at nine o'clock in the forenoon, and also on the seventeenth day of January in the year of our Lord one thousand eight hundred and fifty-seven, at nine o'clock in the forenoon, *I seized and took in execution, by virtue of the within execution*, the real estate and land of the within named debtor *John L. Leighton*, and the lands of said debtor set off by metes and bounds to

the creditor within named, and appraised towards satisfying this execution, and all fees, which lands so appraised are described in, as appears by the foregoing certificate of the appraisers, which is hereby adopted by me and is made by me a part of this my return."

We lay out of the case the seizure of the seventeenth of January, because the subsequent seizure on Feb. 2d, must be considered as a waiver or abandonment of the former. The question then presented is, what constitutes a seizure on an execution by an officer? An important question, in the decision of which, we must resort to the legislation and decisions upon that subject.

By § 5, c. 94 of R. S. of 1841, in force at the time of the levy, it is provided that—"After the officer *has taken* land in execution, and given notice to the debtor thereof, if he or his attorney be residing in the same county, and allowed him a reasonable, specified time, within which to appoint an appraiser, as mentioned in the preceding section, he shall then proceed, without unnecessary delay, to have the estate appraised, and the levy completed; and it shall be considered as made, when the land *is taken in execution;* and the subsequent proceedings and return shall be valid, though made and done after the return day, or after the removal or other disability of the officer." Sect. 24,—"The officer shall state in his return, on the execution, the *time* when the land *was taken* in execution." Sect. 25,—"When lands are taken and set off on execution, the debtor may redeem the same at any time within one year after the levy," &c.

Statute of 1856, c. 278, § 1, provides that—"All levies on real estate which have already been made, or which shall hereafter be made, shall, for the purpose of fixing the amount due on the execution, and the time when the debtor's right to redeem will expire, be considered as commenced, on the day of the date of the administration of the oath to the appraisers, *although it may appear from the officer's return that the estate was seized on the execution before that day*, or

that the proceedings were not completed until after that day."

The foregoing provisions, and others upon the same subject matter, all recognize a seizure on execution by the officer as the basis of, and preliminary to ulterior proceedings. The officer's return upon a writ of an attachment of real estate by him made, and the time when so made, has invariably been held to be conclusive between the parties, however general in terms, without designation of lot or description of boundaries, and even without any knowledge of the officer of the existence of any such estate. Can it reasonably be contended that a mere seizure on execution requires an act more formal than an attachment on a writ? It is true that, in order to perfect the seizure, a levy must subsequently be made, and within a reasonable time and according to the requirements of law, which are not questions now under consideration.

We are aware of the decision in *Allen* v. *The Portland Stage Co.*, 8 Maine, 207, wherein WESTON, J., remarks that—"The first act to be done by the officer, in extending an execution upon real estate, is to cause three disinterested freeholders to be sworn as appraisers. The statute points out how they are to be designated, in which the creditor, the debtor and the officer have a part to perform; but the duty of causing them to be sworn is the first, which is especially and distinctly enjoined upon the officer. We are of opinion that, until this is done, the levy cannot be said as commenced. Indeed, it might not be going too far to hold, that the first step in extending an execution upon any particular real estate is when it is shown to the appraisers; for there is no designation of the land to be appraised, in the oath administered."

That opinion was delivered in 1832, under the provisions of R. S. of 1821, c. 60, § 27. And what may be considered somewhat remarkable, is, in that whole chapter, no mention is made of a seizure or the taking real estate in execution by an officer, or any such words as have been quoted

in the statutes of 1841 and 1856, expressive of preliminary proceeding. So that, in *Hall* v. *Crocker*, 3 Met., 245, SHAW, C. J., was well justified in his apology to the Court, whose opinion he overruled, by remarking that—"possibly the decision in that case (*Allen* v. *Portland Stage Co.*) may have been influenced by the special provisions of the Revised Statutes of Maine, which may differ in phraseology from the Massachusetts Acts." He then proceeds to cite and comment upon certain provisions in their Acts, which are very similar to those *now* embraced in ours already referred to. We fully concur in the correctness of the opinion in *Hall* v. *Crocker*, and in its conclusion, that—"it is the officer's return alone, after all, which must govern."

In the present case, the officer returns that, on Feb. 2d, 1857, at nine o'clock, &c., he "*seized and took in execution*," &c., which was the commencement of the service of the execution, and all subsequent proceedings related back to that time, which was before the record of the demandant's mortgage. *Fitch* v. *Tyler*, 34 Maine, 463.

The next point presented, and on which the demandant's counsel relies as a fatal defect in the levy, is an appointment of an appraiser by the creditor; it is contended that the officer's return shows the selection to have been made by himself and not by the creditor. We have been furnished with a copy of the levy certified by the register of deeds, and also with one certified by the clerk of the Court to which the execution and proceedings were returnable. The first is as follows:—"*Jonas Wheeler* of Dexter was chosen an appraiser by *me* in behalf of the within named creditor, *Ezekiel Page*, and I was then notified of the same." The second is similar to the first except the word "and" is substituted for "me."

We have also been furnished with the original, which on inspection appears problematical. It was a grave fault in the officer, undoubtedly, and for which he is justly censurable for his defective chirography. But if the word be *me* instead of *and*, as urged by the demandant's counsel, and

the register's copy is alone admissible, can it be considered more than a clerical error, calculated to deceive no one who may be able and disposed to read the whole sentence, viz., "and I was then notified of the same;" i. e., notified of an act which he had himself performed! The astute counsel must also yield this point.

It is next contended that under § 7 of R. S. of 1841, c. 94, the nature of the estate appraised should be described, &c. That section has received a construction in *Roop* v. *Johnson*, 23 Maine, 335, adverse to such proposition. It is true that R. S. of 1857, c. 76, § 3, enacted subsequent to the levy, may have changed the phraseology of the former section, but whether for better or worse remains perhaps hereafter to be seen.

The other points raised by counsel are already too well settled to require a further examination.

Demandant nonsuit.

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

DAVIS R. STOCKWELL *versus* FREDERIC DILLINGHAM *& al.*

A contract made by a co-partner in the name of the firm, will *prima facie* bind the firm, unless it is outside of the business of the firm.

The firm is liable for the false and fraudulent representations of one of its members relative to matters falling within the scope of its business, and much more so when the representations are true; and an innocent third party has a right to regard such representations as true, and to act upon them.

When one of a firm borrows money, not expressly on his individual credit, and it is shown that it was borrowed for and appropriated to the use of the firm, the firm is liable.

Where one partner contracts a debt, representing to the creditor that it is for the benefit of the firm, if the contract is within the scope of their business, the firm is liable, whether the representations are true or false.

ON EXCEPTIONS to the ruling of APPLETON, C. J., at *Nisi Prius.*

TROVER for pine logs. Both parties claim under Brown & Lee, who owned the logs prior to Nov. 2, 1858, and were a firm engaged in the lumber business. By agreement of parties, the trial was by the Court, with right to except. At the hearing, the facts appeared as follows:—

On Nov. 2, 1858, Lee, of the firm of Brown & Lee, represented to the defendants, Dillingham & Smith, that he wanted to raise money to pay one Chase, for money he (Lee) had had of Chase, to pay Brown & Lee's bills; that Chase wanted to go to California, and he had no other means to raise the money to pay him; thereupon Lee gave to Chase a bill of sale of certain logs in the west branch of the Penobscot river, to which he signed the name of the firm, Brown & Lee, and Chase gave the defendants his mortgage of the same logs, and the defendants gave the note described in the mortgage, and charged the same to Lee.

The condition of the mortgage was as follows:—

"This sale is made to secure to Dillingham & Smith a demand they have against James Lee of Milford, for the sum of one hundred and fifty dollars, payable in nine months from the date hereof, and when said Lee shall pay or cause to be paid to said Dillingham & Smith the said sum of one hundred and fifty dollars, then this sale to be void. The said demand being their note of this date, for said amount, payable nine months after date, lent to and receipted for by said Lee."

The bill of sale and mortgage were both dated Nov. 2, 1858, and the mortgage was recorded in the town records, Jan. 4, 1859.

Both the bill of sale and mortgage were in the handwriting of Dillingham. The note was paid at maturity by the defendants. It also appeared by the testimony of Dillingham, given for the defence, that he (Dillingham) had no information that it was Lee's private debt; that he understood from Lee that he had borrowed money of Chase to pay bills of Brown & Lee, and that Chase had loaned the money to Lee.

On Aug. 1, 1859, Brown & Lee, being indebted to the plaintiff, in payment therefor, Brown, in the name of and for the firm, conveyed the logs before mentioned to the plaintiff, by a complete sale. Subsequently the defendants converted the logs to their own use.

It did not appear, except as before stated, that the defendants made any inquiry whether Lee had used any money had of Chase, to pay Brown & Lee's bills, or whether Chase had furnished any to Lee for any purpose.

Nor was it proved, that Lee did pay any bills of Brown & Lee, or that Chase did furnish him with any money for that purpose, as Lee had stated to Dillingham, except as before stated. Upon this point Lee was examined as a witness.

The presiding Judge found the titles of both parties were acquired in good faith, in fact, and, upon these facts, ruled that, in law, the title of both the plaintiff and the defendants, having been so acquired, that of the defendants being prior in date, must prevail, and ordered judgment for the defendants. To which the plaintiff filed exceptions.

W. C. Crosby, for the plaintiff.

Brown & Lee were not liable to Chase, and the debt to him was Lee's private debt, and the defendants should so have considered it, notwithstanding Lee's representations. Story on Partnership, §§ 134, 140, 148; Collyer on Partnership, 266, 268; 6 Cowan, 497; 9 Pick., 272; 8 Met., 411.

It is fraud in law for a partner to sell, or for a creditor to buy partnership property, in payment of the partner's private debt, and such a transaction is wholly void in respect of other partners or creditors. Story, §§ 128 to 133; *Rogers* v. *Bachelder*, 12 Peters, 229; *Dob* v. *Halsey*, 16 Johns., 34; *Pudgett* v. *Lawrence*, 10 Paige, 170.

If the defendants are not subject to the imputation of moral fraud, they are still liable for negligence and legal fraud. Either is sufficient to destroy their title to the property.

If the funds of a partnership are received in payment of the separate debt of one partner, it is not necessary for the firm to establish the fact that the creditor knew at the time that it was a misapplication, for the very nature of the transaction ought to put him upon further inquiry, and, however in good faith he may have acted, it is a case of negligence on his part which will not entitle him to recover. Story, § 133; *Green* v. *Deakin*, 2 Starkie, 347.

Rowe, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — The facts in this case are not open to controversy. The only inquiry is whether the ruling of the presiding Judge upon the facts as disclosed was erroneous.

Both parties claim the logs in controversy under bills of sale from the firm of Brown & Lee. The defendants' title is prior in time and consequently prior in right, unless impeached.

The bill of sale from Brown & Lee to Chase is *prima facie* to be deemed the act of the firm and binding on them. "When a contract," remarks Mr. Justice STORY, in *U. S. Bank* v. *Binney*, 5 Mason, 176, "is made in the name of the firm, it will *prima facie* bind the firm, unless it is *ultra* the business of the firm." The bill of sale must be deemed then as conveying a good title, unless impeached.

The evidence discloses that "on Nov. 2, 1858, Lee of the firm of Brown & Lee, *represented* to the defendants that he wanted to raise money to pay one Chase, *for money he, (Lee,) had had of Chase to pay Brown & Lee's bills*, that Chase wanted to go to California, and he had no other means to raise the money to pay him." It also appeared from the testimony of Dillingham, given for the defence, that "he, (Dillingham,) had no information that it was Lee's private debt — that he understood from Lee, that he had borrowed money of Chase to pay the bills of Brown & Lee, and that Chase had loaned the money to Lee." But this does not impeach the defendants' *prima facie* title.

The firm is liable for the false and fraudulent representations of any of its members relative to matters falling within the scope of its business. Lindley on Partnership, 250. Much more, for the representations, which are true. Whether true or not, therefore, the defendants had a right to regard them as true — and so regarding them, to act upon their truth.

Upon the representations of Lee, the defendants advanced their note upon the faith of a bill of sale given by Lee in the name of Brown & Lee, which the plaintiff seeks to avoid, on the ground that it was the private debt of Lee, and not the debt of the firm, for which the advance was made. The statements of Lee show the money received went to pay the debts of the firm. The defendants understood it was the debt of the firm and not of Lee — which the money raised was to pay. "The firm is liable for goods though they may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm." Lindley on Partnership, 233. "Thus, if the money is in fact borrowed for the partnership business, or it is in fact applied to the partnership business, in the absence of all controlling circumstances, the partnership will be bound therefor; since the fair presumption is, that it was intended by the partner to pledge the partnership credit, and not merely his individual credit, whether the partnership was known to the lender or not." Story on Partnership, § 139. "The firm is liable, where one of the firm borrows money (not expressly on his individual credit) and it is shown that it was borrowed for and appropriated to the use of the firm." *Church* v. *Sparrow*, 5 Wend., 223; *Tucker* v. *Peaslee*, 36 N. H., 167. The language used was sufficient to satisfy the defendants that it was a firm debt for the payment of which, they advanced their note. They are not responsible for the truth of Lee's statements. As they were made in the course of business, if untrue, the firm must be the sufferer. The finding of the

Judge was that the defendants were *bona fide* purchasers — and that finding is not adverse to the facts as reported, and must conclude the parties. *Exceptions overruled.*

CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

NATHANIEL WILSON *versus* LEWIS BARKER.

A, the owner of the right of redemption of certain land of which B held a mortgage, gave a deed of the land to C, and took a mortgage from C to secure a part of the purchase money. The mortgage was recorded, but the deed was not. Afterwards W took an assignment of the latter mortgage; but, in the mean time, M, a creditor of A, attached A's right of redemption, seized and sold it, and the purchaser's title was perfected by lapse of time. W, not knowing of M's attachment and sale, and without consulting the records, tendered to B the amount due on his mortgage, which B accepted, and discharged the mortgage. — *Held*, that W cannot maintain assumpsit against B to recover back the money paid to redeem the premises from the first mortgage, as his loss resulted from his own neglect to examine the records and make due inquiry as to prior incumbrances.

The fact that W was ignorant that A's deed to C was unrecorded will not avail him, as this, also, he could easily have learned from the records.

W and B negotiated *ex adverso;* and B was not bound to know that W was not aware of the prior attachment, nor to inform him thereof without being inquired of respecting it.

ASSUMPSIT for money had and received. The evidence was reported from *Nisi Prius*, by KENT, J., for the decision of the full Court.

Wilson, pro se.

A. W. Paine, for the defendant.

The facts in this case sufficiently appear in the opinion of the Court, which was drawn up by

APPLETON, C. J. — The facts, upon which the rights of these parties depend, are few and not controverted.

On Nov. 8, 1843, David Pingree and Eben S. Coe con-

veyed a tract of land in Stetson to E. G. Allen, who, on the same day, mortgaged the premises to his grantors to secure in part the purchase money. The deed and mortgage were duly recorded, and the latter was assigned to the defendant, Sept. 19, 1854, and the assignment seasonably recorded.

E. G. Allen, having only the equity to redeem, on 16th of April, 1850, conveyed by deed the premises purchased to D. C. and C. L. Whiting, who, on the same day, conveyed them in mortgage to their grantor. The deed was not recorded, the mortgage was.

On Sept. 13, 1853, the deed, E. G. Allen to the Whitings, not having been recorded, Messrs. Shaw & Merrill caused an attachment to be made of Allen's right of redeeming his mortgage to Pingree and Coe. They subsequently, at the April term, 1856, obtained judgment, and, on the 30th of the following May, this equity of redemption was seized, and, on 2d July, of the same year, at 2 o'clock, P. M., the same was sold to the plaintiffs in the execution, in whom, or in their assigns, the title thus acquired became perfected by lapse of time. All these proceedings are conceded to have been in conformity with law.

The mortgage of the Whitings, dated 16th April, 1850, after intermediate assignments, on 9th Feb., 1856, became vested in the plaintiff.

It thus appears that the plaintiff, to make his mortgage available and his title under it good, was bound to procure a discharge of the mortgage of Allen to Pingree and Coe, which had been assigned to the defendant, and to remove the attachment of Shaw & Merrill.

In this state of the title, the plaintiff, on 26th July, 1856, at 1 o'clock, tendered the defendant $230 on account of the mortgage of Allen to Pingree and Coe, assigned to him, which he received. Subsequently, being doubtful whether the amount tendered was sufficient, on the 6th of September following, he tendered the further sum of $6, which the defendant took, remarking that he always made it a rule to

take all the money offered him, and, on the 12th of the same September, discharged the mortgage of Allen to Pingree and Coe, upon the records of the county.

By these proceedings the estate of the plaintiff was relieved from one of the outstanding incumbrances. The attachment, ripened into a title by sale on execution, was still subsisting and unpaid. The plaintiff neglecting to redeem that, and the title being perfected in the purchaser, he lost all benefit from his payment of the mortgage debt. The tender, effecting the object for which it was made, ultimately failed to be of any benefit, by reason of the intervening title of Shaw & Merrill becoming vested in them.

The plaintiff brings assumpsit to recover the money tendered on account of the Pingree and Coe mortgage.

It seems the plaintiff was in fact ignorant of the attachment in favor of Shaw & Merrill, though the same was duly recorded. The defendant, who, as their attorney, procured it to be made, did not disclose its existence at the time the tender was made, nor since. As the attachment was recorded, its existence was ascertainable by all interested to inquire. The plaintiff having an interest to ascertain the facts, omitted to examine the records and thus learn them. His neglect to make those inquiries, which ordinary prudence would dictate, cannot give him any new rights nor enlarge those already existing.

The defendant did not disclose the existence of an attachment. He was not aware of the plaintiff's ignorance of that fact. He could not reasonably anticipate negligence on the part of one so sagacious and vigilant as the plaintiff. The parties were dealing adversely. He could not assume, that the records of the county were unknown. He was not bound to inform the plaintiff of their contents, certainly not, when no inquiries were made of him on the subject.

That the plaintiff derived no ultimate advantage from the tender is no fault of the defendant. It answered the purpose for which it was made. It effected a discharge of the Pingree and Coe mortgage. It was made for the purpose of

discharging that mortgage. The defendant appropriated the tender as the plaintiff intended he should. The mortgage is discharged. The plaintiff cannot place the defendant in the position in which he stood before its discharge. The plaintiff, by tendering the amount due to Shaw & Merrill, or to their assignee, might have accomplished his object. He neglected it and must suffer. But all this gives him no right of action.

Neither can the plaintiff's ignorance, that the deed of Allen to the Whitings was not recorded, avail him. The fact was easily ascertainable, and if not known, it was his neglect that he did not ascertain it. The defendant could not presume that the plaintiff did not know the state of his own title. He was not bound to deduce it for him, nor to point out any defective links there might be therein.

The parties negotiated *ex adverso*. The defendant made no misrepresentations. The plaintiff failed to tender enough to remove all existing incumbrances. He mistook the facts, and neglecting to guard his rights with his usual vigilance, he must abide the result. *Plaintiff nonsuit.*

RICE, CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

SOPHIA L. TRASK *versus* EDWARD WILDER.

A held a mortgage from B of a lot of land. C, claiming under B, gave a deed of the same land to D, with a covenant against all incumbrances, and D afterwards conveyed the premises to A, with a like covenant. A cannot, after releasing D, maintain an action against C for breach of covenant, on the ground that he has been evicted by an older and better title.

The holder of a mortgage of a lot of land, who subsequently takes a warranty deed of the same lot from one who has, through intervening conveyance, the mortgager's right of redemption, will not, in an action against one of the intermediate grantors for breach of covenant of warranty, be sustained in pleading that he has been evicted by the mortgage title which he holds himself, nor in a claim for damages on account of the incumbrance.

Trask *v.* Wilder.

THIS was an action of COVENANT BROKEN.

Charles O. Butman, being seized of the premises, conveyed them to the plaintiff in mortgage, May 6, 1851.

April 6, 1855, the defendant, having come into possession of the premises through mesne conveyances, conveyed them to Hall Bagley, with covenants against incumbrances and of general warranty in the usual form.

Dec. 13, 1856, Bagley, by deed containing similar covenants, conveyed the premises to the plaintiff.

The plaintiff commenced this action, Sept. 10, 1861, assigning Butman's mortgage as a breach of the defendant's covenants.

At November term, 1861, the plaintiff released Bagley from his covenants by a release filed in Court.

At the trial at *Nisi Prius*, the defendant offered to prove that Bagley bought the land for the plaintiff; that the plaintiff was present, and did not mention the mortgage; and that the defendant was ignorant of the existence of the mortgage. To this the plaintiff objected.

The case was submitted to the full Court, on report of the evidence by APPLETON, C. J.

A. W. Paine, for the plaintiff, argued that the owner of property is bound to know his own title, and, if he sells, it is for a price apportioned to its full value. If there is an incumbrance, it reduces the value. Suppose the incumbrance had been equal to the full value, and yet the seller obtains the full value by his sale. Has the purchaser no remedy?

The important question is, whether the plaintiff has been evicted by an older and better title. The eviction which the law requires is technical only; there need be no actual turning out of possession, but any state of facts, showing actual loss by the incumbrance, is an eviction in law. *Cole* v. *Lee*, 30 Maine, 392; *Stowell* v. *Bennett*, 34 Maine, 422; *Whitney* v. *Dinsmore*, 6 Cush., 124; *Eastabrook* v. *Smith*, 6 Gray, 572; *Loomis* v. *Bedel*, 11 N. H., 74.

The estate conveyed is defeated to the extent of the in-

cumbrance. If Bagley had conveyed the land as he did to the plaintiff, and the mortgage had been held by a third person, it would not be denied that the plaintiff was evicted. But the plaintiff's loss or damage is the same as though a third person held the mortgage instead of herself. In either case the plaintiff has bought what purports to be an unincumbered title, and paid its value as the deed presumes. But the title proves to be incumbered, and is of so much less value as the amount of the incumbrance proves to be.

The statute (R. S., c. 82, § 16) provides that "the assignee of a grantee" "may maintain an action on covenant," "and recover such damages as the first grantee might upon eviction." It follows, that the plaintiff in this action has the same rights that Bagley would have had if, when he held the title, the mortgage still outstanding, he had sued his grantor. There can be no doubt that Bagley could have sued and recovered nominal damages before paying the mortgage, and, after having paid it, full damages. By the statute, the plaintiff has the same right that Bagley would have had. This enables her to sue and maintain this action.

F. A. Wilson, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—This action is founded on that clause in the defendant's deed which warrants against all incumbrances.

It appears that one *Charles O. Butman*, on August 6, 1851, being seized of the premises described in the deed, conveyed the same to the plaintiff, to be held by her in mortgage,—*that*, on April 6, 1855, the defendant, claiming under the same grantor through mesne conveyances, conveyed the same premises to one *Hall Bagley* by a deed containing a similar covenant, and in like manner *Bagley* conveyed to the plaintiff, on December 13, 1856,—*that*, on September 10, 1861, this suit was instituted, alleging the mortgage to be a breach of the covenant, and *that* subsequently, at the October term of this Court, to which the

writ was made returnable, the plaintiff duly released *Bagley* from the covenant contained in his deed to her. It appears that such release was executed under R. S., c. 82, § 16, which provides that — "The assignee of a grantee, or his executor or administrator, after eviction by an older and better title, may maintain an action on a covenant of seizin or freedom from incumbrance, contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might upon eviction, upon filing, at the first term in Court for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon."

The foregoing provision is in derogation of the common law, and must receive a strict construction, although manifestly intended to avoid circuity of action. Consequently the question arises whether the plaintiff, as the assignee of *Hall Bagley*, has proved "an eviction by an older and better title."

It is difficult to perceive how she could have been so evicted, when it is apparent that hers was the oldest, if not the better title. The question is not whether *Hall Bagley* was in fact evicted by the plaintiff, for of that there is no evidence, but whether she, as his assignee, had been evicted by any one having a title better and older than her own. She could not evict herself, and Hall Bagley could not evict her so long as she possessed the older title, and there can be no fiction of law opposed to impossibilities. Upon such a fiction the plaintiff relies.

The case of *Whitney* v. *Dinsmore*, 6 Cush., 124, cited by the plaintiff's counsel, seems to support the view we take; for the Court say — "To prove a breach, it must appear that the plaintiff has been *lawfully* evicted or ousted, or has been so disturbed in his title and possession, by a party having a *paramount* title, as would be equivalent to an actual eviction or ouster." In that case, the plaintiff had purchased in a paramount title, or, in the language of our statute, an older and better title, which was an incumbrance

created by an attachment prior to the deed from the defendant. And so in *Cole* v. *Lee*, 30 Maine, 392, *Stowell* v. *Bennett*, 34 Maine, 422, and *Loomis* v. *Bedell*, 11 N. H., 74.

Had *Hall Bagley* been ejected by the plaintiff, or, to avoid such a contingency, had discharged her mortgage, he would have been in a situation to sustain an action against his warrantor, either immediate or remote, by pursuing in the steps of the statute; and in such case the authorities cited by the plaintiff's counsel would have been pertinent. But here the plaintiff, after having received her deed from *Bagley*, was in possession under her prior mortgage and *Bagley's* subsequent deed, and she can invoke no fiction of law by which the *servient* shall overcome the *dominant* title. While, therefore, the law justly protects the one party by the exclusion of the evidence offered to show for what purpose *Bagley* conveyed to the plaintiff, the law likewise shields the other party from the effect of a fictitious eviction, and by both rules of exclusion in this case, doubtless, justice is administered. *Plaintiff nonsuit.*

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

LUCILLA P. KELLEY, *Adm'x, in Equity, versus* HORACE JENNESS and RODERICK D. HILL.

Where A, being the owner of certain land, conveyed it to B in mortgage, with the usual covenants of warranty, and afterwards paid the amount due on a prior mortgage of the same land, and took an assignment of the mortgage to himself, the title thus acquired by A, unexplained, would enure to the benefit of B.

But if the prior mortgage was in fact purchased by C, and the consideration paid by him, and the mortgage, immediately after its assignment to A, was by him, pursuant to a previous arrangement of the parties, assigned to C, or assigned in blank, and delivered to C, with power to fill the blank, the assignment to A was clearly for the use of C, and an implied resulting trust in favor of C at once attached to the conveyance made by the first mortgagee to A.

A trust estate does not, like an absolute estate, enure to the benefit of the grantee of the trustee, when the latter made the conveyance in his individual capacity. And an implied trust is governed by the same principles, and subject to the same general rules, as other trusts.

But, if a part of the money was paid on the mortgage by A, and a part by C, the implied trust in favor of C will extend no further than the amount paid by him, whether more or less.

BILL IN EQUITY.

Cyrus L. Clark, Sept. 10, 1852, conveyed in mortgage to Samuel H. Blake, township No. 7, 11th range west from the east line of the State, to secure a note for $7665,97. Nov. 2, 1852, Clark conveyed the same premises by deed to Horace Jenness. Dec. 2, 1852, Jenness conveyed the same township in mortgage to Webster Kelley, the plaintiff's intestate. Clark's deed to Jenness, and Jenness' mortgage to Kelley, were acknowledged and delivered on the same day, June 15, 1853, and both recorded in the Piscataquis Registry of Deeds, June 16, 1853. The mortgage to Kelley was to secure the payment of a note of Jenness for $8000 and interest.

The plaintiff alleged in the bill that the note to Kelley remained unpaid, and claimed the right to redeem the mortgage given by Clark to Blake. The bill then sets forth

sundry sums paid on the Blake mortgage in part payment, and alleges that, on July 23, 1860, Jenness paid to Blake the full remaining balance due him, being $4614,58, the actual amount due Blake at that time not exceeding $3700, and, at the time of said last payment, Jenness took from Blake an assignment of his mortgage, and still holds it; and further, that Blake advertised his mortgage for foreclosure, in the Piscataquis Observer, the last publication being Feb. 17, 1859, and caused the advertisement to be duly recorded.

The bill further alleges, that, on Sept. 8, 1860, the plaintiff in writing notified Jenness of her right as administratrix to redeem the mortgage, and demanded an account of the sum due thereon, also of the rents, profits and income received from the lands mortgaged, the expenditures thereon, and the several payments made on the note and mortgage. Jenness afterwards in writing made the following answer:—

"Amount due on the Blake mortgage, $7036. September 15, 1860. "H. J."

The bill further alleges that Jenness has made no further answer, and that the answer made is defective, false, and not a legal reply; that there is no such sum due on said mortgage, and, if any sum is due, it is no more than $3700; that the claim of Jenness to any further sum is unjust; and that he seeks to deprive the plaintiff of her right to redeem, by taking advantage of the foreclosure commenced by Blake.

After the filing of the bill, the plaintiff was permitted to amend by inserting the name of Roderick D. Hill as an additional defendant. The amendment alleges that the plaintiff has been informed that Hill had possession of the mortgage and note, and claimed that the mortgage had been assigned to him by Jenness; but the plaintiff alleges that no such assignment is on record, and denies that Hill had any assignment, if at all, until after the plaintiff's demand on Jenness to account, but that, if any assignment was made, it was made in blank, and no assignee's name inserted for a long time after Blake's assignment to Jenness.

The bill further alleges that, on Feb. 2, 1861, the plaintiff in writing notified Hill of her right to redeem, and demanded of him an account of the amount due on the mortgage; but he has neglected to make any answer.

The plaintiff thereupon offers to pay all sums equitably due on the mortgage, and to perform all the conditions thereof, and prays for relief.

Jenness, in his answer, declares that, on July 23, 1860, Blake executed an assignment of his mortgage to the respondent, but did not deliver it nor the note secured by it to him; that R. D. Hill, by his agent, J. S. Ricker, purchased the note of Blake, and paid therefor; and Blake indorsed and delivered the note and mortgage, with the assignment of the respondent thereon, to said Ricker, agent of Hill; and the respondent at the same time, and as part of the same transaction, executed an assignment of the mortgage and delivered it to said Ricker, as agent of Hill; that the respondent has never been the owner or holder of the note nor of any title under the mortgage save momentarily, and for the purpose of transferring the same to Hill, and Hill has ever since held the same, as the respondent believes.

Jenness denied that he had furnished any account to the plaintiff when demanded, but had, as a matter of courtesy, given her a written memorandum of what he believed to be due on the mortgage.

Hill, in his answer, denies that Jenness paid to Blake the amount due on the note, or that any one had paid it in full; alleges that he (Hill) purchased the note and mortgage of Blake through Ricker; that it was by the choice of Blake, in which the respondent had no interest, that the mortgage was passed to the respondent through an intermediate assignment to Jenness; that, at the same time that Blake's assignment was executed, Jenness made and signed an assignment of the mortgage, with a blank for the name of the assignee, and delivered it to Ricker; that Ricker delivered the note, mortgage and assignment to the respondent, who has had them ever since; and that the respondent's name was in-

serted in the assignment afterwards, he thinks, soon after the plaintiff filed her bill.

Ricker, called by the defendants, testified that he went to Blake, at the request of Hill, and paid him some money for the purchase of Clark's note and mortgage, and received from Blake the note, mortgage and assignment from Blake to Jenness, and also an assignment from Jenness with a blank for the name of the assignee, with verbal authority from Jenness to insert any name as assignee that Hill might desire. Hill had directed him to obtain an assignment in blank, as he might wish to have it run to his brother.

There was evidence tending to support the allegations in the bill, and also to the contrary. There was likewise evidence tending to sustain the statements contained in the answers, and evidence to contradict some of those statements. There was also considerable testimony as to the amount paid, and the balance due, on the note and mortgage, and as to who made the several payments on the mortgage note.

A. W. Paine, for the plaintiff, argued that the facts alleged in the bill, and proved, showed payment of the Clark note and mortgage. But, if not,—

1. The plaintiff has the right to redeem the mortgage:—

2. The plaintiff has proved a legal demand for an account, made upon the holders of the mortgage:—

3. The assignment of the mortgage to Jenness, who had previously, as the owner of the fee, conveyed to the plaintiff's intestate with full covenants of warranty, had the legal effect to discharge the mortgage, at least so far as it affected the Kelley title.

But it is contended by the defendant, that the assignment to Jenness was merely formal and momentary, and the assignment from him to Hill being part of the same transaction, Jenness was a mere conduit or medium of title; and that the assignment was paid for by Hill, and was in trust for him.

In reply, the counsel argued,—1. The transaction whereby the mortgage passed from Blake to Jenness was an entire and complete fact. The act of passing it to Hill was an independent fact, based on a new and different consideration to a great extent, and forming no necessary part of what had already been done. The consideration from Jenness to Blake was $4614; that from Hill to Jenness $5114. This appears by the testimony. Although both assignments were made at the same time, there was a rest long enough for the title to vest in Jenness. It is well settled that when a title passes to one from whom it takes a new start, as from a new base, the new title is considered as coming from the intervening party, and subject to all the incidents flowing from that fact. 1 Wash. R. E., 178; *Gage* v. *Ward*, 25 Maine, 101; *Gerrish* v. *Lee Normal Academy*, not yet reported; *Somes* v. *Skinner*, 3 Pick., 52.

But there was no such momentary seizin. The actual assignment to Hill was not made until the blank was filled with his name, long after Blake's assignment to Jenness.

2. If there is any trust, it is an implied, not an express trust. But is there any trust?

Jenness, by his own statement, negotiated the assignment with Blake, without mentioning Hill's name. His motive, as he explains it, was a personal one. Hill's name was not even inserted in the assignment Jenness executed. The first notice of Hill's interest was imparted by the respondent's answer to the bill in the case at bar, nearly four months after service on Jenness. Hill's name was not inserted in the blank assignment until after the plaintiff's bill was filed.

So far as third parties are concerned, the construction and effect of deeds must depend upon their own language and express terms. Neither equity or law can vary the construction of a legal instrument, nor its effect as dependent on its inherent terms. This is emphatically the case with instruments which the law requires to be recorded.

The only exception is in cases which arise outside and independent of the instrument of title. The effect of the

deed is not changed, but the result arising is a new thing flowing from what the deed is, and in addition to it. Such is the nature of a constructive trust, being built upon the legal title as its base. The trust title is engrafted on the legal, not a substitute for it.

The legal base, as the main stock of the tree, retains its distinctive character, and is still subject to its own rules of construction and effect. Whatever effect the trust has, it does not change the base, but is a superstructure upon it.

Hence the question of trust is one arising solely between the alleged trustee and his *cestui que trust.* No others can be involved, unless those in privity with one or the other. Those not in privity are to be governed by the form of the title which the record discloses.

The plaintiff is in no degree privy with either of the defendants in estate or title. Her rights are of record, and she is bound by no trust or confidence affecting her claim. Her legal title was far back of Blake's assignment. When Jenness received the mortgage, it enured to her benefit under his covenants. Jenness was at once estopped to deny her right to the benefit of the removal of the incumbrance. When Hill's trust began to operate, it took the legal title subject to the defect created by the estoppel.

If an unrecorded assignment is allowed to defeat or change the effect of the record title, all reliance on records is at an end. If a secret and carefully concealed trust is to come in and cut off the rights of the party having the record title in this case, there is no case where it may not be done; and it may be asked, where is the security of the public in their titles to be found?

The only safety is in an entire rejection of so dangerous a doctrine, and by limiting the effect of constructive trusts to the parties themselves and their privies, and persons having actual or presumed knowledge of the trust.

3. But, if the doctrine be as the respondents contend, its applicability to the case at bar is denied.

The case is to be treated as it would rest on Blake's as-

signment to Jenness. The assignment to Hill was not made till after suit brought, and therefore is not admissible in evidence.

Resting on Blake's assignment to Jenness, the legal effect is very clear. The mortgage was discharged. Why should it not be so? The plaintiff is in no privity with either party, and had no notice of any right in Hill; but was cognizant of Jenness' bargain with Blake, and knew that Jenness claimed to be interested in the right of redemption.

Both Jenness and Hill knew of the Kelley mortgage. If they did their business with Blake in such a manner as to get them into trouble, it was their misfortune. It was no mistake of fact or erroneous representation that led them into trouble; but, if misled at all, it was by ignorance of the law applicable to their acts. From such ignorance, equity cannot relieve any more than can the law. *U. S. Bank* v. *Daniels*, 12 Pet., 32; *Warren* v. *Jameson*, 6 Gray, 559; *Clark* v. *Burnham*, 2 Story, 15.

Hill's acceptance of the assignment from Jenness rebutted the presumption of a trust. *Livermore* v. *Aldrich*, 5 Cush., 231; 1 Foster, 470. Neither can there be a trust implied when there is an agreement about the matter. If a deed is made according to the agreement of the parties, there is no trust, though there may be a loss. *Hunt* v. *Morse*, 6 Cush., 1; 2 Wash. R. E., 175. And if the deed is made under the direction of the party who owns the money, there is no resulting trust. *St. John* v. *Benedict*, 6 Johns. Ch., 117.

Where real estate is purchased by one with the money of another, and a conveyance is taken in the name of the former with the consent of the latter, there is no resulting trust. *Nutter* v. *Stevens*, 8 Paige, 222. Hill on Trusts, §§ 91, 92, lays down as a principle that, in order to raise the presumption of a trust, the parties must be, *quoad hoc*, strangers. For some breach of faith or wrong done is implied, which the Court will correct by declaring a trust. *Tufts* v. *Tufts*, 3 Wood. & M., 462. So that, if a purchase be by two, and the deed be to one of them, there is no

trust. Hill on Trusts, § 92. Here the deed was taken with the knowledge of Hill, and in fact by Hill himself, acting by his agent Ricker.

The presumption that the purchase was made for the benefit of the person who advanced the money, and that the conveyance was in trust, may be rebutted by evidence to the contrary, and the trust defeated. If the money was lent by Hill to Jenness, whether there was any security or not, the money ceased to be the lender's property, and the conveyance was not in trust. It is contended that such was the case here, that Jenness borrowed of Hill, and that the mortgage was bought of Blake for Jenness' own benefit. There is evidence to support this view. And it is made more apparent by the reason given by Hill for the assignee's name being left blank, that he did not know who would have the mortgage, his brother or himself, and it might be paid for by his brother's money. This shows that it was to be a loan, for there is no pretence that his brother contemplated becoming the purchaser.

In order to create a trust, as here alleged, the *whole* consideration should come from the *cestui que trust*, and no part from the alleged trustee. *Baker* v. *Vining*, 30 Maine, 127; *McGowan* v. *McGowan*, 14 Gray, 119, and note 122; *White* v. *Carpenter*, 2 Paige, 240. And any payment made subsequent to the transaction does not raise a trust. 2 Wash. R. E., 175; *Buck* v. *Swazey*, 35 Maine, 41; *Botsford* v. *Burr*, 2 Johns. Ch., 405.

In the case at bar, all the evidence shows that a part of the consideration was paid by Hill, and a part by Jenness; and that several sums were paid after the assignment.

Again, a resulting trust cannot be raised against the intention of the parties to the legal title, meaning the grantor as well as the other parties. *White* v. *Carpenter*, 2 Paige, 217; *Rogers* v. *Ross*, 4 Johns., Ch., 388; *Grove* v. *Mann*, 27 Maine, 212. A trust is declared in such cases to carry out the intention of the parties, and to prevent fraud. *Brown* v. *Lynch*, 1 Paige, 147. Here Blake refused to as-

sign to any one but Jenness, according to all the evidence. Will the Court give to Blake's assignment a different and contrary effect to what he intended? Is not that making a new agreement for the assignor, to which he is no party, and against his consent?

Rowe & Bartlett, for the defendants, argued the case orally, and no brief has come into the hands of the Reporter.

The opinion of the Court was drawn up by

KENT, J.—Horace Jenness, on the 2d of December, 1852, made his deed of mortgage to Webster Kelley, the intestate, of a township of land. The deed was in the usual form and contains the usual covenants of general warranty. It was given to secure payment of a note for eight thousand dollars, given by Jenness to Kelley. The deed was acknowledged and delivered on the 15th of June, 1853. At this time there was an incumbrance on the township, created by a prior mortgage to secure a note to S. H. Blake for $\$7665\frac{97}{100}$ given by Clark, who then had the title.

The original bill alleges that Blake, in July, 1860, received the amount then due, on that prior mortgage, from Jenness, and thereupon assigned the note and mortgage to Jenness, who still holds the same.

On such a state of facts, there could be no doubt that such payment would enure by way of estoppel, or implied trust, to the benefit of Jenness' grantee, to whom he had conveyed with covenants of warranty. The mortgage, which was paid, was an incumbrance, which was covered by the warranty, and it was the duty of Jenness to pay it and remove the incumbrance. The assignment of the mortgage to him could give him no right to set it up against his grantee, but, if of any effect, it would be held only in trust for Kelley. Equity would treat it as paid and discharged as to Kelley, on the simple principle that a person purchasing in and taking the assignment to himself, of an incumbrance which he was himself under an obligation to discharge, acquires in equity no title against one to whom he

was bound to remove the incumbrance. The common law doctrine of estoppel, where there are covenants in a deed, leads to the same conclusion. *Kellog* v. *Wood*, 4 Paige's Ch. Rep., 589; *Van Horne* v. *Crane*, 1 Paige, 459; *Bradley* v. *George*, 2 Allen, 392.

But the respondents in this case say that there are other facts on which their rights must depend.

It is clearly established that the assignment, by Blake of his mortgage, was made to Jenness on the day the money was paid. It is also proved, and not denied, that Jenness, on the same day, executed an assignment, with a blank for the name of the assignee, and that afterwards the name of R. D. Hill, the respondent, was inserted therein.

We think that it is also proved that the sum of $\$4614\frac{58}{100}$ which was paid to Blake on the day of the assignment, was furnished by Hill, was his money and was paid by his agent to obtain an assignment of the mortgage to himself and for his benefit. Jenness on that day paid nothing. It was not a loan of that money from Hill to Jenness, to enable him to pay the mortgage. Hill paid the money to obtain the assignment of the mortgage to himself, for his own use and benefit. Jenness negotiated the business until the time of payment, but he did it, as he says, for Hill. His object was to have the mortgage in some person other than the person then holding it. But Hill manifestly paid the money, not for Jenness' benefit, but for his own. He expected an assignment to himself or to some one for his benefit. It would doubtless have been so made, if Mr. Blake had not promised the attorney for the complainant that he would assign to no one but Jenness.

On this state of facts, it is clear that, as between Jenness and Hill, the assignment to Jenness was for the use of Hill, and that a resulting trust attached at once to the conveyance in favor of Hill. It is a settled doctrine that when a man purchases an estate with his own money, and the deed is taken in the name of another, a trust is implied by law, and this trust may be proved by parol. There are numerous

authorities in this State; and in England and in other States, which sustain this principle. It is entirely unnecessary to cite them. They can be found in any digest.

But it is contended by the complainant, that although this may be so as between the two parties named, yet that Kelley's legal rights could not be affected, and that when the legal assignment was made to Jenness, it instantly enured to the benefit of his grantee, by force of the estoppel created by his covenants. The question then is, did Jenness acquire such a title that, notwithstanding the implied trust, it enured to the benefit of Kelley.

It is important to observe the relations of all these parties. Kelley was not a subsequent purchaser, nor a creditor who had levied on the land, and therefore not within the saving provision of the statute in relation to implied trusts. R. S., c. 73, § 12. His right was to redeem that mortgage. This was all that was conveyed to him in fact. His other rights rested upon the covenants in the deed to him. His rights were not impaired or his situation changed by the transfers of the mortgage from Blake to Hill. The complainant does not contend that they were, but insists that, by operation of law, the estate she represents has obtained the payment and discharge of the mortgage, without paying any part of it. This, as we have seen, would have been the result, both legal and equitable, if Jenness had in fact and truth paid it, and the equitable rights of another party had not come in question.

Is a trust estate, or a conveyance charged with a trust, such an after acquired title as will enure to the benefit of one to whom the trustee had before conveyed in fee with covenants of warranty?

In the case of *Jackson* v. *Mills*, 13 Johns., 463, it was held, where one took a deed, merely as trustee for another, although absolute in form, and the consideration was paid by the other, and thereupon he gave him a deed, that the latter deed was a mere execution of his trust and did not

operate as an estoppel to any title he might thereafter acquire in his own right to the same lands.

The case of *Jackson* v. *Hoffman*, 9 Cowen, 271, reaffirms the above case, and decides that estoppels do not apply, except between parties acting in the same character. In that case, the purchase was made by one in his individual capacity, and the covenant was made by him as administrator. *Sinclair* v. *Jackson*, 8 Cowen, 565, sustains the same view, and the Court say,—"A conveyance to operate as an estoppel, it is necessary that it should be in the same right with the former one. To estop, a conveyance must be by one claiming under and in right of identically the same power and the same estate as he first conveyed."

If, as we have seen in the case before us, Jenness took the assignment of the mortgage charged with a trust, it was not in the same character and of the same estate as in his deed to Kelley. He was here a mere trustee. There can be no division or separation in the effect of the assignment. He did not take a conveyance and afterwards have engrafted thereon a trust, allowing the legal estate to vest absolutely and for a time, before any trust arose. The assignment was charged with the trust, as soon as executed.

Is a trust estate such an after acquired title as will enure by way of estoppel? It would hardly be contended that a conveyance to one as trustee for the use and benefit of a charitable association, or a religious body, would thus enure. Nor where the conveyance creates a trust and declares it fully in the deed, and the purpose is to give the whole benefit of the estate to a party named and no personal benefit to the trustee.

But an implied trust is equally a trust for the benefit of another, as when the trust is declared in writing. It may require a different mode of proof to establish its existence, and it may be limited in case of purchasers without notice. But, being established, it follows the general rules and is subject to the doctrines applicable to trusts.

A case very similar to this is found in 11 Ohio Reports, 316, *Burchard* v. *Hubbard*. It was where a person, who had no title, conveyed by deed of warranty, and afterwards received title as trustee from the owners, for the purpose of transmitting it to a *bona fide* purchaser. The Court say that, in such a case, the doctrine of estoppel does not apply; that a mere naked title was all that passed through him; that the title was conveyed as a mere matter of convenience; that it constituted him a mere trustee of the naked legal title; that a trust resulted to the party who paid the money; that, if he had acquired for himself the legal and equitable title, he would have been estopped by reason of the covenants, but it being a mere trust estate no such estoppel can apply.

A doctrine analogous to this is found in those cases where the party taking the deed is a mere conduit of the title, an instrument by whom the title is to be taken to carry out the understanding of the parties, he, in fact, having no real interest. In such cases it has been held that the title would not enure to the benefit of a former grantee. *Runlet* v. *Otis*, 2 N. H., 167; *Marsh* v. *Rice*, 1 N. H., 167.

Another analogy may be found in the well established doctrine that the widow of a mere trustee is not dowable in equity of the trust estate. All these cases rest upon the general principle, that the estate must be acquired by the warrantor or husband, in fact and substance as his own property, without intervening rights in third parties, and not as mere trustee for another's use, or as a mere conduit of title. Whilst the law is careful to see that an after acquired title, purchased and paid for by the warrantor shall enure, it is equally careful to guard against any unequitable result by enforcing the rule, where the substance is wanting and the rights of others are impaired.

The complainant contends that the trust is not sustained, because, she says, the whole consideration of the transfer did not come from Hill.

It was decided in some of the earlier cases that, unless the

whole consideration moved from one person, no implied trust would arise. But this doctrine has been repudiated. It is now held that such a trust may arise where several persons furnish the money, if the portions of each can be defined clearly. But where this is uncertain, and no satisfactory evidence is offered, showing the portion of each, no trust can be established. *Baker* v. *Vining*, 30 Maine, 121.

The same case also clearly states the foundation of the rule as to implied trusts to be payment of the money. It raises a trust to the extent of that payment, if the same was due and rightfully paid—but not beyond this.

The proof in the case shows that the amount actually paid by Hill at the time of the assignment was $\$4614\frac{58}{100}$, the consideration named in the assignment to Jenness was $5138. On examination of the evidence, we are satisfied that Jenness and others had paid to Blake certain sums amounting to $1700—which had not been indorsed on the note. There was an understanding, not very definite, that some extra interest or consideration for delay should be paid or allowed Blake, and he held this sum to await a settlement. It was arranged, as Mr. Blake testifies, that he should retain these sums amounting to $1700, but as this sum exceeded by more than $500, what was finally fixed upon as his extra, he would take and did take of Jenness, the sum of $\$4614\frac{58}{100}$. By this arrangement the $500 (more or less) was deducted from the amount due on the mortgage.

It is clear that the whole $1700 was paid to Blake towards the mortgage debt, and the understanding as to extra interest. This was paid by Jenness, or those interested to pay it. The $500 balance at least should have been indorsed on the note, for it was paid in on that debt, and it was admitted that at most but $1100 of the $1700 was required "to protect the extra interest," leaving $500, more or less, to be appropriated towards the principal and legal interest. Blake agreed to consider it as a payment and received the sum apparently due, less this sum of $500. We can see no differ-

ence in effect, if he had actually indorsed the amount on the note.

It will not be disputed, that if Jenness had paid all the debt, except one hundred dollars, and Hill had paid this $100 to Blake, and to Jenness the seven or eight thousand dollars which had been before paid by him, that no implied trust on an assignment to Jenness would arise, beyond the one hundred dollars. As between Kelley and Jenness, as we have seen, it was Jenness' duty to pay all the debt. Whatever he did pay in fact on this note to Blake was a payment for the benefit of Kelley. If Hill did afterwards pay Jenness the five hundred dollars, it gave him no right against Kelley. It is the same in effect as if he had paid to Jenness the amount of any prior payments made years before, to Blake. What had been paid by Jenness or others on the note before assignment, which Blake was bound to account for as payment, was fixed in favor of Kelley, and must be accounted for, and no resulting trust as to such payments could arise in favor of Hill. Whether any more than the balance of $500 of the $1700 should be allowed as payment on the note, we are not now called upon to determine. If any question on this point is made, it may be determined on the coming in of the master's report.

It being admitted that the complainant has a right to redeem, a decree to that effect may be entered. The case will be referred to a master to determine the amount due on the principles before stated, unless the parties can agree upon the sum. The complainant is entitled to costs.

Appleton, C. J., Rice, Cutting, Davis and Walton, JJ., concurred.

* LUCILLA P. KELLEY, *Adm'x, versus* RODERICK D. HILL.

Where an assignment of a mortgage was taken by one party, when another party paid the consideration of the assignment, whereby an implied trust resulted in favor of the latter, parol proof to show the payment, and by whom made, is admissible in a suit at law, notwithstanding the statute of frauds.

WRIT OF ENTRY, to recover possession of land mortgaged by Horace Jenness to the plaintiff's intestate, for breach of condition. The facts are the same as in the preceding suit in equity.

A. W. Paine, for the demandant, argued that the defence set up in the equity case, of an implied trust, is not available in the case at bar. The question of trust is a matter of *equity*, and a court of law cannot take cognizance of it.

In law, the assignment of an outstanding mortgage to a grantee who has previously conveyed the premises with full covenants of warranty, has the effect to discharge the mortgage.

The plaintiff establishes a *prima facie* case by introducing the mortgage and note from Jenness to the intestate. The defendant exhibits the mortgage of Clark to Blake, with the assignment to Jenness. The plaintiff admits this, and objects to all further testimony affecting the title.

In the case at bar, the proof of payment is not by parol, but by the instrument of assignment duly recorded. The assignment to Kelley was effectual to discharge the mortgage as to this plaintiff. *Somes* v. *Skinner*, 3 Pick., 52; *Holman* v. *Bailey*, 3 Met., 55.

As to how far, and in what cases, parol testimony is admissible in courts of law to affect title to real estate, the counsel cited *Parsons* v. *Wells*, 17 Mass., 422; *Wade* v. *Howard*, 11 Pick., 297; *Howe* v. *Lewis*, 14 Pick., 331;

* This case was commenced and tried in Piscataquis county, but having been argued and decided in connection with the preceding equity case in Penobscot county, is more conveniently inserted here.

Howard v. *Howard*, 3 Met., 557; 1 Wash. R. E., 526, 527, 543; *Smith* v. *Vincent*, 15 Conn., 14; *Doten* v. *Russell*, 17 Conn., 146; *Dudley* v. *Caldwell*, 19 Conn., 227; *Gray* v. *Jenks*, 3 Mason, 531; *Fay* v. *Cheney*, 14 Pick., 403; *Prescott* v. *Ellingwood*, 23 Maine, 425; *Nugent* v. *Riley*, 1 Met., 120; *Holman* v. *Bailey*, 3 Met., 55.

Rowe & Bartlett, for the defendant.

The opinion of the Court was drawn up by

KENT, J. — This is a writ of entry on the mortgage given by Jenness to Kelley, described in the foregoing case in equity between the plaintiff and Jenness and Hill.

It is agreed that the title of both parties are the same as are involved in that suit in equity, and that each party introduces the same evidence as in that case, so far as the same is legally admissible in this case.

The result to which we have come in that case is that the mortgage now held by the defendant, Hill, is valid and outstanding and unpaid, notwithstanding the assignment to Jenness, — that by reason of the implied trust no discharge enured to the benefit of Kelley.

The counsel for the plaintiff very frankly admits that "if that mortgage is a present, subsisting and valid mortgage, it of course makes a full defence to this suit."

But he insists that, having offered his mortgage, he makes out a *prima facie* case; — that thereupon the defendant, introducing his mortgage, shows a prior title, but that the assignment of that mortgage put in by defendant, and *adopted* by plaintiff, shows a transfer to Jenness, his warrantor. He claims that as he objects to all further testimony, as to the payments or other matters, the Court must of necessity give him judgment on the ground of estoppel, notwithstanding the decree in the equity suit.

It is not controverted that it is well settled law, that after a breach of the condition of a mortgage, the legal title is in the mortgagee, and that even after payment in full to him,

he may resist a suit at law, the only remedy being by a bill in equity. *Wilson* v. *Ring*, 40 Maine, 116.

It is contended that this rule can only apply, where it is attempted to prove the payment by parol, and that the nature of the evidence offered compels the Court to reject it, thus leaving the fact unproved. We do not so understand the cases.

The rule assumes that the payment is proved by legal and competent evidence.

The objection that is urged, is, that the proof offered contravenes the provisions of the statute of frauds—that the implied trust cannot, in a suit at law, be invoked, when the proof is by parol. But it is settled in all the cases, that this implied trust may be shown by parol proof of the payment, notwithstanding the statute of frauds. The whole doctrine rests, for its foundation, on the avoidance (if it may be so termed) of the statute of frauds.

It may be proved in a suit at law, as well as in equity. Indeed most of the cases, cited in the equity case, were suits of ejectment at common law. It is called in our statute "trust arising or resulting by implication of *law*."

If the deed from Jenness to Kelley had been an absolute deed in fee with warranty, and not in mortgage, Jenness having no title, and if he had taken a title in fee from the true owners afterwards, the suit by Kelley, to avail himself of the estoppel, must have been at law. If Jenness, in fact, had taken such subsequent deed charged with a trust, implied in favor of Hill, by reason of the payment of the consideration—unless he could prove it by parol he would be without remedy, in a suit at law.

This suit is by a second mortgagee, against the first mortgagee. At best, the plaintiff can only claim, that as to her and the estate she represents, the first mortgage has, by operation of law, been paid, and is discharged. If this were so, we have seen that, by all the authorities, no action at law could have been sustained on the ground of payment after breach. The only remedy is in equity. But we have decid-

ed that the mortgage has not been discharged, but is outstanding. We see no reason why Hill may not prove the facts in this suit at law, by parol, which, having been established in the suit in equity, have satisfied us that the mortgage he holds is valid and undischarged.

Plaintiff nonsuit.

APPLETON, C. J., RICE, CUTTING, DAVIS and WALTON, JJ., concurred.

W'M FREEMAN, *in Equity*, *versus* BENJAMIN ATWOOD *& al.*

A mortgagee, in his process of foreclosure, must strictly perform all the conditions required by the statute, to bar the right of redemption.

Although the certificate of witnesses, in whose presence he took possession, was dated and recorded, it will be insufficient, if therein the day of the entry is not stated, as it will not, with certainty, appear that it was recorded within thirty days from *the time of entry*.

BILL IN EQUITY for the redemption of a mortgaged estate, situate in Brewer. The defendants claim that the right of the mortgager to redeem has been foreclosed.

J. Granger, for the plaintiff.

A. W. Paine, for the defendants.

The facts, relating to the question considered by the Court, sufficiently appear from their opinion which was drawn up by

DAVIS, J.—The statute provides three modes of foreclosing a mortgager's right of redemption, by taking possession of the premises. One of these is as follows:—

"The mortgagee may enter peaceably and openly, in the presence of two witnesses, and take possession of the premises; in which case, a certificate of the *fact* and *time* of such entry shall be made and signed and sworn to by such witnesses before any justice of the peace; and such certificate

shall be recorded in each registry of deeds in which the mortgage is recorded; and no such entry shall be effectual, unless such certificate shall be recorded within thirty days next after such entry is made."

In the case at bar, the mortgagee took possession of the mortgaged premises in 1844; and three times, in 1845, 1846 and 1848, he called witnesses, who made a certificate, each of which, being recorded, is claimed by the defendant to be sufficient to work a foreclosure. The plaintiff claims to redeem, on the ground that they are defective.

Several objections are urged, one only of which is worthy of consideration. It is contended that neither of the certificates states the *time* of the entry. In this respect they are alike, as follows:—

"Be it remembered, that Caleb Holyoke of Brewer, in the county of Penobscot, in presence of us, *made* open and peaceable entry into the following described premises, &c.

"In witness whereof we have hereunto set our hands this ——— day of ———," &c.

The date is inserted in each; and the certificate of the justice of the peace, before whom each is sworn to, is of the same date. And each certificate appears to have been recorded within thirty days afterwards.

The counsel for the defendant contends that the date of the entry and the date of the certificate must be presumed to have been the same.

But the only fact certified is, that the mortgagee *made* the entry. *When* he made it, does not appear, except that it was in time past. Some time had elapsed; how long time is not stated. All that is embraced in the certificate may be strictly true, and yet the entry have been made many times thirty days before the certificate was made or recorded.

The process of foreclosure is one of the modes of divesting a person of his interest in the property, to which he is not a party. The mortgagee must strictly perform all the conditions required by the statute, or the right of redemption will not be barred. Neither of the certificates in the

case before us so states the time of the entry that it appears to have been recorded afterwards within thirty days.

The bill is sustained; and a master is to be appointed to determine the amount due upon the mortgage.

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

ELI F. LITTLEFIELD *versus* INHABITANTS OF BROOKS.

A domicil once acquired continues till a new one is gained. While in transit the old domicil remains.

An inhabitant of A on 30th March leaves that place with the intention of residing in C; on 1st April he arrives at B and the next day reaches C, where he establishes his residence. It was held, that for the purposes of taxation he was to be deemed an inhabitant of A on 1st April, and was liable to taxation *there*.

EXCEPTIONS to the ruling of APPLETON, J.

THIS was ASSUMPSIT in which the plaintiff claims to recover the amount paid to the collector of the defendant town as taxes—the payment of which he contests, on the ground that he was not an inhabitant thereof.

The only question raised is his liability to taxation as an inhabitant of the defendant town.

It appeared that in March, 1860, the plaintiff was an inhabitant of Brooks; that on the 30th of March he formed the intention of leaving that town as his place of residence; that he accordingly left that day and went to Monroe; that on the 1st of April he proceeded to Bangor, where he spent the night, and on the 2d of April reached Oldtown, at which place it was his intention to make his residence, when he left Brooks.

On these facts the presiding Judge decided that, for the purposes of taxation, the plaintiff was an inhabitant of Brooks, and was there legally taxed, and thereupon ordered a nonsuit—to which the plaintiff filed exceptions.

Sewall, for the plaintiff.

Blake & Garnsey, (with whom was *W. G. Crosby*,) for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—By R. S., 1857, c. 6, § 1, it is enacted that "a poll tax *shall* be assessed upon *every male inhabitant of this State* above the age of twenty-one years, whether a citizen of the United States or an alien, in the manner provided by law, unless he is exempted therefrom by the provisions of this chapter."

By § 10, "all *personal property*, within or without this State, except in the cases enumerated in the following section, shall be assessed to the owner in the town, where he is an inhabitant on the first day of April in each year." Neither the plaintiff nor his property are within the exemptions nor the exceptions of the statute.

By these provisions it is unmistakeably apparent that it was the legislative intention that *every* male inhabitant of this State, and that all personal property within the same, with certain exceptions not affecting this case, should be taxed. No person is to be exempt. No one should be. No property is exempt. None should be. The payment of taxes is the price paid for the protection which government gives to person and to property. The State affords security to all persons. It protects all property. The burden of maintaining government should be co-extensive with the benefits conferred.

The statute assumes that every inhabitant of the State is an inhabitant of some place therein. Every inhabitant, by the statutory definition of the word, has an "established residence" somewhere. R. S., 1857, c. 1, § 2. If this be not so, then one might be an inhabitant and not within the exception, and yet not liable to taxation, which would be against the plain and clear language of the statute. Assuming, therefore, that all the male inhabitants of the State,

not specially exempted, are to be taxed somewhere, the question arises, where was the plaintiff to be taxed?

To determine this, it remains to ascertain where he was an inhabitant—where had he a domicil. "Domicil," says Phillimore in his Law of Domicil, p. 13, is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." "Every one at birth receives a domicil of origin, which adheres till another is acquired; and so throughout life, each successive domicil can only be lost by the acquisition of a new one." Westlake's Private International Law, 33. While *in transitu* the old one remains. It continues till a new one is acquired, *facto et animo*. The Roman law was otherwise. *Siquis domicilio relicto naviget vel iter faciat, quaerens quo se conferet atque ubi constituat, hunc puto sine domicilio esse.* Dig., 50, 1, 27, 2. But such is not our law. The old domicil continues till the acquisition of the new one. Story's Conflict of Laws, § 48.

The plaintiff has a domicil somewhere. He is to be deemed an inhabitant of some place. He was *in itinere*. He was not an inhabitant of Oldtown, to which he was going, for the fact of personal presence was wanting. He was not an inhabitant of Bangor, for the intention to be one, which is an indispensable requirement, did not co-exist with the fact of his personal presence. The old domicil was not lost, for the new one was not gained. He was rightly taxed in the defendant town. *Bulkely* v. *Williamston*, 3 Gray, 493. Were it otherwise, one might evade taxation, which would be a meanness, abhorrent to every honorable and honest mind. It would be to enjoy the benefits and shirk the burdens of government.

The counsel for the plaintiff, in his very able argument, has called our attention to certain decisions of this Court in relation to the settlement of paupers as applicable to the present inquiry.

Before considering and examining the cases to which we have been referred, it may be observed that the purpose and

object of the statutes relating to taxes and to paupers and the language in which they are respectively embodied, are entirely different. When a pauper gains a settlement, it is by having "his *home* in a town five successive years, without receiving directly or indirectly, supplies as a pauper." R. S., 1857, c. 24, § 1. One becomes an inhabitant, one acquires a domicil, by the residence of a day, if to this the requisite intention be superadded.

In considering the decisions under the statute relating to paupers, it should be further remembered that neither the word "domicil" nor "inhabitant" is to be found therein, and the opinion of the Court in each case is made to depend upon the peculiar language of the act under consideration. In *Exeter* v. *Brighton*, 15 Maine, 58, WESTON, C. J., says, "if he (the pauper) abandons his former residence with an intention not to return, but to fix his home elsewhere, while in the transit to his new and it may be distant destination, we are of opinion that whatever may be said of his domicil, his *home* has ceased at his former residence, *within the meaning of the statute for the relief of the poor.*"

In *Jefferson* v. *Washington*, 19 Maine, 293, WHITMAN, C. J., uses the following language:—"The counsel for the defendant in error, in his argument, treats the words dwelling place and home as if synonymous with domicil, and proceeds to argue that one domicil continues till another is gained, and that to have a domicil a man need not have any particular place of dwelling or for his home; and he cites numerous authorities to support his position. But the answer to all is, that domicil, though in familiar language used very properly to signify a man's dwellinghouse, has in certain cases arising under international law and in kindred cases thereto, a sort of technical meaning. And the authorities cited all apply to it in this sense. It fixes the character of the individual in reference to certain rights, duties and obligations; but dwelling place and home have a more limited, precise and local application." In *Warren* v. *Thomaston*, 43 Maine, 406, RICE, J., in delivering the opinion of the

Court, says:—"In the discussions in our books upon the pauper law the term *domicil* is frequently used. The term is not found in the statute, but has been interpolated upon it by the Court. Its introduction has at times, it is feared, tended to confuse and mislead rather than to simplify and aid in the trial of this class of cases. In its ordinary sense, as used by legal writers, it has not the same restricted meaning as the words residence, dwelling place and home have in the statute under consideration. The meaning of words and the purport of language must ever have reference to the purposes for which they are used, and the subject matter to which they refer." *Exceptions overruled.*

CUTTING, DAVIS, KENT and WALTON, JJ., concurred.

SAMUEL VEAZIE *versus* RUFUS DWINEL.
Same, (*Pet'r for review,*) *versus* same.
Same, (*in Equity,*) *versus* same *& als.*
RUFUS DWINEL *versus* SAMUEL VEAZIE.
SAMUEL VEAZIE *versus* RUFUS DWINEL.

Penobscot river above the tide, is not a *navigable* stream within the meaning of the statute of 1840, regulating water mills, although a highway *floatable* for boats, rafts, or logs, and as such subject to the public use.

The owner of a mill dam, on such a stream, is bound to provide a suitable, safe and convenient passage through, or by his dam, for rafts, logs and other lumber.

To obstruct or occupy such a passage with any waste material; or, to an unreasonable extent, even with valuable property, is a public nuisance.

Where mill occupants above cast their slabs, edgings, and other waste into a stream, to sink or float, without direction or control on their part, which injuriously affects the use of the stream by occupants below, an action for the damages can be maintained therefor.

No presumptive right to continue such a practice can be obtained in a stream or channel, provided for rafting boards, and running logs and lumber.

Riparian ownership confers no authority upon the proprietors of land, to interfere with or obstruct the right of passage in the adjacent stream, to the injury of another.

THESE cases were submitted upon the printed volume of testimony, to the full Court, who, by an agreement of the parties, were authorized to render such judgment, orders, or decrees, in the respective actions, as the legal rights of the parties require.

In the matter of damages, the Court were to decide upon the amount, if any, which shall be rendered in each case upon the evidence legally admissible in such cases.

The cases were submitted upon very elaborate printed arguments, answers and replies, by

A. W. Paine, (with whom was *H. W. Paine*,) for Veazie:—and by

J. A. Peters, for Dwinel *& als.*

The facts sufficiently appear from the opinion of the Court, which was drawn up by

RICE, J.—These cases come before the Court on full reports of evidence. They all refer to the same subject matter, and the evidence submitted and the facts, admitted or proved, apply with slight exceptions to all. Though the evidence reported is very voluminous, the facts, on which the rights of the parties depend, are neither numerous nor complicated. As a foundation for the application of legal principles pertinent to the issues presented, we state the controlling facts established by the evidence reported. They are as follows:—

The Penobscot river, at the point thereof where the mills of the parties litigant are located, is a fresh water stream, not affected by the ebb and flow of the tide, but of sufficient capacity in its natural state to float logs, rafts and lumber;

That the mill site of Veazie was first occupied as such in 1801, and has been thus occupied from that time to the present; and the mill site of Dwinel has been occupied as such, from 1803 to the present time;

That Dwinel's dams, by which the head of water was raised and has been maintained, consists of a structure across the western branch of the main river and a side dam

between Goat Island and Webster Island, through which latter structure there has been a sluice for the passage of rafts, logs, &c.;

That Dwinel and his predecessors have ever maintained a convenient and suitable passage way for rafts, logs and lumber, from Veazie's mills to and through the sluice in the side dam, except when the same has been obstructed by slabs and other waste material thrown into the same by the occupants of Veazie's mills, and except also a portion of the year 1854, when the "gap" or "breach" in the side dam was permitted to remain unrepaired;

That, the piers placed in the "basin" were constructed with the knowledge and assent of Veazie; and had a tendency, with the boom attached thereto, to render more safe and convenient the passage for rafts to the sluice, as well as the passage for logs to the mill pond of Dwinel;

That, in 1846, Dwinel reconstructed or rebuilt his dam across the main stream, and increased the efficient height thereof, but not to such an extent as to obstruct the operation of any mills then in existence on the mill site occupied by Veazie;

That the practice of throwing slabs, edgings and other waste materials into the stream, from mills on the Penobscot river, has prevailed from an early period, and, with few exceptions, prevails at the present day.

These propositions, which we think are well established by the evidence in the case, cover the main facts in controversy, upon which the rights of the parties depend; and the application of established legal principles will dispose of all the cases before us without detailed examination of each particular case.

First, then, do the dams and mills of either party, exist in violation of law? Or, in other words, do they, or either of them, constitute public or private nuisances?

A nuisance has been defined as anything that worketh hurt, inconvenience or damage. 3 Black. Com., 116.

A public or common nuisance is such an inconvenience,

or troublesome offence, as annoys the whole community in general, and not merely some particular person. 1 Howard, 197; 4 Black. Com., 166, 167.

A private nuisance is anything done to the hurt, or annoyance of the lands, tenements, or hereditaments of another. 3 Black., 215.

All erections and impediments made by the owners of adjacent lands to the free use of rivers, which are navigable for boats and rafts, are deemed nuisances. 3 Kent's Com., 411.

These are general principles, and do not, of course apply to obstructions or other inconveniences which are authorized by law. Such are not nuisances. *Trustees* v. *Utica*, 6 Barb., 313. The subject will be further examined in another part of the case.

To encourage the erection and maintenance of water mills, has long been the established policy of this State, and of Massachusetts before our separation. Our mill Act, as it is termed, had its origin in the latter State, in the early part of the last century, and has been continued, with slight modifications, both in Massachusetts and this State, to the present time. The object of the statute was thus stated in the preamble to this law, at its origin:—

"Whereas, it has been found, by experience, that when some persons in this province have been at great cost and expenses for building of mills serviceable for the public good and benefit of the town, or considerable neighborhood in or near to which they have been erected, that in raising a suitable head of water for that service, it hath sometimes so happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and lawsuits have arisen, for the prevention whereof for the future. Be it therefore enacted," &c. Ancient Charters, p. 404.

In 1796, February 27, the Legislature of Massachusetts

passed an additional or amendatory Act, the preamble and first section of which are as follows:—

"Whereas, the erection and support of mills to accommodate the inhabitants of the several parts of the State ought not to be discouraged by many doubts and disputes; and some special provisions are found necessary relative to the flowing of adjacent lands, and mills held by several proprietors. Therefore, Be it enacted," &c.

"That when any person hath already erected, or shall erect any water mill on his own land or on the land of any other person, by his consent legally obtained, and to the working of such mills it shall be found necessary to raise a suitable head of water; and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water on the terms hereinafter mentioned."

This provision was incorporated into our statutes in 1821. Smith's Laws, vol. 1, c. 45; and was in force when the dams on both mill sites now occupied by the parties were originally erected.

It will be perceived that the Act is, in its terms, very broad, and applies to all cases, whether the streams were navigable or otherwise.

By the Act of 1840, c. 126, § 1, R. S., it is provided that any man may erect and maintain a water mill, and dam to raise water for working it, upon and across any stream that is *not navigable*, upon the terms and conditions and subject to the regulations hereinafter expressed.

The facts show that Dwinel's dam has been raised since 1840, and it is contended that this has been done without authority, because the river at that point is a navigable stream.

This raises the distinct question, what is a *navigable* stream, within the meaning of the statute of 1840?

There is a distinction at common law between navigable rivers, technically so called, and rivers which have the capacity to float boats, rafts and logs, and subjected to the

servitude of the public, and which are therefore denominated public highways.

All rivers where the tide ebbs and flows are, by the common law, denominated navigable rivers. Com. Dig. Navigation B, and prerogative D, 50; 3 Kent's Com., 412; *Ward* v. *Creswell*, 3 Wills, 265; *Scott* v. *Wilson*, 3 N. H. 321.

A river is deemed navigable in the technical sense of the term as high from the mouth as the tide ebbs and flows. Ang. on Watercourses, 205; *Berry* v. *Carl*, 3 Maine, 269; *Com.* v. *Chapin*, 5 Pick., 199; *Spring* v. *Russell*, 7 Maine, 273; *Brown* v. *Chadbourn*, 31 Maine, 9; *Knox* v. *Chaloner*, 42 Maine, 150; *Strout* v. *Millbridge Co.*, 45 Maine, 76; *Palmer* v. *Mulligan*, 3 Caine's R., 307.

Lord HALE, in his De Jure Maris, c. 3, says, —"There be some streams or rivers that are private not only in propriety or ownership, but in use, as little streams and rivers that are not of common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for the carriage of boats and lighters, and these, whether fresh or salt, whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man or goods, or both, from one inland town to another." And he instances the Wey, the Severn, and the Thames, as rivers of that description.

All streams in this State of sufficient capacity, in their natural condition, to float boats, rafts or logs, are deemed public highways, and as such, subject to the use of the public. *Wadsworth* v. *Smith*, 2 Fairf., 278; *Berry* v. *Carl*, 3 Maine, 269; *Spring* v. *Russell*, 7 Maine, 273; *Brown* v. *Chadbourn*, 31 Maine, 9; *Knox* v. *Chaloner*, 42 Maine, 150.

In *Brown* v. *Chadbourn*, WELLS, J., remarks, in giving the opinion of the Court; "In this State, the rights of public use have never been carried so far as to place fresh water streams on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law."

In *Spring* v. *Russell*, MELLEN, C. J., remarked,—"Saco river, in the town of Fryeburg, is one of the character above described; not a navigable river, however deep and large, in common law language, being above tide waters, but is under servitude to the public interests, and over the waters of which the public have a right to pass. In this respect such a river resembles a highway on land."

Though in many of the States of the Union, which are intersected or bounded by the great rivers of the continent, the common law distinction between *navigable* rivers, and those which are simply recognized as *highways*, does not exist; in this State, as has been seen, the common law definition has been fully recognized.

Under our existing mill Act this distinction becomes of paramount importance, for were all our streams, which are capable of floating rafts or logs, to be deemed *navigable* within the meaning of the statute, it would at once place out of the protection of the law all the mills and dams now existing on the *floatable* streams in the State. The Act contemplates no such destructive operation, and cannot receive such construction. The dams of both parties are, therefore, and have been, under the general protection of the mill Acts. The case of *Bryant* v. *Glidden*, 39 Maine, 458, is not in conflict with this view of the law, but supports it.

In all cases when the party is entitled to his damage upon complaint under the mill Act, his common law remedy, by an action, is taken away. *Fisk* v. *Framingham Man. Co.*, 12 Pick., 68; *Baird* v. *Hunter*, 12 Pick., 555; *Baird* v. *Wells*, 22 Pick., 312.

But when an upper proprietor has actually built or is building a mill on his privilege, a lower proprietor cannot, without a right acquired by grant, prescription or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege, simply under a liability to pay damages under the mill Acts, as those Acts do not apply in such a case. *Bigelow* v. *Newell*, 10 Pick., 348; *Baird* v. *Wells*,

22 Pick., 312; R. S., 1840, c. 126, § 2; R. S., 1857, c. 92, § 2.

The lower proprietor cannot therefore erect or maintain his dam in such a manner as to raise the water and obstruct the wheels of the prior occupant above him. His appropriation to that extent, being prior in time, necessarily prevents the proprietor below from raising the water, without interfering with the rightful use already made. Such appropriation of the stream, however, gives the upper proprietor priority of right only so far as the use has been *actual*. *Cary* v. *Daniels*, 8 Met. 466; *Simpson* v. *Seavey*, 8 Maine, 138.

The case does not show, that the dam of Dwinel, as it now exists, causes the water to flow back upon the wheels of Veazie's mills, as they existed at the time said dam was raised. Nor does it appear that the wheels of the Canal mills, erected *since* that time, have been obstructed in their operation by means of said dam. Indeed, it may well be doubted whether the water in the mill pond of Dwinel, or in the "basin," has been materially and permanently raised by the new dam, for the reason that the *side dam and sluice*, which have not been raised, afford space for the water to pass off freely in that direction.

But, notwithstanding this dam is thus shown to be within the protection of the mill Acts, and its owner is authorized to maintain a head of water therewith for the operation of his mills, he is not authorized, wholly or substantially, to obstruct the *navigation* of the stream. The river, as we have seen, though not technically *navigable* is still a *floatable* stream, and as such, may lawfully be used as a highway for the public upon which to float boats, rafts, and logs. Of this right, the public cannot be deprived, nor, in its use, unreasonably obstructed. A dam which impedes or obstructs the rights of the public, in floating boats or logs, in a stream in which they can be floated, must be held to be *pro tanto* a nuisance. *Knox* v. *Chaloner*, 42 Maine, 150.

These rights are not necessarily conflicting. On the contrary, if exercised in a reasonable manner, they are materially beneficial to each other. While the mill proprietor may erect and maintain his dam, he must, at the same time, keep open, for the use of the public, a convenient and suitable passage way, through or by his dam. The privileges of the mill owner must be so exercised as not to interfere with the substantial rights of the public in the stream, as a highway, for the purpose of transporting such property as, in its natural capacity, it is capable of floating. The use of both parties must be a reasonable use, and the rights of both must be exercised in a reasonable manner.

The erection and maintenance of water mills has, as we have seen, ever been deemed matter of great public utility by the people of this State. No other branch of industry has received more marked encouragement from our Legislature. So, too, the right of the public to the use of our *floatable* streams has ever been guarded with jealous care by our Courts. They are the great highways over which vast amounts of the property of our citizens are transported to market, and without which much of the wealth of the State would be locked up in inaccessible forests. These two great interests mutually sustain each other. Without the mill, the lumber which now floats on our streams from the distant forests would be comparatively valueless, and, without the unobstructed streams on which to float the product of the forest, the mill would be of little worth. To give either interest absolute prerogative would be destructive to *both*. Hence the rights of each must be so exercised as not unnecessarily or unreasonably to interfere with or obstruct the rights of the other. And such is the law. The maxim, *sic utere tuo ut alienum non laedas*, here applies with its full force.

The evidence shows that Dwinel did provide and maintain a convenient and suitable passage way for rafts and lumber, except when the pond was obstructed by edgings and other waste material cast into the stream from the mills

of Veazie, and also, except at a period of time when the side dam was out of repair.

The effect of the breach in the dam has been the subject of investigation and adjudication in an action which has heretofore been determined between the parties. That question is no further important than as it may bear upon the question of review now before the Court.

It was declared by this Court, in the case of *Dwinel* v. *Veazie*, 44 Maine, 167, that the defendant had the right to use the water above his mills to float logs to them, and also to the use of the water to float rafts and lumber to market, and also to float away the waste stuff from his mills so far as such use was reasonable and conformable to the usages and wants of the community.

This rule, it will be observed, does not afford a very distinct and practical illustration of the rights of the parties. How far, it may well be asked, is it reasonable to cast waste material into the stream, which is by law deemed a public highway, to float whither it may, or to sink and obstruct such way, without any direction except mere chance? The testimony shows that the waste from the manufacture of lumber, as now conducted, has a tendency to sink rapidly, to accumulate in masses, and obstruct the streams into which it is cast. Do the reasonable wants of the community require that such material should be cast at random into our streams, to float whither the currents or the winds may direct, or to sink, and obstruct navigation as it may?

The rights of parties are to be determined by law and not by any local custom or usage, unless there be proof that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon, and unless it shall be adjudged to be reasonable. *Leach* v. *Perkins*, 17 Maine, 462.

All hindrances or obstructions to navigation, without direct authority from the Legislature, are public nuisances. *Williams* v. *Wilcox*, 8 Ad. and Ell., 314; *Knox* v. *Chaloner*, 42 Maine, 150.

Any unauthorized obstruction in a highway is a public nuisance. Lew. Cr. Law, 526.

A temporary occupation of a part of a street or highway by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, is allowed from the necessity of the case; but a systematic and continued encroachment upon the street, though for the purpose of carrying on a lawful business, is unjustifiable. *People* v. *Cunningham*, 1 Denio, 524.

It is a nuisance at common law to dig a ditch or make a hedge across a highway; to erect a fence or gate across it; to deposit lime or gravel or bricks upon it; or pile logs or lumber or stones therein, or to extend a rope across the same. 1 Hawk. P. C., c. 78, § 48; *Gregory* v. *Com.*, 2 Dana, 417; *Bush* v. *Steinman*, 1 Bos. and Pul., 404; *Burgess* v. *Gray*, 1 Man., Gr. & Sct., 578; *Frost* v. *Portland*, 11 Maine, 271; *Johnson* v. *Whitefield*, 18 Maine, 268; *French* v. *Brunswick*, 21 Maine, 29; *Stetson* v. *Faxon*, 19 Pick., 147.

The navigation of public rivers is governed by the same principles. The right of the citizen to use such rivers as a highway must everywhere, within reasonable limits, accommodate itself to the same rules as in the use of public highways. Angell on Highways, § 229; *Stetson* v. *Faxon*, 19 Pick., 147.

All unauthorized intrusions upon public highways, for purposes unconnected with the rights of navigation or passage, are nuisances in judgment of law. *Com.* v. *Caldwell*, 1 Dal., 150.

It was held in *Com.* v. *Fleming*, Lew. Cr. L., 534, that logs lying in the river Susquehanna, in places where the bed of the river was covered with water at the time, and susceptible of being used for purposes of navigation, if deposited there for mere private convenience, and for no purpose connected with the right of navigation, constituted a nuisance in judgment of law.

Lord HALE, in his treatise *de portibus maris*, notices

among others the following nuisances that may be committed to ports; tilting or choking up the port by sinking vessels, or throwing out *filth* or *trash:* decays of wharves, piers or quays; leaving anchors without buoys; building new weirs or enhancing old; the straitening of the port by building too far into the water, and the suffering a port or passage to be filled or stopped up.

The authorities, ancient and modern, are all consistent, and point in one direction. Highways, whether on land or water, are designed for the accommodation of the public, for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in judgment of the law. They cannot be made the receptacles of waste materials, filth or trash, nor the depositaries of valuable property even, so as to obstruct their use as public highways. All such obstructions, in the eye of the law, are deemed unreasonable.

As has already been remarked, the owner of a mill dam upon a public stream is bound to provide a suitable, safe and convenient passage through or by his dam, for purposes of navigation. But such passage way or channel can only be used for purposes of navigation. It would be equally a violation of law to encumber it with unauthorized obstructions, as thus to encumber the stream in its natural channel or course.

If, therefore, any person obstruct a stream, which is by law a public highway, by casting therein waste material, filth or trash, or by depositing material of any description, except as connected with the reasonable use of such stream as a highway, or by direct authority of law, he does it at his peril;—it is a public nuisance for which he would be liable to an indictment, and to an action at law by any individual who should be specially damaged thereby. Angell on Watercourses, § 567; *Cole* v. *Sprowl*, 35 Maine, 161. No length of time can legitimate or enable a party to prescribe for a public nuisance. *People* v. *Cunningham*, 1

Denio, 524; *Mills* v. *Hall*, 9 Wend., 315; *Commonwealth* v. *Upton*, 6 Gray, 473; *Brown* v. *Watson*, 47 Maine, 161.

It is contended that Veazie has acquired a right by prescription to a passage through the old sluice in Dwinel's main dam, for slabs and other waste from his mills. The evidence does not sustain this proposition. It does appear, that, for many years, there was a sluice or waste way through Dwinel's dam, which was used by the owners of that dam to discharge waste and other materials from their mill pond, and through which, at high stages of water, slabs and waste from Veazie's mills also passed. But there is no evidence tending to show that the owners or occupants of Veazie's mills ever claimed the right to control or use that sluice for such purpose, or, in fact, ever exercised such control. But, on the contrary, the evidence does show that the occupants of those mills have cast their slabs, edgings and waste into the stream, to sink or float, without direction or control on their part, and that, while some portions thereof have undoubtedly passed over Dwinel's main dam, or through the sluice therein, and other portions through the board sluice and over the side dam, other portions, still, have sunk in the "basin," choked up the rafting channel, and, to some extent, obstructed the mill pond of Dwinel. This practice, however, if exercised under a claim of right, was manifestly under the claim of a right to cast waste into the stream, there to remain without further direction or control, and not under a claim to have it deposited to remain in a particular place, or to float it through a particular channel. Such casual passage of slabs through the sluice in Dwinel's dam would give Veazie no prescriptive right therein. As well might one who should, without authority, turn animals upon the highway to graze, claim a prescriptive right to all the land upon which those animals might chance to stray. A prescriptive right can only be obtained by adverse user, under claim of right. Nor would the sanction of casting his waste into the stream, or the channel provided for rafting boards and running logs, it matters not how long this prac-

tice has been continued, give a prescriptive right to continue the same, if the stream or channel was thereby obstructed. *Knox* v. *Chaloner*, 42 Maine, 150; *Rex* v. *Ward*, 4 Ad. & El., 384; *Gates* v. *Blencoe*, 2 Dana, 158; Angell on Watercourses, § 562.

The evidence establishes the fact that Dwinel's main dam has been abutted upon and connected with Webster's Island, substantially as it now is, for more than half a century. Under such circumstances a right thus to maintain it must be presumed. We do not find any evidence tending to establish such acts of trespass by Dwinel of the lands of Veazie, situate on Webster's Island, as are described in either of his writs.

It is admitted that Gen. Veazie has not run his mill himself since Dec., 1854, but that the mills since that time have been worked by his lessees. The defendant was not liable for the tortious acts of his lessees, unless authorized by him, anterior to the Act of April 2d, 1859, c. 98. *Dwinel* v. *Veazie*, 44 Maine, 167.

The leases in the case show that they had no such authority as would render Veazie liable for their acts prior to that time.

By the Act above cited, the owner of any mill, used for the purpose of manufacturing lumber, is made liable for the act of his tenant in the unlawful obstruction or diversion of the water of any river or stream caused by the slabs or other mill waste from his mill. This Act is prospective in its terms.

David N. Estabrooks testified in April, 1861, among other things, as follows:—"I should say that the Dwinel mill pond had been filled up the last three or four years to a certain extent. * * * * I found it difficult to float logs down our channel when I had cleared it out, it had so filled up with edgings, slabs, &c. The reason why it filled up so fast is as follows:—They cut their raft channel so far up, it lessened the current in our channel, consequently the edgings would sink and fill it up. * * * We hung a boom

across the old channel, at the head of Treat and Webster island, after Gen. Veazie cut his raft channel last fall, (1860,) to guide our logs by that channel; used to take it out of the way when we got through turning in, until towards fall the slabs and edgings rolled under and caught, and it was difficult to move it and there it is now."

The "new cut" was made in August, 1860. This, it would seem, caused the current in the old channel to move slow, and the edgings, &c., to sink more rapidly, and thus to obstruct the passage for logs to Dwinel's mills. The same fall, it does not appear precisely at what time, Dwinel's boom across the old channel became a fixture, under such circumstances as to show that it must have contributed in no small degree to the same result.

Now, although Veazie had no legal right, as we have already seen, to obstruct this raft channel by the waste from his mill, and notwithstanding Dwinel had a right to direct his logs floating in that channel into his mill pond, and, for that purpose, it would not be unreasonable for him to use temporary guide booms, which should not obstruct the passage through said channel, as a teamster may temporarily encumber the highway while loading or unloading his team, he was not authorized to permanently obstruct said channel for such purpose. While so doing he was himself contributing to the production of the very evil of which he complains, and during that period he has no remedy against a co-contributor to the same injury. It however appearing from the evidence that he received some injury after Veazie became liable by the Act of 1859, and before his boom became a permanent obstruction, he is entitled to some damage. But the extent of that injury, before he became a contributor thereto, not appearing, the damages which he is entitled to recover must be nominal only.

The foregoing facts and considerations bring us to the following conclusion, to wit:—

The bill in equity must be dismissed, with costs for the defendants.

In the two actions of *Veazie* v. *Dwinel*, nonsuits are to be entered.

In the action *Dwinel* v. *Veazie*, a default is to be entered. Judgment for nominal damages only.

This brings us to the consideration of the only remaining question: the petition for review.

The action now sought to be reviewed has been twice before a jury, and as many times before the law Court, where it has received a full, and, apparently, a careful examination. Still the defendant in that case, impressed with a belief that the merits of his case have not been fully understood either by Court or jury, and that this is made apparent by the additional testimony now introduced, presents his case again under a petition for review, and asks that it may be reconsidered.

It is desirable that there should be a termination to litigation, and equally as desirable that, when ended, parties should feel that they have been fully heard and their cases maturely considered.

Has this been done in the case now under consideration? The first verdict was set aside, in consequence of a failure on the part of the presiding Justice to present, to the consideration of the jury, all the legal elements that might influence their judgment in determining the question of damages. The second jury trial was had upon legal principles, which the Court, on deliberation, had determined to be applicable to the case, and of the soundness of which, upon reconsideration, they were fully satisfied. Yet it is insisted, by the defendant, that his case was not understood, and that the law was erroneously applied through the inadvertence of the Court.

The legal proposition stated to the jury at the trial, and which is supposed to be erroneous and prejudicial to the defendant, is as follows:—"If the defendant effected such passage, when it was effected, by cutting away and removing a portion of bank of drift stuff and edgings, the fact that he was (if he were) the riparian proprietor of the land on the

west bank of the river opposite to the bank of drift stuff and edgings, in the river, would make no difference in the rights and liabilities of the defendant in effecting such passage for his rafts and lumber—that his rights and liabilities, as to effecting such passage must be considered as the same in this action whether he was or was not such riparian proprietor."

To understand fully the application of this proposition, it will be necessary to consider the facts clearly deducible from the evidence then before the jury, to which the instruction is applicable, and also a remark of the Judge preceding the one just quoted, and of which complaint is made.

On the east side of the rafting channel, Dwinel, with the implied assent of Veazie, had caused piers to be erected, with booms connecting the same, which served as guides to keep logs and rafts floating to Dwinel's mills, or through the board sluice, in the channel.

Into this channel or passage, the occupants of Veazie's mills have cast edgings and other waste, without limitation. This waste had floated against and lodged upon and under the piers and booms until it had formed an impenetrable "reef" or bank on the east side of said channel. It had also sunk in the bottom thereof, and thus raised the bed of the river, forming an artificial channel in which the water was much more elevated than it was immediately east of the bank or "reef" of edging, &c. The waste materials from Veazie's mills had also lodged in and obstructed the channel, to a considerable extent, most of the way to the board sluice through the side dam. This was the condition of things when the breach occurred in the side dam. It was the duty of Dwinel to have repaired that breach as soon as it was reasonably practicable; but he wilfully or negligently omitted to do so, though the evidence shows that the repairs could have been made for an inconsiderable sum. With this breach in the dam, and with the channel thus partially obstructed, it became difficult, if not impracticable, to run rafts through the board sluice. Then it was that Veazie,

instead of repairing the breach in the dam, at a much greater expense, cut a channel through the "reef," or bank of edgings to that breach, the effect of which was largely to increase the breach and wholly to divert the water from the former channel and the mills of the plaintiff.

It was in view of these facts that the Judge gave the instruction of which complaint is made, having, however, previously instructed the jury,—"That if the plaintiff did not provide and keep in repair a suitable and proper way or passage for the defendant's rafts and lumber through the side dam, although the defendant had the right to effect such passage, yet he had not the right to effect it in a manner wanton, unreasonable, and unreasonably injurious to the plaintiff, and if he did effect a passage in such manner, he would be liable for any damage caused to him by such unreasonable proceedings."

The Court has decided that these instructions were not erroneous.

Assuming the facts to be as claimed by the *petitioner*—that it was the duty of Dwinel to repair the *breach*, and that the "reef" was placed by Dwinel, without authority, on the land of Veazie, still the instruction would be manifestly correct. In that case it would be the duty of Veazie to repair this breach or open a channel in a reasonable manner, and without causing unnecessary injury to Dwinel. So use your own as not to injure another, is a maxim of the law, and *molliter manas imposuit*, is a necessary plea to justify a charge of violence in ejecting an admitted trespasser from one's premises. In abating a nuisance, a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose. The abatement should be limited to its necessities, and with the least practicable injury to the object which creates the grievance. *Gates* v. *Blencoe*, 2 Dana, 158; *Prescott* v. *Williams*, 21 Pick., 241; *Moffett* v. *Brewer*, 1 Green. Iowa, 348; Angell on Watercourses, § 390; Com. Dig., action on the case for nuisance, D 4.

But when it is considered that the raft channel had been raised, and also obstructed by the unauthorized acts of Veazie or his tenants, and that the "cut," made by him, rendered that channel absolutely useless, when, but for those obstructions, it probably would not have been injuriously affected by the cut, the instructions of the Judge became too obviously appropriate to be made more plain by illustration or argument. — The authorities cited by the petitioner on this point do not apply.

That the jury found, under this instruction, that the course pursued by Veazie was unnecessarily and unreasonably injurious to Dwinel, is apparent. The Court, from the evidence, would have come to the same conclusion, but the damages assessed were, in the opinion of the Court, too large, and hence the plaintiff was required to remit a portion of his verdict, or go to a new trial. The case is not one in which damages can be assessed with mathematical accuracy, but must depend upon the judgment of men, in view of all the facts and circumstances of the case. There is room for error. But, from a careful review of the evidence, we are not satisfied that the Court has erred in the order heretofore made.

Complaint is also made of the manner in which the learned Judge, who tried the case, presented it to the jury, and this is one of the grounds on which a review is asked.

The case finds that the counsel for the defendant presented twelve specific requests for instructions, in writing, and that the Judge presiding, after having stated the case to the jury and spoken of its importance to the parties, and the carefulness with which it should be tried, stated to the jury that the defendant's counsel had presented his views of the law in the form of requests for instructions to be given to the jury, which requests he would read to them — and he then read to the jury the twelve requests made by the defendant's counsel, for instruction to be given them, and said to them, that the legal propositions contained in those requested instructions were correct, so far as they were

applicable to this case, and that he gave them all those instructions, as requested, except so far as they might be qualified by the subsequent instructions which he should give them, and then proceeded to give the very full and explicit instructions reported in the case.

Of the instructions thus given, particular exception was taken to the one which we have already considered.

We are unable to perceive anything in the history of the case, or in the manner in which it was presented to the jury, by the learned and conscientious Judge who tried it, as it is presented, which calls for, or can justify or excuse the complaining, acrimonious, and censorious course of remark indulged in by counsel. He had undoubtedly presented his views of both law and fact to the jury, and then restated his legal propositions, in form of requests for instructions, which were read by the Court to the jury, and their correctness affirmed, except so far as he should qualify them by remarks which he then proceeded to make. We see not how with propriety he could have done more.

The only remaining point for consideration is the newly discovered evidence. The important fact presented by this new evidence, is this: — That in the year 1860, a new cut commencing at the same point as the old, was made by Veazie through the "reef" of edgings, &c., directly to the boom and sluice in the side dam, and that this cut has occasioned no material injury to the old channel; and from this fact it is argued that the injury complained of by Dwinel in the original action must have arisen, if sustained, from some cause other than the cut of 1854. This argument would have weight and be entitled to serious consideration, were all the other facts bearing upon the point the same as in the other case.

But when it is considered that the only outlet for this new cut is through the board sluice, while the outlet for the cut of 1854 was through the "gap" or breach in the dam, which presented an opening some two feet deeper and of nearly double the width of the board sluice, the force of the

new testimony is much diminished, if not wholly destroyed. We think it by no means establishes the fact that the cut of 1854 did not produce the injury imputed to it. No other new fact has been brought to our attention which will authorize us to review the former judgment.

Petition dismissed with costs for respondent.

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

KENT, J., concurred in the opinion in all the cases, except the petition for a new trial; and in that, dissented.

LEVI WHEELDEN *versus* ABRAM LOWELL.

When trespass will not lie against one for an entry upon the lands of another.

As where, by the fraudulent representation of a purchaser, a contract for the sale of a horse has been made, and the horse delivered, the vendor, having rescinded the contract, may peaceably enter into the premises of the fraudulent vendee, if not forbidden, and take his property.

The question, whether an actual tender is dispensed with, is for the jury, where one party, for the fraud of the other, has rescinded a contract, and is willing and ready to return what he has received, but is prevented by the declarations of the other party, that he will not receive it.

In what cases a fraudulent intent will be inferred from the declarations of a party to a contract.

THIS was an action of TRESPASS *quare clausum*, for breaking and entering the plaintiff's close and barn, and taking and carrying away his horse. Pleadings, general issue, and brief statement of license to enter, or right to enter to reclaim property by plaintiff wrongfully obtained and carried upon his, plaintiff's land.

It was in evidence, that in the month of March, 1861, plaintiff's son, acting as his agent, and defendant, made a trade, in which the plaintiff let defendant have a note against Gregory Lambert, dated Aug. 13, 1860, for $105,68, payable to Wm. D. Swazey, or order, by him indorsed, not

holden, for which the defendant let plaintiff have the horse in dispute, and five dollars.

Defendant contended that the contract was procured by the false and fraudulent statements and representations of plaintiff's agent. This was denied by plaintiff.

The Court instructed the jury, that the gist, essence, foundation of the action, is the breaking and entering; that all else is mere aggravation, as breaking door, and taking and carrying away the horse. Therefore, if the action for the breaking and entering is not sustained, the question as to the sale of the horse, and whether the trade was rightly rescinded, or not, is of no consequence. On the other hand, if it is sustained, then the plaintiff is entitled to at least nominal damages for the breaking and entering.

Whether he is entitled to recover anything in addition, for taking and carrying away the horse, depends upon the question whether the contract for the sale of the horse was procured by the fraudulent representations of plaintiff's agent.

The main question of damages depends upon the title to the horse. It is not denied that the contract was made and fully perfected. The defendant sold and delivered his horse to plaintiff, and took therefor the note, he paying plaintiff five dollars, and plaintiff took the horse and carried him home and put him in his barn. Defendant says he had a right to rescind the contract, and take back his horse, as he did; because, he says, the contract was procured and entered into, on the basis, or in consequence of the false and fraudulent statements and representations of the plaintiff, or his agent, at the time of the trade.

Admitting that the trade was made and perfected, the title of the horse was in plaintiff, until the trade was legally rescinded.

If a party in making a trade, makes statements of matters of fact of essential importance, as being true, and they are untrue, and he knows them to be untrue, and the other party relies upon such statements, and they constitute essential inducements and grounds in the mind of such party

in making the contract, it is fraudulent. (No question was made, that if fraudulent, the defendant was damaged.) It would be the same if a party makes a statement as an absolute fact, and not as of opinion, and he does not know whether the statement is true or not, the other elements being also proved.

You are to determine from the evidence what statements and representations were made.

If plaintiff's agent made no statement as to the goodness of the note, the mere fact that the note was not good would not make a case of fraud.

You are to inquire whether the statements made, if any, by plaintiff's agent, were essentially false, or not; this you are to determine from the evidence. If his statements were not true, did he know them to be false, or did he make statements as absolute facts, not knowing whether true or false. If he made statements that are not true, and he knew them to be false, or if he made statements as absolute facts, he not knowing them to be true or false, they are fraudulent. If the statements were false, did defendant *rely upon* them; this is for you to determine.

If all these points are found against the plaintiff, and on principles I have stated; if then the contract was obtained by such false and fraudulent representations, so relied upon by defendant, then the defendant had the right to rescind the trade and take back his horse, as he did.

But, in such case, the contract is not in fact rescinded, until the party defrauded returns or tenders or offers to return whatever of any value he may have received. Where it is the note of the party committing the fraud, it would be in season to make the tender at the trial; but when it is the note of a third party, if of any value, it must be returned or offered back before he can retake the property he let go for it, after the sale has been once perfected.

You will inquire whether the defendant tendered back or offered to return the note before he entered upon the plaintiff's premises, or into his barn.

The time when the defendant made the tender may become important in relation to the breaking and entering; but if it was made after entry, and at any time before leaving the premises, when the defendant took the horse away, it would be sufficient, so far as rescinding the bargain, and the defendant would have the right thereafter, so far as the point of rescinding, to repossess himself of the horse, after such tender or offer to return.

As to breaking and entering;—if the plaintiff owned, or was in the possession or occupation of the premises where the horse was, then you will inquire if the defendant did or not enter on those premises. Any entry, unjustifiable or without license, is a trespass, and the law implies some damages, although no distinct damages beyond such entry is proved.

Is there any doubt that the defendant entered upon the plaintiff's premises? If not, was he justified, or had he a license?

If, before he entered upon the plaintiff's premises, he had made a tender or offer of the note back to the plaintiff, and he had a right to rescind, on grounds stated before, the defendant would have a right peaceably to enter the stable of the plaintiff, and take away his horse, he doing no more damage than was absolutely necessary; but, if he had not made the tender, or offer, before he entered the stable, then, on this ground, he would not have the right to enter.

But it is insisted that, if he had no legal right to enter without license, he had that license.

A man may give license by his acts or words. It may be implied from his acts or his words, or both.

But the mere fact that a man sees another entering upon his premises, and does not in words forbid him before he enters, will not of itself give license to enter. Licenses may sometimes, perhaps, be inferred from prior relations and acts of parties; but what evidence is there here of consent. At most was there anything more than not forbidding.

You will determine, then, whether from the prior acts

there had been a tender or offer back of the note, before the breaking and entering, or whether there was any license.

If the note was tendered or offered back before the breaking and entering, or if the defendant had a license to enter, then he had a right to enter and take away his horse, other points of defence being established.

By request of the defendant's counsel, the Court also gave the following instruction: —

"If you find that at any time before an entry on the plaintiff's land by the defendant, the defendant had offered to deliver back the note to the plaintiff, or to his son, his agent, from whom he received it, being ready and willing to deliver it, and such actual delivery or more formal tender was prevented by the plaintiff, or his agent, declaring that he would not receive it, it would constitute a legal tender, if at the time, the defendant or his son had the note at hand."

The verdict was against the plaintiff, who filed exceptions to the instructions of the Court to the jury.

A. L. Simpson, for the plaintiff, argued in support of the exceptions.

J. A. Peters, for the defendant, *contra*.

The opinion of the Court was drawn up by

APPLETON, J. — This is an action of trespass *quare clausum*.

The defendant justifies his entry. His defence is, that having been defrauded, in the exchange of his horse for the note of one Lambert, by the false and fraudulent misrepresentations of the plaintiff's agent, he had the right to rescind the contract thus made — that he exercised that right by tendering to the plaintiff the note received and demanding back his horse — that the plaintiff declining to give up the same, peaceably and without being forbidden, he entered the premises in question and took therefrom his own horse of which the plaintiff had acquired possession only by the fraud of his agent.

(1.) Every entry upon the land of another is not a trespass. It is well settled that the owner may enter upon another's land to identify and retake things stolen. So, when they are on the land of the plaintiff by his consent or contract. *Nettleton* v. *Sikes*, 8 Met., 34. "All the old authorities say," remarks Mr. Baron PARKE, in *Patrick* v. *Colerick*, 3 Mees. & Wels., 483, "that when a party places the goods of another upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many authorities to that effect in Viner's Abridgement. Thus, in title, Trespass, (a), it is said, "if a man takes my goods and carries them into his own land, I may justify my entering to take my goods again; for they came there by his own act. So, if A wrongfully place goods in B's building, B may lawfully go upon a close adjoining the building for the purpose of removing and depositing the goods thereupon for A's use." *Rea* v. *Sheward*, 2 Mees. & Wels., 426. A man is never a trespasser in peaceably obtaining possession of his own property. *Spencer* v. *McGowan*, 13 Wend., 257. "If J. S. has driven the beast of J. N. into the close of J. S., or if it had been driven thereinto by a stranger and J. N. go thereinto to take it away, the action does not lie, *because J. S. was the first wrongdoer.*" Bacon's Abr., Trespass F. So the owner may enter where it is the fault of the owner of the goods, and the owner of the land—as when the cattle of the defendant escaped through a defective partition fence, maintainable jointly by both parties. 1 Dane's Abr. c. 134, § 13.

In the present case, assuming the facts as found by the jury under the instructions given, the horse was on the plaintiff's land, not merely by his fault, but worse, by his falsehood and fraud. If the defendant might lawfully take his horse, if it had been on the plaintiff's land by his permission, or by his fault, much more might he do it, if there, by and in consequence of his wrongdoing. If the right of rescission existed, the moment it was legally exercised, the

plaintiff ceased to have any title to the horse, as between him and the defendant, and the latter might peaceably enter, not being forbidden, and take his own.

(2.) The production of money as a tender is dispensed with, if the party is ready and willing to pay the sum, and is about producing it, but is prevented by the creditor declaring that he will not receive it. 2 Greenl. Ev., § 603. The question, whether an actual tender is dispensed with, is for the jury, and we must regard them as having found such to be the case. Whether the tender was of money or of a note of hand, can make no difference as to the rules which must govern.

(3.) In *Stone* v. *Denny*, 4 Met., 151, Mr. Justice DEWEY says, "that to charge a party in damages for a false representation, not amounting to a warranty, it must appear that it was made with a fraudulent intent or was a wilful falsehood." "Such fraud will be inferred, when the party makes a representation which he knows to be false, or as to which he has no information and no grounds for expressing his belief." "So, if he positively affirms a fact as of his own knowledge, and his affirmation is false, his representation is deemed fraudulent." It was there held the action could be maintained "when the false representation had been intentional on the part of the vendor, or, what would be equally fraudulent in law, knowing that he was affirming as to the existence of a fact about which he was in entire ignorance." In *Hammatt* v. *Emerson*, 27 Maine, 308, SHEPLEY, J., cites the case of *Stone* v. *Denny* with approbation, and says,—"when one has made a representation positively, or professing to speak as of his own knowledge, without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred." The instructions of the presiding Judge are in accordance with these views. *Exceptions overruled.*

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

STATE *versus* INTOXICATING LIQUORS, claimed by GEORGE G. HATHAWAY, *Appellant.*

Intoxicating liquors in possession of a warehouseman, but intended by the owner for unlawful sale in this State, when they should reach their destination, are liable to forfeiture.

And the lien of the warehouseman is no bar to the forfeiture, although he has no intention to violate the law.

ON EXCEPTIONS to the rulings of APPLETON, J.

LIBEL against certain intoxicating liquors, claimed by the appellant, who had been acquitted upon the charge of keeping them with intent to sell them in this State in violation of law. The claimant alleged and the evidence tended to prove that these liquors were in his possession as warehouseman, and that he had a lien upon them for trucking and storage. The evidence also tended to show that the liquors were not intended for sale by the claimant, but that they were intended for sale by the owner in this State, in violation of law, when they should reach their destination.

The presiding Judge instructed the jury that if the liquors seized were in possession of the claimant at his warehouse, where he trucked and stored them, and he had a lien upon them for such services, and if claimant had no intent to sell them himself and no intent that they should be sold by any other person, and no intent or design to aid or assist any person in such sale, still, if the jury were of opinion that *the true owners* of the liquors, when they reached their destination, intended them for sale within this State in violation of law, then the liquors by law were liable to be forfeited, and the verdict ought to be for the libellant, notwithstanding the possession of claimant, and any lien upon them as truckman or warehouseman.

The verdict being against the claimant, he excepted to this instruction.

There was also a motion to set aside the verdict as being

against the evidence, but no question of law, other than that involved in the exceptions, was raised upon it.

W. H. McCrillis, submitted a very elaborate argument for the claimant.

The twelfth section of the Act of 1858 provides that no person shall deposit or have in his possession any intoxicating liquors, with an intent to sell the same in this State in violation of law, or with an intent that the same shall be sold by any person, or to aid or assist any person in such sale. If any person shall deposit or have in his possession intoxicating liquors, with an intent to sell them himself, or that they shall be sold by another, or to aid or assist another in the sale of them in violation of law, what is the penalty? Section twelve presupposes some penalty for the violation of its prohibitions. Every law does. The Legislature did not enact the prohibitions of this section without intending to provide some penalty for their violation. Unless section thirteen does so provide the penalty for their violation, there is none in the statute. If section thirteen does provide the penalty, then section twelve must be interpreted to be the prohibitive section of the statute, and section thirteen as providing the penalty, and the rules of interpretation applicable to the two sections of a statute, one containing the prohibitions and the other providing the penalty, must be applied to these two sections. They must be regarded as counterparts of each other, but the section providing the penalty must also be regarded so far subordinate to the prohibitory section, that the former cannot embrace a case not within the latter, for the reason that the penal provisions of a statute cannot be made broader than the directive or prohibitive ones.

They being counterparts of each other, the words "deposit or have in his possession," in the twelfth section, are the counterparts of the words "kept and deposited," in the thirteenth section.

In order to create a forfeiture, there must be a *legal* in-

tent, and an intent must be coupled with an act in order to be a legal intent, and such act under this statute is the having possession of intoxicating liquors, and such act of possession, coupled with an intent to sell in violation of law, creates a forfeiture. Under this statute, is there any other act coupled with such unlawful intent, which will create a forfeiture? If there is, it will be admitted that it is the act of depositing liquors with an intent to sell in violation of law. What is the distinction between the depositing of liquors with an intent to sell in violation of law, and to have possession of liquors with an intent to sell in violation of law? How does the act of depositing differ from the act of possession? If a person in possession of liquors delivers them to another, and divests himself of the possession of them, is such delivery a deposit?

If a person in possession of liquors *bona fide* delivers them to another, and also by such delivery becomes the vendor, mortgager, pledger or bailor of such liquors, is such delivery a deposit, within the statute? If such person at the time of such delivery intends to repurchase or redeem the liquors and then to sell them in violation of law, is such delivery a deposit; and if made with unlawful intent, will it render such liquors, kept and deposited by the vendee, mortgagee, pledgee or bailee, liable to forfeiture? In the present case, suppose the jury had found that, at the time Hathaway trucked the liquors and stored them, the owners had the intention to redeem them and then sell them, could the delivery of the liquors to Hathaway be regarded as a deposit which, coupled with such intention, rendered such liquors liable to forfeiture? We contend not. If a person in possession of liquors divests himself of the possession of them, or gives the possession and custody, and control and property of them to a vendee, mortgagee, pledgee or bailee, such a delivery cannot be a deposit with an intent to sell. Such delivery divests such person of the custody and control of the liquors, and of the power and right to sell, and such delivery therefore cannot be a deposit with an intent

to sell. It is not an act compatible, or consistent, or in furtherance of an intent to sell. On the contrary, it is an act inconsistent and incompatible, with an intent to sell. The intent to commit murder, in order to constitute a crime, must be accompanied with an act; but could that act be one which necessarily placed the intended victim beyond the power of the person who had such intent to carry it into execution?

It is the act which in the eye of the law is punishable, and the unlawful intent is but an incident or accompaniment which stamps the quality of unlawfulness upon the act, and makes it punishable. When an act is done, the law judges not only of the act itself, but of the intent with which it was done, and if the act be coupled with an unlawful intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise became criminal and punishable. Broom's Legal Maxims, p. 213.

But, if the act itself be innocent, the law will not adjudge it done with any unlawful intent, if the act be of a character which renders the execution of any such unlawful intent impossible. An act cannot be committed with an unlawful intent to violate the law, when the act itself makes it impossible to execute such intent.

An act of delivery of intoxicating liquors to a vendee, mortgagee, pledgee or bailee, cannot be an act of deposit, in the meaning of the statute, for such delivery would render the execution of an intent to sell by the person who made such delivery impossible, and, besides, there must be an act united with an unlawful intent to sell at *the time of the seizure*, and by such delivery the forfeiture would depend upon the intent, at the time of the seizure, of the person to whom they were delivered; and in no real or conceivable case could the forfeiture depend upon the intent, at the time of such delivery, of the person who delivered them. After such delivery is made, the liquors are kept and deposited by such vendee, mortgagee, pledgee or bailee, and if kept and deposited without any intent to sell, or that another should

sell, or assist another to sell in violation of law, they are not liable to forfeiture.

But there are other reasons in the way of regarding such delivery as a deposit, within the statute. The thirteenth section is a counterpart of the twelfth section, and the words "kept and deposited," in the former, are the counterparts of the words, "deposit or have in his possession," in the latter section. The words "kept and deposited," interpret and explain the true meaning and intention of the words "deposit or have in his possession." The depositing of liquors and the keeping of liquors are the same acts, and the word "*deposit*" and the word "*kept*" are convertible terms, and so intended by the statute, and mean the same thing, and both must be construed to require the custody and control of the intoxicating liquors.

The whole theory and idea of the forfeiture is based upon the principle that the possession of intoxicating liquors by a person, with an intent to sell illegally, may be forbid by the law, and being so forbid, the property of any person in such situation can by law be properly and constitutionally seized and declared forfeited and destroyed. By the sixteenth section, it is the person who was in the possession of the liquors at the time of the seizure, who has the right to have them restored to him, if it appears they were not intended for sale; and he is the only person who is allowed to become a claimant for them before the magistrate. The law does not esteem or regard the interest or claim of any other person of any importance or consequence. The process issues only against the person in possession, and the inquiry of the magistrate is confined to the claim of the person in possession, and there is no provision for the restoration of the liquors to any person but to the person in possession at the time of the seizure.

The deposit of intoxicating liquors within the intention of the statute is not a delivery of them to another person, but is a deposit of the liquors in a place where the liquors remain within the keeping of the person who deposits them.

If the owner of intoxicating liquors has the intent to sell them illegally, are they not liable to forfeiture? Not by this statute. Where is it provided that the illegal intent of the *owner* of intoxicating liquors to sell them renders them liable to forfeiture? Where in the statute is the *owner* prohibited having such intent? There is no such provision. To so interpret it, would be a forced construction of the statute, and more, it would be forcing the statute itself. The statute forbids *any person* to be the *keeper* of intoxicating liquors with intent to sell, or that another shall sell, or to aid or assist another to sell in violation of law. It is such intent of the keeper which the statute prohibits and makes unlawful, and punishes by a forfeiture of the liquors so kept with such intent. If it appears that the keeper kept and deposited the liquors with an intent to sell, or that another should sell, or to assist another to sell, they must be decreed forfeited, without regard to the intent of the owner. And does it not follow that if it appears that the keeper did keep and deposit the liquors without any intent to sell, or that another should sell, or to aid another to sell, that they must be restored to him without regard to the intent of the owner?

Is constructive possession an act of possession, or if the agent or servant actually keeps and deposits the liquors, and the owner is only the keeper constructively, is such constructive possession or keeping an act of possession or keeping, within the statute? The agent or servant, who is in the actual possession or keeping of the liquors, may not have any intent to sell or to assist another to sell them. If such constructive possession or keeping is an *act*, then if the owner unites with such constructive possession or keeping an intent to sell illegally, he has committed a crime for which he may be fined twenty dollars, and his property forfeited.

But constructive possession is a fiction, and a fiction holds good "only for the ends and purposes for which it was invented." When attempted to be used for other purposes,

the truth and not the fiction must prevail. Fictions in law are designed to be in furtherance of equitable objects, and for the attainment of substantial justice, and to prevent the failure of right. It is a maxim of the law that "a legal fiction is always consistent with equity." Crime cannot be imputed to a person, nor property forfeited by a fiction. The possession and keeping must be an actual possession or keeping. 'Broom's Legal Maxims, p. 113. Constructive offences and forfeitures are not in accordance with the spirit of our laws or institutions; the common law abhors them.

But in the present case the general owners were neither actually or constructively in possession or in keeping of these liquors. Hathaway's possession and keeping was adverse to theirs, and he could have maintained an action against them for disturbing his possession. By law, Hathaway was the owner of the liquor, and the bailors had what is termed a reversionary interest only. Bouvier's Institutes, vol. 4, p. 55.

The possession of Hathaway, with no intent to sell, and the property of Hathaway in the liquors, were facts which show the liquors not liable to forfeiture.

We conclude, *First*, That the statute does not forbid the keeping or the possession of intoxicating liquors alone; nor the intent alone; but only the keeping and the unlawful intent when both are united together.

Second, That such prohibition is in accordance with the universal principle of the law which requires an act, as well as an unlawful intent.

Third, That a deposit of intoxicating liquors is a keeping of the liquors in the custody of the person who deposits them, and such is the plain and clear provision of the statute, and such interpretation is required for many reasons; and for one which is omnipotent, and that is, because by the statute the forfeiture is made to depend upon the intent of the person who keeps the liquors at the time they are seized.

Fourth, That an actual and not a constructive keeping or possession is necessary, for one person may have the actual

possession, while another, for certain purposes, is regarded as having the constructive possession of liquors, while the forfeiture depends upon the intent of the person who has the *actual possession*, and for another reason cannot depend upon the intent of the person who has only the constructive possession, for constructive possession is a fiction of law, and a fiction of law cannot be resorted to in order to impute a crime or create a forfeiture.

Drummond, *Attorney General*, for the State.

The opinion of the Court was drawn up by

DAVIS, J. — The claimant in this case appealed from the decree of the Police Court, in the city of Bangor, by which the liquors in controversy were declared forfeited. He had been arrested for having them in his possession unlawfully, and had been acquitted upon his trial. Upon the liquors being libelled by the officer, he claimed a portion of them as his own property, and they were restored to him. A portion of them he claimed as in his custody for storage, for which he had a lien upon them; and these were condemned.

When the case was tried in this Court, the jury were instructed that any lien of the claimant as a warehouseman would not affect the liability of the liquors to forfeiture; and that if the liquors were intended by the *owners*, when they should reach their destination, for unlawful sale in this State, they were liable to forfeiture, though the claimant, who had the custody of them, had no unlawful intent.

To these instructions exceptions were taken by the claimant.

The question in regard to the lien of the claimant seems to have been abandoned in the argument. It would be strange, certainly, if the express provisions of a criminal statute could be nullified by the lien of a carrier, warehouse keeper, or other bailee. A bailee can acquire no better ti-

tle than that of the bailor. If the latter is a tortfeasor, the former has no lien upon the goods. *Robinson* v. *Baker*, 5 Cush., 137; *Clark* v. *Railroad Company*, 4 Allen, 231. The bailor can confer no rights superior to his own. A liability to forfeiture for his unlawful acts relating to the goods, under state or national laws, annihilates all rights *in* him, or *under* him, as against the government, in any legal proceeding for such forfeiture.

The other questions raised have been argued with great ability, and require a careful consideration.

The statute provides various penalties for *selling* intoxicating liquors, according to the circumstances under which they are sold. With these provisions we have nothing to do in the present case.

Section 12 prohibits any person from depositing, or "*having in his possession*, any intoxicating liquors, (1) with intent to sell the same (himself) in this State in violation of law, or (2) with intent that the same shall be so sold by any (other) person, or (3) with intent to aid or assist any person in such sale thereof."

When a *person* is on trial, for a violation of section 12, he cannot be convicted unless he is proved to have had the *possession* of the liquors, *with the unlawful intent*, within one of the three clauses embraced in it. Such intent, *by him*, must be charged in the complaint. *State* v. *Larnerd*, 47 Maine, 426.

It is contended, that he cannot be convicted unless he has the liquors in his *actual* possession. The counsel for the claimant makes two propositions;—(1,) that, in order to render liquors liable to forfeiture, there must be an unlawful intent, "accompanied by the actual possession of the liquors;"—(2,) that such intent of the person having actual possession renders such liquors liable to forfeiture, "whoever may be the owner of them."

Whether the *person* can be convicted, is one question; whether the *liquors* are forfeited, is another, and entirely different question. *State* v. *Miller & al.*, 48 Maine, 576.

The counsel for the claimant confounds them. We shall consider them separately.

The proposition that there can be no unlawful *intent*, without *actual possession*, is at variance with the most familiar principles of law. That a person does himself, what he does by a servant or agent, is not a legal fiction, but a fact, which has almost universal application, in civil, as well as in criminal matters. The possession of the servant or agent, is the possession of the principal. There is no branch of jurisprudence in which this rule is not applied. And the statute under consideration, instead of being any exception, expressly recognizes the rule. A person may not only have the unlawful *intent*, he may be guilty of the unlawful *act*, without having actual, personal possession of the liquors. "If any person, by himself, clerk, *servant* or *agent*, shall sell, &c.," § 7. As a person may be convicted of *selling* liquors, himself, upon evidence of a sale by his agent, so he may be convicted of having them *in his possession*, with intent to sell, though they are in the possession and custody of his agent, he, the owner, intending to sell the same, either by himself, or by his agent. To "deposit" liquors is to *put them into* some warehouse, shop or other place. To "keep" them is *to have possession* of them. The words are intended to embrace every possible case. All liquors are deposited and kept; and, if within this State, they are within these terms of the statute. And it is entirely immaterial whether the owner does the depositing and keeping himself, personally, or employs a carrier, warehouseman, or other agent, to do it. The innocence of the *agent* will protect *him*, *personally*, from punishment; but it will not save the liquors from forfeiture, if the *owner* has the unlawful *intent*. If the liquors are in the possession of an agent, both he and the owner may be convicted, if *both* have the unlawful intent. If the agent has no unlawful intent, *he* cannot be convicted; but the owner, if known, may be.

In addition to these provisions respecting the *person* of

one having intoxicating liquors in his possession with an unlawful intent, section 13 provides that all such liquors shall be declared "contraband and forfeited;" or rather it "declares" them contraband and forfeited. So that the only matters left for judicial determination, in any case, are, (1,) whether the liquors, when seized, were "within this State," and (2,) whether they were "intended for unlawful sale in this State." When these facts are found by the Court, then the liquors are forfeited by operation of law.

It is quite true, as the counsel for the claimant has argued, that if one, not the owner, obtains possession of liquors *wrongfully*, *his* intent to sell them will not render them liable to forfeiture, if such owner is innocent, and claims them, in case of seizure. The unlawful intent must be that of the owner, or of his clerk, servant, or agent, or of some one having possession by his consent.

To carry the law into effect, provision is made for a process *in rem*.

The Legislature might have provided for this by proceedings analogous to those in the courts of the United States, when goods are seized for being imported in violation of the revenue laws. In that case no proceeding against the *person* would have been necessary.

But no provision is made by the statute for a libel as an original proceeding. The liquors must first be seized. Whether a complaint could be made, charging no person by name with any unlawful intent, and a warrant be issued that would authorize the seizure of liquors without requiring any arrest, we need not now determine. That the statute authorizes, if it does not require, the usual process against both the *person*, and the *thing*, is not denied.

But from this point the proceedings immediately diverge into two channels.

The officer seizes the *liquors*, and libels them, as forfeited under the thirteenth section.

He arrests the *person*, and he is put on trial, under the twelfth section.

The proceedings in the two matters are entirely distinct. The result in one is not affected at all by the other. The charge in the libel is different from that in the complaint. The evidence upon the trial must be different. If tried by a jury, the verdict must be different. Though the *liquors* are forfeited, the *person* may be acquitted. *State* v. *Miller*, 48 Maine, 576.

When liquors, that have been seized and libelled, are claimed by any person, his claim cannot be allowed unless it appears "that he is entitled to the custody thereof." Sec. 16. This cannot appear, unless he is the owner, or an agent of the owner. As a mere stranger he can have no right of custody.

If the claimant in the case before us is *not* the owner, and the liquors were intended for unlawful sale by the owners, then he is placed in one of two positions, either of which is fatal to his claim.

1. *If he was the agent of the owners*, then his possession was the possession of the owners, and the liquors are liable to forfeiture, the jury having found that they were intended for unlawful sale.

2. If he was *not* the agent of the owners, then he is a mere stranger, and is not entitled to the custody of the liquors. He has no rights to be protected.

But the claimant was the agent of the owners. He claims no title, except as a warehouseman. The liquors were in this State. If the owners intended to sell them in this State, in violation of law, after they should reach their destination, they were liable to forfeiture. The instructions were correct.

The exceptions and motion must be overruled.

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

INHABITANTS OF VEAZIE *versus* INHABITANTS OF CHINA.

Cities and towns are required by the Act of 1861, c. 63, to make suitable provision for the support of the families of soldiers, who, having a residence therein, have enlisted in the service of the United States, under the provisions of said Act, whenever such families shall stand in need of assistance.

Statutes imposing a duty, and giving the means of performing such duty, are to be regarded as mandatory.

The families of absent soldiers in the service of the United States, when standing in need of assistance, do not incur the disabilities of pauperism by receiving supplies from the cities or towns, where such soldiers resided at the time of their enlistment.

Nor do such disabilities attach to the soldier, whose family in his absence may receive such needed assistance.

No action can be maintained by the city or town furnishing supplies under this Act, against the city or town, where the soldier, whose family may have received such supplies, has his settlement.

REPORTED from *Nisi Prius*, APPLETON, C. J., presiding.

J. A. Peters, for the plaintiffs.

A. W. Paine, for the defendants.

The facts in this case are fully stated in the opinion of the Court, which was drawn up by

APPLETON, C. J.—By R. S., 1857, c. 24, it is made the duty of the overseers of the poor "to relieve persons destitute found in their towns," &c. This provision is general. The obligation rests upon the municipal officers to relieve all so found destitute, and it is immaterial how such destitution may have arisen.

Daniel Starkie, a resident of Veazie, enlisted as a volunteer in one of the ten regiments raised under the Act of 1861, c. 63, and, while in the service of the United States, his wife, standing in need of assistance, applied to its municipal officers for such assistance, which they afforded, and of which they gave notice to the defendant town, where said Starkie had his settlement. This suit is brought to recover payment for the supplies thus furnished.

If the wife and family were "destitute" within the meaning of the general pauper law of the State, c. 24, the plaintiffs are entitled to recover, unless Starkie, being a volunteer under the Act of 1861, c. 63, authorizing the raising of ten regiments, is by its provisions exempted from the disabilities attached by the general law to pauperism.

By the Act of April 25, 1861, c. 63, § 6, it is enacted that, "whereas many of our citizens, *who have families*, are ready, at the call of the country, to volunteer their services in its defence, and it is not only *the duty* but the pleasure of their fellow citizens, who are left at home, *as a suitable compensation for their patriotic services, to provide for the support of their families* in their absence, *therefore*, cities and towns are hereby authorized and empowered to make proper provision for the support of the families of *any persons, having their residence in such cities and towns*, who may enlist by virtue of this Act, during their absence from the State and *whose families may stand in need of assistance. No disabilities of any kind, whatever, shall be created by reason of aid so furnished and received.*"

By the general pauper law, cities and towns were required to relieve "persons destitute." This Act, c. 63, was not needed to impose that obligation upon them. If the destitution was not such as to bring the supplies furnished Starkie's family within its provisions, the plaintiffs cannot maintain this suit, because their case is not within the statute under and through which they seek to recover.

If the destitution was such as would require assistance to be furnished under the pauper law of 1857, c. 57, then the inquiry arises as to the effect of the Act of 1861, c. 63, § 6.

It is very obvious, that if supplies are "furnished and received" under the provisions of § 6, before referred to, that the town furnishing them cannot recover for the amount so furnished of the town in which the person receiving had his settlement. If they could, then it is difficult to perceive what effect is to be given to this section. If they could, then it amounts only to an unnecessary and illusory re-en-

actment of the general pauper law, and no rights would be acquired and no disabilities prevented.

It may be assumed as conceded, that cities and towns may as a "duty" provide for the support of the families of resident volunteers under the Act of 1861,—which provision the latter receive "as a suitable compensation for their patriotic services,"—and that this may be done without their being entitled to recover of the towns where the families of the persons furnished had their respective settlements.

The question then occurs, can cities and towns refuse to furnish supplies to the families of resident volunteers having their settlement elsewhere, or, furnishing them, can they recover of the cities and towns where such settlements may be the amount so furnished?

It is clear they cannot rightfully refuse to furnish supplies to persons destitute under the general law. And the families of soldiers are as much entitled to relief under its provisions as the families of those not soldiers. Because of "their patriotic services," their families, if destitute, are not to be deprived of the assistance necessary to relieve their destitution.

The cities and towns of the State being obliged by the general law to relieve destitution, and being "authorized and empowered," by c. 63, § 6, to provide for the support "of the families of any persons having their residence in such cities and towns, who may enlist by virtue of this Act, and whose families may stand in need of assistance"—and it being provided that "no disabilities of any kind, whatever, shall be created by reason of aid *so* furnished and received," can they or their officers so furnish relief, that it shall be at their option, or that of their officers, whether the disabilities of pauperism shall or shall not attach to the families so relieved?

To determine this it will be necessary to consider the object and purpose of the Legislature in passing the Act, as well as the peculiar language of the Act itself.

The language of this section is general. It applies to all

cities and towns, as well as to all volunteers who have enlisted under its provisions. It asserts it to be the *duty* of those at home to provide for the families of those in the field, whenever they "may stand in need of assistance," and that such provision is but "a suitable compensation for their services." It is clearly specified by whom and for whom this provision is to be made. Nor is this all. Cities and towns are empowered and authorized to make this provision, and when made, it is enacted that "*no disability of any kind, whatever*, shall be created by reason of aid *so* furnished and received." All this specially applies to volunteers under the Act of 1861, c. 63. All this was unnecessary and idle legislation, if no effect is to be given to the last clause of § 6; for without any legislation it was the duty of cities and towns to provide for the support of persons destitute, and it was not for them or their officers to inquire how or by whose fault or act the need for such support may have arisen.

It was a *duty* for cities and towns to provide for the support of the families of absent volunteers, when standing in need of assistance, and if such provision was a "suitable compensation for their patriotic services," most assuredly, they, when enlisting, could never have imagined that the performance of this duty would consist in imposing on them the disabilities of pauperism, nor that the compensation so liberally tendered would terminate in making their families paupers. Neither would they have imagined that it was optional with the cities and towns, whether the duty should be performed or this compensation rendered.

By § 6 the receiving of support was to create no disabilities. But pauperism creates disabilities. It separates families. It takes children from the paternal roof and removes them from the paternal control. It disfranchises the father. If the supplies furnished authorize the plaintiffs to recover, then have grievous disabilities been imposed upon the volunteer soldier, where he was told none should be created.

By the general pauper law of 1857, c. 24, cities and

towns were required to relieve "persons destitute." By it, they were required to relieve the families of soldiers, whenever they should fall within the category of persons destitute. No statute was needed either to oblige or to authorize and empower them to do this. It was their duty without and before this Act to relieve the families of destitute soldiers. It was the duty of town officers to relieve destitute persons within the precincts of their town. The sixth section of this Act was not necessary to impose that duty upon them. Why, then, was it enacted? If this section had not been enacted, it was the duty of cities and towns, as much *before* as *after* its passage, "to provide for the support" of the families of those, who "may stand in need of assistance,"—whether of soldiers or not. But, before this enactment, cities and towns could not relieve "persons destitute," without imposing, upon those so aided, the disabilities of pauperism. They could relieve, but those so relieved were paupers by the general law on the subject. This the Legislature designed to prevent, so far as relates to supplies furnished for the relief of the families of volunteers under the ten regiment Act. To that end, they imposed upon cities and towns the *duty* of relieving them—they made that relief, so afforded, a "suitable compensation for their patriotic services," and, in language the meaning of which cannot be doubted, enacted that "*no disabilities of any kind, whatever, shall be created by reason of the aid so furnished and received.*"

But it is argued that this section is not mandatory. While it is conceded that cities and towns may so relieve the families of volunteer soldiers as not to impose the disabilities of pauperism upon those so relieved, it is insisted that it is at their option *so* to do or not. The section is general. It is declared to be the "duty" of cities and towns to provide for the support of their families, when they may "stand in need of assistance." But is the fulfillment of this duty a matter of discretion? Can cities or towns escape at their own will and pleasure the performance of a duty, by simply

passing a vote to that effect. The supplies furnished on the part of the cities and towns are but a "suitable compensation" to the volunteer soldiers "for their patriotic services." Can cities or towns grant or withhold them as they may choose? Can one town make a soldier a pauper by relieving his family, and another *so* be relieved under the same act that he shall not be one? Are the duties of towns and their officers to be determined by this section, or are they variable with every corporate locality?

The statute nowhere implies, much less authorizes, any discrimination on the part of towns in the giving or the withholding this aid. The giving it is required by the general law. This section (§ 6) does not sanction one rule for the plaintiff, and a different one for the defendant town. Still less does it sanction different rules for the inhabitants of the same town—as that they may relieve one soldier as a pauper, and another without his incurring the disabilities of pauperism. Yet that very attempt is made in the case before us. The families of resident soldiers, having a settlement, were to be supplied under § 6, without disfranchisement, while those of resident volunteers, having a settlement elsewhere, were to be aided under the general pauper law, and thus be liable to all its disabilities.

The aid "furnished and received" the same,—coming from the same source—the funds of the town,—raised in the same mode—taxation,—disbursed for the same purpose—the relief of the families of soldiers in need of assistance,—received by them to relieve that need,—how or where is conferred the authority on cities and towns to determine according to whim or caprice whether these disabilities shall be incurred or not?

But if relief may be rendered without imposing disabilities upon its recipients, where is to be found the authority to render it in such a manner as to create them? What the form—what the mode to designate whether the relief is to have one effect or the other? Who is to discriminate and determine when the relief rendered shall create and when it

shall not create disabilities? Is it for cities and towns? By what words is this right of discrimination given? Is it for municipal officers to determine? By what language is this right of determination conferred upon them? If there be no right of discrimination conferred, either in terms, or by implication, upon cities, towns or municipal officers, then any aid makes the families of all volunteers receiving it paupers, or none. But the statute expressly enacts that no disabilities shall be created—and consequently no persons receiving aid under and by virtue of the authority conferred by § 6, and under its provisions, can be made paupers.

Why should such power of discrimination exist? Are not all soldiers alike and equally entitled to the "suitable compensation" provided for their families? Did any volunteer enlisting suppose that a distinction would be made between him and his companion in arms—that he would be disfranchised and his fellow remain freed from disabilities—the circumstances in each case the same? Could those, who enlisted for one common purpose, imagine that they were at the mercy of their respective towns—that one town would aid their families so as not to expose them to the degradation of pauperism and that another would refuse so to do—and that both would act legally and rightfully in so doing—nay, more—that these diverse and contrarient principles would be adopted in the same town—that relief would be so afforded as *not* to create disabilities to those of its inhabitants in the service who had their settlement in town—and denied to those having their settlement elsewhere—so that, in the same town, one soldier, after the expiration of his enlistment, returns to his home, while another returns to find that in his absence he has been made homeless—that his children have been taken from his control, that his wife is in the poor house, and he is a pauper—and that this is to be the "suitable compensation for his patriotic service," which the Legislature intended by the Act under consideration?

It will be conceded that relief may be *so* tendered, under

§ 6, as that no disabilities shall attach. If not so, the section would be worse than idle — it would be a fraud. If so, then the municipal officers may relieve, and there will be no loss of *status*. But if the relief be under § 6, and *not* under the general pauper law, it is clear that the town relieving cannot recover of the town where the family of the volunteer receiving relief has his settlement, — for the expenses incurred. When the town relieves as a duty, and the family of the soldier receives as a compensation for services, the town so relieving cannot, by suit or otherwise, obtain remuneration for its advances.

But the plaintiffs claim that any town may relieve the families of volunteers, resident but not having a settlement therein, with the rights of recovery against the town where the settlement of the soldier, whose family has been relieved, may be. If so, then a town relieving the families of all its soldiers may be subjected to the expense of relieving those resident, and not having a settlement there, as well as of those having a settlement there but residing in towns which make provision for them under the pauper act. The consequence will be that all towns relieving under § 6 will be exposed to more than their fair liability. If China supplies the families of all its resident volunteers, without reference to where their settlement may be, it is all that can reasonably be required. But if this suit is maintained it may be compelled to support not merely the families of *all* its resident volunteers when destitute, but those of volunteers resident in other towns and having their settlement in China.

Now if such be the law, no city or town could safely or wisely relieve the families of *all* its resident volunteers under § 6, because, as in the very instance before us, it may be made liable for the families of its inhabitants having a settlement elsewhere, as well as for those of the residents of other towns, but having a settlement in it. No town could therefore safely relieve, except by imposing pauper disabilities upon those relieved, — if there be two ways of relieving — with different and opposite legal consequences.

If so, then the whole section is a sham and a cheat. The duty is evaded. The promised compensation is withheld. If, under § 6, one town may relieve the families of resident volunteers having a residence elsewhere without receiving remuneration from the town where such settlement may be, and another may relieve and receive such compensation — it is apparent that the section will be of no avail, — for all will *so* relieve as to recover compensation, as far as may be, for the expenses incurred in furnishing the relief needed. The consequence may be, that the families of volunteers, who have a settlement in the place of their residence, will escape disability, and those not having such settlement will incur them. But such was not the intention of the Legislature, whose purpose it was to treat all alike.

The word *may* in a statute is to be construed *must* or *shall* when the public right or interests are concerned, and the public, or third persons, have a claim *de jure* that the power be exercised. *Blake* v. *Portsmouth & Concord Railroad*, 39 N. H., 435. When a public body is clothed with power and furnished with means to do an act required by the public interest, the execution of such power may be insisted on as a duty, though the statute conferring it be only permissive in its terms. *Mayor of New York* v. *Furze*, 3 Hill, 612. What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds it should be done. *Mason* v. *Fearson*, 9 How., (U. S.,) 248. When the law imposes a duty upon individuals or corporations, its performance or non-performance is never a matter of discretion on the part of those upon whom the duty is devolved. Though the language of a statute is simply enabling, yet if it confers a power which concerns the public as well as individuals, it is not merely permissible, but it is mandatory. *People* v. *Supervisors of New York*, 11 Abbott, 114. In the case before us, it is specially declared to be the *duty* of cities and towns to provide for the support of the families of resident volunteers, "in their absence," whenever they may "stand in need of

assistance." It is equally a matter of deep public interest, as well as of private right, that this be done—and when done the statute prohibits the creation of disabilities as a consequence of receiving supplies thus furnished.

The general power to relieve distress existed without any new enactment. It authorized relief to the families of soldiers as to those of others. The duty to relieve existed. Cities and towns were bound as much before, as after the passage of § 6, to relieve the families of volunteer soldiers resident in their town and needing assistance. But they could not do so without imposing disabilities. Hence cities and towns were authorized and empowered to relieve the families of resident volunteer soldiers—and so that "no disabilities of any kind, whatever," should be created "by reason of any aid so furnished and received." The cities and towns of the State have no election. Municipal officers have no option. No soldier and no family of a soldier, while in the service of the United States, can be made a pauper by reason of any aid furnished by the town, of which he was a resident at the time of his enlistment,—to his family—standing in need of assistance. This relief, thus rendered by the city or town in which the soldier resides, gives no right of recovery over against the town where his settlement may be, if other than his place of residence. It is aid under *this* act and not under the general pauper law.

Plaintiff nonsuit.

CUTTING, WALTON and DANFORTH, JJ., concurred.

BARROWS, J., concurred in the result, stating his reasons as follows:—

I concur in the result reached in this opinion, because the case finds that the necessity for supplies to the family apparently arose from the absence of the father under his enlistment, and, but for such absence, the family would not probably have required aid.

Against *such* necessities I hold that the town where the volunteer resided is bound to protect his family by the Act of 1861. *Milford* v. *Orono*, *post.*, 529.

But I understand this opinion to go further and maintain that no soldier *can* be made a pauper by reason of *any* aid furnished to his family by the town of which he was a resident at the time of his enlistment.

Shiftlessness, idleness, vice or dissipation, or even long sickness of many of its members, may bring a family into distress so that they would stand in urgent need of relief, and be entitled to it under the pauper laws, in spite of the best efforts of the head of the family, even when at home and diligently employed in his ordinary vocation. Against distress thus produced I do not suppose it was the intention of the Act of 1861 to relieve. Such a construction would give to the family of the soldier unlimited command of the town purse, *without regard to the manner in which they make use of its bounty*, and without the danger of forfeiting position by idleness, recklessness or extravagance.

It seems to me that the true question for Court and jury to determine in case of such claims, is—*was the need the result of the father's absence* in his country's service, or did it originate in causes which would have probably produced the same distress and need of relief if the man had never enlisted?

Since 1861, the Legislature have indicated by more specific enactments the amount of aid which towns ought to furnish to the families of soldiers by way of additional compensation for their services. It is plain that pauper disabilities should never be incurred by reason of aid furnished and received to that amount.

When it exceeds that and arise from some other cause besides the father's absence, I am unable to perceive why one town should be called upon to support another's poor.

KENT, J., dissented.

INHABITANTS OF MILFORD *versus* INHABITANTS OF ORONO.

The purpose of § 1, of the Act of 1862, c. 127, was to extend the benefit of the Act of 1861, c. 63, § 6, to all in the service of the United States or of the State, and to relieve, to the extent specified in the Act, cities, towns and plantations from their liabilities for the support of the families of their inhabitants in such service.

By this Act, they were authorized and obliged to render aid to the families of all their inhabitants, who were actually engaged in the military service of the United States or of this State.

No recovery can be had, by the city, town or plantation so furnishing aid, against the city, town or plantation, where such inhabitant may have his settlement.

The claim for supplies furnished under this Act is against the State, as provided therein and thereby.

No disabilities are imposed upon or incurred by the soldier or sailor whose families receive such aid, nor by their respective families.

EXCEPTIONS from the ruling of APPLETON, C. J., at *Nisi Prius*.

I. H. Hillard, for the plaintiff.

J. A. Peters & N. Wilson, for the defendants.

The facts fully appear in the opinion of the Court, which was drawn up by

APPLETON, C. J. — Stephen G. Inman enlisted as a soldier in the volunteer army of the United States. At the time of his enlistment he was a resident of Milford, but his settlement was in Orono. While in the service, his family, being in actual distress, applied to the overseers of the plaintiff town for assistance, which they duly furnished, and gave notice of the same to the defendants, who declining to pay the same, this suit was commenced.

The relief was furnished while the Act of 1862, c. 127, § 1, was in force, which is in these words — "The cities, towns and plantations in this State are hereby severally empowered to raise, by taxation or otherwise, to be applied to

aid in the support of the wife or dependent mother, father or sister, or minor children, *being inhabitants of such* city, town or plantation, of any soldier, sailor or marine, who may be *actually engaged in* the military or naval service of the United States or of this State, in any recognized company, battalion or regiment of this State, or on board of any armed vessel of the United States, *during the present rebellion*. The money so raised, to be expended under the direction of the municipal authorities of said cities, towns and plantations, as the exigencies of the persons for whose benefit it was intended may severally require, for *the relief of actual distress*. And such aid may, at the *discretion* of any city, town or plantation, be *continued* to the family of any soldier, sailor or marine killed in battle, or by the casualties of war, or who may be discharged from service in consequence of any disability resulting from the casualties of war, and not from his own fault, for a period not exceeding one year after such death or discharge, provided, in case of such discharge, he shall not sooner recover from such disability."

By § 2, a portion of the money so applied was to be reimbursed from the State treasury to the city, town or plantation furnishing the aid referred to in the preceding section.

By § 6, "No pauper disabilities shall be created by reason of receiving the aid provided for in this Act."

By the pauper law, as established prior to the Act under consideration, towns and cities were obliged to relieve all persons destitute within their limits, with a right of reclamation, when those relieved had a settlement elsewhere, against the towns where such settlement might be. No special legislation, therefore, was necessary, for the purpose of enabling towns to relieve the families of destitute soldiers;—but it was, if the Legislature designed to prevent such relief from imposing upon those relieved the disabilities of pauperism.

The Act of 1861, c. 63, provided only for those enlisted in the ten regiments therein referred to,—and enabled

towns to relieve the families of those enlisted therein, without their incurring any disabilities. But there were many in the service in 1862, on land and sea, who were not included within its terms. That Act imposed the burden of relieving upon the towns and cities where the volunteers, whose families were relieved, should reside at the time of their enlistment, irrespective of the question of their settlement. The Act of 1862, c. 127, was enacted to extend the benefits of the Act of 1861, c. 63, to all in the service of the government of the United States, and to relieve cities and towns from the burden of relieving the class of destitute persons therein enumerated, and to impose it upon the whole State, upon a compliance on the part of the cities, towns and plantations, relieving, with its conditions. It was not the intention that cities, towns and plantations, should recover in any case for such relief, but that they should in all cases receive remuneration from the State, to the extent provided in the Act.

If the first section left it at the election of towns to relieve in accordance with its provisions, the Act might be of no effect. If they may relieve under it or not—then all cities and towns may decline to relieve under it, and the Act thereby become repealed—and all families of volunteers relieved, by the fact of receiving relief, are made subject to the disabilities of pauperism.

If it be optional with cities, towns and plantations, whether they shall relieve persons destitute who are within its provisions, then if the town of Orono should relieve all the destitute families of its resident volunteers, under the first section, and the town of Milford should relieve none, but should so relieve that it may recover compensation for the amount furnished of the defendants under the general pauper law, as they claim to do, then, in such case, Orono would be compelled to bear its share of the general burden of the State, as well as its particular and special liability to the plaintiffs, for the amount advanced by them to the destitute families of volunteers having a settlement in the de-

fendant town. The defendants would be obliged to pay the plaintiffs without any remuneration therefor from the State, for this right is specially confined to cities and towns who relieve the destitute families of their inhabitants, who may have volunteered, and Inman, when enlisted, was not an inhabitant of Orono, and that town could not receive from the State remuneration for the amount the plaintiffs might recover for the support of his family. The statute intended all cities, towns and plantations, should support the destitute families of all inhabitants volunteering, irrespective of their settlement, and receive the amount furnished from the State. If the construction contended for were to prevail, one town could impose an unequal burden upon another, without the latter being able to recover it back, and at the same time escape its own just share of taxation,—for the amount recovered, in such case, would not be included in the tax of the State, but would entirely fall on the town against which the recovery was had.

It is obvious, too, that this law is general, applicable to all cities, towns and plantations, and that no right is any where given for any city or town or plantation to escape its provisions. If the right of election were given, it would cease to be a law—if its enactment might be disregarded by any city or town so choosing.

It is insisted that this law is not mandatory. It was passed for the purpose of encouraging enlistments, and, as it sets forth, "in aid of the families of volunteers." But, if not obligatory, if not mandatory, it is entirely inoperative or may be made so. The general rule in the construction of statutes, is, that when a public body is clothed with power, and furnished with means to do an act required by the public interests, the execution of that power may be insisted upon as a duty, though the statute conferring be only permissive in its terms. The reasoning of NELSON, C. J., in the *Mayor, &c., of New York* v. *Furzè*, 3 Hill, 612, is entirely applicable to the statute under consideration. "This statute," he remarks, referring to the one, the con-

struction of which the Court was called on to determine, "is one of public concern, relating exclusively to the public welfare; and though *permissive mainly* in its terms, it must be regarded, upon well settled rules of construction, as *imperative* and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty, which the corporation are bound to fulfil. In the case of the *King* v. *Inhabitants of Derby*, (Skinner, 470,) a motion was made to quash an indictment found against the inhabitants for refusing to meet and make a rate to pay the constable's tax. The ground taken for the motion was, that the statute was not imperative, but merely "they *may* meet," &c. The Court, however, said, *may* in the case of a public officer is equivalent to *shall;* and if he does not do it (the act required,) he shall be punished, &c. The same principle was also held in the case of the *King* v. *Barlow*, (2 Salk., 609) (Carthew, S. C., 293) when church wardens were indicted for not making a rate or assessment under 14 Car. 2, c. 12, § 18. The statute said, "*they shall have power and authority to make a rate*," &c.; and it was insisted, they were simply invested with a power to do the act, but were under no obligation or duty to perform it as to render them punishable for neglecting it. The Court held otherwise; observing that, "where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as "shall." And it was added, that when a statute says "the sheriff *may* take bail, this is construed he shall, for he is compelled to do so.— (See also Comb. 220, *Blackwell's case*, 1 Vern. 153, and note (1). The *People* v. *Corporation of Albany*, 11 Wend., 530; *Attorney General* v. *Lock*, 3 Atk., 166; *Stumper* v. *Miller*, id. 212; *Newburg Township Co.* v. *Miller*, 5 Johns. Ch., 113; *Malcolm* v. *Rogers*, 5 Cow., 188.) The inference deducible from the various cases on this subject seems to be, that when a public body or officer has been clothed by statute with

power to do an act which concerns the public interest, or the right of third persons, the execution of the power may be insisted upon as *a duty*, though the phraseology of the statute be *permissive merely*, and not peremptory."

It was the duty of the plaintiff town "to raise money by taxation or otherwise" to aid in the support of the family of Inman. They have done this in some way, for they have furnished it supplies for which they claim to recover of the defendants. This they cannot do. Their only claim for reimbursement was against the State. — *Veazie* v. *China*, ante, p. 518. *Exceptions overruled.*

CUTTING, WALTON, DANFORTH and BARROWS, JJ., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT.

1861.

COUNTY OF CUMBERLAND.

SARAH S. ELDER, *in Equity, versus* ROSCOE G. ELDER *& als.*

A man died, leaving children of age, and children under age. By his will, he directed that the "income" of his estate should be applied, under the "control and management" of his widow, as executrix and trustee, to provide support and furnish a home for his minor children until a period named, so that they should have "the same privilege and assistance the older children had enjoyed" in his lifetime. And the remainder of the estate, after paying a legacy, he directed to be divided equally amongst all his children, at the end of the period. But the annual income proved inadequate for the purposes expressed by the testator. It was *held*, that a Court of Equity may give relief, by ordering a sale of part of the estate, for the purpose of adding to the income, and fulfilling the intention of the testator.

It seems, that this may be done, not only in cases where it is the future estate of the beneficiaries alone which will thereby be broken in upon, but even where the future estate of others will be diminished, to supply the present need of the beneficiaries.

BILL IN EQUITY. The bill states that the plaintiff is the widow of Samuel Elder of Portland, who died Oct. 15, 1856, leaving a will and codicil, which were duly proved in

December, 1856. Among the provisions of the will and codicil are the following:—

From the will:—"I, having a family of wife and children, whom I have kept together until some of my children have arrived *to* the age of twenty-one years, and capable of supporting themselves, and wishing that my minor children may have the same privilege and assistance that the older children have enjoyed, my will is,—that the property I may have shall continue undivided until my youngest child shall become twenty-one years old; that my dwelling shall continue during this time a home for the family I may leave, as it has been heretofore for myself and family; and that the income of such estate as I may leave be appropriated to the assistance and support of the minor children that shall remain at home until they all arrive *to* the age of twenty-one years.

"And my will further is, that my said wife, should she outlive me, should have the control and management of my said property, and appropriate the income to the support of the family as above said."

From the codicil:—"I hereby so far alter my within written will and testament, as that the division of my estate, among my heirs as aforesaid, shall take place in the year of our Lord 1867, on or after the sixteenth day of June in said year, instead of the time named in said instrument, in which said year (1867) my son Samuel shall be twenty-one years of age, and, in addition to the other provisions in my said will, I hereby bequeath unto my son Charles, the only issue by my second wife, (on account of his youth,) the sum of two hundred dollars, to be paid from my estate in the year aforesaid, which said sum shall then be put at interest for the benefit of said Charles, he not to come into possession of the same until he shall arrive at the age of twenty-one years; the remainder of my estate to be divided equally among all my children, including my said son Charles; but, should the said Charles die before the said sixteenth day of June, then and in that case, the aforesaid sum, be-

queathed as above to the said Charles, shall be equally divided among the children by my first wife."

The plaintiff gave bond as executrix, and afterwards as testamentary trustee under the will.

The whole estate of the testator was appraised at $7589,44, of which $6800 was real estate, including one parcel subject to a mortgage of $500. The debts of the testator, including the mortgage, amounted to about $1050.

The testator left the following children: Roscoe G. Elder of Boston, Mass., and Jane, wife of Samuel Pierce of Portland, both of whom were of age at the time of his decease; Joseph P., born March, 1839; Leonard, born February, 1842; Sarah, born August, 1844; Samuel, born June, 1846; and Charles, born February, 1856, the last named only being the child of the plaintiff.

The real estate consisted of two house lots and houses thereon in Portland, one a double tenement, in one of which the family continued to live. On the single house, expensive repairs had to be made after the testator's death, in order to put it in such a condition as to derive an income from it.

The plaintiff alleges that the largest annual income she was able to derive from the estate has not amounted to $350 a year; that she has, since her husband's decease, maintained a home for his minor children, and has paid more than $200 of the debts of the testator, leaving more than $300 still unpaid, beside the mortgage debt. In doing this, she has incurred debts on her own account.

The plaintiff further alleges that she has no property in her own right, aside from her beneficial interest in the estate of the testator, except a small parcel of real estate in Portland, yielding a nett annual income of about $150; that she has living four children by her former husband, R. B. Kimball, two of whom are minors, and dependent on her for support.

She further alleges that, notwithstanding the will and codicil contained no specific devise to herself, she has never

waived the provisions thereof on her own account, nor claimed dower, nor any allowance or other personal benefit out of the estate to her separate use.

Finding, after using her utmost endeavors, the income of the estate to be wholly inadequate to pay the debts and support the minor children of the testator, and that her comfort and even her health are affected by the continual anxiety she suffers, the plaintiff brings this bill for relief, praying the Court, in the exercise of its jurisdiction over trusts and trust estates, to instruct the plaintiff, as testamentary trustee, in what manner she shall execute the trusts confided to her, so as to accomplish, as well as may be, the intentions of the testator.

The bill was filed January term, 1860.

The respondents entered a general *demurrer*, and the plaintiff joined issue.

Barnes & Talbot, for the plaintiff.

I. The Court has jurisdiction of the case. R. S., c. 68, §§ 9 and 10; c. 77, § 8.

II. In the construction of a will, the intention of the testator, as discoverable from the whole will, is to be effectuated, if it can be done consistently with the established rules of law. *Fisk* v. *Keene*, 35 Maine, 349; *Deering* v. *Adams*, 37 Maine, 264; *Shaw* v. *Hussey*, 41 Maine, 495; *Doane* v. *Holbrook*, 42 Maine, 72. For emphasis, *Hawley* v. *Northampton*, 8 Mass., 3.

The general intent here is plain: see the first sentence in the body of the will. This, even if there be a conflicting particular intent, must govern.

Courts of equity have widened the meaning of the word "income." *Ivy* v. *Gilbert*, 2 Piere Williams, 19; *Sheldon & ux.* v. *Dormer*, 2 Vernon, 310; *Heycock* v. *Heycock*, 1 Vernon, 256; *Jackson* v. *Ferrand*, 2 Vernon, 424; 1 Vesey, jr., (Sumner's ed.,) 234, note.

The present will is within the limitation of this rule as laid down by Courts. *Ivy* v. *Gilbert*, *ubi supra*; *Mills* v. *Banks*, 3 P. Williams, 6.

These cases show the liberality of the Courts, especially towards children of a testator. So do the following:—

1st. So far as to permit the future estate of a beneficiary to be broken in upon for his present benefit against or without the direction of the testator. *Barlow* v. *Grant*, 1 Vernon, 255; *Harvey* v. *Harvey*, 2 P. Williams, 21, and cases cited; *Greenwell* v. *Greenwell*, 5 Vesey, jr., 194, and note; *Collis* v. *Blackburn*, 9 Vesey, jr., 470; *Firman* v. *Green*, 10 Vesey, jr., 45; *Aynsworth* v. *Pratchell*, 13 Vesey, jr., 321.

2. So far as to permit the future estate of others to be diminished, for the present benefit of the beneficiary, against or without direction. *Trafford* v. *Ashton*, 1 P. Williams, 416; also, *Jackson* v. *Ferrand*, *ubi supra*.

In the case at bar, the support must be furnished in a given time, and therefore the arguments for the bill take the full force of *Trafford* v. *Ashton*.

This case rests upon all the strongest reasons that are to be found as supports of the decisions cited. This, so far as the minor children are concerned.

Beyond this, the widow, orator (executrix and trustee) is entitled to her own subsistence, as well as to relief from a task too onerous and perplexing for her to bear.

III. There is no limiting particular intent in this will. The words which might be so construed, are words of inadequate expression of the one single intent of the testator clearly made manifest in the opening sentence of the will.

Fessenden & Butler, for the respondents.

It is not denied, that, in cases of difficulty, of doubtful construction of wills, &c., and where there are conflicting claims, the direction and protection of a Court of equity may be sought and obtained, by a trustee. But this presents no such case.

The facts are simply, that the testator died leaving some $6000 clear of debt, mostly in houses in Portland. The leading object, or at least one of the leading objects of his

will, beyond question, was that this property should remain undivided for a term of years. His wife, the plaintiff, is to have the management and control thereof until divided, and he directs that the *income* shall be appropriated to the assistance and support of his minor children remaining at home.

He makes no provision whatever for the appropriation of any part of the *property* itself towards such assistance and support, but only the income.

The plaintiff, according to the allegations in the bill, besides occupying one house in which the testator resided while alive, derives some $350 income from the other tenements, which certainly is as much as is generally derived from property of the kind.

Now a Court of equity cannot reform this will, although it may be a foolish one. It cannot increase the testator's bounty. Where he has only given the income, the Court cannot give the principal or any part thereof in addition.

There is nothing to show that the testator supposed that the income derived from the estate would be sufficient for the *entire* support of the children remaining at home, without exertion on their part or that of the plaintiff; and if he did so suppose, and the event has proved that he erred in judgment, that cannot alter the terms of the will.

The attention of the Court is called to the fact, that, from the ages of the minor children, as stated in the bill, all but one can *contribute* at least to his or her own support, one having arrived at his majority since the bill was filed.

It will not be contended, that the Court has power to relieve the plaintiff from her indiscretion, if any such there has been, in not waiving the provisions of the will and claiming her dower, or in attempting to execute it.

The plain and simple duty of the plaintiff is first to settle up the estate in the Probate Court, and pay the testator's debts, which she has not yet done, and then to manage what property is left prudently, and the income thereof to apply as far as it will go to the purposes expressed in the will. If it is insufficient for those purposes, she is not responsible.

Her duty is to apply it, *so far as it will go*, to the best advantage.

The case then, we will say in conclusion, as presented upon the plaintiff's own showing, is not one requiring the interposition and direction of this Court.

There is no uncertainty as to the construction of the will. The terms are plain, although the provisions are not such as a prudent person would make.

There are no conflicting claims.

There is no difficulty as to the management of the trust property, consisting mostly of tenement houses. Ordinary prudence will dictate how they should be managed.

We would also suggest that if the plaintiff would go on and settle up the estate fully in Probate Court, she would find in the process a solution of many of her difficulties, and get rid of many if not all of her embarrassments. See *Barras & al.* v. *Kirkland & al.*, 8 Gray, 512. The attention of the Court is called to the language of the testator, as giving his reason for making the provisions which he did in his will:—"*and wishing that my minor children may have the same privilege and assistance that the other children have enjoyed.*"

Now the testator cannot be presumed to have appropriated more than *the income* of his property to the support of his family *in his lifetime*, and there is no averment in the bill to that effect; and it is apparent from his will that he did not mean that more than the income should be thus appropriated *after his death*,—by the provisions for keeping it undivided so long.

The opinion of the Court was drawn up by

GOODENOW, J.—The *demurrer* admits the facts stated in the bill. The 9th and 10th sections of c. 68, R. S., give this Court power to determine all matters relating to testamentary trustees. If the plaintiff is entitled to any relief, it is a case within the jurisdiction of the Court. She holds the estate in trust, not only for herself, but for all the chil-

dren. She might have waived the provision made for her in the will, and claimed her dower in the real estate, and applied to the Judge of Probate for an allowance from the personal estate. This might have been better for her than to have abided by the will. She deferred to what she considered the better judgment of her husband. He, perhaps, made the same mistake that thousands had done before him, estimated his property too highly. He did not consider how much his own personal services would be missed, in supporting his family and *keeping them together;* an object, manifestly, very near his heart. But he did not proportion the means to the end.

He desired all his children to share equally, after providing for his widow and paying his debts. He treated the support and education of his elder children, who were of age, and had found a home in his family till of age, as advancements, and wished all his minor children to have an equivalent in the same way, by having a home in his family after his decease. This was just and laudable. His estate, at the time of his decease, amounted to the sum of $7589,44, the real estate was appraised at $6800, a portion of which was encumbered by a mortgage of $500, and is still so encumbered. His debts, at the time of his decease, amounted to $1050, including the debt secured by said mortgage.

He left *two* children of age, at the time of his decease, and five under age, whose ages and names are stated in the bill; Charles, the youngest and last named, is the son of the complainant; the other six are his children by a former wife. The real estate consisted of two house lots with houses thereon, in Portland, one of the houses containing two tenements. Since the decease of the testator the complainant has been obliged to make expensive and indispensable repairs upon the single dwellinghouse, in order to put the same into a tenantable condition, so as to derive any income therefrom. The complainant, out of such means as have been at her command, and by incurring new debts on her own account therefor, has made those repairs, and has

also paid, of the debts due from the testator, an amount exceeding *two hundred dollars;* and there are now more than *three hundred dollars* of the proper debts of the testator remaining unpaid.

Since the decease of the testator the complainant has resided, and now continues to reside, in the tenement owned and occupied by him in his lifetime, and has thus kept and maintained a home for his minor children, and has faithfully and diligently applied all the available income of the estate towards their assistance and support, as required by the testamentary provisions aforesaid, and, over and above the amount of such income, has incurred debts on her own account for their support.

The complainant further shows, that Peter Elder has been duly appointed guardian of said minor children, and has accepted the trust, but that said minor children have no property or estate whatever, to her knowledge, other than the beneficial estate of their father, before described; that she is seized in her own right of a small parcel of real estate in Portland, which usually yields a net income of about $150; that she is the mother of four children, now living, by a former husband, two of whom are minors dependent on her for their support; that she had not, at the decease of the testator, any other property, and has not now, other than her interest in the estate of the testator; that the largest annual income which she has been able to derive from the productive estate of her testator, has not amounted to the sum of $350; and that she does not believe any greater income can be obtained from it. She avers that she has exerted herself with the utmost fidelity and diligence to carry out the testamentary trusts, and has practiced all reasonable economy; but alleges that the income of said estate, in its best condition, is wholly *inadequate* for the purpose; and that her efforts, during the three years past, to maintain the family, and discharge the other burdens imposed upon her, out of said income, have involved her in great perplexity, anxiety and care, destroying her comfort, and threatening

seriously to impair her health; that she has never waived the provisions made for her in the will and codicil, nor claimed her dower, or an allowance, or other personal benefit out of said estate to her separate use.

These are the material facts, admitted by the demurrer. It furnishes, in my opinion, a strong case for relief, if this Court has the power to give it.

It was a leading object with the testator, that his family should be kept together, after his decease, as they had been in his lifetime; but it is most manifest that he did not provide the adequate means. By his codicil, he provides for an earlier division of the estate among his children, by some *ten years;* that is, when Samuel becomes of age, in June, 1867, instead of the time when Charles, the youngest, would become of age, in February, 1877. But as Charles would lose thereby the benefit of a home for some ten years, which all the other children would have received, he gives him, "on account of his youth," the sum of two hundred dollars to be paid from his estate, in the year 1867, to be put at interest for his benefit, he not to come into the possession of the same until he shall arrive at the age of twenty-one years. This sum was to be in addition to his distributive share of the estate. From this, we may understand what the testator considered the pecuniary value to each child, of the privilege of a home at his mansion house, after his decease. If the property should be finally divided in 1867, instead of 1877, Charles would lose this privilege, for about ten years. The testator's estimate of the value would seem to be about twenty dollars per year.

Joseph P., was born in March, 1839, of age, March, 1860; Leonard, born February, 1842, of age, February, 1863; Sarah, born August, 1844, of age, August, 1865; Samuel, born June, 1846, of age, June, 1867; Charles, born February, 1856, of age, February, 1877.

The three oldest children have received the full benefit of a home, till they were of age.

The four youngest are *minors*, according to their respec-

tive ages, in different amounts. Under these circumstances, what would the testator have done, if he could speak? If a portion of the estate could not be sold to meet these *imperative* demands, without an injury to the sale or value of the residue, he would probably direct the whole to be sold, and, after paying all the debts and claims upon it, and making the minor children equal with those of age, have the balance divided equally among all the children. But, as some of these minors may die, before they become of age, and their shares fall into the general fund, it would be more in conformity with the intent of the testator, to break in upon the principal, and appropriate only so much of it as is necessary to make up for the deficiency of the income, and as far as possible follow out the design of the testator, by keeping the family together. Has the Court the power to direct the trustee to accomplish this?

It needs no citation of authorities to show, that, in the construction of a will, the intention of the testator is to be effectuated, if it can be done consistently with the rules of law.

And when the particular intent cannot be executed, the general intent must direct the construction. 8 Mass., 3. The first sentence in the will under consideration discloses, unmistakably, the intention of the testator. "I, having a family of wife and children, whom I have kept together, until some of my children have arrived at the age of twenty-one years and capable of supporting themselves, and *wishing that my minor children may have the same privilege and assistance, that the older children have enjoyed, my will is*," &c. The "income" of the estate left by the testator is appropriated to the assistance and support of the minors that shall remain at home. "The natural meaning of raising a portion by rents, issues and profits, is by the yearly profits; but, to prevent an *inconvenience*, the word profits has, in some particular instances, been extended to any profits which the land will yield by sale or mortgage." 2 Piere Williams, 19. The same doctrine is held in *Sheldon & ux.*

v. *Dormer*, 2 Vernon, 310. In *Heycock* v. *Heycock*, 1 Vernon, 256, "the Lord Keeper declared, he took it to be the law of this Court, that where there is a devise of a sum certain to be raised out of the profits of lands; if the profits will not amount to raise the sum in a *convenient* time, *the Court will decree a sale.*" See also, Sumner's edition of Vesey, jr., vol. 1, p. 234, and cases there cited.

It was manifestly the intention of the testator, "that the privilege and assistance" of his minor children, till they should be able to support themselves, should be secured by a charge on the estate, before any division should be made.

There is a *class of cases*, where the amount ultimately to go to the beneficiary, is, under the direction of the Court, to be broken in upon for his *necessary* advantage meanwhile. *Barlow* v. *Grant*, 1 Vernon, 255. "Upon a bill for £100, legacy given to a child, the defendant insisted upon an allowance of £10 a year, for keeping the legatee at school. It was objected that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the Lord Keeper thought it fit and reasonable to be allowed, and said the money laid out in the child's education was most advantageous and beneficial to the infant, and therefore he should make no scruple in breaking into the principal, when so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education; but, in case of a legacy of a £1000, or the like, then it might be reasonable to restrain the maintenance to the interest of the money." See *Harvey* v. *Harvey*, 2 P. Williams, 21. The Master of the Rolls observed, that these being vested legacies, and no devise over, it would be extremely hard that the children starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their death, would have the said legacies. That, in this case, the Court would do what, in common presumption, the father if living would, nay ought to have done, which was,

to provide necessaries for his children. That a Court of equity would make hard shifts for the provision of children, where younger children were left destitute, &c. "Every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy."

A *second class* includes those cases where the money to be expended for the beneficiary, is taken to the diminution of that amount which is to go over to other persons. This is a case, where, by granting a sale of a part of the estate to relieve the trustee of immediate present claims, there will be a diminution of the amount which was to go over to the minor childen, as well as to those of full age. See *Trafford* v. *Ashton*, 1 P. Williams, 416. "The questions were, first, whether £8000 should be raised otherwise than out of the yearly rents or profits, or by sale or mortgage." It was decreed that the portions should be raised by *sale* or *mortgage*, as should be agreed by the master and the parties.

The testator no doubt expected that his minor children would, by their services, contribute something, according to their respective ages and ability, towards their own support or maintenance. *Twenty dollars* per year, would be a sum entirely inadequate for the support of any one of them. The complainant, to whose care they were committed by the testator, is not at liberty to disregard one of the primary laws of nature. That she did not waive the *poor* provision made for her in the will, and claim her dower and an allowance out of the personal estate, and thereby greatly diminish the shares of the children, deserves anything but reproach. If relief can be granted in any form, the demurrer must be overruled. It is not necessary in this stage of the case, to indicate the "mode and measure."

Upon a careful consideration of the case I have arrived at the conclusion that relief can be had consistently with the established rules of law.

Demurrer overruled.—Defendants to answer.

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

DAVIS, J.—It is apparent that the *primary* intention of the testator, to which all others were subsidiary, was that, during the minority of his children, *his dwelling should continue to be a home for his family, as it had been during his own lifetime.* To carry out this intention, he bequeathed the "income" of his property, to be "under the control and management of his wife."

According to the case stated in the bill, the *income* of the property is not sufficient to effectuate this intention of the testator, unless we give the word that enlarged meaning which will allow, in case of necessity, a portion of the property to be sold. Property may yield an income by a sale; and it will be no violation of well settled principles in equity proceedings, when absolutely necessary in order to carry out the purpose of the testator, to give the word that signification. It is a reasonable presumption that he intended, in case the annual rents of the other property, besides the dwellinghouse, should not be sufficient to provide a home for the children during their minority, that a portion of it should be sold for that purpose.

Such being the construction of the will, the executrix, though not expressly appointed a trustee therein, became such by virtue of its provisions, by operation of law. R. S., c. 68, § 12; c. 78, § 8. Having given the bond required of testamentary trustees, she is duly authorized to act in that capacity. *Deering* v. *Adams*, 37 Maine, 264.

Whether the complainant, in her capacity as such trustee, ought to be authorized to sell any portion of the property, cannot be finally determined at this stage of the case.

JABEZ C. WOODMAN *versus* YORK AND CUMBERLAND R. R. COMPANY.

Where the directors of a corporation had, by vote, authorized the treasurer to procure "a seal for the company, bearing the title of the corporation with the year of its charter," and scrip issued by the corporation, duly authorized and signed, bore a printed impression of a seal with the title and date inscribed, and contained the words, "In testimony of which" "the seal of said company," &c., is "hereunto affixed," such scrip was held to be under the corporate seal, and that an action of covenant broken may be maintained thereon.

At common law, "the impression of a seal is not a seal," as remarked by the Court in *Mitchell* v. *Union Life Insurance Co.*, 45 Maine, 104; but, under the present statutes, bonds issued by a corporation impressed with a seal, declared on their face to be sealed, and accepted as such by the holders, are deemed to be under the corporate seal.

ON AN AGREED STATEMENT OF FACTS.

THIS was an action of covenant broken, to recover interest on two instruments issued by the defendants, covenanting to pay the bearer one thousand dollars (each) in twenty years, with interest semi-annually. They were dated Feb. 1, 1857, signed F. O. J. Smith, president, and Nathaniel J. Herrick, treasurer, and bore a printed impression of a seal inscribed "York and Cumberland Railroad Company, incorporated July 30, 1846." It was admitted that no interest had ever been paid.

It appeared that, at a meeting of the directors, held July 27, 1848, it was voted, "that the treasurer be authorized to procure, at the expense of the company, a seal for the company, bearing the title of the corporation, with the year of its charter."

The concluding words of the bonds will be found in the opinion of the Court. No defence was insisted on, except the insufficiency of the seal.

F. O. J. Smith, for the plaintiff.

L. Pierce, for the defendant, cited *Mitchell* v. *Union Life Insurance Co.*, 45 Maine, 105.

The opinion of the Court was drawn up by

CUTTING, J. — The only question here presented is, whether the instruments declared on were sealed with the corporate seal. Upon an examination of the company's authority to issue such instruments, it appears, that the obligations binding them and authorized to be issued by them or their legally constituted agents under the construction contract, were invariably denominated *bonds*. So that if such instruments are not bonds, but only simple contracts, then, not only this suit must fail, but all paper thus issued by the agents or officers of the company might possibly be avoided for the same reason. Most railroad companies by their charters have been authorized to issue scrip, which is defined to be an evidence of indebtedness, whether under seal or otherwise. But here under the contract the issuing of bonds was only authorized.

The instruments under consideration bear upon their face the imprint in red ink of what purports to be a corporate seal, "bearing the title of the corporation with the year of its charter," as authorized by a vote of the directors, under R. S. of 1841, c. 76, § 1, which makes all corporations capable, among other things, of "having a common seal, which they may alter at pleasure."

That such imprint is recognized to be the common seal of the corporation is inferable from the language opposite, which is in these words — "In testimony of which, pursuant to authority vested in us for this purpose, by the directors of said company, the seal of said company, and the signatures of the president and treasurer thereof are hereunto affixed," &c.

Here then is a substance affixed to the instruments more tenacious than wax or wafer, adopted and declared by the company to be their seal, and we know of no decision in this enlightened age which declares it to be otherwise.

It is true that in *Mitchell* v. *Union Life Ins. Co.*, 45 Maine, 104, where it appeared that "the policy had upon it

a printed impression of the seal of the company," the learned Judge is reported to have said — "The impression of a seal is not a seal." At common law he was unquestionably correct, where a seal is defined to be — "*cera impressa*," and, by his interpretation, an impression on *paper*, and not upon *wax*, would be no seal. Whereas by our statute it is provided that — "In all cases, in which the seal of any *Court* or *public office* shall be required to be affixed to any paper issuing therefrom, the word seal shall be construed to mean the impression of such official seal made on paper alone." Besides, in the case cited, it did not appear that the contract would be void without a seal; that the defendants ever adopted such impression as their seal, or that their agents affixed it as such.

In conclusion we would remark, in the language of COMSTOCK, J., in the celebrated case of *Curtis* v. *Leavitt*, 1 Smith, 90, that — "The corporate seal was plainly impressed on the bonds. They are declared on their face to be sealed; they were so intended, so far as we know; they were so accepted by the holders who advanced their money upon them, and so we must hold them to be."

Defendants defaulted.

APPLETON, C. J.; DAVIS, KENT and WALTON, JJ., concurred.

In Re Bondholders of York and Cumberland R. R. Co.

R. S. of 1857, c. 51, § 51, and the nine following sections, and statute of 1858, c. 30, relative "to trustees of railroads," and regulating the proceedings to be had when a railroad has been conveyed to trustees for the use of the bondholders, apply to cases where the trust, the trustee and the *cestui que trust*, are all created by one and the same deed, and not to a case where a mortgage is made to an individual, to secure him and his assigns who may subsequently become holders of bonds to be issued by him.

Should such a mortgagee transfer any part of the bonds, he would hold the mortgaged estate, as mortgagee for the part not transferred, and as trustee for the holders of the portion transferred, precisely as any mortgagee would do under similar circumstances. But neither before nor after such transfer, would he be such a trustee as the statutes referred to contemplated.

The statutes referred to contemplate a deed of trust, and such a mortgage as has been described is not within the letter or the spirit of their provisions.

In such a case, the election of trustees in place of the original mortgagee, made at a meeting of the bondholders called for the purpose of foreclosing the mortgage, was unauthorized by the statutes.

On exceptions to the ruling of Davis, J.

This case came before the Court at *Nisi Prius*, upon a motion that the proceedings of a meeting of bond holders of York and Cumberland Railroad Company, be ratified and confirmed.

It appeared that the company by their president and treasurer and with their corporate seal affixed, on Feb. 6, 1851, in consideration of a contract made with them by John G. Myers of Portland, conveyed to "the said Myers and his assigns, who shall become the holders of the bonds, and coupons hereinafter mentioned, each in the ratio of the bonds so held by him, the franchise of said corporation with all its privileges and immunities, as the same exists by virtue of said Act of incorporation and the laws of said State, together with all personal and real property, and rights of way of said corporation, however situated and bounded, and as the same has been or may be purchased, within the counties of York and Cumberland, and for a more particular description of which, reference is hereby

made to the registry of deeds in said counties and the records of said corporation, together with all the buildings that are or may be situated on said premises, excepting only the depot and lot of land whereon the same stands, situated in the city of Portland, but meaning to include herein all iron rails, road bed, track and other structures, of said corporation, now completed or in the process of being furnished and constructed, or that may be acquired, and as the same shall be when finished, be the same more or less, and throughout the whole line of said road, and including all cars, engines and furniture, that have been or may be purchased by said company.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Myers, his heirs and assigns, and to the holders of said bonds and coupons, to their use and behoof forever. And we do covenant with the said Myers for and in behalf of said corporation, and by authority aforesaid, and with his heirs and assigns and the holders of said bonds, which are hereby recognized as transferable by delivery only, that said corporation is lawfully seized in fee of the premises, that they are free of all incumbrances, that it has good right to sell and convey the same to the said Myers and to the holders of said bonds in manner aforesaid, and by these presents and to hold as aforesaid, and that said corporation shall and will warrant and defend the same to the said grantees forever, against the lawful claims and demands of all persons.

"*Provided nevertheless*, that if said corporation or their agents or assigns, pay to the said Myers or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons for interest pertaining thereto, that shall be issued concurrently with these presents, and such also as shall hereafter be issued by the directors of said corporation, according to and to satisfy the terms of the contract existing between said corporation and said Myers, bearing date the fifth day of August, A. D.

1850, and as modified in writing on the sixth day of February, A. D. 1851, for the construction and equipment of said railroad, as by reference to said contract and the records of said company will fully appear; each of said bonds being numbered consecutively, from one to the sum total thereof, requisite for the completion of said road, according to said contract, and each being issued only by the previous specific vote thereof of the said directors, at their meeting duly notified; and if said payments shall be made, as the same shall respectively become due, according to the terms of said bonds and coupons; and if said contract shall also be fully performed by said corporation, in all other respects, then this deed shall be null and void thereafter, otherwise the same shall remain good and in full force.

"And it is further provided and a condition of this deed, that the possession and uses of said premises shall at all times remain in the said grantors, so long as payment shall be made promptly and in good faith by said grantors, of said several bonds and of the coupons pertaining thereto as the same shall become due or payable, but upon failure thereof for the term of sixty days, the holder of said bonds or of any one or more thereof, shall be and hereby is authorized and empowered to take full and complete possession of said premises and mortgaged property, personal and real, rights of way and corporate franchise, without hindrance or process of law, for the common and joint benefit and the use of the holders of all the bonds so previously issued and whether payment then be due or not, and in satisfaction thereof, and such holders shall share and share alike in the disposition and sale of the same for that purpose by public vendue, on reasonable public notice given thereof, to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale."

On Dec. 29, 1860, notice was given by Myers, as trustee, named in the foregoing mortgage, for a meeting of the bondholders of said company, to be held in Portland, Jan. 22, 1861, for the purpose of a foreclosure of said mortgage for

condition broken, and for electing by ballot one or more trustees, under the provisions of the Act. of 1858, c. 30. This meeting was called in pursuance of a request of certain bondholders, and was held at the time and place appointed.

The resignation of J. G. Myers, as trustee, was presented.

It appeared that holders of bonds to the amount of $24,500 were represented, being entitled to 245 votes; and John W. Lane and Joseph Ilsley were unanimously elected trustees, and accepted the trust.

E. H. Daveis and others, representing $5000 bonds, protested against the proceedings of the meeting.

It was then voted that a certified copy of the proceedings of the meeting be presented to the S. J. Court then in session, for the purpose of having the same ratified and confirmed, and such proceedings had thereon as the Court may order.

At the trial *E. H. Daveis* and *Evans & Putnam* appeared in behalf of the holders of other bonds of the same company, and of other persons claiming to be trustees by deeds of trust duly appointed, and claiming to hold the railroad and all the property of the corporation, free from any lien, encumbrance or trust in favor of the proponents.

The contestants introduced a deed from the company to Toppan Robie and others, dated Nov. 1, 1851; a deed from Myers to Amos Finch, dated July 29, 1856; Finch to James Hayward and others, dated Jan. 1, 1857; Myers to same, same date; same to same, Jan. 28, 1857, together with other papers, all of which were received, subject to all legal objections.

The presiding Judge ordered that the election of Lane and Ilsley, in place of Myers, be ratified and confirmed, to which the contestants excepted.

Evans, in support of the exceptions.

The proceedings of the meeting, presented to the Court below for ratification and confirmation, were not authorized

by the Act of 1858, c. 30, by virtue of which they purport to have taken place, and consequently the Court had no jurisdiction in the matter.

The statute relates to "trustees of railroads." None are such but those *expressly* created and appointed in that capacity, by deeds or instruments defining their powers and duties explicitly. Such appointments are not unusual in this State. They are well known, and to such only is the statute applicable.

In the case at bar, the deed to Myers of Feb. 6, 1851, under which these proceedings are attempted to be supported, was not a deed of trust. It created no trustees. It was simply a deed of mortgage, and is to be treated as such throughout. Myers is no where called a trustee, and no obligations are imposed upon him as such by the deed. He had the legal rights of a mortgagee, and was subject to the obligations which in law or equity other mortgagees are subject to, and no more.

Duties and obligations in the *nature of trusts*, though not properly and technically *trusts*, may grow out of the contract of mortgage, as they may and do out of various other contracts and transactions—but it is not to these constructive and implied trusts, or obligations in the nature of trusts, that the statute regulating trustees can have reference.

That a mortgage deed is not a trust deed, except in a very limited and peculiar sense, though sometimes so denominated. See 2 Story's Eq. Ju., § 1012, note 2 and quotations, and §. 1015, *ut seq.*

The form of expression used to describe the interest of the mortgagee, is "in the nature of a trust"—"treated *as* a trustee," &c.

Now, when and under what circumstances, and for whom, may a mortgagee be *treated as* a trustee? When does he hold in the *nature of a trust?* The law is well settled. When a mortgagee takes possession, and before foreclosure, he holds for the benefit of the mortgager, and must account to him on redemption. Or, if a mortgagee assigns or trans-

fers the debt or any part of it secured by the mortgage, but does not assign the mortgage itself, equity will require him to hold the estate for the benefit of such assignee. In this State, this doctrine is recognized in *Johnson* v. *Candage*, 31 Maine, 30; *Haynes* v. *Wellington*, 25 Maine, 458.

The legal estate is in the mortgagee, and, in this State, can only pass from him by deed duly executed. *Vose* v. *Handy*, 2 Maine, 322; *Prescott* v. *Ellingwood*, 23 Maine, 345; *Smith* v. *Kelley*, 27 Maine, 237.

An assignment of the debt does not here, as in some other States and in England, transfer the mortgage also.

An assignment of the mortgage, or conveyance by the mortgagee, conveys all his interest of every description, and his grantees succeed to his rights, and, where notice of his tenure exists, to his liabilities. If *he* has held for the benefit of others, in the nature of a trust, they can hold in no other way. If he was trustee, or *quasi* trustee, they must occupy the same position. But, having parted with the title and conveyed the estate, he has no further interest in, and no more control over it, and can do nothing, and is liable to nothing, which legal ownership authorizes or imposes.

Now this was Myers' condition. The case finds that he conveyed all his interest by his deed to Finch, July 29, 1856, having the opinion of this Court that he might lawfully do so, *Y. & C. R. R. Co.* v. *Myers*, 41 Maine, 109, and subsequently, Jan. 1, 1857, released to Churchill and others, to whom also Finch conveyed, Jan. 1, 1857. The legal title, then, which Myers held under his deed, is vested in Churchill and others, and they succeed to all his rights and obligations.

Myers' deed secured not only the bonds issued to him, but the performance in other respects of the company's contract with him. Myers recovered judgment against them for breach of that contract, and assigned that judgment also to Churchill and others, and they hold as the assignees of the mortgagee, not only the mortgage itself, but a large portion of the debt secured by it.

Myers, being no longer legal owner, could no longer be clothed with any implied or constructive trusts for those who had become holders of the bonds.

Of consequence he had no authority to call the meeting. That should have been done, if it could have been by anybody, by his successors in the trust, Churchill and others. Myers' attempted resignation was nugatory, and left no vacancy to be supplied. If there were ever any trustees under the Myers deed, they were still so, when the bondholders attempted to fill the supposed vacancy of Myers.

After a conveyance by a mortgagee, or an assignment, he can maintain *no action* to foreclose, *Gould* v. *Newman*, 6 Mass., 239, and, by parity of reasoning, resort to no other mode of accomplishing the same end.

2. The deed to Myers contains some provisions, anomalous and unusual, and is most loosely and inartificially drawn, obscure, uncertain, and incapable of being literally carried into effect. These provisions, equity will not allow to stand. Notwithstanding these anomalies, the deed is still a mortgage only. No title passed to the bondholders as such, by the deed. Titles must go to persons named, or definitely described and known, and cannot be ambulatory, passing by the delivery of a note of hand, or bond, or bill of sale, to any person to whom it may be delivered.

3. But while it is denied that the deed to Myers can operate to convey any *title* to the holders of the bonds named in it, or to give them any right of possession or control over the mortgaged property, it is admitted that they have a beneficial interest in it, a lien upon it, in whosesoever hands the legal title may be.

The deed was intended, doubtless, to secure the bonds described in it. It ought to operate for the purpose designed, if a lawful one. *Security* was intended. The exhibits filed by some of the bondholders show that they so regarded it. No claim of title or possession was asserted, but notice, accompanying the transfer, that the grantees may hold subject to their claim for security.

4. In giving a construction to the Act of 1858, c. 30, to determine whether it authorized these proceedings, the Court will ascertain, if possible, what it may reasonably be supposed was intended.

The construction must be a *reasonable* one, and the object to be accomplished a reasonable one also. Would anything be more *unreasonable* than to suppose that the Legislature intended to authorize *one class* of creditors secured by mortgage, to have the entire control of the mortgaged property, to the exclusion of another class or creditor, equally secured by the same deed, and holding vastly greater interests? Can it be supposed the Legislature meant to authorize so gross inequity? It these proceedings are sustained, what is to be the next step? Is the Court to order conveyance to be made to these new trustees? Myers has nothing to convey, and the Court will do no such absurd thing as to direct a perfectly useless act. Are Clapp and others, trustees under the deed to Robie and others of Nov. 1, 1851; or Churchill and others, trustees under the deed of Jan. 1, 1857, to convey? Certainly not. The new trustees do not assume to be *their* successors, but only Myers'.

Will the Court construe the statute so as to deprive trustees duly appointed of their property and legal rights? Did the Legislature so intend? And, if so, is it constitutional?

Shepley & Dana, for the bondholders.

1. Exceptions do not lie in this case. The order of the Court, ratifying and confirming the election of Lane and Ilsley as trustees, was a mere exercise of discretion, and not a determination of any question of law, and not the subject of a bill of exceptions. It was a matter which might be presented in a summary manner to the Court at any term, or to any Judge at chambers, and such Court or Justice had power to ratify and confirm the election, and to make all orders and decrees for effectuating the same. Stat. 1858, c. 30, § 2. No right of exceptions is reserved. If heard before the Judge at chambers, manifestly there could be no exceptions.

2. The proceedings were strictly in accordance with the statute. Those who met were "holders of bonds of a railroad corporation of this State." The meeting was "called and held in pursuance of the provisions of the Act approved April 15, 1857." R. S., c. 51, § 54. The call was by the trustee, and due notice given.

3. The statute was intended to apply, and does in terms apply, to those "who take and hold in trust any property embraced in the mortgage, for the benefit of the bondholders." A trustee is one who takes or holds in trust.

The mortgage of Feb. 6, 1851, is to Myers, "to have and to hold to the said Myers, his heirs and assigns and to the holders of said bonds and coupons, to their use and behoof forever." The condition of the mortgage was the payment to the holders of the bonds "of the amounts specified in the several bonds and coupons for interest pertaining thereto." Precisely such a mortgage is contemplated in the statute. R. S., c. 51, § 53.

At common law, if any instrument, operating as a legal disposition of property, contained a declaration or direction that the party taking under it should hold for the benefit of another, he took the legal estate as a trustee for the beneficial owner. Hill on Trustees, 63*.

Since the statute of uses, it has been laid down that there are three *direct* modes of creating a trust of lands, notwithstanding the statute:—1st. Where a use is limited upon a use; i. e., conveyance to the use of A, and his heirs, to the use of B, and his heirs:—2d. Where copyhold or leasehold estates are limited by deed or will to any person, upon any use or trust; and, 3d. Where the donee to uses has certain trusts or duties to perform which require that he should have the legal estate. In all these cases, however, the question is not, whether the first taker shall hold beneficially or as trustee, but, whether he takes any legal estate at all under the limitation to him. Hill on Trustees, 63*, 64*, 229*, 230*.

That this was a conveyance in trust and not a use execut-

ed, see Williams' Saunders, 11, note 17; *Sylvester* v. *Wilson*, 2 T. R., 444; *Newhall* v. *Wheeler*, 7 Mass., 189; *Norton* v. *Leonard*, 12 Pick., 156.

It is contended, however, that Myers, by a conveyance of the trust estate, has divested himself of the character of trustee. This he cannot do until he has discharged himself of the trust.

If a trustee, with or without a power of sale, or authority to sell, convey the trust estate, is he not a trustee for the consideration received? He may not hold the particular property in trust after the sale, and, in one sense, may cease to be the trustee of that particular property, but he is no less a trustee, and bound to account as a trustee.

If persons who are trustees for bondholders could, by a mere alienation of the trust property, divest themselves of the relation of trustees, and cease to be accountable to the *cestuis que trust*, then the position of the counsel would be a correct one, and the bondholders would be remediless.

The opinion of the Court was drawn up by

APPLETON, J.—By R. S., c. 51, § 53, it is enacted that "when a railroad corporation shall have mortgaged its railroad and franchise to secure the payment of any of its bonds and coupons, *whether such mortgage was made directly to the holders of such obligations, or to trustees for their use*, the refusal or neglect to pay any such bond or coupon, within ninety days after its presentment, (subsequent to its pay day,) to the treasurer or president for payment, shall be deemed a breach of the condition of the mortgage."

The section in terms explicitly refers to two classes of mortgages—one directly to the bondholders—the other "to trustees for their use."

When the mortgage is made directly to the bondholders, they have the rights and privileges of mortgagees.

If the mortgage is to trustees, for the use of the bondholders, the 54th and the eight following sections of c. 51, define the rights, duties and powers of such trustees and pro-

vide for the foreclosure of the mortgage by them, in their trust capacity, and for the creation of a new corporation composed of the bondholders, for whose use the franchise of the railroad had been conveyed to them in trust.

The Act of 1858, c. 30, under which the proceedings in question were had, relates "to trustees of railroads." It provides for the meetings of the bondholders, the removal of trustees, and the election of new ones, and for the transfer of the estate mortgaged from the old to the new trustees.

It is claimed, that the deed of the York and Cumberland Railroad Company to John G. Myers, of the date of Feb. 6, 1851, is to be regarded as a deed of trust within the intent and meaning of the statutes to which reference has been made.

The deed from the corporation is signed by its president and treasurer, and sealed with its seal. It recites that, in consideration of the sum of one dollar, paid by John G. Myers, of Portland, &c., "the receipt whereof we do hereby for and in behalf of said corporation acknowledge, and in consideration of the stipulations contained in the contract of said Myers, hereinafter mentioned, do hereby give, grant, bargain, sell and convey, for and in the name and behalf of said corporation, unto the said Myers and *his assigns*, who *shall become* holders of the bonds and coupons hereinafter mentioned, each in the ratio of the bonds so held by him, the franchise of said corporation, with all its privileges and immunities, &c., &c., * * * to have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Myers, *his heirs and assigns*, and to the holders of said bonds and coupons, to their use and behoof forever." * * * "Provided nevertheless, that if said corporation, their agents, or assigns, pay to the said Myers or *his assigns*, *who shall become* the holder or holders thereof, the amounts specified in the several bonds and coupons for interest pertaining thereto, that shall be issued concurrently with these presents and also such as shall hereafter be issued by the directors of said corpora-

tion, according to, and to satisfy the terms of the contract existing between said corporation and said Myers, bearing date the fifth of August, A. D., 1850, and as modified in writing on the sixth of February, 1851, for the construction and equipment of said railroad, as by reference to said contract and the records of the company will fully appear; each of said bonds being numbered consecutively from one to the sum total thereof, requisite for the completion of said road according to said contract, and each being issued only by the previous specific vote therefor of the said directors at their meeting duly notified; and if the said payments shall be made, as the same shall respectively become due, according to the terms of said bonds and coupons; and if said contracts shall also be fully performed by said corporation in all other respects, then this deed shall be null and void thereafter, otherwise the same shall remain good and in full force."

There is a further condition, that if the bonds and coupons should not be paid within sixty days from maturity, that the holder or holders of such unpaid bonds may take possession of the mortgaged premises for the common benefit of the holders of all the bonds and may sell the same, &c., &c.

By the statute in question, the deed of mortgage is to be made "to trustees for their (the bondholders') use"—to trustees "of the holders or owners of bonds secured by the deed creating said trust." The trustees are authorized "when not inconsistent with any of the provisions of the deed creating the trust," &c., to take possession of the road on certain contingencies expressed in the statute. The trustees are authorized "as fully as a board of directors of said road for the time being to take charge of and manage said road," &c., and to do all things in the management of said road that a board of directors might lawfully do, with the right to prosecute and defend suits *in their names as trustees*, and to do all other things, which the corporation itself might legitimately do." "When the dishonored bonds and coupons secured by the *deed in which the trust is created*, shall have

been paid, said trustees shall surrender said road," &c. The bondholders are "to vote such instruction to the trustees as they may deem advisable, and if not inconsistent with the duties prescribed in the deed of trust," &c., and to "prescribe the compensation of the trustees." When the mortgage is foreclosed, the foreclosure is to "enure to the benefit of all the holders of the bonds and coupons provided for in its condition," who are constituted a new corporation. Provision is made for the appointment of new trustees in case of death or resignation or removal of those first appointed, and for the election of new ones in their place, "who shall take and hold in trust the property embraced in the mortgage according to the terms thereof." R. S., 1857, c. 51, §§ 53, 54, 55, 56, 57, and stat. 1858, c. 30, §§ 1 and 2, &c.

The statute most manifestly relates to "trustees of railroads" created by deeds of trust, in which the trusts are set forth, and the powers and duties of the trustees are defined. It refers to trusts created by deed in contradistinction to trusts incidentally arising under a mortgage by and from the transfer of the claims secured by the mortgage. It treats mortgages and trusts as distinct. It recognizes their diversity. It negatives their identity.

The relations between Myers and the Y. & C. Railroad are apparent from and are disclosed by the mortgage. Myers was the party contracting with them. The contract was thereby secured. Bonds were to be issued to him under the contract, according to its terms and conditions. It was the expectation of the parties that they would be assigned, and it was their intention that *when* assigned, they should still be secured by the mortgage, as they were before such assignment. The mortgage expresses, in terms, the rights of the parties as they would be regarded in a Court of equity, after the mortgagee has transferred the debt secured in whole or in part without transferring the mortgage. In such case, he holds the estate in the nature of a trust for the holders of the demands assigned, and the mortgagee is to

be treated as a trustee. *Johnson* v. *Candage*, 31 Maine, 30; *Moore* v. *Ware*, 38 Maine, 496. The mortgage deed expresses in words what a court of equity would imply without such words.

By the terms of the deed, Myers is simply mortgagee. He is not named as trustee. He is not trustee in fact, though he may by his own act thereafter become one. The contract secured is with him. It is his contract. The bonds to be issued under it are his. If he keeps the contract and bonds without transferring any, he remains simply a mortgagee. The deed to him on its face and at its inception is not a trust deed within the statute, for that contemplates a deed, where the trust, the trustee and the *cestui que trust* are all created by one and the same instrument. But here, until Myers makes a transfer, he is mortgagee and that alone. It would be absurd to say that he holds the mortgage in trust for himself, before he has assigned any of the bonds of the corporation, and that he is both trustee and *cestui que trust*.

If Myers should transfer the bonds or a portion of them, then, undoubtedly, according to the decisions of this Court, he holds the estate as mortgagee for so much of the mortgage debt as is not transferred, and in trust for the holders of the portion transferred. But the trust in such case arises not because the mortgage was originally one of trust, *but from the transfer* and by operation of law. Whether any trust relations shall ever exist, will depend upon the will of the mortgagee. But in such case there would be no "deed of trust" "to trustees for their (the bondholders') use." The trust would spring into existence, when the transfer should be made, *and not before*. This is in no wise different from any mortgage deed. In all mortgages, the mortgagee may assign a part of demands secured, and he is deemed in equity as holding the title in the nature of a trust for all parties secured by the mortgage. Yet the mortgagee, as such, and before he transfers, is not deemed a trustee—nor after

such transfer, is he to be regarded as a trustee within the meaning of the Act.

The provisions of the statute, to which we have referred, are entirely inapplicable to an ordinary mortgage. They imply the whole estate as in the trustee and in him alone. But under the deed of mortgage, if Myers were to transfer a part of the bonds, retaining the residue, it has been seen that he would be mortgagee for such residue. But if the trust arising consequent upon the transfer and in virtue thereof were to be deemed a trust, such as the statute intends, then would Myers *after* such transfer be mortgagee *and* trustee—mortgagee for the remaining interest—trustee for whatever he may have transferred. The holders of the transferred bonds might meet, depose the mortgagee from his position as trustee, appoint a new trustee, and the legal title of the mortgage would be in Myers as mortgagee and in the *new* trustee. Indeed, they might proceed to form a new corporation, which would consist of but a portion of the bond holders. But such results are entirely inadmissible—and at variance with the purpose, object and intent of the Legislature.

Even if it were to be said that all the bonds were in fact transferred when the mortgage was made, (though it manifestly was *not so*,) still, such assumption would not alter the conclusion to which we must inevitably arrive. Myers would still remain mortgagee for his contract, and would be entitled to his rights as such. He might be treated as a trustee, holding the estate mortgaged in the nature of a trust for the bondholders in the ratio of and according to their interest, but the legal title would be in him, and though they might as *cestuis que trust* be entitled to the aid of a court of equity, to protect their rights, it is not perceived how they could divest Myers of such legal estate.

The statute most obviously does not contemplate one and the same person as trustee and mortgagee, with opposing and conflicting interests, as viewed in one or the other capacity. It does not contemplate the cotemporaneous existence

of a mortgage and a trust as created by and derived from one and the same instrument. Yet it is apparent that such results would naturally flow, from the position that Myers, besides being mortgagee, was to be treated as trustee under the statute.

The conflict of interests and duties and rights which would exist, if the construction contended for was given to the mortgage to Myers, is most apparent. Myers, as mortgagee, might wish to foreclose. The bondholders might not desire a foreclosure. As trustee, he would be bound to obey their directions—as mortgagee, he is at liberty to follow his own preferences. The trustee may be compelled to transfer the estate at any time. The mortgagee is not obliged at all to transfer it. He may release and discharge the mortgage upon payment. The former is entitled to compensation, the latter is not. The one is a mere agent for the *cestui que trust*. The other is personally interested. The legal title is in the mortgagee—such is the rule of law. Does it change, as each bond is transferred—and a certain proportion of the title pass from Myers as mortgagee to Myers as trustee?

But it is unnecessary further to examine the subject. The statute contemplates a deed of trust, and the mortgage to Myers was not one within its letter or its spirit.

It is not material to the present inquiry to determine whether the mortgage confers a power to sell, or whether, if it does, the power is, or is not well executed. The settlement of those questions, howsoever they may be decided, does not affect the subject matter of our present investigation.

The election of trustees was unauthorized by the statute, and the proceedings must be dismissed.

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

ANNA A. W. CUMMINGS, *Adm'x*, *versus* F. O. J. SMITH.
Same *versus* DAVID HAYES.

When parties to an action pending in Court agree that it shall abide the result in another case, and a memorandum of such agreement is entered on the docket, the parties are bound by it.

The defendant in such case, waives a jury trial by such agreement. After he has consented that judgment may be rendered against him, he is not entitled to a jury trial, to fix the amount of damages.

It is a matter of discretion with the Court to receive or reject a plea *puis darrein continuance*, which alleges matters which arose before the last continuance.

Pleas *puis darrein continuance* must have the same certainty as to time and place as other pleas. Such a plea which does not allege the day on which the matter pleaded, happened, is bad.

Exceptions do not lie to the decision of the presiding Judge upon matters within his discretion.

THESE cases were presented on EXCEPTIONS to the rulings of DAVIS, J., at *Nisi Prius*.

Shepley & Dana, for the plaintiff.

Smith, for the defendants.

The questions presented by the exceptions appear from the opinion of the Court, which was drawn up by

APPLETON, J.—It appears that Cummings, the original plaintiff, in his lifetime commenced suits against the defendant and others, as indorsers of certain promissory notes. The first action, *Cummings* v. *Herrick*, came on for trial, a verdict was rendered in favor of the plaintiff and the cause was continued on the report of the presiding Judge. An agreement was then made between the parties to the present action to abide the decision in *Cummings* v. *Herrick*, and a memorandum thereof was entered upon the docket under the action. After a hearing before the law Court, judgment was rendered on the verdict in *Cummings* v. *Herrick*, 43 Maine, 219.

When the entry of judgment on the verdict was made, in

the suit *Cummings* v. *Herrick*, the plaintiff, by virtue of his agreement, was entitled to the same judgment in this action. Both parties, were bound as much by that agreement as by any other, while it was in full force and subsisting. The defendant thereby waived his right to be heard by a jury. He consented, that in a certain contingency, judgment should be rendered against him. He had lost his opportunity to defend the suit, and the only remaining inquiry related to the assessment of damages. The defendant, after a default, has no right to claim a trial to determine the damages. They are to be assessed by the Court, unless the plaintiff claims a hearing by the jury on that question. *Price* v. *Dearborn*, 34 N. H., 481. In the present case, the defendant is in no better position than if he were defaulted, for, by virtue of his agreement, judgment was to be rendered against him.

The defendant claimed to file certain pleas *puis darrein continuance*. But after one continuance, it is a matter of discretion to receive or reject such plea. *Rowell* v. *Hayden*, 40 Maine, 582. If, therefore, the plea was not seasonably filed, its rejection was purely discretionary with the Court.

But to constitute a valid plea of this description, it must have the same certainty as to time and place with other pleas. "It is no good plea to say *puis darrein continuance*, such a thing happened, but it ought to be precise in the day." 7 Bacon's Abr., 687, ed. 1856. "For, in pleading a thing after the last continuance, it is not good pleading, *quod post ultimam continuationem*, such a thing happened, but it ought to allege precisely the very day, viz., from such a day to such a day. *Ewer* v. *Moile*, Yelv., 140. The pleas filed are entirely defective in this respect.

From the evidence offered and received, it would seem that all the alleged facts, upon which the defendant relies, happened long *before* the last continuance. Nor is this inconsistent with the pleas. Whether, therefore, the defendant should be allowed to plead such facts, was a matter dis-

cretionary with the Court. The exercise of this discretion is never matter of exception.

Besides, the defendants only claimed "to be heard in damages by a jury," and the exceptions taken, are to the overruling of this motion. But, as has been seen, the defendant, by reason of his agreement, was in no better condition than that of a defendant defaulted, and could not claim to have damages assessed by a jury. He had agreed judgment should be rendered against him, and it was.

The defendant was allowed for the amount paid by Poor. This payment was neither made nor received in full discharge of the execution. *Exceptions overruled.*

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

CLEMENT PHINNEY *& als. versus* HIRAM HOLT.

Where the issue to be tried is, whether a sale of certain goods was made to defraud creditors, and the vendor is a witness to disprove any fraudulent intent, he may be asked, on cross-examination, if, on the same day, he made a conveyance of other property, to a third person (a relative), although the instrument of conveyance be not produced; — as such inquiry relates to a fact collateral to the main issue, and is admissible on the question of intention.

EXCEPTIONS from the ruling of DAVIS, J.

THIS was an action of TROVER for goods. It appeared by testimony introduced by plaintiffs, if believed by the jury, that Robert Potter of Wilton, on the afternoon of the first day of July, 1861, purchased for cash of the plaintiffs the goods described, which were sent in the ordinary course of business to the railroad depot, to be transported to Potter at Wilton, with a bill of the goods; that during the same afternoon, he purchased for cash, goods of Charles McLaughlin & Co., and of J. W. Perkins & Co., and of Charles E. Jose, all of Portland; that payment had not

been made for any of the goods. That Potter made a mortgage to defendant and others of all the goods in his store in Wilton, and of some other goods, bearing date July 2, 1861, and entered of record on July 4. And another mortgage to same, of all goods in and about his store, bearing date July 6, 1861, recorded July 8; and a mortgage to Ira Fuller, of the goods purchased in Portland as aforesaid, which are on the way from Portland to Wilton, dated July 5, 1861, and recorded same day. This testimony was introduced to prove that the goods were purchased by Potter fraudulently, and with a design to obtain possession of them, and not to pay for them.

In defence, the defendant testified to the circumstances under which the mortgages were made, and respecting the debts, to save him harmless on account of his becoming surety for Potter on them. And that he had become receipter to an officer for the goods attached on their way to Wilton, at the suit of one Staples, tending to prove that the transactions between him and Potter were fair and honest.

Robert Potter, called by defendant, testified respecting the purchases of the goods, tending to contradict some of plaintiffs' testimony, and to prove that the purchases of goods were made by him without fraud or intention of fraud. On cross-examination, among other questions, he was asked and testified that he went up in the steamboat from Portland to Boston, during the night of the first of July; that the next morning, on his arrival, went to Larkin A. Smith's in Charlestown, a brother-in-law, and he was then asked, — "Did you on that day convey any property to Smith?" The counsel for defendant objected to any answer being received, and asked the witness whether, if any such conveyance was made, it was made by deed, and the witness said it was. Plaintiffs' counsel did not propose to introduce such conveyance in evidence, but insisted that the witness should answer the question. The Court ruled that such conveyance could not thus be proved by parol testimony, and excluded the answer.

The verdict was for the defendant. The plaintiffs excepted to the ruling of the Court excluding the answer of the witness Potter to the question propounded.

Shepley & Dana, (with whom was *E. Shepley*,) in support of the exceptions.

The question presented to the jury was, whether certain goods had been obtained by Robert Potter from the plaintiffs, by false and fraudulent representations.

Potter had been examined as a witness for the defendant. The case finds, that the goods were sold on July 1st, 1861, at Portland; that Potter went to Boston during the following night, and to the house of Larkin A. Smith, a brother in law, in Charlestown, the next morning. On cross-examination he was asked this question, "did you on that day convey any property to Smith?" Defendant's counsel interposed and asked witness "whether, if any such conveyance was made, it was made by deed," and the witness said it was. The plaintiffs' counsel did not propose to introduce such conveyance in evidence, but insisted that the witness should answer his question, but the Court ruled that such conveyance could not be proved by parol testimony and excluded the answer.

Let it be noticed, that the purpose was to prove a fraud committed by the witness. The plaintiffs could not know what disposition he had immediately made of his property; could not be prepared therefore to produce any such conveyance. A party so situated should be entitled to call from the witness and introduce every act of his immediately preceding and following the alleged fraudulent transaction. If the witness can escape such a searching inquiry, by a statement that his transactions have been reduced to written contracts made with parties dealing with him, and of which the party defrauded can have no means of knowledge, the opportunity to prove a fraud must be very greatly restricted. The purpose of the law in such cases is to require a full disclosure from the person; to find out, not to screen a fraud. The fact sought was collateral to the issue, and yet suited to

prove the fraud alleged, by showing the intention of Potter in making purchase of the goods.

"And, in all cases, where the guilt of the party depends upon the intent, purpose, or design, with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose or knowledge." *Bottomley* v. *United States*, 1 Story's R., 135, 143; *Farmers' & Man. Bank* v. *Winfield*, 24 Wend., 419; *Dennett* v. *Crocker*, 8 Greenl., 244; 1 Greenl. Ev., § 87, note 2.

In the case of *Ayers* v. *Hewett*, 19 Maine, 281, it is apparent, that the plaintiff would have been permitted to prove a sale of goods by a written bill of sale, without its production, being a collateral matter, had it not been produced on suggestion of the opposite party, who then objected that it could not be received in evidence without being first proved by the subscribing witness. The Court decided that, being an instrument collaterally presented, such proof was not necessary. The dispensation of such proof is the same in principle as that of the production of the instrument itself.

Let it be noticed also, that the question, the answer to which was excluded, did not call for the *contents* of the deed of conveyance. It only called for the *fact* whether a conveyance of property had been made. In this there was no violation of any rule of evidence attempted. *Baker* v. *Cotter*, 45 Maine, 236. It was analogous to the proof of a tenancy by lease without producing the lease, as in cases of *Rex* v. *Inhabitants of Holy Trinity*, 7 B. & C., 611; *Doe* v. *Harvey*, 8 Bing., 239.

It should not be considered that proof of the *fact* alone of making a conveyance of property at that time, and to that person was immaterial. It was most material, without a knowledge of what the property was or of its value. It would, with other testimony in the case, have had an important influence, if unexplained; and thus have called upon the defendant or his witness to explain it.

There is another ground upon which the answer should have been received. The deed appeared to be in the hands of a person who could not be reached by process of the Court; and he was not obliged to part with his deed by annexing it to a deposition. Being a collateral matter, the facts respecting it might for these reasons have been proved by parol.

In the case of *Ralph* v. *Brown*, 3 Watts & Serg't, 395, a deposition was excluded "because it appeared on the face of the deposition, as it was said, that the material facts referred to by parol were in writing," which should have been produced. The exclusion was decided to have been erroneous, because the original paper was in the hands of a person, who could not be reached by process of the Court. That person appeared to have been a resident of New York.

When a title to property depending upon a deed or written contract is to be established, such deed or contract must be produced. But when in cases of alleged fraud the fact of a conveyance by the witness is to be proved as a collateral matter, to exhibit the intention or purpose of the original transaction, the law does not require the production of such deed or contract.

Fox, contra.

In *Hutchinson* v. *Chadbourne*, 35 Maine, 190, it was decided that a party could not use office copies of deeds of conveyance of real estate, to show a design on the part of the grantor to commit a fraud, about the time of another conveyance, which was attempted to be impeached in the pending suit. The evidence was inadmissible because it was not the best evidence; it was secondary. Much more is it secondary to inquire of a party on the stand about such a conveyance.

Oral evidence cannot be substituted for any writing the existence of which is disputed, and which is material, either to the issue between the parties or to the credit of the witness. 1 Greenl. Ev., § 88.

A witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. *McDonnell* v. *Evans*, 73 E. C. L. R., 930; 2 B. & B., 286. *Vide* 6 E. C. L., 118; 1 Starkie on Ev., 192.

The object of the plaintiff was to establish the fraud of Potter, by proving a written conveyance of property about the same time. This conveyance is an independent material fact, and the best evidence is the conveyance itself; and no reason is shown why that evidence should not be produced.

The opinion of the Court was drawn up by

WALTON, J.—When the question to be determined is whether a person has conveyed away his property with the fraudulent design of avoiding the payment of his debts, very little if any aid can be derived from an inspection of the written instruments of conveyance. Such writings are often made for the very purpose of concealing the fraud, and, if produced, would tend to aid rather than detect it. A searching cross-examination of the guilty parties is one of the most efficient modes of unveiling such transactions, and the evidence thus obtained is often sufficient to establish the fraud.

It is always important to show that the accused party has so disposed of his property that the party defrauded cannot secure his demand by attachment; for it could hardly be believed that a person intended to cheat another out of his debt, if he should continue openly to own attachable property sufficient to secure it. And when it can be shown that he has disposed of it in a way that an honest man desirous of paying his debts would not dispose of his property, the fraudulent intent is established.

When it can be shown that a party has disposed of *all* his attachable property, some progress has been made in establishing such a fraud. If in addition to this it can be shown

that it has been disposed of to a relative, the evidence is strengthened, for experience shows that such transfers are oftener made to relatives than strangers. If it can be shown that property which could readily be disposed of for cash has been sold on credit, especially if it be a long credit, and negotiable paper taken so that the credits could not be reached by trustee process; or if after a pretended sale the seller retains the possession and continues to use the property as before; or if the pretended purchaser is so situated that he would not be likely to want the property, or is unable to pay for it; or if it can be shown that notes given for the property have been deposited in the hands of some third person friendly to both the pretended seller and buyer, showing an intention that they should not be collected; or if the deeds or other instruments of conveyance can be shown to bear false dates, so as not to disclose the true dates of the transactions; these and other similar circumstances will very much strengthen the evidence of fraud; and circumstances, of but little importance when considered separately, may be so multiplied, that in the aggregate, they leave no doubt of the fact.

And if parties to such fraudulent conveyances, by such an evasive answer as was interposed in this case, which neither admits nor denies the existence of a conveyance in writing or otherwise, but is hypothetical and equivocal, namely, "that if any such conveyance was made, it was by deed," can shut out all further inquiry, so that it cannot be ascertained even *when* or to *whom* such conveyances, if any, were made, unless the writings themselves are produced, the means of detecting and preventing such frauds will be very much restricted. To summon all the parties supposed to have possession of such instruments would be exceedingly expensive, inconvenient, and hazardous; for, after all, it might turn out that the wrong parties had been summoned and the right ones left at home; and it is not likely that those who were thus aiding a fraudulent debtor

would make any disclosures in aid of his creditors till obliged to.

In *Keene* v. *Meade*, 3 Pet., 1, the Court say, "it cannot be laid down as a universal rule that, where written evidence of a fact exists, all parol evidence of the same fact must be excluded;" and in *Mumford* v. *Bowne*, 1 Anthon, (N. Y.,) 40, the rule is laid down that "parol evidence of the contents of papers relating to facts collateral to the issue is sufficient;" also in *Lowry* v. *Pinson*, 2 Bailey, 324. Thus in *Whitefield* v. *Brand*, 16 Eng. Law J., a witness was allowed to testify that he had agreed to sell goods on commission, although the agreement had been reduced to writing; and in *Robinson* v. *Tipton*, 31 Ala., 595, "that W. sold him the land for $2000," without producing the written evidence of the sale, or accounting for its absence; and in *Sanders* v. *Stokes*, 30 Ala., 432, to a sale of chattels, though a written bill of sale was made and accepted at the time; same in *Blood* v. *Harrington*, 8 Pick., 552; in *Thompson* v. *Mapp*, 6 Geo., 260, to a sale of personal property, *and the time when it was made*, notwithstanding the contract was reduced to writing; in *Waller* v. *Cralle*, 8 B. Mon., 11, to the contents of papers executed to a third person residing out of the State; in *Ralph* v. *Brown*, 3 Watts and Serg., 395, because the papers were in the hands of a person who could not be reached by process of Court; same in *Brown* v. *Wood*, 19 Miss., 475; *Bridge Co.* v. *Shannon*, 1 Gilman, 15; *Lemon* v. *Johnson*, 6 Dana, 399; in *Tucker* v. *Welsh*, 17 Mass., 160, a copy of a mortgage deed was admitted in evidence on the question whether the mortgager had assigned an insurance policy to defraud his creditors, and Chief Justice PARKER, in delivering the opinion of the Court, (page 165,) says, *the conveyance might have been proved by parol, for the purpose for which the copy was used;* that it was produced to prove a collateral fact; that the original was not in the possession of the party producing the copy, and he had no control over it, &c.; and in *Ayers* v. *Hewett*, 19 Maine, 281, a bill of sale was admitted in evidence with-

out calling the subscribing witness, because it related to a fact collateral to the issue; and it is quite apparent from the opinion of the Court that the sale was in the first instance proved by parol; for the Court say, "the writing was produced by the witness at the suggestion of the defendant, *as corroborative of his testimony*, or to enable the adverse party to determine *whether it was in conformity to the evidence contained in the writing.*" The bill of sale could not have been "corroborative of the witness' testimony," nor could his testimony have been "in conformity to the evidence contained in the writing," unless he had testified to the facts evidenced by the writing.

In respect to the case now under consideration it will be observed that, if there was any such deed of conveyance as the answer of the witness would seem to intimate, the plaintiffs were not parties to it; that it was in the hands of a stranger residing out of the State; that so far as appears the plaintiffs had no previous knowledge of its existence, and were only inquiring generally after such conveyances as a person intending to defraud his creditors would be likely to make; that the inquiry was upon cross-examination of the accused party, and related to a fact collateral to the main issue, and admissible only upon the question of intention.

We are of opinion that the question propounded to the witness was proper, and ought to have been answered.

Exceptions sustained,
Verdict set aside,
New trial granted.

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

DAVIS, J.—The general rule is, that oral evidence cannot be substituted for a written instrument. Mr. GREENLEAF states an exception to this rule, "when the writing is *collateral* to the question in issue." 1 Greenl. Ev., § 89. In nearly all the cases cited by him to support the proposition,

the writing was presumed to be within the control of the other party, and the nature of the action such as to amount to a notice to produce it; and not being produced, oral evidence was admitted.

There are some cases in which the admission of such evidence is justified on the ground that it related to a matter *collateral to the issue*. *Southwick* v. *Stevens*, 10 Johns., 443; *McFadden* v. *Kingsbury*, 11 Wend., 667. But it by no means follows that such evidence is always admissible when collateral. On the contrary, there are numerous cases, in almost every State, in which oral evidence of letters, and other writings, has been excluded, though relating to the intention of the parties, the credit to be given to the witnesses, or to some other merely collateral question. And the general rule is rarely departed from, that no evidence is admissible which indicates the existence of evidence of the same fact, of a higher or better nature.

But I concur in the result to which my associates have come in this case, for the following reasons.

It does not appear that the question excluded related to *real estate*. By its terms it might have had reference to a conveyance of *personal* property. The latter may be conveyed by parol; the former can be conveyed by deed only, and therefore the *fact* cannot exist except by the *deed*. It is impossible to prove such a conveyance except by proving a deed. If personal property is sold by a deed, the *fact* could be proved without any evidence of a deed, though generally such evidence would not be admissible. But to prove a sale of real estate, there must be evidence of a deed. And therefore, though it relates to a matter entirely collateral, the deed itself must be produced. *Hoitt* v. *Moulton*, 2 Foster, (N. H.,) 586. In this State, even *office copies* are not admissible. *Hutchinson* v. *Chadbourne*, 35 Maine, 189. And, in those cases where secondary evidence is admissible, it must be the best kind of such evidence of which the case admits. Thus, if the plaintiff undertakes to prove fraudulent sales of real estate by the defendant, if

secondary evidence is admissible, which is denied in this State, it must be proved, not by oral testimony, but by office copies. *Blanchard* v. *Young*, 11 Cush., 341; *Pierce* v. *Gray*, 7 Gray, 67.

But the question excluded in this case not only might have related to a conveyance of personal property, if the conveyance was by deed, it did not call for any evidence of its contents. It did not relate to the property in controversy; it was not an inquiry about any particular property. The object was not to show title in any one, but to prove, by sales of other property, to a relative, at about the same time, an intent of the defendant, generally, to put his property beyond the reach of his creditors. The particular kind of conveyance, or its validity, or sufficiency, was not of any importance; nor was any inquiry made in regard to those matters. I think a general question of that kind was admissible. A general statement of a fact of which there is written evidence may sometimes be admitted, when a detailed account of the contents of the writing would be excluded. *Taylor* v. *Carpenter*, 2 Woodbury & Minot, 1.

HARVEY GARCELON *versus* HAMPDEN FIRE INSURANCE CO.

Where an applicant for insurance covenants in his application that it contains "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk;" and the policy declares that the application is made a part of the policy, and that the policy "is made and accepted upon the representations of the assured in his application;" the statements made in the application, if warranties, are such only so far as the facts stated "are known to the applicant, and are material to the risk."

But whether deemed to be representations, or warranties limited in their character, the question as to their materiality, and as to the knowledge of the applicant, is properly left to the jury.

Garcelon *v.* Hampden Fire Insurance Co.

ON EXCEPTIONS from the ruling of DAVIS, J., at *Nisi Prius*.

ASSUMPSIT upon a policy of insurance.

The policy contained the following clauses:—"This insurance is predicated upon an application or survey filed in the office of said Insurance Company as No. 332, which application or survey is made a part and portion of this policy, and warranty on the part of the assured." And it is moreover declared, &c., * * * "that this policy is made and accepted upon the representations of said assured, in his application for said insurance, and in reference to the conditions hereunto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, and not herein otherwise specially provided for."

The application referred to in the policy was for insurance on a stock of molasses, rum, alcohol, &c., in a distillery and still house, and, in describing the building, contained the words, "plenty of water upon the premises and force pump, and well ventilated." The sixth question in the application, "What is used for lighting?" was answered by the words, "Oil in close lamps."

The defendants' counsel contended that the statement in the application as to ventilation was a warranty, and the plaintiff must show a compliance with it before he could recover in this action. But the presiding Judge instructed the jury that it was not a warranty, but a representation; and if they were satisfied it was material to the risk, and false or not complied with by the assured, it was a defence to the action; but, if they were not satisfied it was material to the risk, or, if material, that it was not complied with or was false, it would not be a defence.

The counsel for the defendants contended that the sixth question and answer were a warranty; and that the plaintiff must show a compliance with it before he could recover. But the Judge instructed the jury that it was not a warranty, but a representation; and if they should be satisfied

it was material to the risk, and was false, or not complied with by the assured, it was a defence to the action, otherwise not.

The verdict was for the plaintiff, and the defendants filed exceptions.

Drummond, in support of the exceptions.

Fox, contra.

The opinion of the Court was drawn up by

APPLETON, C. J.—Policies of insurance vary in the language used. The conclusions, therefore, to which the Courts may arrive, must necessarily depend, in no slight degree, upon the terms in which the policy, and the application preceding it, are expressed.

The plaintiff, in his application, after answering the several inquiries proposed, "covenants and agrees to and with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances *in regard* to the condition, situation, value and risk of the property to be insured, *so far as the same are known to the applicant and are material to the risk.*"

The policy contains the following clause. "This insurance is predicated upon an application and survey filed in the office of said Insurance Company, as No. 322, which application or survey is made part and portion of this policy and warranty on the part of the assured. And it is moreover declared * * * that this policy is *made and accepted upon the representations of the assured in his application for said insurance*, and in reference to the conditions hereunto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto and not herein otherwise specially provided for."

If this is to be regarded as a warranty, it is one, the limitations of which are clearly expressed in the application. It is not an absolute warranty that each answer is true—but only that the answers are "a just and true exposition of

all the facts and circumstances in regard to the condition, situation, value and risk of the property, *so far* as the same are known to the applicant and are material to the risk." The warranty extends no further. The party applying and the party receiving the application must have understood it as warranting to the extent thus indicated. The knowledge of the applicant, therefore, and the materiality of the facts stated, were properly to be submitted to a jury. *Lindsey* v. *Union Mutual Fire Insurance Company*, 3 R. I., 157.

In reference to the statement in regard to ventilation, it may be observed, that it is not responsive to any inquiry, and, in such case, the burden of proof is on the insurance company to show its materiality and falsity. And these are to be determined by a jury. *Daniels* v. *Hudson River Fire Insurance Company*, 12 Cush, 417.

If it be doubtful from the words of a policy, whether certain statements made by the applicant relative to the subject of insurance are to be regarded as warranties or as representations, they will be regarded as the latter. *Wilson* v. *The Conway Fire Ins. Co.*, 4 R. I., 143. A statement in an application for insurance is to be considered a representation rather than a warranty, unless it is *clearly* made a warranty by the terms of the policy or by some direct reference thereto. *Daniels* v. *Hudson River Ins. Co.*, 12 Cush., 416.

That the answers referred to in the exceptions should be deemed representations, they being so termed in the policy, would seem hardly to be a matter of doubt, according to the case of *Houghton* v. *Manufacturers' M. F. Ins. Co.*, 8 Met., 114. So too, in *Elliot* v. *Hamilton M. F. Ins. Co.*, 13 Gray, 139, the same Court held language almost identically similar to that used in the present case, to be a representation rather than a warranty, and referred the materiality and truth of the answers to the determination of a jury.

But whether the answers are to be deemed representations or warranties limited in their character, their materiality

and truth were necessarily to be passed upon by a jury. If they were representations, it is not contested that such should be the case. If they were warranties, if the statements were immaterial, the plaintiff was not to be deprived of his policy. The limitation imposed, was, "so far as known to the applicant and material to the risk," and, with this limitation, the warranty is found not to have been broken. *Exceptions overruled.*

RICE, DAVIS, KENT and WALTON, JJ., concurred.

SETH SCAMMON, *Sup't of Reform School, versus* INHABITANTS OF WELLS.

It is provided by c. 37 of the Acts of 1858, that the expense of subsistence, &c., of a boy sent to the Reform School shall be defrayed by the town, *where he resides*, if in the State; otherwise by the town in which he commits the offence: — *Held* that the town of his *residence* at the time of his commitment, if within the State, is thus made liable, and not the town in which he committed the offence.

The statute makes it the duty of the magistrate to certify in his mittimus the town in which the boy resides, *if known:* which certificate shall be sufficient evidence in the first instance to charge the town. But the omission of the justice to certify the fact, will not defeat the right to recover, for the statute makes that right absolute, while the making of the certificate is conditional; and the fact of residence may be proved *aliunde*.

THIS was an action, by the plaintiff as Superintendent of Reform School, to recover to the use of the State, from the defendant town, for expenses incurred for the subsistence and clothing furnished one Frank L. Pinkham at the reform school, and expense of transportation of him to said school. The statute on which the suit is founded, is recited in the opinion of the Court.

The facts in the case sufficiently appear from the opinion of the Court, and the points made in argument.

M. H. Smith, for the plaintiff.

T. M. Hayes, for the defendants.

Every fact requisite to bring the case within the provisions of this statute should be alleged. Among other things, it was necessary to allege that the justice, before whom the conviction was had, certified in his mittimus that the convict resided in the defendant town, at the time of conviction. This is the plain meaning of the statute, which makes the town liable where the residence is at the time of conviction, and not at the time of the commission of the offence. The offence may have been committed any number of years before conviction. The phraseology of the statute is all in the present tense and applies to the time of conviction only.

The plaintiff's count asserts that the justice certified in his mittimus that the convict resided in Wells, at the time of the commission of the offence, but not that he resided there at the time of his conviction.

Again. This action must fail upon the testimony, because the mittimus does not certify that the convict resided in Wells at the time of his conviction. Such a fact, thus certified, is indispensable to the maintenance of this action. There must be an express, explicit certificate of this fact, in addition to the usual and necessary contents of a legal mittimus. This the statute clearly requires.

In this case the mittimus contains no such certificate. This statute should be rigidly construed. It is, to say the least, of doubtful validity when tried by the constitution of the State, for its tendency is to impose the burden of supporting *quasi* paupers upon towns, without any previous notice of their liability, or privilege of controverting the same, upon the shallow judgment or vicious caprice, or dishonesty, of some facile justice, many of whom are not distinguished for vigor of mind or incorruptible integrity.

The opinion of the Court was drawn up by

WALTON, J.—An Act of the Legislature, passed in 1858, (c. 37, § 2,) provides that when any boy between the ages

of eleven and sixteen years, is convicted of any one of the offences therein described, he may be sentenced to the reform school; and that "the expense of transporting such boy to the reform school and of his subsistence and clothing during his imprisonment, shall be defrayed by the city or town *where such boy resides*, if within this State, otherwise by the city or town where the offence is committed."

This action is to recover for expenses thus incurred; and it is objected that the action cannot be maintained, because the justice did not certify in his mittimus that the boy resided in the defendant town *at the time he was convicted*. The *third* section of the Act above referred to provides, that "it shall be the duty of the justice, before whom any boy is convicted, to certify, in his mittimus, the city or town in which such boy resides, if known; and that such certificate shall in all cases be sufficient evidence, in the first instance, to charge such city or town with the expense of such boy, not exceeding one dollar per week."

Do these provisions have reference to the boy's residence at the time of committing the offence, or at the time when he is committed to the reform school? We are satisfied that the statute has reference to the latter; and if, after having committed an offence, and before being committed to the reform school, a boy should change his residence, it is the city or town where the boy resides when committed to the reform school, and not the city or town in which he may have resided when he committed the offence, that is thus made liable for his support.

The justice certified in his mittimus that when the offence was committed the boy resided in Wells, but he omitted to certify where he resided at the time he committed him to the reform school. Is this omission a fatal objection to the plaintiff's right to recover? Clearly not. The right to recover is absolute, while the making of the certificate is conditional, depending upon the knowledge of the magistrate. Why the justice omitted to make the latter certificate does not appear. It may have been because he did not know

where the boy then resided, in which case it was no omission of duty. Such omission would not authorize the Superintendent to assume that the commitment was illegal, and to refuse to receive him into the reform school; and, having received him, the law is imperative that the city or town where he resides, if within this State, at the time of such commitment, shall defray the expense of transporting him to the reform school, and of his support while there, not to exceed one dollar per week. Such certificate, if made, is one sufficient mode of proving the fact, in the first instance, but, in the opinion of the Court, it is not the only legal mode. The fact may be proved by any other competent evidence, in which case the plaintiff will be entitled to recover the same as if such a certificate had been inserted by the magistrate in his mittimus.

Such being the opinion of the Court upon the questions presented for consideration, by the agreement of the parties, the action is to stand for trial.

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

NATHANIEL B. BEACH *versus* SARAH D. PENNELL.

In an action, where the question in issue is, whether the property in controversy *is* a part of an estate, of which one of the parties is an administrator, the parties are admissible as witnesses.

Thus, in an action of replevin for certain articles of merchandise, where the defendant alleged, by way of brief statement, that the property was part of an estate of which she was administratrix, the plaintiff was permitted to testify that the goods were not sold by him to the defendant's intestate, but consigned to him for sale.

EXCEPTIONS to the ruling of DAVIS, J.

THIS was an action of REPLEVIN for a quantity of cheese.

Plea, general issue, with a brief statement, in which it was, in proper form, alleged, that the defendant was the ad-

ministratrix of the estate of George W. Pennell; that the property replevied was a part of his estate, and was in his possession at the time of his death; that, on her appointment, as his administratrix, she took possession of the same, &c., and that the plaintiff had no title to the property. And further, that if the property had not been *sold* by the plaintiff to her intestate, he held the same as consignee—had made advances for freight, &c.,—that he had a lien upon the property for said expenses, and, as his administratrix, she rightfully had possession of the same, at the time the plaintiff brought this action, the lien not having been discharged.

It appeared that the defendant's intestate kept a grocery store, in Portland, and died suddenly, on the 14th day of October, 1860, leaving the cheese in question in his store, with other goods. The plaintiff was a farmer and manufacturer of cheese, residing in Vermont, and had been accustomed to sell cheese to said George W. Pennell, previous to the year 1860. The defendant was appointed administratrix of said Pennell's estate, Oct. 17th, 1860, and plaintiff made a demand upon her, for the cheese in question, on the 22d day of said October; and, the same not having been given up, commenced this action on the same day against her, personally, and not as administratrix.

The plaintiff, among other things, to maintain his action, relied upon an alleged parol contract made between himself and said George W. Pennell, at a personal interview at the the latter's store, in Dec., 1859, by which it was agreed that the plaintiff should send and said Pennell should receive the cheese in question, to be made the next season, to sell on commission; and, to prove such alleged contract, the plaintiff's counsel proposed to call the plaintiff himself as a witness. The defendant seasonably objected to his competency, but the Court overruled the objection and admitted the plaintiff as a witness. The defendant, after the plaintiff had been thus admitted generally as a witness, seasonably objected to his being permitted to testify what took place

at the interview aforesaid, between him and said George W. Pennell, respecting said cheese, or as to any matters and things relating thereto, happening before said Pennell's death; but the Court again overruled the objection and the plaintiff testified to the making of such alleged verbal contract, as aforesaid, between him and said Pennell, and that he sent the cheese in controversy to said Pennell, in his lifetime, under said contract, in September and the first of October, 1860.

The defendant offered evidence tending to show, that the cheese in question was sold and not consigned by the plaintiff to said George W. Pennell, in his lifetime, and was the property of said Pennell at his decease, and came rightfully into her hands and possession, in her said capacity of administratrix, as part of his estate.

The verdict was for the plaintiff, and the jury found specially that the property in the cheese, at the time of the commencement of the action, was in the plaintiff.

To the ruling of the Court the defendant excepted.

Fessenden & Butler, in support of the exceptions.

The statutes impose no hardship upon the living party, because he can so conduct his transactions and make his contracts that they may be susceptible of other proof than his own testimony.

This case itself is a good illustration of the wisdom of the exception contained in § 83, c. 82 of R. S. For a series of years the plaintiff had sold his cheese to the intestate. After the intestate's death, and insolvency of his estate, the plaintiff seeks, by his own testimony *alone*, to show a change, the last year, in this whole course of dealing and that the particular cheese in question, were consigned instead of sold.

This may or may not have been so in this particular case, but the point is, that it would be highly dangerous to found decisions, as a general rule, upon testimony of this kind, and that substantial justice in the long run would be better pro-

moted by its exclusion. The exception in the statute being founded on this principle, is not the defendant a "party defending," in her capacity as administratrix, fairly within its meaning?

She is so, we contend:—1st. Because it appears, by the pleadings themselves, that the defendant, in her said capacity, is "the party defending." It is true that she is not made a party as administratrix, by the plaintiff in his writ, but the writ is only a part of the record. The subsequent pleadings, by which the real issue in the case is raised, show that she is defending in her official capacity. And the averments therein are supported by the facts, as the case shows.

This is an action of replevin. The defendant's plea and brief statement are in the nature of an *avowry* at common law; where both plaintiff and defendant are actors, and either party may allege upon the record and prove material facts.

2d. If not technically a party to the record in her representative capacity, the defendant is "the party defending" in said capacity, within the language, the spirit, intent and object of the statute. She sets up no claim of her own to the property. The controversy is between the estate she represents and the plaintiff, in regard to it. The estate alone suffers or is benefited by the result. The controversy arose out of transactions which took place in the lifetime of her intestate, with which she had nothing to do, and of which she had no knowledge. Under the circumstances, it was her duty, as administratrix, to defend the suit, and she would have been unfaithful to her trust had she neglected to do so.

The language of the statute is peculiar; "when the party prosecuting or the party defending is," &c. It is evident that the word "party" is not used in the technical sense of party to the record, for then the words "prosecuting" and "defending," would be entirely superfluous. It would rather seem to mean the real party or person who is actually

prosecuting or defending the suit in distinction from the mere nominal party.

And, on the other hand, when an executor or administrator is made a mere nominal party at the suit of some third party, neither the language or the spirit of the 83d section would apply so as to exclude the testimony of either party. In such case they would not be "the party prosecuting or the party defending."

That the above is the true construction of the 83d section, appears from the fact, that administrators or executors, in the settlement of estates, frequently have occasion to bring actions in the name of third parties, as, for instance, upon choses in action, non-negotiable, belonging to their estates. Are they not parties prosecuting, in the sense of the statute? and does it not apply in such case as much as it would if they appeared parties upon the face of the record?

There are numerous cases also, in which it is admissible for executors or administrators to declare either in their individual or representative capacities.

Is the statute to receive such a construction that parties may have the power, by the mere change of the form of declaring, to admit or exclude testimony at their pleasure?

In this controversy concerning the property replevied, had the parties been reversed, and the present plaintiff, having seized the cheese and the present defendant thereupon replevied the same, she could have brought the action either in her individual or representative capacity. Would she not have been the party prosecuting in her capacity of administratrix, whether brought in one form or the other? And in the one case should the evidence be excluded, and in the other admitted, the controversy being all the time the same? And if she in the case supposed would be "*the party prosecuting*" in said capacity, is she not now equally *the* "*party defending*" in the same capacity?

J. C. Woodman, contra.

The opinion of the Court was drawn up by

DAVIS, J.—This is an action of replevin, brought to recover a quantity of cheese from the possession of the defendant, who refused to give it up, on demand being made therefor. Upon the trial, the defendant justified her refusal to give up the property, on the ground that it belonged to her late husband, and that she was administratrix of his estate. Whether she was justified, as administratrix, in withholding the property, depended on the question of title; and this was the issue presented.

The plaintiff offered himself as a witness, and she objected to his admission, on the ground that she was defending the suit as administratrix. He being admitted, she objected to his testifying to any facts occurring in the lifetime of her husband; and to the admission of the witness, and of such testimony, exceptions were taken by her counsel.

By R. S., c. 82, § 78, parties to civil suits are made competent as witnesses, in all cases, as far as there is any objection on the ground of interest. By § 83, an exception is made, "when the party prosecuting, or the party defending, is an executor, or administrator." So that parties are admissible as witnesses, in all such cases, *unless it appears, at the time of the trial*, that one of the parties is prosecuting or defending as an administrator or executor.

It is argued by the counsel for the defendant, and correctly, that the description of the parties in the writ is not conclusive. Nor is it material that either party is, in fact, an administrator of some estate, unless the subject matter of the controversy is a part of the *same estate*. And, until that fact appears, the *rule* must be applied, which admits the parties, and not the *exception*, which excludes them.

When, therefore, the very question in issue is, whether the property in controversy *is* a part of an estate of which one of the parties is an administrator, the parties are admissible as witnesses. For while that fact is in dispute, it does not yet appear that either party *is* an administrator *respect-*

ing such property. It is the duty of *the Court* to rule whether either party is such administrator; and when that is the fact on trial, before the jury, the Court cannot find that either party is then within the exception, so as to be excluded.

This principle has been applied to cases under this statute. Thus, on a trial of the question whether a will is valid, so that it should be approved, the person named as executor, not having yet assumed the trust, is admissible as a witness. *McKeen* v. *Frost*, 46 Maine, 239. So in the case of *Longley* v. *Rand*, decided in the western district, in 1862, it was held that one sued as an executor *de son tort* was admissible as a witness, on the ground that, if the statute applied to such executors, the question in issue was, whether the property was taken by defendant *as such an executor;* and, until that fact was *established*, he could not be excluded.

So in the case at bar, the question for the jury was, whether the defendant, in holding the property sued for, *acted as administratrix*. When the plaintiff was admitted to testify, it had not then appeared that she held the property as administratrix. It subsequently appeared, by the verdict of the jury, that she did not. If the verdict had been otherwise, it could not have affected a *previous* ruling of the Court.

It is argued that the design of the exception in the statute, was to exclude the testimony of one party to a contract, when the other party, being dead, could not be heard. And it is said that the case before us is within the mischief which the statute was intended to remedy.

If such was the design of the statute, then the Legislature were unfortunate in framing it. For such a purpose, there was no necessity that the *executor* or *administrator* should be excluded at all. But the statute excludes him, as well as the other party to the suit.

And besides, it very rarely happens that a suit at law turns upon the question *as to what any contract was*. A

large proportion of contested cases are for *torts*, in regard to which only *one* of the parties may have any *personal* knowledge. And in suits for the violation or non-performance of *contracts*, it often happens that *one* of the parties, only, can testify from any personal knowledge. In suits between indorsees, and makers or indorsers of negotiable paper, frequently only one of the parties, and perhaps neither, knows anything in regard to the original contract. And yet in all these cases, when prosecuted or defended by an administrator or executor, the living party, who may have some knowledge, must be excluded, because the other party, who may have known nothing of the matter, is dead. So that, if the rule, which admits parties to testify, is a good one, then the exception referred to works injustice as often as otherwise. When both parties are living, they seldom stand upon equal terms, in regard to the advantage of being witnesses. And therefore an absolute rule, that one shall not testify when the other is dead, is quite as likely to work mischief, as to remedy it.

Such being the general result, it is our duty to apply the statute according to its terms, whatever may be its effect upon any particular case. And, as the parties should not be excluded in any case, unless it appears, *as a fact not in controversy*, that one of them is acting as an *administrator or executor, in regard to the property or other matter in dispute*, the rulings in the case at bar were correct.

Exceptions overruled.

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

RICE, J., non-concurred.

UNION BANK *versus* ALFRED J. STONE.

In an action against an indorser of a promissory note, proof having been adduced of demand and notice, and the allegation of due notice being controverted by the defendant, it is no ground of exception that the presiding Judge called the attention of the jury to the fact that the defendant did not testify in the case, as a matter that they might consider, and give it such weight as they thought it might deserve.

Where a notary public testified that, at the maturity of a note, after making due demand, he prepared notice of the dishonor, and gave it to one S. to deliver to the indorser, a copy of which notice, in proper form, appears in his records; and S. testified that he was in the habit of delivering notices for the notary, and that he seasonably delivered to the parties to be notified, all notices handed to him for delivery, but had no definite recollection of doing so in the present instance; that he made out the notarial records in controversy at the time, and they were signed by the notary; — this evidence, uncontradicted, is sufficient to prove notice.

A notary may be permitted to state his usual course of proceedings, and his customary habits of business.

ON EXCEPTIONS to the ruling of KENT, J., at *Nisi Prius*, and on a motion for a new trial.

ASSUMPSIT against the defendant as indorser of a note of hand dated March 21, 1856. The defence was, want of notice.

Nathaniel Badger, notary public, called by the plaintiffs, testified that he had the note in suit on the last day of grace; made a demand on the principal, and he did not pay it; made notices to the indorsers. It being admitted that the defendant had been duly notified to produce at the trial the notice served on him, the witness was permitted, against the defendant's objections, to exhibit his records, and testify to a copy there recorded of the notices he made out for the indorsers. He further stated, that it was his custom to compare the notices he prepared, put them in envelopes, and such as he did not deliver himself to give to Benjamin S. Swift to deliver. In this case, he gave the notice for the defendant to Swift to deliver. He usually made up his record the same evening or the next morning. In this instance, the

record was made up by Swift, and signed by the witness. The witness made the protest himself, and Swift copied it into the record. He never completed a protest, or made a record of the mode of serving notice, until after Swift returned.

The deposition of Swift was introduced by the plaintiffs, in which he stated, amongst other things, that in 1856 he resided in Brunswick, and was a clerk in the post office, in which Badger was an assistant; that he sometimes aided Badger in his business as a notary, by copying notices to indorsers and protests, and by delivering notices; that he sometimes delivered notices to the indorsers personally, and sometimes at the dwellinghouses or places of business of the indorsers; that all notices left with him for delivery he delivered on the same day; that he did not make any memorandum of notices delivered by him, but sometimes informed Badger of having delivered notices, and that the information he gave him at such times was true.

The witness identified a book shown him as Badger's notarial record, and stated that the notices on the seventeenth page were in the witness' own handwriting, except the signature of Badger to each notice. The witness had no recollection of delivering the notices copied on that page to the defendant Stone, but recollected generally that he delivered notices to Stone during that year. The witness testified that their custom was to copy the notices into the record before delivery, and that he had no doubt that the notices on page seventeen were true copies of the original notices.

The presiding Judge instructed the jury, that it was a matter for their consideration, if Swift copied the record in this case on the same day, whether he did not know that the matters therein stated were true; and that the fact that the defendant did not appear to testify in the case, was a matter they might consider, and give such weight to it as they thought it might deserve.

The verdict was for the plaintiffs, and the defendant

excepted, and also moved that the verdict be set aside as against law and evidence.

Barrows, in support of the exceptions.

1. The testimony from the notary as to his customary manner of doing business was improperly admitted.

2. The testimony given by Badger and Swift that the record of the protest was in Swift's handwriting, the offering of that record in evidence, and the use that was made of it by the Judge in presenting the case to the jury, were alike improper. It was substantially admitting the declaration or admission of one of their witnesses, not under oath, to corroborate the testimony of another. *Commonwealth* v. *Chabbock*, 1 Mass., 144; *Smith* v. *Morgan*, 38 Maine, 468; *Chamberlain* v. *Sands*, 27 Maine, 458; *Law* v. *Payson*, 32 Maine, 521.

3. The testimony as to the time of making up the record, and the manner of serving notices, was wrongly admitted, in effect admitting hearsay evidence in support of the plaintiff's case.

4. No legitimate inference is to be drawn from the fact that the defendant did not volunteer his testimony in this case. He could not negative the proposition that the notice was left at his dwellinghouse. The plaintiffs might have called him, if they had any reason to suppose there was any fact within his knowledge favorable to them. The Judge erred in calling the attention of the jury to the fact of the defendant not testifying.

Fox & Barnes, *contra*.

The opinion of the Court was drawn up by

APPLETON, J.—This is an action against the defendant as an indorser. To prove notice, the plaintiffs introduced the notarial records of Nathaniel Badger, a notary public, and called said Badger, who testified that he made out notices to the defendant, a copy of which was in his book of records and was in due form; that he gave them to Benja-

min S. Swift, then in his employ, to deliver to the defendant, on the last day of grace; that, after he had delivered notices, or had been informed by Swift that he had delivered them, his notarial records were made out; that this was usually done on the evening of the day when and after such notices were given, or on the next morning, and that his records in the present case were written out by Swift and signed by himself.

From the voluminous testimony of Swift, it appeared that he was in the habit of delivering notices for Badger; that, he had no definite recollection of doing it in this particular instance; that, all notices finally handed him for delivery, he seasonably delivered to the persons to be notified; that, after this was done, he informed Badger what he had done; that, the information thus given was true; that, he made out the notarial records in controversy at the time, and that they were signed by Badger.

The defendant, though present in Court, was not a witness, and, though notified, did not produce the notice alleged to have been delivered him.

The presiding Judge in his instructions to the jury remarked that, "it was a matter for their consideration, if Swift copied the record in this case, on the same day, whether he did not know that the matters therein stated were true." This was a very natural suggestion, in the utterance of which nothing objectionable is perceived. Swift's memory must have egregiously failed, if he did not know the truth or the falsehood of the record, he was then making.

The objection mainly relied upon is found in the remark "that the fact that the defendant did not appear to testify in the case was a matter they might consider and give such weight to it as they thought it might deserve."

This presents a question of much importance, and which, as parties are now witnesses, will or may not unfrequently arise, in the trial of causes.

It is to be observed, that the Judge called the attention of

the jury to the fact of the defendant's not testifying, as one proper for their consideration, leaving its probative force and effect to their judgment, and without indicating any inference to be drawn therefrom, whether favorable or adverse to either party. It was a fact in the case and he called their attention to it.

If the jury regarded the defendant's omission to testify as an immaterial and unimportant fact, or if they drew from it an inference favorable to the defendant, he would have no ground of complaint. Certainly not, in case they regarded it as immaterial and unimportant.

They might, however, though not so specifically instructed, have deemed the defendant's absence from the stand as a circumstance entitled to some weight, (and of that weight they were the special judges,) and as tending to strengthen, in a greater or lesser degree, the case against him. If they did so, would the defendant have just cause of exception?

How stood the case? There was evidence proving, or tending to prove, that a notice of demand and non-payment had been given the defendant. He had been notified to produce it and did not. He was present and was not a witness. If he had never received such notice, he knew it, and, knowing it, would be little likely to omit an opportunity of stating a fact thus conclusively in his favor. The evidence tended strongly to charge him. A word from his lips might exonerate him from all liability. The pressure of adverse testimony seemed to demand the negation of all notice, if none had been given. If notice had been received, and the defendant knew it, he might well be silent. The utterance of the truth would establish the plaintiffs' claim. His only defence would be in the failure of proof on the part of his adversary. If he were a witness, he must either state the truth or a falsehood. If he testified truly, his hope of a successful defence was at an end. The defendant does not offer his own testimony. He prefers the adverse inferences, which he cannot but perceive may be drawn therefrom, to any statements he could truly give, or to any ex-

planations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse, than would be the testimony he would be obliged, by the truth, to give.

The fact of not testifying was obvious to the jury. They could not fail to perceive that here was evidence tending to charge the defendant as indorser—that, if in fact no notice was received, here was an opportunity to deny its reception—yet the defendant failed to make such denial. A witness on the stand, if he answer evasively, would not the jury regard such evasion as a discrediting circumstance? If a party is silent when interrogated, is not such silence tantamount to confession? *Habes confitentem reum.* Here the party declined to become a witness, and to exonerate himself from liability. If he truly could, would he not have been likely to do it?

No Court could perceive such a fact, without attaching some degree of importance—more or less—to its existence, according to the necessity of the testimony and the emergencies of the defence. No Judge exists, who would not, if the trial had been before him, regard this as a fact bearing on his decision. To direct a jury to disregard it, would be to direct them to disregard a fact existent, material and probative. However much so directed, they could not fail to perceive, and, perceiving, could not avoid regarding it.

The importance of any given fact or circumstance is ever varying—according to the ever changing facts and circumstances with which it is surrounded. The presiding Judge gave no specific directions as to the effect of this fact on the issue or of the inferences to be drawn therefrom. He merely adverted to it, leaving its significance to be measured and determined by the jury. Of all this, the defendant assuredly cannot complain.

In *Tufts* v. *Hathaway*, 4 Allen, (N. B.,) 63, the defendant might have been called as a witness, he knowing all the facts, but he was not. The presiding Judge instructed the jury, that they might infer, if the defendant had been call-

ed, that his evidence would not have benefited his case. In delivering the opinion of the Supreme Court of New Brunswick, CARTER, C. J., says, "we cannot consider this a misdirection. It is an inference so naturally arising to a jury themselves possessing ordinary sense and acumen, that such a remark might be hardly necessary; but it is clearly within the discretion of the Judge on the evidence which had been adduced, and on that which had not been adduced." So, it seems, the omission of the defendant in a criminal case to call as a witness a person in his employ and interest, who could probably explain facts, already proved, tending to show the defendant's guilt, if capable of being explained favorably to the defendant, may properly be commented on by the prosecuting officer, in his argument to the jury, as bearing upon the question of the defendant's guilt. *Com.* v. *Clark*, 14 Gray, 367. When the truth or falsehood of a fact that is material, is known to a party, to whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth. *Robinson* v. *Blen*, 20 Maine, 109.

It is allowable to permit a notary to state his usual course of proceeding and his customary habits of business. In *Miller* v. *Hackley*, 5 Johns., 383, VAN NESS, J., says, "the bill, when presented for acceptance, was refused and due notice given to the defendant. The evidence to this point consisted of the deposition of the notary, who stated that he presented the bill for acceptance, and protested it for non-acceptance. That it was his *usual practice*, as a notary, on the evening of the day of the protest, and in all cases of protest, to give notice in writing to the indorsers residing at a distance, by putting such notice in the post-office, directed to the party at his place of residence; and he had no doubt notice in this case was duly given, though, at that distance of time, he could not recollect positively; and that it was possible he might have given the notice to the holder to be forwarded."

"This evidence was sufficient, in the first instance, to sup-

port the averment of notice, and there being nothing to affect it, it will support the verdict."

Of a similar tenor are the remarks of SHAW, C. J., in *Stone* v. *Wiley*, 18 Pick., 561.

It is not necessary to notice particularly the objections to certain interrogatories and answers, in the deposition of Swift, to which exceptions have been taken, as, upon examination, we are satisfied they are entirely without foundation.

A careful perusal of the evidence in the cause leaves no reasonable doubt on our minds, that the defendant had due notice. The motion, for a new trial, must therefore be overruled. *Exceptions and motion overruled.*

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

CHARLES DAVIS *versus* ELISHA GETCHELL *& al.*

Every proprietor of land on the banks of a river or stream has naturally an equal right to the use of the water; and this right to use, implies a right to control, detain, and even diminish the volume of the water, but only to a reasonable extent.

What is a reasonable detention, depends upon the size of the stream, as well as upon the uses to which it is subservient, as the detention must necessarily be sufficient to accumulate the head of water requisite for practical use.

The right of detention is not limited to time necessary for repairs or to extraordinary occasions, but applies to the ordinary use of such streams, provided it be not an unreasonable use or detention.

ON EXCEPTIONS to the ruling of DAVIS, J., at *Nisi Prius*.

THIS was an action of the case for an alleged unreasonable detention of the water in a mill stream in Raymond.

The plaintiff and defendants were owners of mill privileges on the stream, that of the defendants being above the plaintiff's. The title deeds of each party were produced.

There was evidence tending to support the allegations in the plaintiff's writ, and evidence to the contrary.

The presiding Judge instructed the jury, amongst other things, that the defendants, being riparian proprietors, had a right to erect and maintain their dam, save the surplus water, and use it, in a reasonable manner; that the plaintiff, being a riparian proprietor below, upon the same stream, had the right to the natural flow of the current as incident to their privilege, unless such right, as existing at common law, had in some way been abridged; that although the plaintiff claimed, by the grants in his deeds and a reservation in one of the deeds of the defendants, a right greater than the natural current of the stream, the evidence did not sustain such claim; but was sufficient to authorize the jury to find that the plaintiff had the right to the natural flow of the stream at all times, unless it was necessary for the defendants for the purpose of making repairs, or by reason of some extraordinary occurrence, temporarily to detain the water; and if the defendants unreasonably detained the water, so that they deprived the plaintiff of the natural current of the stream, they were liable for the damages caused thereby.

The jury returned a verdict of $29,36 for the plaintiff, and the defendants excepted.

F. O. J. Smith, in support of the exceptions.

Shepley & Dana, contra.

The opinion of the Court was drawn up by

RICE, J. — The parties are riparian proprietors and mill owners on the same stream; the plaintiff's mill being located below that of the defendants. The complaint on the part of the plaintiff is, that the defendants, by means of their dam, unreasonably detain the water in its passage to his mill, to his injury.

Among other instructions, to which no objections are now made, the Court instructed the jury that, although the plaintiff claims by the grants in his deeds, and a reservation in one of the deeds of the defendants, a right greater than the

natural current of the stream, the evidence did not sustain a right to more than the natural current; but that the evidence was sufficient to authorize the jury to find that the plaintiff had the right to the natural flow of the stream at all times, unless it was necessary for the defendants, for the purpose of making repairs, or by reason of some extraordinary occurrence, temporarily to detain the water, and, if the defendants unreasonably detained the water, so that they deprived the plaintiff of the natural current of the stream, they were liable in damages.

The defendants complain of this rule as being more restrictive on them than the law authorizes.

Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his land, without diminution or alteration. No proprietor has the right to use the water to the prejudice of the proprietors above or below him, unless he has a prior right to divert, or a title to some exclusive enjoyment. He has no property in the water itself but a simple usufruct while it passes along. This right to use, however, necessarily implies a right to exercise a degree of control over it, and even, to some extent, to diminish its volume. Thus he may apply it to domestic purposes or purposes of irrigation, but not to such an extent as unreasonably to diminish its quantity. He may apply it to purposes of manufacture, or the arts, but may not, in so doing, corrupt it and so injure its quality as to render it unfit for use by other proprietors below. He may use it for hydraulic purposes, but may not unreasonably retard its natural flow, nor injuriously accelerate its motion, by discharging it from his works in an unreasonable manner, nor suddenly and in excessive quantities, nor divert it from its accustomed channel without returning it to the same before it passes from his own premises to those of others. Within these general limitations he may make any practicable use of streams of running water, so far as proprietors below are concerned, and incur no legal liability. The use in all these

cases must be a reasonable one. 3 Kent's Com., 439, note a; *Tyler* v. *Wilkinson*, 4 Mason, 401; *Springfield* v. *Harris*, 4 Allen, 494.

The reasonableness of the detention of running water by dams, by the riparian proprietor *above*, to the injury of a riparian proprietor *below*, depends much upon the nature and size of the stream as well as the use to which it is subservient. Ang. on Water Power, § 119.

In small streams, where the volume of water in its ordinary course would be insufficient for practical use, the law would authorize its detention for a reasonable time in which to accumulate a head which could be made available. *Hitchcock* v. *Deuchler*, 6 Barr., 32. It is only by thus accumulating water and then using it, that many small streams can be made practically useful as a power for propelling mills and machinery. And, so far from this detention being confined to times necessary for repairs or by reason of some extraordinary occurrence, it is the common and ordinary way in which the water power on such streams is made effective or valuable. The question in such case is whether the detention, under all the circumstances in the case, is an unreasonable use of the water, not whether it is unreasonably detained for the specific purpose of repair, or by reason of some extraordinary occurrence.

On this point we think the jury may have been misled by the instruction of the Court, and, therefore, the exceptions must be sustained.

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

APPENDIX.

OPINION

OF THE

JUSTICES OF THE SUPREME JUDICIAL COURT.

When one has been elected a county commissioner for three years, and resigns during the first year, it is provided by law that the Governor, with advice of the Council, shall appoint a person who shall hold the office until the first of January after another has been chosen to *fill the place.*

If, at the next election, a person be chosen, he will be entitled to hold the office only for the unexpired term of the officer who resigned, commencing on the first day of January after his election.

The person chosen, at the election immediately preceding the expiration of his term, is elected for the term of three years.

STATE OF MAINE.—IN COUNCIL,
AUGUSTA, Dec. 18, 1863.

ORDERED,—That the following statement of facts be submitted to the Justices of the Supreme Judicial Court, by the Governor, and that they be required to give their opinions on the questions appended thereto:—

At the annual meeting for the choice of State and county officers, held on the second Monday of September, A. D. 1860, John Hemingway of Shapleigh, in the county of York, was duly chosen to the office of county commissioner for said county of York, for the term of three years, in accordance with the provisions of the R. S., c. 78, § 2, and having been by the Secretary of State duly notified of that fact, was, on the first Monday of January, A. D., 1861, duly qualified and entered upon the duties of said office.

Said Hemingway having served in said office one year, resigned; the Governor then, by force of said statute, c. 78, with advice of the council, appointed Alfred Hall, of said Shapleigh for one year, or to fill said vacancy, who was duly qualified and entered upon the discharge of the duties

of said office, and served in the same until the first Monday of January, 1863.

On the second Monday of September, 1862, the cities and towns in said county of York gave in their votes for a county commissioner to fill the vacancy occasioned by the said resignation of said Hemingway, which votes being duly returned to the office of Secretary of State, duly counted by the Governor and Council, Samuel Hasty of Shapleigh was declared elected to said office, and was by the Secretary of State notified of said fact, and on the first Monday of January, 1863, was qualified, and entered upon the discharge of his official duties.

First interrogatory. — For how long a time was said Samuel Hasty elected to serve as county commissioner, by force of the statutes of this State in such cases made and provided?

On the second Monday of September, 1863, the inhabitants of the several cities and towns in said county of York, gave in their ballots for a county commissioner, to serve in said office for the term of three years from the first Monday of January, 1864; having been duly notified so to do, by an article in the warrant of each city and town in said county for calling the annual meetings on the second Monday of September in said year.

The proper municipal authorities of the several cities and towns in said county made due returns of said ballotings to the office of the Secretary of State, of the votes so cast, and said returns were duly counted by the Governor and Council, and Alfred Hall of said town of Shapleigh, in said county of York, had a majority of all the ballots so thrown for county commissioner as aforesaid.

Second interrogatory. — Is said Alfred Hall legally elected county commissioner for said county of York?

Bangor, 23d Dec., 1863.

The undersigned, Justices of the Supreme Judicial Court, have the honor to answer the questions proposed as follows:

By statute 1842, c. 3, it was provided that county commissioners should be elected in the several counties, and

that those first elected should continue in office one, two and three years; the tenure of their office being so arranged that one is to retire each year. A similar arrangement is made when new counties are established. After this, a county commissioner is to be chosen annually for the term of three years.

These provisions are substantially continued by reënactment in the last revision, c. 87.

When vacancies happen otherwise than by the expiration of the full term, provision is made for filling *the place* made vacant, by R. S. c. 78, § 3, which is in these words:— "When no choice is effected, or a *vacancy* happens by death, *resignation*, or removal from the county, the Governor, with advice of Council, shall appoint a person who shall hold office until the first of January after another has been chosen to *fill the place*."

John Hemingway was elected for the full term of three years. He held office one year and resigned. It then became the duty of the Governor and Council to make a temporary appointment to continue "until the first day of January after another has been chosen to fill the place." The *place* to be filled was the one made vacant by the resignation of Hemingway, whose original term of office had not then expired, but which will expire on the first day of January, 1864. That *place* has been filled by the election of Samuel Hasty for that specific purpose and no other.

The conclusions to which we have arrived, are, that Samuel Hasty was elected county commissioner to serve one year; and that Alfred Hall is elected county commissioner for the county of York.

JOHN APPLETON, C. W. WALTON,
JONAS CUTTING, J. G. DICKERSON,
WOODBURY DAVIS, WM. G. BARROWS,
EDWARD KENT.

To the Honorable the Governor and the Honorable Council of the State of Maine, Augusta, Maine.

RESOLUTIONS

OF THE BAR OF THE COUNTY OF YORK,

ON THE DEATH OF THE

HON. DANIEL GOODENOW, LL. D.,

LATE ASSOCIATE JUSTICE OF THIS COURT.

At the January term of this Court, A. D., 1864, Kent, J., presiding, Judge Bourne, chairman of the committee selected for that purpose, presented the following resolutions:—

Resolved,—That while the death of a good man carries its withering and sorrowful influences to the hearts made desolate by the bereavement, it cannot fail in having its appropriate effect on those associated with him in other relations of life; and that, as members of the Bar of the county of York, of which he has long been a valued and distinguished member, we cannot but recognize the death of the Hon. Daniel Goodenow as a great loss to our association. The memory of such an one must be honored by those whom it was a ruling principle of his life to honor, by his steady adherence to the high and noble principles which should ever actuate the legal profession—by his bright example of unwavering integrity, by judicial acumen always honestly exercised; and by all those moral attributes which distinguished him as a man and a christian.

Resolved,—That a copy of this resolve be transmitted to his sorrowing family.

Judge Bourne then made the following remarks:—

While it is a sad fact that so many of our personal friends, associate members of this Bar, have recently passed away, it is a pleasant thought that they have lived out their days as faithful and true men; faithful to their obligations as cit

izens, and to the special obligations assumed by their profession. I have been called within the last three or four years, to render before the Court, in this mode, all the tribute in my power to the memory of our deceased brothers, DANE, APPLETON and EMERSON; and now another honored name has dropped from our roll. Since the last term of this Court, Hon. DANIEL GOODENOW has been removed from his sphere of earthly action. I should do injustice to one whose kind fellowship I have long enjoyed, were I not to avail myself of the opportunity afforded by this occasion, to express my views of his worth and of the strong claims which he had on the respect and high estimation of a christian community.

Whenever the image of the good and the worthy comes up to the mind, many pleasant and useful memories at once cluster around it; and, for the while, we are cheered and excited onward by the contemplation of their personal virtues, toward those excellencies which made their lives so valuable and their companionship so dear. The memory of such men is a rich legacy, never fully appreciated; perhaps, in the final result of life, more than compensatory for all the sorrows of bereavement. In our limited view, the death of Judge GOODENOW may well be regarded as a great *loss* to the Bar; for he was one of its most honored and exemplary members, and justly entitled to all the encomiums which the public prints have bestowed upon him since his decease. Strongly attached to his profession, and regarding it as eminently fitted to draw to itself the honors of the community, it was with him a ruling principle, all his life long, to do what he could to preserve it from being dishonored by the unworthy deportment of any of its members; and at all times and in all places he was ready to denounce iniquity in the practice, by whomsoever manifested. Integrity and honest action he felt to be indispensable elements in the character of any one who claimed to rank himself among its members. He entertained the true idea of what a lawyer should be; and when he assumed the responsibili-

ties of professional life, he duly appreciated the solemnity of this consecration of himself to the important objects for which the legal profession is recognized as a part of the institutions of the land. He felt, that, as law was essential to the very existence of the government, so was it, therefore, the mission of every lawyer to bring his honest aid to the application and enforcement of its provisions — and hence, he looked on dishonesty and all low artifice in the practice, as meriting the scorn and contempt of every good citizen. This exalted view of the profession he had imbibed in early life; and the high estimation in which he held it, undoubtedly furnished the predominant motive, which impelled him to great exertions, to become one of its members; for he obtained his education at a great price.

Judge GOODENOW was not educated in the lap of paternal independence. His own exertions were the only agencies through which he obtained an admission to the bar. His education was earned; and being earned, he knew well how to prize and honor it. The various steps in his progress to intellectual and legal eminence, have been set forth in the public prints. His mind was active, and thus restless, in the home employments of his minority. This intellectual activity, this impulsive thought, urged him to aspirations for eminence in other fields of labor. He devoted himself to study; stored his mind with the elements of education; assumed the responsibilities of a teacher; and, in process of time, so far progressed in classical studies, and in the whole curriculum of college instruction, as to enter the senior class of Dartmouth College, in its advanced state; a feat which very few, even after graduation, would be able to perform. He studied law, both before and after he left the institution, with the Hon. John Holmes at Alfred, and was admitted to the bar in 1817.

But he did not feel that his life-work was then accomplished, as is too common with the profession. Neither did he feel that he was a lawyer or a man, merely because thus initiated to the practice; but he rather felt, that the educa-

tion of his moral, social and professional manhood was all before him; that the great business of life was, to grow. This was ever after his rule of action; and having this view, Judge GOODENOW never ceased in the appropriate studies of his profession. Though not favored with a firm physical constitution, as material to intellectual as to manual activity, he was always zealous in the pursuit of knowledge. Idleness was no attribute of his character. By this constant exercise of his powers, he was enabled to attain to that honorable standing in his profession, and in political life, to which a commendable ambition may well aspire. He was elected and appointed to various responsible offices, even, as I regard it, to the highest in the State; and, from his fidelity to duty, and his distinguished intellectual attainments, was honored with the highest laurels which our colleges can bestow.

But, in my view, his memory is far more precious, from his high moral culture, and the social and domestic attributes of his character, than from those elements which made him eminent in his more public relations. It is sometimes said, in derogation of one's standing and worth, that he is a man "of one idea." But no more exalted character can be given to a man, than that which may be implied in such an affirmation. The ruling idea of his life was, that right, or the law of God, was the first of all human obligations; and in all his pursuits, even political and professional, I do not believe that he ever lost sight of his high moral standard. The one idea of right was always allowed to guide him in his intercourse and employments. I enjoyed occasionally for many years, those benefits which always result from the true, honorable and respectful demeanor of opposing counsel; and never, do I believe, in all his contests at the bar, where, to the earnest and faithful lawyer, excitement is almost inevitable, did he, for a moment, forget the proprieties of his position as counsel, or as a gentleman. I never saw him, but once, evince anything like irritation; and that was when opposing counsel, imprudently and groundlessly, im-

puted to him an intention to deceive, in eliciting testimony. His quick, delicate sensibilities could not remain unmoved under such an imputation, and his reply to the charge was replete with salutary instruction to the transgressor.

The same sense of the obligations of right and truth ruled in his judicial action. As has been said in some sketch of his character, he believed that all law was designed for the promotion of justice and the well being of society; and that our jurisprudence was a system of principles, and not an aggregation of authorities, as found in our innumerable Reports, and Digests—many of which are but the annunciations of indolent, inconsiderate and uneducated judges, led on ministerially, rather than judicially, by a current of decisions, to results altogether adverse to sound law. Thus he did not regard such authorities as entitled to such deference as to be permitted to come in, to subvert the very objects for which our judiciary was established. But it would be presumptuous in me, who have been absent from the bar during nearly his entire official term, to attempt any delineation of his judicial character, when your Honor, from many years' association with him on the bench, must be so much better versed in that matter than I possibly can be.

As said before, I had rather remember Judge GOODENOW for his many personal virtues—for that moral stamen from which emanated his whole character; for his respectful and gentlemanly demeanor; for his liberal and philanthropic spirit; for his fearlessness and independence in the expression of his opinions; and for his self-consecration to the great purpose of his being; his exalted view of the dignity of the human soul, and the high destiny of man; his christian faith and christian practice; his life in the footsteps of the Saviour, whose disciple he was, without guile and without reproach.

Having these views of his character, it gives me pleasure to be the organ of the bar, in communicating to the Court the request that these resolves may be entered on the records, that they may bear perpetual testimony to his worth.

JUDGE KENT'S REMARKS.

It is a source of mournful satisfaction to me, to be the organ of the Court in receiving these testimonials, by the members of the bar, of regard and respect for the memory of our late brother GOODENOW. This Court, of which he was so recently an honored and highly esteemed member, joins, most sincerely, in the public and private grief which his death has occasioned, and in the appropriate and feeling tribute which has just been offered. I am sure that it is not the mere cold and formal performance of a duty, imposed by custom or required by usage, that has prompted the members of this bar to express their grief and their regrets, and their high appreciation of his professional and personal character, in words so fitly chosen. It was here, in this ancient and honored county of York, that his whole professional life was passed, and it was with his brethren of this bar that he lived and struggled and won an honest fame and an honorable place. And it is alike honorable to the dead and to the living, when, after years of service on the bench, he had returned amongst them, "a brother beloved," and in one short year had been suddenly called from their midst, that a meet tribute to his character and his virtues is by them placed on enduring records.

It was not my fortune to see much of our brother at the bar, as we resided in parts of our State distant from each other; but I early knew of the high position he held in our honorable, liberal and laborious profession. But it was my good fortune to commence public life, as his contemporary, in the first decade of our existence as a State; and the friendship then formed, and thus early commenced, remained unbroken with no intermission, and increasing as years silvered our heads, and brought us to the days when our labors were drawing to their close.

Judge GOODENOW has always been a marked and prominent man, and he has ever exerted a decided influence on society. This was the result of talents cultivated and wisely

employed, of character unsullied, and integrity unquestioned, of that combination of intellectual and moral qualities which in their development give the world "assurance of a man," true to himself and true to his fellow-man.

There was something in his character and in his success worthy of examination and imitation. His early life was one of struggle, with adverse circumstances, — but this has been the fortune of many. He met and overcame obstacles — and so have most of the leading men of our country. But it always seemed to me, that our deceased friend early formed a *plan of life* and adhered to it. That, in his years of early manhood, without wasting his days in repining, he *fixed* his *aim* high; and an earnest ambition to be a man among men, — and they among the highest, stimulated him to excel. But he laid the foundation on which he hoped to rise, not on low, cunning, or mean intrigues, or sycophantic flattery, but on the solid basis of integrity, sincerity and industry — hoping and striving always for honor and success, — but compassing "noble ends by noble means," and spurning everything which would justly lower him in the estimation of good men, and would wound and tarnish his conscientious sense of right and duty. Tracing the life thus commenced, we find, in its development and its history, the formation of a character less marked by startling brilliancy, than by solid worth and firm principle, and the useful and honorable performance of the duties of daily life. In manners, courteous and dignified, he was firm in his convictions, and decided in avowing and maintaining them.

Judge GOODENOW had great *self-respect*, which, no doubt, in his earlier years and through his whole life, stood sentinel against low temptations and degrading or corrupting associations or habits. It never took the form of arrogance or of undue assumption, or of ascetic life, or of aristocratic contempt of those around him. But it was the result of a proper appreciation of his own character and position, of the true dignity of human nature, and of watchful care, that, whatever else befel, his own self-respect should not

be lost or clouded, by misfortune, or by the malevolence or misconstruction of others. It produced in him a high sense of personal honor, which, whilst it rendered him courteous and gentlemanly, and genial in social life, could repress insults, and check unseemly license, with dignity and effect.

He was a *frank* and a *sincere* man. He meant what he said, and he said what he meant. He was true, not merely in words — but in his instincts and in his life. He professed nothing that he did not feel, and promised nothing that he did not intend to perform. His convictions were clear and strong, and held unwaveringly, and with few misgivings, and he was ever true to them in word and in deed. But he was not dogmatic or offensive in uttering and maintaining them. What he claimed for himself he yielded to others. His popularity was never the result of that weakness or selfishness which fears to form a distinct opinion, or to express it when duty calls, but of the conviction, which even those who differed from him felt, that he was sincere and honest and truthful, and that, whilst ever true to his friends, he was never false even to an opponent — or to an enemy — if he had one.

The professional life of our brother was honorable and successful. He seemed to have early formed a right appreciation of its true character and highest dignity. It was never with him a mere trade, by which money was to be gained and a living secured. It was not to him an instrument to be used for chicanery and oppression, or to extort unjustly, by bye paths and indirection, the hard earnings of the unlearned and confiding. It was never with him a cover to conceal, under forms of law, the grasping spirit of avarice, and he never stirred up strife among his neighbors, that fees might flow into his coffers. To the just and reasonable and honorable pecuniary rewards for his professional labors he was not indifferent, but he claimed them as rightly paid for laborious and valuable service. But he felt, as every true and high minded professional man must feel, that there are higher rewards and higher motives than those that

are merely mercenary, which should move and excite him to action.

No man who does not honor his profession can be honored by it. But the upright lawyer, who has spent his days and nights in preparation, and has mastered his profession in its principles and in its details, and stands up as the advocate of his fellow-man, when his interests, his character, or his liberty are in question, always feels that he has assumed a responsibility, which mere money can never adequately recompense. And, when engaged in the conflicts of the forum, earnest and faithful in presenting the cause of his client, and while true to him and his duty, equally true to the Court and to himself, he thinks not an instant of his pecuniary reward, but he exerts his best powers of eloquence and argument in the discussion of great principles or minute details, with no other feeling than that of duty, and with no other thought than of the honorable fame which may follow from its performance. As soon would the true soldier, in the hour of the sternest strife on the battle-field, think of his pay and rations.

Judge GOODENOW brought to the bench the learning, the experience, and the maturity of mind and judgment acquired in his many years of laborious industry at the bar. He gave to the State his best powers, and he faithfully strove to administer justice without fear or favor, and, as far as possible, to reconcile the equity of particular cases with the established principles of law. The characteristics to which I have alluded, and which have been spoken of by our brother, were manifested in a marked degree in his judicial career. He was there, as everywhere, independent and firm—impartial and just—more anxious to do his duty and satisfy his own conscience, than to gain temporary applause. He claimed no exemption from error, but he must be convinced of his error before he would yield to the decision of a majority. When he left the bench, at the expiration of his term of office, we all felt that the State had lost a faithful, devoted and honest servant, and he retired with

honor, carrying with him the best wishes of his colleagues and of the whole people.

It is cheering to contemplate such a life in all its parts until its earthly end. With no adventitious advantages, with no uncommon natural powers, but starting on the voyage of life with good sense and good purposes, and amid difficulties and trials and dangers, and the shoals and rocks, keeping his eye fixed on his polar star, he steers his course, ever "steady with an upright keel," never relaxing in his purpose, or yielding to fear or despondency, until his bark is safely moored in its last harbor and resting place. Well may we — well, especially, may all young men pause and contemplate and study such an example.

Alas! how often is it otherwise! When one, who can look back, through a long vista of years, recalls and counts up the multitude of young men, who commenced life with him, with fair promise, full of hope, and talent, and ambition, and joyous anticipation, and with honest and earnest purpose to excel, and then numbers the wrecks caused by want of a steady aim and a fixed plan of life, and remembers how many sank by yielding to sensual indulgence, or enervating indolence, or to the syren song of pleasure, luring them on to the rocks, or yielded themselves willing victims to that scourge of our land, intemperance, or fainted under difficulties, or gave up in despair at early failures of extravagant hopes, or by reason of disappointments which they had not manliness and strength of will enough to make stepping stones for new efforts and thus surmount them: when the vast mass of ruin lies before him in his memory, he would fain turn from it and the sorrow which it creates, to the contemplation of the life and history of those who, like our deceased brother, have weathered the storms and sailed over the seas in safety and with success. In the one class the young man may find beacons to warn — in the other, charts to guide him in the voyage of life.

Our brother's death was startlingly sudden. And yet it was to him "no unthought of hour." He had fixed his

thoughts through life, and especially as it drew towards its close, on the high themes of death and immortality. He had the faith, and he lived the life of a rational christian. The foundation of all that was estimable and valuable in his character was his devout sense of responsibility to his Maker. The summons did not find him unprepared. His life's work had been done, and well done. He had reached the allotted time for man on earth. He had borne himself honorably through life, and possessed the love of his family and the esteem of his neighbors. With no stain on his character as a citizen, a christian, or as a man, but with a high and enviable reputation in all these relations, he has gone down to the grave in the fulness of his years, without suffering and without the wasting pains of protracted sickness.

Although nature may prompt us, ordinarily, to join in the prayer of the Litany for the deliverance "from sudden death," yet there are cases when we can but feel that among the blessings of the good man's life, not the least may be the sudden summons which calls him away from suffering and sorrow, and from those years of protracted life which have no pleasure in them. "*Felix—non tantum vitæ claritate, sed etiam opportunitate mortis.*"

The resolutions of the bar will be entered on the records of the Court, and, as a further mark of respect, the Court will now adjourn.

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ABATEMENT.

See PLEADING. FLOWAGE, 6, 7. REAL ACTION, 3.

ACTION.

1. An action (authorized by c. 22, § 4 of R. S.) to recover double the price of building the defendants' part of a divisional fence, is prematurely brought, if commenced before the expiration of "one month after demand." *Sanford* v. *Haskell*, 86.
2. In such a case *indebitatus assumpsit* will not lie; it should be an action of the case, setting forth all the facts necessary to be established, to fix the defendants' liability. *Ib.*
3. The law is now well settled, that an action on an indorsed note or bill of exchange may be maintained in the name of a nominal plaintiff with his consent. *Demuth* v. *Cutler*, 298.

See ASSUMPSIT. ATTORNEY, 6, 7. COLLECTOR OF TAXES, 11, 12. HUSBAND AND WIFE. INSURANCE, 5.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AGENCY.

If an agent neglects his directions, to insure a cargo shipped to him, and it arrives safely, although he would be liable to the owner for damages in case of loss, he cannot maintain an action against the owner for a premium on insurance. *Storer* v. *Eaton*, 219.

See EVIDENCE, 5. MORTGAGE, 6.

AID TO SOLDIERS' FAMILIES.

See SOLDIERS' FAMILIES, AID TO.

AMENDMENT.

An amendment of the writ, charging a different cause of action, will not be allowed. *Cooper* v. *Waldron*, 80.

See EQUITY, 6, 7, 8, 11. PRACTICE, 4.

APPEAL.

See PROBATE COURT, 3, 5.

ASSUMPSIT.

1. A, the owner of the right of redemption of certain land of which B held a mortgage, gave a deed of the land to C, and took a mortgage from C to secure a part of the purchase money. The mortgage was recorded, but the deed was not. Afterwards W took an assignment of the latter mortgage; but, in the mean time, M, a creditor of A, attached A's right of redemption, seized and sold it, and the purchaser's title was perfected by lapse of time. W, not knowing of M's attachment and sale, and without consulting the records, tendered to B the amount due on his mortgage, which B accepted, and discharged the mortgage. — *Held*, that W cannot maintain assumpsit against B to recover back the money paid to redeem the premises from the first mortgage, as his loss resulted from his own neglect to examine the records and make due inquiry as to prior incumbrances. *Wilson* v. *Baker*, 447.

2. The fact that W was ignorant that A's deed to C was unrecorded will not avail him, as this, also, he could easily have learned from the records. *Ib.*

3. W and B negotiated *ex adverso;* and B was not bound to know that W was not aware of the prior attachment, nor to inform him thereof without being inquired of respecting it. *Ib.*

See ACTION, 2. PARTNERSHIP, 1, 7.

ARBITRATION.

1. Where a report of the majority of referees is recommitted, for the specific purpose of having them certify that the disagreeing referee acted with them in the trial of the case, but refused to sign the report, they may thus amend their report, without the knowledge or presence of their dissenting associate. *Brown* v. *Vassalborough*, 64.

2. Even if the statute provided that referees might certify a report of evidence to the Court, a report certified by one, only, would be insufficient, especially when it does not purport to be in behalf of the board. *Ib.*

3. The submission of an action to referees is a waiver of all formal defects in the writ, and in the service thereof. *Hix* v. *Sumner*, 290.

4. When two parties submit a matter in controversy to arbitrators, although in terms somewhat vague and indefinite, they have power to determine both the validity and the amount of the claim in dispute, unless restricted by the terms of the submission. *Colcord* v. *Fletcher*, 398.

5. But the award of arbitrators, being in the nature of a judgment, in order to be valid, must ascertain and decide as to the matters submitted, so that it shall not be the cause in itself of a new controversy.
Colcord v. *Fletcher*, 398.

6. Thus where, in case of a claim by one part owner of a vessel against another part owner, for insurance collected by the latter, the award was, that "there is due to C. the amount collected on policy of insurance held by F., for his, (C.'s) sixteenth part of barque S.," it was held to be invalid, as not determining that F. had received any money on the policy, nor, if any, how much. *Ib.*

7. The law does not require that referees, whom the parties have agreed upon, should be sworn; notwithstanding the agreement to refer confers upon them the powers of commissioners, who by law must act and determine on their oaths. *Bradstreet* v. *Erskine*, 407.

ATTACHMENT.

See MORTGAGE OF CHATTELS, 2, 5.

ATTORNEY.

1. An attorney, who prosecutes a bastardy process to final judgment and execution, has a lien for his services and disbursements upon the bond given by the respondent in that process; and he may maintain a suit thereon to recover his claim, notwithstanding the complainant in the original process has given a full discharge to the obligors. *Bickford* v. *Ellis*, 121.

2. Until the rendition of judgment in an original suit, the attorney's lien does not attach; but when judgment has been obtained, an execution issued, and the lien has attached thereto, it extends to suits arising from, and incidental to the enforcement of the judgment. *Newbert* v. *Cunningham*, 231.

3. In a replevin suit, in which judgment has been rendered for the defendant, the attorney has a lien on the execution in his hands, which issued thereon; and, *to the extent of the lien*, is to be regarded as an equitable assignee, with rights, co-extensive with those of his client, to any remedial suit to obtain satisfaction of the same. *Ib.*

4. The right to enforce the replevin bond arises from the judgment, for by enforcing it the judgment is made available; and the attorney, as an equitable assignee, has a right to enforce it, to the extent of his lien, which the obligee in the bond cannot defeat. *Ib.*

5. If the execution recovered against the makers of the bond cannot be collected or satisfied by reason of their insolvency, the officer will be liable for taking a bond with insufficient sureties, to the person to whose benefit, the bond, if good, would accrue. *Ib.*

6. And the attorney has the right to prosecute such action, in the name of the defendant in the replevin suit, to whom the bond was made; and his settlement with, and discharge of, the officer, will not defeat the attorney's right to recover. *Ib.*

7. The right of action against the officer does not accrue till after the lien of the attorney becomes perfected by the rendition of judgment in the replevin suit; and the statute of limitation in such case, does not, till then, commence to run. *Newbert* v. *Cunningham*, 231.

8. If the judgment, in the first suit, is for costs only, the execution is a notice of the attorney's lien. But, in this State, the statute does not require the attorney to give notice that he claims his lien. *Ib.*

9. The attorney's lien extends only to such professional services as are taxed and included in the execution. *Ib.*

See POWER OF ATTORNEY.

BAILMENTS.

1. The owner of property, in order to recover of a common carrier for hire, damages for loss or injury to the property, — after proving a contract, express or implied, for the carriage of the goods, and the delivery of them to the carrier, — needs only to show further that the goods have not arrived or have received injury, unless the carrier proves the performance of his contract. *Tarbox* v. *Eastern Steamboat Co.* 339.

2. A bill of lading signed by the carrier, acknowledging the receipt of the goods, "to be delivered in good order to A at B," is *prima facie* evidence that they were in good condition when received by the carrier, but is not conclusive, and the carrier may prove that the goods were damaged before they came into his possession. *Ib.*

3. In such a case, the burden is on the carrier to exhibit such proof. *Ib.*

4. It is not important whether the words "in good order," or "well conditioned," or both, are used in the receipt or bill of lading, the phrases being substantially synonimous. *Ib.*

5. Where the burden of proof is thrown upon one of the parties by the state of facts presented, it does not shift from one to the other as the weight of evidence varies by the introduction of fresh testimony, but rests on the same party on whom it was thrown at first, until the proof is such as to present a new and distinct question. *Ib.*

6. In a suit against a common carrier for hire, for loss or injury to goods delivered to him to carry, the burden is not on the owner to show affirmatively that the loss or damage was occasioned by neglect or want of diligence on the part of the carrier, as would be required in the case of an ordinary bailee. *Ib.*

BANK.

1. By an Act, accepting the surrender of the charter of a bank, its corporate powers were continued for a specified time, for the collection of debts then due the bank: — *Held*, that it was within the scope of its authority, to take a new note in payment of one then held by the bank, although the indorsers of the two notes were not the same. *Mariners' Bank* v. *Sewall*, 220.

2. The statute forbids a director of a bank to sign as a surety the bond of its

cashier, therefore his obligation to indemnify others against loss, to induce them to become sureties, is void. *Jose* v. *Hewett*, 248.

3. So, too, a mortgage, to secure the performance of such an obligation, is invalid. *Ib.*

4. As no legal liability, on the part of the director, is created by his obligation, a conveyance of real estate, by him to the bank, based thereon, and to make good a defalcation of the cashier which had occurred, is without legal consideration; — a gift, fraudulent in law, as against prior creditors, unless it appears he has sufficient estate left to satisfy the claims of the creditors. *Ib.*

5. In an action by a bank against the maker of a negotiable note, evidence is not inadmissible to prove, that the note was given by him, with the express understanding with the officers of the bank, that it should be used only for exhibition to the Bank Commissioners to increase the apparent assets of the bank, and was to be used for no other purpose. *Lime Rock Bank* v. *Hewett*, 267.

6. And this may be shown by the maker himself in a suit by the bank, he being a competent witness to prove the facts. *Ib.*

7. The opinion of the cashier as to the consideration of the note, based upon the coincidence of figures made by a former cashier upon the books of the bank, cannot be admitted in evidence. *Ib.*

8. By the Act of amendment, § 62 of R. S. of 1841, the number of receivers to be appointed by the Court, to take possession of the property of a bank, on application of the Bank Commissioners in case they deem the bank unsafe, is left to the discretion of the Court, or of the Justice by whom the appointment is made. *Wiswell* v. *Starr*, 381.

9. If one of three receivers is removed, or resigns, it is discretionary with the Court, to appoint another person in his stead, or allow the two remaining to act without the appointment of another. *Ib.*

10. *On suggestion*, that certain stockholders, who were defendants, were not residents of this State, and therefore, the Court had not jurisdiction as to them, *it was held*, that the bill could not be dismissed on a mere suggestion. *Ib.*

11. When receivers are appointed in any case, a lien is created by statute (c. 47, § 74, R. S. of 1857) upon the real estate, situate in this State, of the stockholders liable for claims which exist against the bank; therefore, the Court has jurisdiction over the real estate of non-resident stockholders. *Ib.*

See EQUITY, 7, 13.

BETTERMENTS.

1. In a real action in which the tenant claimed betterments, the value of the improvements, and also of the land without any improvements, both at the time of the entry thereon, and at the time of the trial was ascertained; and the demandant afterwards elected to abandon to the tenant: *it was held*, that

the sum to be paid by the tenant was the ascertained value of the premises, at the time of trial and not at the time of entry. *Cary* v. *Whitney*, 322.

2. Where the parties agree upon certain persons to ascertain the value of improvements on land demanded, and also the value of the land, as provided by § 3, c. 104 of R. S., and exceptions are taken to the acceptance of their report, which are overruled, interest will be allowed on the sum from the time of the acceptance of the report at *Nisi Prius*. *Cary* v. *Whitney*, 337.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note, given on Sunday, is void, as between the parties; and a subsequent promise to pay it, will not make it valid. *Pope* v. *Linn*, 83.

2. The law is now well settled, that an action on an indorsed note or bill of exchange may be maintained in the name of a nominal plaintiff with his consent. *Demuth* v. *Cutler*, 298.

3. In an action against an indorser of a promissory note, proof having been adduced of demand and notice, and the allegation of due notice being controverted by the defendant, it is no ground of exception that the presiding Judge called the attention of the jury to the fact that the defendant did not testify in the case, as a matter that they might consider, and give it such weight as they thought it might deserve. *Union Bank* v. *Stone*, 595.

4. Where a notary public testified that, at the maturity of a note, after making due demand, he prepared notice of the dishonor, and gave it to one S. to deliver to the indorser, a copy of which notice, in proper form, appears in his records; and S. testified that he was in the habit of delivering notices for the notary, and that he seasonably delivered to the parties to be notified, all notices handed to him for delivery, but had no definite recollection of doing so in the present instance; that he made out the notarial records in controversy at the time, and they were signed by the notary; — this evidence, uncontradicted, is sufficient to prove notice. *Ib.*

5. A notary may be permitted to state his usual course of proceedings, and his customary habits of business. *Ib.*

See BANK, 5. EVIDENCE, 2, 3.

BOND.

See COLLECTOR OF TAXES. MORTGAGE, 14, 15.

COLLECTOR OF TAXES.

1. Where a town voted to accept a collector's bond if signed by certain sureties, and a bond was prepared with the names of the proposed sureties inserted in it, but, after a part of them had signed, one refused, and his name was erased, after which the remaining sureties placed their names to the bond: — in a suit on the bond against the collector and his sureties, for a default of the collector, the verdict of a jury against the defendants will not be disturbed,

although the evidence was conflicting, as to whether the co-sureties, who signed before the erasure of one of the names, consented to the change or not. *Readfield* v. *Shaver*, 36.

2. Instructions to the jury, that if any surety signed the bond upon the condition that all whose names were accepted by the town should sign, otherwise the bond should not be delivered, such surety would not be liable, if all did not sign, unless he subsequently waived the condition; but that if, without that condition, he signed for the purpose of indemnifying the town for any breach of duty by the collector, and the bond was left to be delivered and used for that purpose, and was so delivered, the surety would be bound, notwithstanding he may have expected, when he signed it, that all would become sureties whose names were accepted by the town, — were not objectionable. *Ib.*

3. A party who signs an instrument which creates a liability is ordinarily presumed to know all its contents, if no fraud is practised upon him; but if a surety signed a bond after one of the names accepted by the town had been erased, it is immaterial whether he knew it or not, if he did not annex to his act the condition that the bond was not to be delivered until all those accepted by the town had signed. *Ib.*

4. The neglect of the municipal officers to enforce the collection and paying over of the money until some time after the year was out, or to take the tax-bills from the collector, did not release the sureties on the collector's bond. *Ib.*

5. Where a person was collector of taxes for two successive years, and at the end of the second year proved to be a defaulter, he had a right to appropriate payments made by him to the town to either year, at the time he made each payment; if he failed so to appropriate them, the town might appropriate them as they desired; and, if no appropriation was made by either, the law would appropriate such payments to the oldest debts, although the whole deficit is thereby made to fall on the second year. *Ib.*

6. Where a person was collector of taxes for two successive years, and the sureties on his official bond were not the same the second year as the first, in a suit on one of the bonds for an alleged default, it is for the defendants to show what part of the deficit belonged to each year. *Ib.*

7. Although the proceedings of a town are very irregular and informal, at a meeting where assessors, treasurer and collector of taxes are elected, and taxes voted to be assessed, yet the collector is legally bound to pay over to the treasurer *de facto* all taxes voluntarily paid to him by the tax payers. *Trescott* v. *Moan*, 347.

8. Although the collector's bond is inartificially drawn, and is vague, indefinite and uncertain, yet it is not void, if, when taken in connection with the tax bills and other evidence in the case, it contains sufficient to give it force and validity. *Ib.*

9. A collector's bond dated August 15, 1854, and reciting that he was "chosen collector of taxes for the year next ensuing," it appearing that he was chosen in 1854, that his tax bills bear date that year, and that he collected that year's taxes, will be deemed to have reference to the municipal year 1854. *Ib.*

10. A bond obligating the collector "faithfully to discharge his duty as collector," although otherwise defective, is sufficient to hold him to pay over money which he has actually collected, and which in equity belongs to the town. *Trescott* v. *Moan*, 347.

11. A collector of taxes cannot compel payment by suit, except in those cases in which the statute expressly confers that right. *Packard* v. *Tisdale*, 376.

12. An action cannot be maintained by a town collector, upon a promise to pay him a tax, in consideration that he will forbear to collect the same in the manner required by law, although by such neglect he becomes liable to account for the tax and actually pays it to the town. *Ib.*

COMMON CARRIER.

See BAILMENTS.

COMPLAINT.

A complaint, charging the commission of an offence "at said A.," which place is immediately before described as a city in the county of K., sufficiently alleges that the offence was committed in that county. *State* v. *Baker*, 45.

CONSTITUTIONAL LAW.

1. The Legislature, undoubtedly, has constitutional jurisdiction over remedies; but after all existing remedies have been exhausted, and rights have become permanently vested, all further interference is prohibited. *Atkinson* v. *Dunlap*, 111.

2. Thus, enactments are found abridging the period of former limitations, which are rendered constitutional by a *proviso*, that suits may be commenced within a certain time after their passage, but none reviving and extending a limitation with such a provision. *Ib.*

3. A judgment of Court becomes final when, by the then existing laws, the time for a review and for reversal for error, has expired; it then becomes a vested right, by force of the constitution and the existing laws. *Ib.*

4. And a statute, designed to retroact on such a case, by reviving the right of review, is unconstitutional and void. *Ib.*

5. And such was the statute of 1859, c. 94, if such was its intendment. *Ib.*

6. But that statute should be construed as intended to be prospective, and so, constitutional; it was thus additional and cumulative, — operative, only for a period of six months, when, by its terms, it expired. *Ib.*

CONTRACT.

1. Where A had agreed in writing to pay the debt of another, and B, in a postscript, subscribed by him, added, "I will be accountable with A, according to the above writing," an action lies against both as joint contractors. *Castner* v. *Slater*, 212.

2. The discontinuance of, an action, by the plaintiff, against the debtor, and another as his trustee, in which there was a reasonable prospect of charging the trustee, was a sufficient consideration for the promise.
Castner v. *Slater*, 212.

3. By the terms of the contract, the plaintiff was to be paid, when the debtor received his money, in the hands of the trustee. The trustee afterwards, with the debtor's consent, gave his promissory note to a third person, and took the debtor's receipt for the money: — *and it was held*, that, in legal contemplation, this was a payment to the debtor, by which the defendant's promise became absolute. *Ib.*

See EVIDENCE, 1, 3, 6. LOGS AND LUMBER, 2.

CORPORATION.

1. Where the directors of a corporation had, by vote, authorized the treasurer to procure "a seal for the company, bearing the title of the corporation with the year of its charter," and scrip issued by the corporation, duly authorized and signed, bore a printed impression of a seal with the title and date inscribed, and contained the words, "In testimony of which" "the seal of said company," &c., is "hereunto affixed," such scrip was held to be under the corporate seal, and that an action of covenant broken may be maintained thereon. *Woodman* v. *Y. & C. R. R. Co.*, 549.

2. At common law, "the impression of a seal is not a seal," as remarked by the Court in *Mitchell* v. *Union Life Insurance Co.*, 45 Maine, 104; but, under the present statutes, bonds issued by a corporation impressed with a seal, declared on their face to be sealed, and accepted as such by the holders, are deemed to be under the corporate seal. *Ib.*

COSTS.

In an action commenced in this Court to recover a penalty, which is "not to exceed one hundred dollars," the jury assessed damages for the plaintiffs at one cent — one-fourth of which sum only, the plaintiffs are entitled to, as costs. *Houlton* v. *Martin*, 336.

See USURY.

COUNTY COMMISSIONERS.

1. When one has been elected a county commissioner for three years, and resigns during the first year, it is provided by law that the Governor, with advice of the Council, shall appoint a person who shall hold the office until the first of January after another has been chosen to *fill the place.*
Opinion of Justices, 607.

2. If, at the next election, a person be chosen, he will be entitled to hold the office only for the unexpired term of the officer who resigned, commencing on the first day of January after his election. *Ib.*

3. The person chosen, at the election immediately preceding the expiration of his term, is elected for the term of three years.
Opinion of Justices, 607.

DEED.

1. A conveyed to B a portion of a lot of land of a certain width, and extending so far in length "as will make precisely twenty acres;" and immediately afterwards A and B, by mutual agreement and survey, marked the lines and corners of the granted premises by spotted trees and stakes. The next year, A conveyed to C the remainder of the lot, more or less, bounding it on the east "by the west line of B's land." B and C occupied their several parcels according to the line marked by A and B, for about twenty-five years. In the meantime, B, by the decision of a lawsuit between him and a third party, had his lot widened on one side four rods, and in consequence relinquished two rods on the other side. C, without any suit, conformed his lines to B's new ones. But the division line between B and C, and their occupation of their respective parcels, continued as before. In an action brought by C's grantee to recover of B's grantee all of the original lot except twenty acres, it was *held*, that the parties intended, in the conveyance from A to C, to bound the land conveyed by the well known marked line then existing, and not by an imaginary west line of B's land to include therein "precisely twenty acres." *Faught* v. *Holway*, 24.

2. After an acquiescence by all the parties in a line so established, for a length of time sufficient to give a title by disseizin, it will not be disturbed, although the occupation has not been such as, aside from the marking of the line, would amount to a continuous disseizin for the whole time. *Ib.*

3. A conveyance absolute in form only, for a consideration grossly inadequate, the grantor retaining a valuable interest, made with the intent, by both parties, to delay creditors, is void, as well against subsequent creditors and *bona fide* purchasers, as against existing creditors, whether they have notice of the fraud or not. *Wyman* v. *Brown*, 139.

4. An estate of freehold, to commence *in futuro*, can be conveyed by a deed of bargain and sale, operating under the statute of uses. *Ib.*

5. Conveyances which derive their validity from our own statutes, and are executed in accordance therewith, will be upheld, although they purport to convey freeholds to commence at a future day. *Ib.*

6. If a deed contains two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold under that which will be most beneficial to him. *Esty* v. *Baker*, 325.

7. If some of the particulars of the description of land conveyed do not agree, those which are uncertain, and liable to error or mistake, must be governed by those which are more certain. *Ib.*

8. In a deed conveying a gristmill, with the land and privileges where it is situated, "necessary for and attached to said gristmill, hereby meaning to convey all the lands and mill privilege (not heretofore sold by us) on the dam connected with said gristmill and privilege," the effect is to convey all the land and privilege not before sold by the grantor, and connected with the

mill and privilege, and not merely what is strictly necessary for and attached to the mill. *Esty* v. *Baker*, 325.

9. But if the parties have, by their acts and occupation, treated the grant as embracing, not all the lands and privilege *on the dam* not previously sold, but all the lands and privilege *connected with the gristmill* not previously sold, the Court will not interfere to control their construction. *Ib.*

10. Where a deed of part of a township refers to a survey and plan of the township by A and B, surveyors, and it appears that A and B have never made any survey and plan jointly, but after A had surveyed the exterior lines of the township, B took A's field notes, surveyed the interior lines, and made a plan of the township, and it is shown that other deeds have been made by the same grantor, with a similar reference under like circumstances, the plan and survey made by B, with the help of A's field notes, may be regarded as the one referred to in the deed. *Black* v. *Grant*, 364.

11. Where a deed conveys the south half of a lot of land in a township, "butted and bounded as follows," and then proceeds to describe the whole of the south half of the township, up to the south line of land deeded to G, (the owner of the north half,) it will be construed to convey the south half of the township, as, in a case of doubtful construction, a deed is to be construed most strongly against the grantor, and in favor of the grantee. *Ib.*

See BANK, 4. MORTGAGE, 10, 11. POWER OF ATTORNEY. REAL ACTION, 5.

DEMURRER.

See EQUITY, 2, 4, 5.

DOMICIL.

1. A domicil once acquired continues till a new one is gained. While in transit the old domicil remains. *Littlefield* v. *Brooks*, 475.

2. An inhabitant of A on 30th March leaves that place with the intention of residing in C; on 1st April he arrives at B and the next day reaches C, where he establishes his residence. It was held, that for the purposes of taxation he was to be deemed an inhabitant of A on 1st April, and was liable to taxation *there*. *Ib.*

DOWER.

1. Where premises were assigned by metes and bounds to the widow, by commissioners appointed by the Judge of Probate, who made no return of their doings, the assignment is ineffectual; but the widow, having entered into possession of the premises thus assigned, and held the same without objection on the part of the heirs, (although some of them were minors at the time,) for more than twenty years, the inference is legitimate, that the dower was assigned with their assent; and, no complaint being made that the assign-

ment was inequitable, there is no rule of law which requires that it should now be disturbed. *Austin* v. *Austin*, 74.

2. In an action for dower in woodland, if the demandant fails to show that the woodland is, in some way, connected with improved land in which she is dowable, so as to give her the right to take the wood therefrom, and that it is necessary that she should have and exercise that right, the action will not be sustained. *Ford* v. *Erskine*, 227.

EQUITY.

1. It is not required to set forth minutely in a bill in equity the mode of proof of an alleged fact — a statement of the facts is sufficient, without stating the evidence by which it is expected to prove them. *Lovell* v. *Farrington*, 239.

2. *Thus* — where it is alleged that a mortgagee "*by his assignment* in writing on said deed, sealed with his seal," (date and consideration stated), "*conveyed and assigned* to the complainant all his right, title and interest in the same, together with the debt secured thereby and all his claims in and to the mortgage; *all which will more fully appear* by said deed and the assignment when produced in Court," — it was held sufficient on demurrer, although there is no allegation in the bill, that the assignment was acknowledged and recorded. *Ib.*

3. When one of the mortgagers refuses to join in a bill for the redemption of the mortgaged estate, he may be properly made a defendant party, if, from the allegations in the bill, it appears that he still has an interest. *Ib.*

4. And his demurrer, for wrong joinder, will not be sustained; — he should discharge himself by his answer and proofs. *Ib.*

5. Cases in equity, on demurrer to the bill, are for hearing by the law Courts. (R. S., c. 77, § 17.) *Hewett* v. *Adams*, 271.

6. Leave to amend the bill should be moved for at *Nisi Prius*, the amendments presented and acted upon, that the aggrieved party may have opportunity to except to the decision. *Ib.*

7. A bill in equity instituted against the stockholders of a bank, by three persons who had been appointed receivers of the bank, may be amended, by striking out the name of one of them, who was a stockholder, and inserting it as a defendant party. *Ib.*

8. In such a bill, if the liability claimed against the stockholders extended to the amount of the stock, but no specific ground for that liability was stated, an amendment may be allowed, alleging loss by the official mismanagement of the directors, (R. S. of 1841, c. 77, § 44) which may properly be regarded as a specification of the claim. *Ib.*

9. But before a bill can be maintained against the stockholders under the provisions of that statute, it must be judicially determined that there has been a loss thus occasioned in the capital stock, and that the directors are unable to make good the loss. *Ib.*

10. The provisions of § 47, c. 47, expressly authorize an individual creditor of the bank to maintain a suit to determine these questions. *Ib.*

11. When the claim in the bill, by the receivers against the stockholders, was for contribution for the payment of the claimants against the bank, their liability *as stockholders* is the basis of the claim; and an amendment founded on § 45 of c. 47 of R. S., which made more specific the ground of their liability, was allowed. *Hewett* v. *Adams*, 271.

12. The bill may be maintained against *cestuis que trust*, notwithstanding the trustees also are parties. *Ib.*

13. So, as to wives holding in trust for their husbands. *Ib.*

14. Where a bill in equity was filed before the R. S. of 1857 went into effect, by § 2 of the repealing Act of that year, the statutes of 1841 are continued in force for the prosecution by such suit of all rights and remedies existing by those statutes. *Wiswell* v. *Starr*, 381.

15. If evidence of the truth of facts alleged in a motion to dismiss a bill in equity is not furnished, the sufficiency of the facts to support the motion will not be considered by the Court. *Ib.*

16. A man died, leaving children of age, and children under age. By his will, he directed that the "income" of his estate should be applied, under the "control and management" of his widow, as executrix and trustee, to provide support and furnish a home for his minor children until a period named, so that they should have "the same privilege and assistance the older children had enjoyed" in his lifetime. And the remainder of the estate, after paying a legacy, he directed to be divided equally amongst all his children, at the end of the period. But the annual income proved inadequate for the purposes expressed by the testator. It was *held*, that a Court of Equity may give relief, by ordering a sale of part of the estate, for the purpose of adding to the income, and fulfilling the intention of the testator. *Elder* v. *Elder*, 535.

17. *It seems*, that this may be done, not only in cases where it is the future estate of the beneficiaries alone which will thereby be broken in upon, but even where the future estate of others will be diminished, to supply the present need of the beneficiaries. *Ib.*

See PARTNERSHIP. POWER OF ATTORNEY.

ERROR.

When, for error, a judgment is sought to be reversed, the error must affirmatively appear; for the judgment will not be held to be erroneous when, from aught that appears, it may have been legally rendered. *Spaulding* v. *Rogers*, 123.

EVIDENCE.

1. In an action to recover for labor done, if the defendant, in the specification of his grounds of defence, does not deny the performance of the labor, but admits it, and alleges a special contract and payment, the plaintiff will not be required to offer proof of its performance, to entitle him to some portion of the damages claimed, unless the defendant shall establish by evidence some ground of defence. *Skillings* v. *Norris*, 72.

2. Parol evidence is inadmissible to prove that a promissory note was intended as a receipt for money put into the defendant's hands, by the payee, to be loaned for him. *Shaw* v. *Shaw*, 94.

3. It seems now well settled that parol evidence of an oral agreement, *made at the time* of making or indorsing a note, cannot be permitted to vary or contradict the terms of the written contract. *Ib.*

4. Where the burden of proof is thrown upon one of the parties by the state of facts presented, it does not shift from one to the other as the weight of evidence varies by the introduction of fresh testimony, but rests on the same party on whom it was thrown at first, until the proof is such as to present a new and distinct question. *Tarbox* v. *Eastern Steamboat Co.*, 339.

5. Proof of the declarations of an agent after his agency has ceased, if inconsistent with his present testimony, may be admitted to affect his credibility, but is not to be regarded as evidence of facts to influence the jury in determining the points at issue in an action brought by a third party against the principal. *Holmes* v. *Morse*, 102.

6. The defendant accepted an order for the payment of a specified sum "*when* he sold certain wharf logs." Three years after its acceptance, a suit was brought upon the order, and the defendant was permitted to show his inability to effect a sale of the logs, notwithstanding he had used all common and ordinary means to do so. *Wilder* v. *Sprague*, 354.

7. The question of unreasonable delay in making the sale was properly submitted to the jury. *Ib.*

8. Where an assignment of a mortgage was taken by one party, when another party paid the consideration of the assignment, whereby an implied trust resulted in favor of the latter, parol proof to show the payment, and by whom made, is admissible in a suit at law, notwithstanding the statute of frauds. *Kelley* v. *Hill*, 470.

9. Where the issue to be tried is, whether a sale of certain goods was made to defraud creditors, and the vendor is a witness to disprove any fraudulent intent, he may be asked, on cross-examination, if, on the same day, he made a conveyance of other property, to a third person, (a relative), although the instrument of conveyance be not produced; — as such inquiry relates to a fact collateral to the main issue, and is admissible on the question of intention. *Phinney* v. *Holt*, 570.

10. In an action, where the question in issue is, whether the property in controversy *is* a part of an estate, of which one of the parties is an administrator, the parties are admissible as witnesses. *Beach* v. *Pennell*, 587.

11. *Thus*, in an action of replevin for certain articles of merchandise, where the defendant alleged, by way of brief statement, that the property was part of an estate of which she was administratrix, the plaintiff was permitted to testify that the goods were not sold by him to the defendant's intestate, but consigned to him for sale. *Ib.*

See BANK, 5, 6, 7. BILLS AND NOTES, 4, 5. MORTGAGE, 6. RECEIPTER, 3.

EXCEPTIONS.

See BILLS AND NOTES, 3. PARTITION, 11. PRACTICE, 9.

EXECUTION.

1. Under the provisions of the Revised Statutes of 1841, and of stat. 1856, c. 278, § 1, relating to levies on real estate, the return of an officer that, on a day and hour named, he "seized and took in execution" certain lands of the debtor, and set off the same by metes and bounds to the creditor in satisfaction of an execution, referring to the annexed certificate of the appraisers for a description of the premises set off, is sufficiently definite.
French v. *Allen*, 437.

2. The time named in the officer's return when he "seized and took in execution" the lands, was the commencement of the service of the execution, and all subsequent proceedings relate back to that time. *Ib.*

3. Such a levy takes precedence of a mortgage recorded the day after the time named when the officer "seized and took" the land in execution. *Ib.*

4. Where the officer's return, *as recorded*, states that one "was chosen an appraiser by *me* in behalf of the within named creditor E. P., and I was then notified of the same," and the original, on inspection, leaves it in doubt whether the word written was *me* or *and*, it is to be regarded at most as a clerical error, and the rest of the sentence as showing that the creditor, and not the officer, must have selected the appraiser referred to. *Ib.*

5. It was not necessary that the nature of the estate appraised should be described in the officer's return under R. S. of 1841, c. 94, § 7. *Ib.*

See HOMESTEAD EXEMPTION. HUSBAND AND WIFE, 4.

EXECUTORS AND ADMINISTRATORS.

1. The law requires, that the bond to be given by an administrator, before sale of real estate of his intestate, shall be approved in writing by the Judge of Probate. *Austin* v. *Austin*, 74.

2. But, where the evidence fails to show, affirmatively, that the bond was thus approved, and the contrary does not appear, — if the case discloses, that all the other necessary steps were taken with strictness and accuracy; that the sale was public; that the purchaser entered immediately and has held the premises for more than twenty years; that the law required such approval before the bond could be filed, and that the bond was actually filed, — the law fully authorizes the conclusion, that all was done, which was required, to give the purchaser a perfect title. *Ib.*

3. The right which the administrator has by statute to set off any claim he may have in his official capacity upon one of the heirs, against the distributive share of such heir, does not apply to articles of personal property ordered by the Judge to be specifically distributed to such heir.
Rose v. *O'Brien*, 188.

4. Neither does the administrator's right of set-off create a lien upon any article of personal property specifically distributed to such heir under the decree of the Judge of Probate. *Ib.*

5. A policy of insurance on a vessel, obtained for the benefit of the owners, after a specific distribution of shares in the vessel had been ordered by the Judge,

cannot inure to the benefit of the administrator, whose interest had ceased, and whether it was for the benefit of the distributee is matter of proof.

Rose v. *O'Brien*, 188.

See EVIDENCE, 10, 11. HUSBAND AND WIFE, 1, 2.

FENCES.

1. An action (authorized by c. 22, § 4 of R. S.) to recover double the price of building the defendants' part of a divisional fence, is prematurely brought, if commenced before the expiration of "one month after demand."

Sanford v. *Haskell*, 86.

2. In such a case *indebitatus assumpsit* will not lie; it should be an action of the case, setting forth all the facts necessary to be established to fix the defendants' liability. *Ib.*

FLOWAGE.

1. The judgment upon a complaint under the statute, to recover damages caused by flowing lands, is not conclusive upon the parties except for the time embraced in it, and for one year after that time.

Billings v. *Berry*, 31.

2. The damages, accruing after the complaint is filed, must be assessed in *yearly* sums, reckoning from the date of filing the complaint; and the judgment should embrace all the yearly payments that have become due when it is rendered. *Ib.*

3. The notice, preliminary to bringing a second complaint, may be given at the end of a year after the expiration of the time embraced in the judgment upon the first complaint, although it is less than a year after the rendition of such judgment. *Ib.*

4. A judgment upon an order of the Law Court, certified to the clerk in vacation, must be entered up as of the last day of the preceding term. *Ib.*

5. A judgment upon a complaint for flowage, on an order of the Law Court, certified to the clerk in vacation, can properly embrace only the sum due on the last day of the preceding term, although another yearly payment is due before the certificate is received. *Ib.*

6. A motion in abatement of a suit can be sustained only upon matters of record. If allegations, requiring proof of matters of fact *dehors* the record, are embraced in such a motion, they will be disregarded. *Ib.*

7. A motion in abatement of a complaint for flowage, alleging "that said complaint was brought before the expiration of one year after the rendition of judgment upon the original complaint," is properly overruled. *Ib.*

8. In a complaint for *flowage* it was held to be no objection that the damages for three years were assessed in one aggregate sum.

Bradstreet v. *Erskine*, 407.

9. Execution may issue for damages to the time of the finding of the verdict; and, when the case has been referred, to the time of making the award.

Ib.

FORGERY.

1. On the trial of an indictment for making and uttering a forged deposition, to procure a divorce by the respondent from his wife; —

1. No exceptions lie to the refusal of the presiding Judge to allow the respondent, on cross-examination of the person whose signature to the deposition is alleged to be forged, to ask whether the statements in the deposition are not true. (KENT, J., dissenting.)

2. The jury are authorized to infer an intent to defraud from the character of the instrument, if they find it to be forged; and a refusal to instruct the jury that "intent to defraud cannot be presumed from the simple fact of manufacturing or forging such deposition," is not erroneous.

3. The presiding Judge properly declined to allow the jury, at the request of the respondent, to take with them to their room the Revised Statutes, and his requested instructions, which had been given no further than they were embraced in the general charge.

4. It is not necessary to allege in such indictment an intent to defraud any one *of property*, nor on the trial to prove that the respondent intended "to defraud his wife of money, or other property, or to do an injury unnecessarily to her character." The statute against forgery is not so limited.

5. The belief of the respondent in the truth of the statements in the deposition, and the fact, that his object in forging it was to procure a divorce, to which he believed himself legally entitled, are no defence.

6. A requested instruction, that the respondent could commit no fraud in law *upon his wife*, was properly refused.

7. A deposition taken out of this State by a justice of the peace or notary of the State where it is taken, or any other person lawfully empowered, is legally receivable in evidence, at the discretion of the Court, under our statute, although the caption does not conform in all respects to the statute requirements for depositions taken in the State. And the certificate of the justice, &c., of his official character, is *prima facie* evidence of his qualification.

8. When the caption of such a deposition states that "it was written down by the authority of the undersigned, justice of the peace," and omits to state that it was written by him, or in his presence and under his direction, and there is a clerical error in the name of the Court to which the deposition is returnable, it, nevertheless, may, at the discretion of the Court, be received as evidence.

9. The indictment need not allege who was intended to be defrauded; nor the means to be used in the commission of the fraud; nor the object to be accomplished thereby; nor contain the full contents of the libel for divorce.

State v. *Kimball*, 409.

2. The forging of any writing, by which a person might be prejudiced, is forgery at common law. *Ib.*

3. Our statute in relation to forgery and counterfeiting does not repeal the common law, but merely prescribes a different punishment in the cases enumerated in it, from that provided by the common law. *Ib.*

FRAUD.

1. Where, by the fraudulent representation of a purchaser, a contract for the

sale of a horse has been made, and the horse delivered, the vendor, having rescinded the contract, may peaceably enter into the premises of the fraudulent vendee, if not forbidden, and take his property.
Wheelden v. *Lowell*, 499.

2. The question, whether an actual tender is dispensed with, is for the jury, where one party, for the fraud of the other, has rescinded a contract, and is willing and ready to return what he has received, but is prevented by the declarations of the other party, that he will not receive it. *Ib.*

3. In what cases a fraudulent intent will be inferred from the declarations of a party to a contract. *Ib.*

See DEED, 3. EVIDENCE, 9.

HOMESTEAD EXEMPTION.

1. Where the "head of a family or householder" claiming the benefit of c. 207, of the laws of 1850, caused his certificate to be recorded *after* a judgment (for costs) had been entered up against him, the premises described in his certificate will not be exempt from the levy of any execution that may be issued thereon. *Mills* v. *Spaulding*, 57.

2. And if the debtor so long neglect to pay the judgment that no execution can be issued, and a suit is brought on the judgment, the execution that afterwards issues may be levied on the premises, notwithstanding it includes interest and costs that have accrued *after the recording* of his certificate of exemption. *Ib.*

HUSBAND AND WIFE.

1. An action, in the name of husband and wife for injuries sustained by her, survives; and the husband may withdraw, that the administrator may come in and prosecute. *Norcross* v. *Stuart*, 87.

2. In such a case, the husband cannot be considered a party after the death of the wife; but, if made her administrator, he may prosecute in that capacity. *Ib.*

3. Since the Act of 1852, c. 227, the wife may deed directly to her husband. *Allen* v. *Hooper*, 371.

4. Where the right of redeeming a levy is in the husband, the wife, in the absence of proof, is presumed to occupy the estate levied upon in subordination to the legal title, and not adversely thereto. *Ib.*

See MARRIED WOMEN.

INDICTMENT.

An indictment for perjury is fatally defective, from which it does not appear with certainty, that at the time the offence is charged, the tribunal, which administered the oath, and before which the testimony was given, had jurisdiction of the matter then on trial. *State* v. *Plummer*, 217.

See COMPLAINT. FORGERY.

INFANT.

1. Ejectment may be maintained against an infant for disseizin, that being a tort. *Marshall* v. *Wing*, 62.

2. But he must appear and plead by guardian, or the judgment will be erroneous; otherwise, if, pending the suit, he attains to full age and afterwards pleads. *Ib.*

INSURANCE.

1. A mortgage is not such an alienation of property as will defeat a policy of insurance which provides that if the property insured is alienated, the policy shall be void. *Smith* v. *Monmouth M. F. Ins. Co.*, 96.

2. A bond of defeasance will convert a deed, absolute in its terms, into a mortgage if such bond is seasonably recorded; and such bond is seasonably recorded if done before it is introduced in evidence, and before any change of title has taken place, or the right of any third party has attached. *Ib.*

3. Such a case is distinguishable from *Tomlinson* v. *Ins. Co.*, 47 Maine, 232, as in that, the bond introduced had not then been recorded. *Ib.*

4. When a policy, if assigned without the consent of the insurers, is to be void, and the assured executes an assignment to be delivered, after such consent has been obtained, but not delivered, because consent was withheld, the assignment is inoperative to affect the rights of the parties. *Ib.*

5. Where the party who procured the policy, a total loss having subsequently occurred, has collected of the insurance company the amount insured, an action for money had and received may be maintained against him by the assignee of a person who was a part owner when the insurance was effected, for his share of the money, if commenced before such share had been paid over to the assignor. *Rose* v. *O'Brien*, 188.

6. If a policy of insurance on a vessel expires while she is supposed to be on a voyage, and a second policy for a different sum is taken, after the expiration of the first, there is, in this country, no rule of law which requires payment of that policy under which the vessel sailed, or was last heard from, in the absence of proof of the time of loss. *Clifford* v. *Thomaston Mut. Ins. Co.*, 197.

7. It is a question of fact for the jury to determine *when* a presumption of loss arises. So, also, in case of loss, the *time* it occurred. *Ib.*

8. Where an insurance company was authorized to cancel such of its stock notes as the company should deem to be worthless, if all its corporate powers had been vested in a board of directors, the cancellation of such notes, by the *directors*, was held to be equally effectual; and an assessment made upon the amount of the remaining notes, a valid assessment. *Maine M. M. Ins. Co.* v. *Neal*, 301.

9. Where its by-laws provide for an assessment for the payment of losses "after the earned premiums shall have been used up," if there be earned premiums that are uncollectable and worthless, they may properly be regarded as "used up;" and whether the claims were worthless was a question of fact for the jury. *Ib.*

10. And an instruction to the jury that — "if the company had not assets enough on hand unappropriated, and dues collectable, to pay these losses, they could make the assessment, to the amount of such deficiency and not otherwise," affords the defendant, in a suit to recover the assessment upon his note, no ground for exception. *Maine M. M. Ins. Co.* v. *Neal*, 301.

11. Nor has he any just ground for complaint, that the directors did not strictly comply with the by-laws, and credit to the makers of the notes the nett profits of a certain year, it appearing that both for the year preceding and that subsequent, the losses greatly exceeded the profits; for thereby he sustained no damage, his assessment being so much less. *Ib.*

12. Where an applicant for insurance covenants in his application that it contains "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk;" and the policy declares that the application is made a part of the policy, and that the policy "is made and accepted upon the representations of the assured in his application;" the statements made in the application, if warranties, are such only so far as the facts stated "are known to the applicant, and are material to the risk."

Garcelon v. *Hampden Fire Ins. Co.*, 580.

13. But whether deemed to be representations, or warranties limited in their character, the question as to their materiality, and as to the knowledge of the applicant, is properly left to the jury. *Ib.*

See AGENCY. EXECUTORS AND ADMINISTRATORS, 5.

INTEREST.

See BETTERMENTS, 2.

LAND AGENT.

See LOGS AND LUMBER, 1.

LAW AND FACT.

1. In an action to recover damages for malicious prosecution of a civil suit, the *malice* to be proved is a question of fact for the jury; *probable cause*, upon facts established, a question of law. *Cooper* v. *Waldron*, 80.

2. The presiding Judge may either order a nonsuit of the plaintiff, or direct a verdict for the defendant, if, in his opinion, the facts admitted, or clearly established, are not sufficient to prove a want of probable cause, notwithstanding evidence, in defence, has been introduced. *Ib.*

See EVIDENCE, 7. FRAUD, 2. INSURANCE, 7, 9, 13. PARTITION, 1, 10.

LEVY ON LANDS.

See EXECUTION.

LIEN.

See ATTORNEY. BANK, 11. LOGS AND LUMBER, 3, 4, 5, 6.

LIQUORS, SPIRITUOUS AND INTOXICATING.

1. In a suit upon a promissory note, given for intoxicating liquors sold, it appearing from the plaintiff's bond (put in as evidence by the defendant) that it had been approved, as the law required, the recital in it, that the plaintiff had been licensed to sell, is sufficient evidence, to warrant the inference of authority to sell, in the absence of any proof to the contrary.
Wills v. *Greeley*, 78.

2. Intoxicating liquors in possession of a warehouseman, but intended by the owner for unlawful sale in this State, when they should reach their destination, are liable to forfeiture. *State* v. *Intoxicating Liquors*, 506.

3. And the lien of the warehouseman is no bar to the forfeiture, although he has no intention to violate the law. *Ib.*

LOGS AND LUMBER.

1. The plaintiffs represented to the defendant that they had "a permit" from the Agent of the State, to cut the birch timber on a certain township by paying "stumpage," and the defendant gave them his note for a specified sum, "for their right." The Land Agent seized the timber when cut, and the defendant was obliged to settle therefor as a trespasser. In an action on the note, *it was held*, that, as the State Agent had no authority to give the plaintiffs a license to cut the timber, there was no legal consideration for the defendant's promise. *Long* v. *Hopkins*, 318.

2. The parties entered into a written contract, by which the plaintiff *agreed* to saw a certain quantity of logs "as fast as they came into the boom and can be sawed," at a specified price per M feet; "to be sawed the present season." And the defendants *agreed to pay* therefor the price above named, the plaintiff "to have all the slabs:" in a suit by him for damages occasioned by the non-delivery of a portion of the logs to be sawed, — *it was held*, that it was not optional with the defendants to deliver a part only of the logs, if the whole came into the boom; but that it was obviously *implied* by the terms of the contract, that the whole number named therein should be delivered. *Whidden* v. *Belmore*, 357.

3. In a suit, under the statute, to enforce a laborer's lien on logs, *not belonging to the persons for whom the services were rendered*, a valid judgment *in rem* must be obtained against the property. *Thompson* v. *Gilmore*, 428.

4. The record of a judgment, in such a case, must show that the logs, upon which the labor was expended, are the same, which, in the writ were commanded to be attached, and which *were* attached and returned by the officer.
Ib.

5. The officer's return on such writ does not establish the fact, that the logs attached are identical with those upon which the services were rendered, although having marks in common with them; but it must be shown *aliunde*.
Ib.

6. In a case where the writ contained an allegation that labor was expended on logs of a certain mark, a default merely admits that fact, but does not establish the fact, that the logs described in the writ are the *same* logs which were attached and returned by the officer. *Thompson* v. *Gilmore*, 428.

LORD'S DAY.

See BILLS AND NOTES.

MALICIOUS PROSECUTION.

1. Where one was arrested on a criminal process, in which he was falsely charged with fraud, *for the purpose* of coercing him to surrender to the prosecutor certain promissory notes of which each of them was a part owner, — such a prosecution was held to be without probable cause, and, in legal contemplation, malicious. *Kimball* v. *Bates*, 308.

2. In such a case, the verdict for the defendant was set aside. *Ib.*

See LAW AND FACT.

MANDAMUS.

See REGISTER OF DEEDS, 3, 5, 6.

MARRIED WOMEN.

Since the Act of 1847, (R. S. of 1857, c. 61, § 1,) authorizing a married woman to hold property exempt from payment of her husband's debts, if his creditor would impeach her title to any property conveyed to her, the burden is on him to prove that it came to her, directly or indirectly, from her husband, after coverture, and fraudulently as to creditors.

Winslow v. *Gilbreth*, 90.

See HUSBAND AND WIFE.

MILLS AND MILL-DAMS.

1. A had a mill on C stream. B built a mill below, on M stream into which C stream flows, and, to secure a supply of water, erected a reservoir dam on C stream above A's mill. In an action by A to recover damages of B for detention of water from his mill, it is not admissible to introduce evidence as to how the reservoir dam affected the operation of the mills below A's, or whether, by reason, in whole or in part, of the erection of said dam, the mills below were enabled to run a longer part of the year than before the dam was erected. *Woodbury* v. *Willis*, 403.

2. Where, in such a case, it appears that A's mill was leased for a certain portion of the time covered by the suit, this will not prevent his recovering

damages for that part of the time, unless it is shown that the dam caused no injury to his reversion, and did not diminish his profits during the lease.
Woodbury v. *Willis*, 403.

3. Penobscot river above the tide, is not a *navigable* stream within the meaning of the statute of 1840, regulating water mills, although a highway *floatable* for boats, rafts, or logs, and as such subject to the public use.
Veazie v. *Dwinel*, 479.

4. The owner of a mill dam, on such a stream, is bound to provide a suitable, safe and convenient passage through, or by his dam, for rafts, logs and other lumber. *Ib.*

5. To obstruct or occupy such a passage with any waste material; or, to an unreasonable extent, even with valuable property, is a public nuisance.
Ib.

6. Where mill occupants above cast their slabs, edgings, and other waste into a stream, to sink or float, without direction or control on their part, which injuriously affects the use of the stream by occupants below, an action for the damages can be maintained therefor. *Ib.*

7. No presumptive right to continue such a practice can be obtained in a stream or channel, provided for rafting boards, and running logs and lumber.
Ib.

8. Riparian ownership confers no authority upon the proprietors of land, to interfere with or obstruct the right of passage in the adjacent stream, to the injury of another. *Ib.*

See DEED, 8, 9.

MINOR.

See INFANT.

MONEY HAD AND RECEIVED.

See INSURANCE, 5.

MORTGAGE.

1. After an action has been commenced upon a mortgage, a tender of the amount to discharge it, should include the costs. To make the tender, if refused, of any avail, the money should be brought into Court, after the action has been entered. *Marshall* v. *Wing*, 62.

2. A bond of defeasance will convert a deed, absolute in its terms, into a mortgage. if such bond is seasonably recorded; and such bond is seasonably recorded if done before it is introduced in evidence, and before any change of title has taken place, or the right of any third party has attached.
Smith v. *Monmouth M. F. Ins. Co.*, 96.

3. A power of attorney, given to the mortgager of a mill by the mortgagee, who is at the same time the mortgagee in possession of certain unmanufactured

lumber, by which power the former is authorized to manufacture and dispose of the lumber as agent of the latter, and account for the net proceeds, confers no authority to purchase fixtures or make improvements in the mill at the expense of the mortgagee, however it may be as to the hiring of men, mills or vessels, in execution of the powers granted.

Holmes v. *Morse*, 102.

4. The relation held by a mortgagee does not in itself make him responsible for permanent improvements or essential additions made to the estate by the mortgager, or enable a party furnishing work or materials therefor to maintain an action against the former, without proof of any further fact than is disclosed by the mortgage. *Ib.*

5. Where an account was stated between the mortgager and mortgagee, by a person employed for the purpose, the fact that a debt due a third party for fixtures for the mortgaged premises was included in the account without objection by either party, would not be conclusive in making the mortgagee responsible therefor, if such account was stated merely to ascertain what the mortgager had done with the money he had received, and was not made or used for the purpose of a settlement between the parties. *Ib.*

6. In an action to recover, of the mortgagee of a mill and lumber, the value of fixtures furnished whilst the mortgager was running the mill under a power of attorney from the mortgagee, the power of attorney was rightfully admitted in evidence as showing a relation between the parties as to the business, although insufficient to prove such an agency as would make the mortgagee responsible for improvements or new machinery. *Ib.*

7. Payment of the debt, secured by a mortgage of real estate, *before* condition broken, revests the title in the mortgager; but not so, if made *after* breach of condition. *Stewart* v. *Crosby*, 130.

8. And if there has been no release of the estate to the mortgager, his right of redeeming it may be seized and *sold* on execution, with the same effect, as though there had been a *levy* of the execution thereon, notwithstanding the debt *after* condition broken has been fully paid. *Ib.*

9. Per Appleton, C. J., and Cutting, J. — Money paid for a deed of release, without covenants, where no fraud is charged, cannot be recovered back, although, by the deed, no title or interest passed to the releasee. *Ib.*

10. Possession, in certain cases, *implied* notice of title to subsequent purchasers, where the deed was not recorded, before the R. S. of 1841, which required *actual* notice. *Boggs* v. *Anderson*, 161.

11. Nor, to imply notice, was the occupation required to be entirely exclusive. *Ib.*

12. *Thus*, where husband and wife, who had long occupied a farm, conveyed it to their son, taking back a mortgage, conditioned for their support, but omitted to have the mortgage recorded, and the mortgagees still remained on the premises, they and the son constituting one family, and all contributing to its support; and, some years after the giving of the first mortgage, the son made a second, to a third person, which was duly recorded: — *It was held* that the second mortgagee, under the circumstances, should be regarded as having had notice of the legal title of the first mortgagees, at the time of the conveyance to him. *Ib.*

13. A, to secure certain notes he had given to B, mortgaged to B a lot of land, and then conveyed the land to C. Afterwards C conveyed by warranty the same land to B, and, without taking up A's notes or procuring a discharge of the mortgage, C received from B a bond for a reconveyance of the land upon C's paying in a time limited the original mortgage notes of A: — *Held*, that this did not operate to discharge the mortgage and vest an absolute title in B, subject only to the stipulations of the bond, but was merely a re-affirmation of the mortgage, with an extension of the time of payment.

Bailey v. *Myrick*, 171.

14. So far as a bond for the conveyance of real estate is a personal obligation, not touching the realty, it is binding on the parties without being recorded. But, although given at the same time, and as part of the same transaction, with a deed from the obligee to the obligor, it must be placed on record before it can operate as a defeasance, so as to affect the rights of third parties without actual notice. *Ib.*

15. The assignment of such a bond, as well as the assignment of a mortgage, must be recorded, or it will not affect the rights of third parties having no actual knowledge of it. *Ib.*

16. In a bill in equity to redeem land which is under a mortgage, where several owners hold distinct parcels of the mortgaged premises, the present value of the several parcels, in case no improvements or erections had been made on them subsequent to the mortgage, is the rule by which to determine what each owner shall contribute to redeem the mortgage, this value to be determined by a master. *Ib.*

17. A held a mortgage from B of a lot of land. C, claiming under B, gave a deed of the same land to D, with a covenant against all incumbrances, and D afterwards conveyed the premises to A, with a like covenant. A cannot, after releasing D, maintain an action against C for breach of covenant, on the ground that he has been evicted by an older and better title.

Trask v. *Wilder*, 450.

18. The holder of a mortgage of a lot of land, who subsequently takes a warranty deed of the same lot from one who has, through intervening conveyance, the mortgager's right of redemption, will not, in an action against one of the intermediate grantors for breach of covenant of warranty, be sustained in pleading that he has been evicted by the mortgage title which he holds himself, nor in a claim for damages on account of the incumbrance. *Ib.*

19. Where A, being the owner of certain land, conveyed it to B in mortgage, with the usual covenants of warranty, and afterwards paid the amount due on a prior mortgage of the same land, and took an assignment of the mortgage to himself, the title thus acquired by A, unexplained, would enure to the benefit of B. *Kelley* v. *Jenness*, 455.

20. But if the prior mortgage was in fact purchased by C, and the consideration paid by him, and the mortgage, immediately after its assignment to A, was by him, pursuant to a previous arrangement of the parties, assigned to C, or assigned in blank, and delivered to C, with power to fill the blank, the assignment to A was clearly for the use of C, and an implied resulting trust in favor of C at once attached to the conveyance made by the first mortgagee to A. *Ib.*

21. A trust estate does not, like an absolute estate, enure to the benefit of the grantee of the trustee, when the latter made the conveyance in his individual capacity. And an implied trust is governed by the same principles, and subject to the same general rules, as other trusts. *Kelley* v. *Jenness*, 455.

22. But, if a part of the money was paid on the mortgage by A, and a part by C, the implied trust in favor of C will extend no further than the amount paid by him, whether more or less. *Ib.*

23. A mortgagee, in his process of foreclosure, must strictly perform all the conditions required by the statute, to bar the right of redemption. *Freeman* v. *Atwood*, 473.

24. Although the certificate of witnesses, in whose presence he took possession, was dated and recorded, it will be insufficient, if therein the day of the entry is not stated, as it will not, with certainty, appear that it was recorded within thirty days from *the time of entry*. *Ib.*

See ASSUMPSIT, 1. BANK, 3. EQUITY, 2, 3, 4. EVIDENCE, 8.

MORTGAGE OF CHATTELS.

1. A mortgage of personal property was given to secure the payment of a note therein described; but that offered in evidence to support the mortgage was materially different; in that case, it must be clearly shown, that the last note was intended, by the parties, as a renewal of the former. *Barrows* v. *Turner*, 127.

2. Before the statute of 1859, c. 114, personal property mortgaged could not be legally attached, until after tender of payment of the mortgage debt. *Ib.*

3. If a mortgage of personal property has been recorded in the town in which the mortgager resided at the time, and he afterwards removes to another town, taking the property with him, the statute does not require the mortgage to be again recorded in the town to which he has removed. *Ib.*

4. A mortgage of chattels, made by joint owners residing in different towns, is invalid as against other persons than the mortgagers, unless it has been recorded in each of the towns where the mortgagers reside. *Rich* v. *Roberts*, 395.

5. Where a creditor of one of the mortgagers has attached the mortgaged property, the holder of a second mortgage of the same property, which has been duly recorded, but not until after the attachment, cannot maintain an action against the attaching officer until the attachment is released or dissolved. *Ib.*

NEW TRIAL.

See WAY.

NOTARY PUBLIC.

See BILLS AND NOTES, 4, 5.

OFFICER.

Where notice was required by statute to be given by an officer in a "public newspaper," the omission in the officer's return of the word "public" is not fatal, a "newspaper" being necessarily public. *Bailey* v. *Myrick*, 171.

See STATE PRISON.

PARTITION.

1. On petitions for partition, all questions concerning the title of the parties, and the nature and proportions of their interests, are for the jury; and the interlocutory judgment, which is conclusive, should conform to the verdict. *Allen* v. *Hall*, 253.

2. Commissioners to make partition have no judicial powers, like referees, to determine any such question. *Ib.*

3. When an interlocutory judgment has been rendered for a fractional part of certain premises, described by boundaries, the petitioner is entitled to that proportion of all the *real estate* within the boundaries, unless specifically limited by exceptions or reservations. *Ib.*

4. Commissioners may determine the location and boundaries thereof; and, if such question arises, what the whole estate is, by distinguishing personal property from real estate. *Ib.*

5. If they err in deciding these questions, the Court will not accept their report, but will recommit the case to them. *Ib.*

6. The statute of 1855 (substantially the same in the revision of 1857) changed the relative rights of tenants in common, where one has occupied a part, in severalty, and has made improvements thereon. *Ib.*

7. It was intended by that statute to provide that if one had so held and made improvements *without* "the consent" of his co-tenants, he cannot claim to have his share so set out as to embrace such improvements, but may be compelled to take some other portion of the estate. *Ib.*

8. Still, he is to have the entire benefit of the improvements made by him; and if not assigned to him, specifically, he shall have their value over and above his share of the common property. *Ib.*

9. If he has had exclusive possession of any part of the premises "by the consent" of the co-tenants and has made improvements thereon, he is entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share. *Ib.*

10. The questions arising under this statute, as they refer to the individual interests and proportions of the parties, must be determined by the jury before the interlocutory judgment; and the result should be incorporated in the judgment, that the proper directions may be given in the warrant of partition. *Ib.*

11. If matters are submitted to the Commissioners under the instructions of the Court, which they have no authority to decide, exceptions cannot be taken thereto at a subsequent term. *Ib.*

12. The case of *Parsons* v. *Copeland*, 38 Maine, 537, as here explained, is not in conflict with the doctrine of this case. *Ib.*

PARTNERSHIP.

1. One co-partner cannot maintain assumpsit against another, unless for a specific sum found due the former on a settlement made.
Holyoke v. *Mayo*, 385.

2. In case of fraud or mistake in the settlement of partnership accounts, the remedy of the aggrieved partner is by bill in equity. *Ib.*

3. Although partners may adjust one partnership transaction separately, leaving all others unsettled, and an action would lie for a balance found due to one of them in that particular transaction; yet, if there are various unadjusted matters between the partners, the Court will not allow an action to be maintained for the ascertained balance, leaving the other matters to be settled by a suit in equity, but all the mistakes or errors must be heard and adjudicated by the same Court, and that a court of equity. *Ib.*

4. If it appears that, on a general settlement of partnership accounts, one partner remitted a certain sum due him on the books, and afterwards an error is discovered of a less amount, if its correction would reduce the sum remitted, it will be considered as offset, and an action to recover the amount will not be sustained. *Ib.*

5. Where a settlement was made of a partnership account at a certain date, both parties being present, and having the partnership books before them, one partner will not be allowed to come into Court afterwards with a claim that the settlement was made only to a date a month or two prior, and that the charges and credits between the two dates were by mistake or fraud omitted. *Ib.*

6. If co-partners enter into a contract for a settlement to be made at a subsequent date on certain terms, and one of them fails to fulfil his contract, the other may maintain an action at common law for damages for the breach. *Ib.*

7. But whether such a contract be performed or not, the remedy of one aggrieved is by action at common law or suit in equity, and not by assumpsit. *Ib.*

8. A contract made by a co-partner in the name of the firm, will *prima facie* bind the firm, unless it is outside of the business of the firm.
Stockwell v. *Dillingham*, 442.

9. The firm is liable for the false and fraudulent representations of one of its members relative to matters falling within the scope of its business, and much more so when the representations are true; and an innocent third party has a right to regard such representations as true, and to act upon them. *Ib.*

10. When one of a firm borrows money, not expressly on his individual credit, and it is shown that it was borrowed for and appropriated to the use of the firm, the firm is liable. *Ib.*

11. Where one partner contracts a debt, representing to the creditor that it is for the benefit of the firm, if the contract is within the scope of their business, the firm is liable, whether the representations are true or false. *Ib.*

PAUPER.

See SOLDIERS' FAMILIES, AID TO.

PAYMENT.

See CONTRACT, 3. MORTGAGE, 7, 8, 9.

PLEADING.

If an action be brought in a wrong county, that fact should be pleaded in abatement, or taken advantage of on motion. The general issue is a waiver of the objection. *Demuth* v. *Cutler*, 298.

See PRACTICE, 7, 8. REAL ACTION, 3, 4.

POOR DEBTOR.

A justice selected by a poor debtor to hear his disclosure, if he is not related by consanguinity or affinity, and has no pecuniary interest in the result, may be considered "disinterested;" and his official act will not be rendered void, because he had counselled and aided the debtor in preparing for his disclosure, — although this should have deterred him from acting as one of the justices. *Lovering* v. *Lamson*, 334.

POSSESSION.

See MORTGAGE, 10, 11, 12. VENDOR AND PURCHASER.

POWER OF ATTORNEY.

1. The authority in a power of attorney "to grant any and all *discharges* by deed or otherwise, both personal or real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by deed of warranty the real estate of his principal. *Heath* v. *Nutter*, 378.
2. And where the agent has assumed so to convey, the principal cannot afterwards ratify it by parol, or by a writing not under seal. *Ib.*
3. If a person, with a full knowledge of the equitable title of such a grantee, obtains a quitclaim from the principal, which is effectual at common law to vest the title in him, a court of equity can alone afford protection to the former grantee. *Ib.*

PRACTICE.

1. A judgment upon an order of the Law Court, certified to the clerk in vacation, must be entered up as of the last day of the preceding term. *Billings* v. *Berry*, 31.
2. A motion in abatement of a suit can be sustained only upon matters of record. If allegations, requiring proof of matters of fact *dehors* the record, are embraced in such a motion, they will be disregarded. *Ib.*
3. Where the clerk, in preparing a blank verdict for the jury, made a mistake in the name of one of the defendants, and the error escaped the notice of the

jury, it may be amended by the Court, after the return of their verdict, so as to conform to the writ and other papers in the case, the jury being present, and affirming the verdict as amended. *Readfield* v. *Shaver*, 36.

4. After exceptions to the ruling of the Court at *Nisi Prius* have been taken, argued and decided, and no objections made to an amendment allowed at *Nisi Prius*, or, if any were made, they were not sustained, it is too late, when the same case comes a second time before the law Court at a subsequent stage, to raise objections to the amendment permitted at the first trial. *Bailey* v. *Myrick*, 171.

5. When parties to an action pending in Court agree that it shall abide the result in another case, and a memorandum of such agreement is entered on the docket, the parties are bound by it. *Cummings* v. *Smith*, 568.

6. The defendant in such case, waives a jury trial by such agreement. After he has consented that judgment may be rendered against him, he is not entitled to a jury trial, to fix the amount of damages. *Ib.*

7. It is a matter of discretion with the Court to receive or reject a plea *puis darrein continuance*, which alleges matters which arose before the last continuance. *Ib.*

8. Pleas *puis darrein continuance* must have the same certainty as to time and place as other pleas. Such a plea which does not allege the day on which the matter pleaded, happened, is bad. *Ib.*

9. Exceptions do not lie to the decision of the presiding Judge upon matters within his discretion. *Ib.*

See FORGERY. LAW AND FACT. WAY.

PROBATE COURT.

1. Where a Judge of Probate, under the statute authorizing a specific distribution of personal property in certain cases, has issued a warrant for an appraisal of a part of a vessel belonging to an estate, and ordered a distribution thereof amongst the heirs in specified proportions, and this has been done accordingly, and a return made, accepted and recorded, the title passed thereby, and the probate records are sufficient muniments of title, without any formal transfer of the several parts distributed. *Rose* v. *O'Brien*, 188.

2. A decree of the Judge ordering distribution and payment of the balance in the hands of the administrator on the settlement of his last preceding account, passed on the same day the return of the specific distribution was accepted, does not annul the latter, nor require that the share of the estate in the vessel should be sold and distributed in money. *Ib.*

3. An appeal from a decree of a Probate Court, like any other appeal, suspends or vacates the judgment or decree appealed from. *Tarbox* v. *Fisher*, 236.

4. The death of a widow abates her petition for an allowance out of the personal estate of her husband, if no *final* decree for an allowance has been made. *Ib.*

5. The Court may in such case direct the costs of both the parties to be paid

out of the estate, by the executor, he having appealed from the decree of the Judge of Probate. *Tarbox* v. *Fisher*, 236.

RAILROAD.

1. The directors of a railroad company, which was failing in its circumstances, agreed in writing with its president, that if he would indorse for the company for an amount not exceeding sixty thousand dollars, they would severally indemnify him in the "*proportions* set against their names." The total of the various sums subscribed was $38,000, — the liability assumed by the president was $40,000. In an action against one of the signers, *it was held*: —
That the assumption of liability was a sufficient consideration for the contract of indemnity; —
That the contract being perfect in itself, in the absence of any parol evidence explaining it, the director would be liable for the full amount of his subscription. *Williams* v. *Hagar*, 9.

2. But parol testimony was admitted without objection, showing that the plaintiff verbally contracted to indorse to the amount of sixty thousand dollars; — these agreements constituted two mutually dependent contracts; one verbal, the other written. *Ib.*

3. Under the two contracts, the plaintiff having performed in part, was, in the same proportion, entitled to be indemnified. *Ib.*

4. As no particular mode of indorsing the notes of the company was indicated, his signing on the back as *guarantor*, was an *indorsement* within the terms of the contract. *Ib.*

5. Money raised on his own private securities, with which he paid the debts of the company, although equally advantageous to the company, the directors would not be liable for — not being within the *form* of the contract. *Ib.*

6. Otherwise, where he had taken the notes of the company payable to himself, for money so paid by him, negotiated them and paid them as *indorser*. *Ib.*

7. As to the mode of computing the amount of damages to which the plaintiff is entitled. *Ib.*

8. R. S. of 1857, c. 51, § 51, and the nine following sections, and statute of 1858, c. 30, relative "to trustees of railroads," and regulating the proceedings to be had when a railroad has been conveyed to trustees for the use of the bondholders, apply to cases where the trust, the trustee and the *cestui que trust*, are all created by one and the same deed, and not to a case where a mortgage is made to an individual, to secure him and his assigns who may subsequently become holders of bonds to be issued by him.
In re Bondholders of Y. & C. R. R. Co., 552.

9. Should such a mortgagee transfer any part of the bonds, he would hold the mortgaged estate, as mortgagee for the part not transferred, and as trustee for the holders of the portion transferred, precisely as any mortgagee would do under similar circumstances. But neither before nor after such transfer, would he be such a trustee as the statutes referred to contemplated. *Ib.*

10. The statutes referred to contemplate a deed of trust, and such a mortgage as has been described is not within the letter or the spirit of their provisions. *In re Bondholders of Y. & C. R. R. Co.*, 552.

11. In such a case, the election of trustees in place of the original mortgagee, made at a meeting of the bondholders called for the purpose of foreclosing the mortgage, was unauthorized by the statutes. *Ib.*

REAL ACTION.

1. What the declaration should set forth in a writ for the recovery of lands, and who may be made defendants. *Wyman* v. *Brown*, 139.

2. Under the general issue pleaded, the real contest is, which party can show the better title *in himself*. *Ib.*

3. The statute requires non-tenure to be pleaded in abatement, and the defendants, who neglect so to plead, cannot avail themselves of that defence, by joining with another defendant in a plea of *nul disseizin*. *Ib.*

4. Whether a joint plea of *nul disseizin* by three, can be supported as to either, by proof of anything short of a joint tenancy or a tenancy in common by all the three, *dubitatur*. *Ib.*

5. Where the title to separate and distinct parcels of land has become united in one person, by purchase from their various owners, and the purchaser afterwards conveys certain described portions of the whole, the rights of his grantees will depend upon the unambiguous language of their respective deeds, unaffected by the previous occupation of former owners, or by previous conversations, or vague understandings. *Blake* v. *Ham*, 311.

6. If a part of the premises demanded is a passage way, to the line of which the tenant is bounded, the demandant will be entitled to recover, the fee of the land being in him, notwithstanding the tenant may have an easement in the passage way. *Ib.*

RECEIPTER.

1. In an action against a receipter for the value of goods attached on mesne process, he cannot defend on the ground that, in the return of the officer, the property is not described with sufficient particularity, — the description being — "a lot of millinery goods and merchandize." *Thompson* v. *Smiley*, 67.

2. Nor is it a ground for defence, that the clerk did not insert in the execution the correct day of the month on which judgment was rendered, and also misdated it, if the precept be afterwards corrected by order of Court, it being competent for the Court to direct the amendment, even after the return day of the execution. *Ib.*

3. The party, whose goods were attached, having testified for the receipter, that they were of less value than the amount of the judgment, the plaintiff, on cross-examination, was permitted to interrogate the witness if subsequent attachments of the goods were not made, by his own procurement, in favor of certain other creditors, whom he desired to secure. *Ib.*

RECOGNIZANCE.

1. The recital in a recognizance, taken by a magistrate, that he found that "there was good reason and probable cause to believe said defendant is guilty," is equivalent to finding that "there was probable cause to charge the accused." *State* v. *Baker*, 45.

2. A recognizance taken by a magistrate with a single surety, is valid, although it is his duty to require *sureties*. *Ib.*

3. A recognizance taken by a magistrate upon the examination before him, of a person charged with a crime beyond his jurisdiction, conditioned for the personal appearance of the accused before the higher Court, "to answer the complaint aforesaid, abide the order of Court thereon, and not depart from said Court without license therefor," is valid. *Ib.*

4. When a person is committed to jail by a magistrate for failing to give such a recognizance as he has authority to require, two justices of the peace and of the quorum are authorized by our statutes to admit the prisoner to bail, by taking a recognizance with the same conditions which the magistrate had required. *Ib.*

5. A writ of *scire facias*, which, after reciting a recognizance, states "all which appears of record, and said recognizance was duly returned to our said Court," &c., and further alleges a default "as appears of record," shows sufficiently that the recognizance was returned to Court and became a matter of record. *Ib.*

REFORM SCHOOL.

1. It is provided by c. 37 of the Acts of 1858, that the expense of subsistence, &c., of a boy sent to the Reform School shall be defrayed by the town, *where he resides*, if in the State; otherwise by the town in which he commits the offence: — *Held* that the town of his *residence* at the time of his commitment, if within the State, is thus made liable, and not the town in which he committed the offence. *Scammon* v. *Wells*, 584.

2. The statute makes it the duty of the magistrate to certify in his mittimus the town in which the boy resides, *if known:* which certificate shall be sufficient evidence in the first instance to charge the town. But the omission of the justice to certify the fact, will not defeat the right to recover, for the statute makes that right absolute, while the making of the certificate is conditional; and the fact of residence may be proved *aliunde*. *Ib.*

REGISTER OF DEEDS.

1. The election or appointment of register of deeds depends wholly upon statute law, which provides that such officer shall be elected in the year 1857 and in every five years then following. R. S., c. 7, § 2. *Rose* v. *County Commissioners*, 243.

2. When a vacancy occurs, the chairman of the County Commissioners is to issue his warrants to the municipal officers of the several towns, &c., of the registry district, to fill the vacancy. *Ib.*

3. Therefore, if the Commissioners shall neglect this duty, mandamus will lie to compel its performance. *Rose* v. *County Commissioners*, 243.

4. But, without such warrants, the municipal officers of the towns cannot legally call meetings to fill such vacancy. *Ib.*

5. And a writ of mandamus will not be issued to the County Commissioners, to compare the returns of votes, made to them, to ascertain who has been chosen, at an election so held. *Ib.*

6. The petition for mandamus, in such a case, must allege affirmatively that a vacancy existed. *Ib.*

7. The Act of March 9, 1860, incorporating the county of Knox, (which was to take effect on the first day of April,) authorized the Governor to appoint a register of deeds and certain other officers for the county, who were to continue in office until their places were filled by an election, according to the laws; manifestly intending an election in the manner prescribed by the general law, and not that there should be special intermediate elections. *Ib.*

8. By the general law, the time for the election of registers of deeds would be in the year 1862. The register appointed by the Governor would hold until that time, and, while he thus continued to hold, there would be no vacancy. *Ib.*

REPLEVIN.

See ATTORNEY, 3, 4, 5. EVIDENCE, 11.

REVIEW.

1. At the hearing on a petition for review, for newly discovered evidence, a witness will be confined to the matter set forth in the petition, to be proved *by him*; and cannot testify as to other facts set forth, which are to be proved by other witnesses therein named, (R. S., c. 89, § 3.) *Berry* v. *Lisherness*, 118.

2. Nor will the petitioner be allowed on such hearing to testify to facts known to him at the time of the trial, from testifying to which the rules of evidence *then* precluded him, although, by statute, a party is now made a competent witness. *Ib.*

3. A party has an undoubted right to have his case tried by the application of the rules of law and evidence existing and regulating such cases, at the time of trial; but after his rights have been thus ascertained and settled, he cannot have a new trial, on the ground, that a change has been subsequently made, by the Legislature, in the law or in the rules of evidence applicable to his case. *Ib.*

See CONSTITUTIONAL LAW.

RIPARIAN RIGHTS.

1. Riparian ownership confers no authority upon the proprietors of land, to

interfere with or obstruct the right of passage in the adjacent stream, to the injury of another. *Veazie* v. *Dwinel*, 479.

2. Every proprietor of land on the banks of a river or stream has naturally an equal right to the use of the water; and this right to use, implies a right to control, detain, and even diminish the volume of the water, but only to a reasonable extent. *Davis* v. *Getchell*, 602.

3. What is a reasonable detention, depends upon the size of the stream, as well as upon the uses to which it is subservient, as the detention must necessarily be sufficient to accumulate the head of water requisite for practical use. *Ib.*

4. The right of detention is not limited to time necessary for repairs or to extraordinary occasions, but applies to the ordinary use of such streams, provided it be not an unreasonable use or detention. *Ib.*

SCIRE FACIAS.

See RECOGNIZANCE, 5.

SEAL.

See CORPORATION.

SOLDIERS' FAMILIES, AID TO.

1. Cities and towns are required by the Act of 1861, c. 63, to make suitable provision for the support of the families of soldiers, who, having a residence therein, have enlisted in the service of the United States, under the provisions of said Act, whenever such families shall stand in need of assistance. *Veazie* v. *China*, 518.

2. Statutes imposing a duty, and giving the means of performing such duty, are to be regarded as mandatory. *Ib.*

3. The families of absent soldiers in the service of the United States, when standing in need of assistance, do not incur the disabilities of pauperism by receiving supplies from the cities or towns, where such soldiers resided at the time of their enlistment. *Ib.*

4. Nor do such disabilities attach to the soldier, whose family in his absence may receive such needed assistance. *Ib.*

5. No action can be maintained by the city or town furnishing supplies under this Act, against the city or town, where the soldier, whose family may have received such supplies, has his settlement. *Ib.*

6. The purpose of § 1, of the Act of 1862, c. 127, was to extend the benefit of the Act of 1861, c. 63, § 6, to all in the service of the United States or of the State, and to relieve, to the extent specified in the Act, cities, towns and plantations from their liabilities for the support of the families of their inhabitants in such service. *Milford* v. *Orono*, 529.

7. By this Act, they were authorized and obliged to render aid to the families

of all their inhabitants, who were actually engaged in the military service of the United States or of this State. *Milford* v. *Orono*, 529.

8. No recovery can be had, by the city, town or plantation so furnishing aid, against the city, town or plantation, where such inhabitant may have his settlement. *Ib.*

9. The claim for supplies furnished under this Act is against the State, as provided therein and thereby. *Ib.*

10. No disabilities are imposed upon or incurred by the soldier or sailor whose families receive such aid, nor by their respective families. *Ib.*

STATE PRISON.

1. By statute provision the warden and deputy warden of the State Prison may serve legal processes *within* the "precincts" of the prison. The precincts embrace not only the prison building, but the grounds connected therewith. *Hix* v. *Sumner*, 290.

2. The service of a writ, within the precincts, by the deputy warden, will be valid, although brought in the name of the warden; — for neither acts as the agent of the other, but both as agents of the State. *Ib.*

STATUTE.

See CONSTITUTIONAL LAW. COUNTY COMMISSIONERS. REGISTER OF DEEDS.

STATUTE OF FRAUDS.

See EVIDENCE, 8.

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TAX.

See COLLECTOR OF TAXES. DOMICIL.

TENANT AT WILL.

1. A tenancy at will is, by alienation of the estate by the landlord, changed into a tenancy at sufferance; and, although the tenant had occupied the premises for a series of years, by consent of successive owners, the last alienation would effect the same change. *Esty* v. *Baker*, 325.

2. The statute providing for the termination of tenancies at will by notice in writing served on the occupant a certain period before the time fixed for such

termination, does not provide that such tenancies cannot be terminated in any other way; and, even if this is implied as to tenancies at will under the statute, tenancies at will at common law may be terminated in the same manner as before the statute. *Esty* v. *Baker*, 325.

3. The decision in the case of *Young* v. *Young*, 36 Maine, 133, where the tenant was in possession under a parol lease at an agreed rent, which was a tenancy at will *by statute*, does not apply to a tenancy *by common law*, where the tenant merely occupied by consent of the owner, without rent. *Ib.*

4. A tenant *at sufferance* cannot maintain trespass *quare clausum* for a peaceable entry. *Ib.*

TENANT IN COMMON.

See PARTITION, 6, 7, 8, 9.

TENDER.

See MORTGAGE, 1.

TRESPASS.

1. An action against two or more for a joint trespass cannot be sustained by evidence of acts committed by one of them; and a judgment against both is not a bar to another action brought against one of them for a several trespass. *Davis* v. *Caswell*, 294.

2. A tenant who has been in possession for years, may maintain an action of trespass against an intruder who has no title. *Black* v. *Grant*, 364.

3. When trespass will not lie against one for an entry upon the lands of another. *Wheelden* v. *Lowell*, 499.

4. *As* where, by the fraudulent representation of a purchaser, a contract for the sale of a horse has been made, and the horse delivered, the vendor, having rescinded the contract, may peaceably enter into the premises of the fraudulent vendee, if not forbidden, and take his property. *Ib.*

5. A tenant at *sufferance* cannot maintain trespass *quare clausum* for a peaceable entry. *Esty* v. *Baker*, 325.

TROVER.

1. In an action for trover, the mere denial of conversion in the specifications of defence is only equivalent to a plea of the general issue, and is not sufficient; but if facts are alleged, which, if proved, would support such plea, the plaintiff will be required to prove the conversion: — *Fenlason* v. *Rackliff*, 362.

2. As, — where the specifications set forth that the buildings which are the subjects of controversy, "were at the time of the alleged conversion, the property of R., and a part of his real estate." *Ib.*

3. Having contracted to purchase a farm, F. erected buildings thereon; and

after thirteen years occupation, abandoned the farm, which the owner afterwards sold and conveyed to R., against whom F. brought trover for conversion of the buildings, R. having sold and conveyed the farm to another person: — *Held*, that the buildings passed to R. as a part of the real estate, notwithstanding R.'s grantor may have verbally agreed with F. that they were personal property; — for the title to real estate, of a subsequent purchaser, cannot be affected by such a verbal agreement.

Fenlason v. *Rackliff*, 362.

TRUSTEE PROCESS.

M. promised to pay E. his account against a third person, if it should be adjudged a lien claim upon a certain ship: — until some competent tribunal has adjudged the claim, a lien, the demand against M. is "contingent" and he cannot be held as the trustee of E. in a suit by a creditor of E. (R. S., c. 86, § 55.) *Bryant* v. *Erskine*, 296.

TRUSTS.

See EQUITY, 12, 13. MORTGAGE, 20, 21, 22.

USURY.

1. The defendant in his plea, verified by oath, alleged usury, and offered to be defaulted for a specified sum which was the amount claimed, less such interest; and the plaintiff indorsed the amount of the excessive interest upon his note before trial and accepted the offer: — *Held* that the damages are not reduced *by proof*, so that the plaintiff forfeits his, and becomes liable for defendant's costs, as provided in the Act of 1862, c. 136.

Whitten v. *Palmer*, 125.

2. But the plaintiff will have costs to the time of filing the offer, and the defendant, *after* that time. R. S., c. 82, § 21. *Ib.*

VENDOR AND PURCHASER.

1. The possession of a chattel continued for ten years under claim of ownership, will not, of itself, vest title therein; it would be evidence tending to show title, but liable to be controlled by other proof.

Moulton v. *Lawrence*, 100.

2. As against one having such possession, a delivery by the true owner will not be necessary to vest title n the vendee. *Ib.*

VENUE.

See PLEADING.

WAY.

1. In an action against a town to recover for personal injuries occasioned by a defective highway, it must *affirmatively* appear, that ordinary care was exercised in passing over the highway; and if, on the whole testimony on this point, the weight of evidence is clearly against the plaintiff, a new trial will be granted. *Gleason* v. *Bremen*, 222.

2. Where the damages were assessed at $5525, which sum, in the opinion of the Court, exceeded the amount, for which the town should be held liable, although the injuries were serious, a new trial was granted. *Ib.*

WIDOW'S ALLOWANCE.

See PROBATE COURT, 4.

WILLS.

See EQUITY, 16, 17.