REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WALES HUBBARD,
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1866.

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, LL. D.,
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, LL. D., 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.

ERRATA.

Page 63, 9th line from bottom, for *take* read *taken*.
" 64, 12th line, for *while* read *when*.
" 66, 10th line from bottom, for *of* read *by*.
" 67, 7th line from bottom, for *equity* read *entry*.
" " 6th line " " for *defection* read *defect*.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT.

1862–3.

COUNTY OF CUMBERLAND.

NATHANIEL J. MILLER *versus* LEVI MORRILL *& als.*

The president and five directors of a railroad company agreed by a memorandum in writing, each to advance certain specified sums, to enable the company to pay coupons becoming due on its bonds, and that the president should advance the further sum of $2,000 "with the *assurance* from the other five, that, at the next meeting of the directors, they will cause provision to be made" to indemnify him for the proportional "excess advanced by him." At the next meeting, the president was authorized to sell or pledge mortgage bonds of the company to raise money "to meet present claims," and also to mortgage movable property of the company to secure its creditors. The bonds were sold, and the proceeds applied to pay other and subsequent debts of the company. In an action by the president, brought against the directors on the written memorandum, to recover for the excess advanced by him, it was *held*, that the votes of the directors authorizing the sale of the bonds and mortgage of movables put it in the power of the president to pay or secure himself, and were a sufficient fulfilment of the agreement of the directors, and the action could not be maintained.

ON REPORT of the evidence before KENT, J., at *Nisi Prius*, on exceptions, and on motion to set aside a verdict for the defendants.

The action was ASSUMPSIT on a memorandum in writing, which is given in the opinion of the Court.

In defence, the defendants proved certain votes of the directors which will be found in the same opinion.

It further appeared that a settlement was subsequently made of the plaintiff's account with the company, in which the company was credited with $2884, the nett proceeds of the bonds sold under the vote of the directors, and charged with note of May 20, 1854, with interest, paid Miller, $307,84; note of March 28, 1854, with interest, paid S. Towle, $340,50; note of Oct. 31, 1853, with interest, paid Miller, $1071,17; account of Miller, (which was for his salary as president from Oct. 17, 1853, to Nov. 14, 1854,) $1291; paid Mr. Clifford, $45; leaving $173,51 due Miller, for which a note on demand was given him, and was paid in April following.

The plaintiff, in his testimony, alleged certain claims which he held against the same company for land damages, amounting to $2044,15, and stated that the notes to himself and Towle, which he paid from the proceeds of the bonds, were for money which he had advanced out of his own funds.

The plaintiff's counsel requested the Court to instruct the jury, that the votes of the directors above referred to, were not a fulfilment of the contract; and that, if a part of the proceeds of the bonds, placed by the directors at the disposal of the president, had been diverted from the appropriation made by the vote, with the consent of the company and of the plaintiff, and without injury to the defendants, the plaintiff's right to recover would not be affected thereby.

These instructions were not given, but the presiding Judge instructed the jury, that, if the plaintiff was present when the vote was passed for the sale of the bonds, and did not request any other or further action in his behalf, and, if he realized enough from the sale to pay his $2000 note, he had the right to pay it therefrom; that he had the power, under the second vote, to cause a mortgage of the movables of

the company to be made to himself; and that, if he did not pay his note of $2000, but appropriated the proceeds of the bonds to pay his note of $1000 and other demands not due, and not within the terms of the vote, and did not take a mortgage, nor, after the vote was passed, notify the defendants or ask for any further action or provision for his security, then he could not maintain this action.

The plaintiff's counsel excepted to the instructions and refusals to instruct, and filed a motion to set aside the verdict as against law and evidence.

Shepley & Dana and *C. P. Miller*, for the plaintiff.

E. Fox, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — This suit is on a memorandum signed by the parties, in these words: —

"Oct. 31, 1853.

"The sum of $6000 being required to meet the payment of coupons of the York & Cumberland Railroad Company, falling due on the 1st November, 1853, Mr. Miller, the president, proposes to advance to the company $1000 on the company's note on demand. Messrs. Woodbury, Morrill, Pierce, Warren, and Barnes propose to advance respectively, the sum of six hundred dollars each on the company's note, payable to them on demand.

"Mr. Miller further proposes to advance two thousand dollars to the company for which he will take the company's note on demand, with the *assurance* from the other five, that at the next meeting of the directors they will cause provision to be made for his indemnity for *the excess advanced by him, so that* he shall be reimbursed or adequately secured for the *excess advanced* by him over and above one-sixth part of the $6000 *now required.*

"P. Barnes,	"Levi Morrill,
"N. J. Miller,	"Geo. Warren,
"N. L. Woodbury,	"Josiah Pierce."

By this memorandum, it appears that the York & Cumberland Railroad were in immediate need of funds to the amount of $6000, to pay the coupons of the company which matured the 1st Nov., and that the plaintiff and the defendants agreed to advance the sum of $4000 in certain specified proportions on the notes of the company. But this was not sufficient for the emergency. The plaintiff advanced $2000 more on the assurance of the directors that, at the next meeting of the board, he should be reimbursed or secured "for the excess advanced by him over and above one-sixth part of the $6000 now required." It is abundantly manifest that the intention of all parties was, that the plaintiff should have a priority for the $2000 by him advanced over the other advances made by the other directors and himself. This sum, by mutual agreement, was to be first paid or secured.

The next meeting of the directors was held on the 11th of November following, and for want of a quorum was adjourned from time to time to Dec. 2, when, the plaintiff being present, it was voted, (1st,) "that the president be authorized to dispose of, by sale or pledge, four of the company's mortgage bonds now in the possession of the treasurer, or any of them, upon the best terms that may be obtained in the market for the purpose of receiving such amount of cash thereon as may be indispensably required to *meet present claims* against the company."

It appears that, on July 6, 1851, the treasurer of the company delivered the plaintiff four of the company's mortgage bonds, each for the sum of one thousand dollars, and, as it would seem, of the value of seventy cents on the dollar, to be returned or accounted for by him on demands against the company.

The plaintiff, by the vote above recited and the reception of the mortgage bonds, had in his own hands the means of reimbursing himself "for the excess advanced by him." The proceeds of the bonds were to be applied "to meet *present claims* against the company." The payment of the

coupons, as they fell due, was "indispensably required" for the credit of the company. Indeed their payment was deemed to be so "indispensably required" that the directors from their own means supplied the funds for that purpose. The notes given represent the coupons and were on demand. They were within the very terms of the vote, for they were "present claims" against the company. Of the notes, the one given the plaintiff for $2000, being the excess by him advanced, was first to be paid or secured, and the vote of the company and the deposit of the mortgage bonds with him enabled him at his own option to reimburse himself.

The plaintiff was fully authorized to dispose of the bonds in the market "for the purpose of raising such amount of cash thereon as may be indispensably required to meet *present* claims against the company." But, upon reference to the account as adjusted, it will be perceived that the proceeds of the bonds were *not* applied to meet "present claims." The only claim, which could be deemed as embraced within that category, was the note given the plaintiff on the day the memorandum was signed for his sixth of the sum then advanced. But, as between these parties, it has been seen that the payment of that sum was to be postponed to that of the $2000 advanced by the plaintiff on the faith of the memorandum in suit, dated Oct. 31, 1853. There was no peculiarly indispensable necessity of paying the plaintiff's salary, nor had it then been earned. The other demands bear date long after the vote of the directors.

The plaintiff, then, had the means of reimbursement, and, if he neglected to make the proper appropriation of the funds under his control, it is not the fault of the defendants nor should they suffer therefor.

At the adjourned meeting of the directors, on Dec. 2, 1853, it was voted, (2,) "that the treasurer, under the *direction* of the president, be authorized in behalf of the company to execute one or more mortgages of the movable property of the company to such persons holding claims against the company, that may be willing to accept the same and are not otherwise adequately secured."

This vote enabled the plaintiff to secure himself by mortgage on the movable property. He was present at the meeting and took no exception to the form of the vote. He was president of the corporation. The direction was left with him as to the making of the mortgages. The option was with him whether he would take a mortgage or not. The provision to be made, was by the defendants, as directors, and from the funds of the company. The security to be given was upon the property of the company. It is not the fault of the defendants that the security proffered may have been inadequate, if such was the fact.

The defendants would seem to have fully complied with all the *assurances* by them given.

Upon carefully examining the instructions given, we think the plaintiff has no just grounds of exception.

Exceptions and motion overruled.

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

HENRY A. SYMONDS & *als. versus* THOMAS W. HARRIS & *als.*

Where the officer's return and appraisers' certificate in a levy on real estate are informal and defective, and are amended by leave of Court, the amended returns are binding on the parties to the levy.

Where the appraisers appraised a parcel of real estate, and set out an undivided proportional part of it to the creditor, at an appraised value which did not agree with their appraisement of the whole parcel, the latter, being unnecessary, may be treated as surplusage and disregarded.

Machinery attached to a mill by spikes, bolts and screws, and operated by belts running from the permanent shafting driven by the water wheel under the mill, becomes a part of the realty.

The disseverance and removal of such machinery from the mill, and its incorporation with another mill, by one of the co-tenants without the assent of the other, is such a practical destruction of the common property, that an action of trespass may be maintained by the latter against the former.

TRESPASS *quare clausum.* The plaintiffs claim to be tenants in common with one George Blake of the mill, priv-

ilege and machinery for a sash and blind factory, in New Gloucester, described in the writ, which was dated Nov. 29, 1859. Each defendant pleaded the general issue separately. Harris, by brief statement, alleged that he was the owner in whole or in part of the premises, that the defendants were not tenants in common, and that Blake was never a tenant in common therein. George Mayberry and B. S. Benson, also defendants, pleaded that whatever was done by them was done as servants and agents of Harris, and by his authority.

It was admitted that Harris owned the property, until the plaintiffs and George Blake obtained judgments against him, and levied their executions on the premises. The executions and returns thereon, and also amended returns, were introduced as evidence of the title of the plaintiffs and of Blake. Harris was present when the levies were made. The machinery was fastened to the mill by bolts and bands.

It appeared that in the night of Nov. 18, 1859, the defendants, without the consent of the plaintiffs, went into the mill, and removed the most of the machinery, and hauled it away to a mill in Gorham, since used by Harris; Mayberry and Benson acting as the servants of Harris in the removal.

At the November term, 1859, Rufus Berry, the officer who made the levies, petitioned the Court for leave to amend his returns, and the appraisers' certificates thereon, to supply certain omissions of facts, alleging that the proposed amendments were according to the facts, and that the omissions were made by mistake; and leave was granted.

In the original certificate of the appraisers, they stated that they had appraised the estate, building and machinery at $1050, and "set out of said estate five-fifteenths to Henry A. Symonds, within named, in common, to satisfy this execution and all fees," on one of the executions; on another four-fifteenths to Martha Symonds, &c.

In the amended certificate, after valuing the whole estate, the appraisers proceed as follows:—"and, as the same is

more than sufficient to satisfy this execution, and cannot be divided by metes and bounds without damage to the whole, we have set out of said estate five-fifteenths thereof, which we appraised at the sum of three hundred seventy-one dollars and seventy-six cents, to Henry A. Symonds, within named, in common and undivided, to satisfy this execution and all fees." The amendments in the other certificates were similar to the one quoted.

The case was withdrawn from the jury to be submitted to the full Court, for decision upon the law and facts legally proved, with jury powers, the damages to be determined by an auditor, unless agreed upon by the parties.

Howard & Strout, for the plaintiffs.

1. The machinery in the mill, fitted and attached as it was at the time of the levy, was a part of the realty. *Parsons* v. *Copeland*, 38 Maine, 537; *Farrar* v. *Stackpole*, 6 Maine, 154; *Winslow* v. *Merchants' Ins. Co.*, 4 Met., 314; *Butler* v. *Page*, 7 Met., 42; *Richardson* v. *Copeland*, 6 Gray, 536.

The plaintiffs hold of Harris precisely as if he had conveyed to them by deed containing the same description used in the levy. *Gorham* v. *Blazo*, 2 Maine, 235. If a deed had conveyed to them the mill and privilege, with the machinery therein, no doubt the machinery would have passed as part of the realty. *Winslow* v. *Mer. Ins. Co.*, 4 Met., 314. The plaintiffs are statute purchasers. Harris was present, and did not object to the machinery being treated as real estate. He could have redeemed if he chose. All the equities are against him.

2. The officer's proceedings were correct, but his return was defective. The defects were amendable. Having been amended, by leave of Court, the amended returns relate back to the levy. *Fairfield* v. *Paine*, 23 Maine, 498; *Whittier* v. *Vaughan*, 27 Maine, 301. As between these parties, the amended returns are as effectual as if they had been original returns.

3. As it appears that Blake's levy is bad, Harris is tenant in common with the plaintiffs of three-fifteenths. A tenant in common cannot maintain trespass against his co-tenants in ordinary cases. But he can do so where his co-tenant has *destroyed* the property. *Maddox* v. *Goddard*, 15 Maine, 219; *Blanchard* v. *Baker*, 8 Maine, 270. In this case, the defendants have destroyed the sash and blind factory, by separating and carrying away the machinery. The factory in New Gloucester has ceased to exist by the act of the defendants. The plaintiffs are entitled to recover in this action the proportion of damage which their interest in the premises bears to the whole property.

E. & F. Fox, for the defendants.

1. Blake's levy was fatally defective, and nothing passed by it. If the plaintiffs' levies were valid, Harris was tenant in common with them when the alleged trespass was committed. One tenant in common cannot maintain trespass against another, unless the latter *destroys* the property. Here nothing has been destroyed. The machinery has only been removed to another mill, a very common proceeding. Such a removal does not authorize an action at law by one co-tenant against another. 38 Eng. Law and Equity, 304.

2. The plaintiffs having joined in this action, if the title of either is defective, the action must fail.

3. The levies were made in Dec., 1858, and the alleged trespass committed in Nov., 1859. The returns of the levies were greatly defective, and there is no proof that the amended returns were made or authorized before the removal of the machinery. If not, the defendants were not trespassers.

Instead of amendments, the officer has made and recorded new returns, which was not authorized by the Court. Whatever was done could have no effect until recorded. The amended returns were not recorded until long after the alleged trespass.

4. The machinery was not a part of the real estate to

pass by levy. It is not such machinery as is built and designed for a particular mill. Harris never intended to make it part of the realty. Such property is constantly changing in value, and no person supposes that by placing it in a mill he makes it real estate. Machinery spiked to the floor, has been held to be no part of the realty. *Fullam* v. *Stearns*, 30 Verm., 443.

The opinion of the Court was drawn up by

RICE, J.—Trespass *quare clausum*. The estate was originally the sole property of Thomas Harris. On this estate, which consisted of a mill privilege, and a mill called the "sash and blind factory," with the machinery therein, the plaintiff and also one George Blake, on the 16th Dec., 1858, had caused executions, which they severally held against said Harris, to be levied. On these executions certain undivided portions of the estate were assigned to each of said execution creditors. It is admitted that the levy of Blake was invalid, thus leaving that portion of the estate seized by him, on his execution, still in Harris. Assuming the levies of the plaintiffs to be valid, Harris would be a tenant in common with them in the estate.

It is, however, objected that the levies of the plaintiffs are invalid, *first*, for the reason that the original return of the officer is insufficient in law to bar the estate. There was, undoubtedly, an informality in the original return of the officer. These defects, however, were cured by the amendments which have been duly and properly allowed by the Court, and which are binding upon the parties to this suit. *Whittier* v. *Vaughan*, 27 Maine, 301.

Further, it is objected that these levies, or a portion of them, are fatally defective in this, that the appraisers, in their certificates, which were made part of the officer's return, appraised the entire estate at a given sum, ($1050,) but did not appraise the undivided portion thereof, which was taken to satisfy such execution, at the same rate at which they had appraised the whole estate. Or, in other

words, that the sum at which the several parts were appraised is not equal to the appraisal of the whole.

By § 9, c. 76, R. S., where the premises consists of a mill, mill privilege, or other estate, more than sufficient to satisfy the execution, which cannot be divided by metes and bounds without damage to the whole, an undivided part of it may be *taken*, and the whole *described*.

By § 2, of the same chapter, the appraisers are to be sworn faithfully and impartially to appraise the real estate *to be taken*, &c.

Now, while the statute, in such case, requires the whole estate to be described, it does not require it to be appraised, nor are the appraisers sworn to appraise the whole. They are, however, sworn to appraise the part *taken* to satisfy the execution. The appraisal of the whole estate was, therefore, unnecessary and irrelevant, and must be treated as surplusage. *Winsor* v. *Clark*, 39 Maine, 428.

It is also contended that, if the parties are tenants in common, this action cannot be maintained, because the defendants' possession, in such case, must be deemed to be the possession of all the co-tenants, and in subordination to their title. Such, undoubtedly, is the general rule of law. But, to this general rule, there are exceptions, as where one tenant in common destroys the common property, or so conducts with reference to it as to effect a practical destruction of the interest of his co-tenants therein.

There is a manifest distinction between the cases in which one tenant in common appropriates the proceeds, such as the rents, profits, or income of the estate, and where he practically destroys the estate itself or some portion thereof. In the latter class of cases trespass may be maintained by the injured co-tenant, in the former it cannot.

Thus, it was held in *Blanchard* v. *Baker*, 8 Maine, 253, that the diversion of the water in a stream from a mill owned in common and entitled to the natural flow of the stream, and the appropriation of such water to the sole use of a mill owned by a part of the co-tenants, was such a destruc-

tion of the common property as would support an action of trespass on the part of the co-tenants who were injured thereby.

So too, in the case of *McDonald* v. *Trafton*, 15 Maine, 225, it was decided that the demolition of the mill by one co-tenant, and the appropriation of the materials of which it was constructed to his sole use, would support an action of trespass therefor, by the injured co-tenant.

In the case at bar, it is denied that the property taken was real estate, or, if so, that it has been so converted by the defendants as to constitute a practical destruction thereof.

The property taken was machinery used in the "sash and blind factory," and evidently necessary to its operation as a factory. Without this machinery, then, the mill would cease to be a factory. This machinery was attached to the mill by spikes, nails, bolts and screws, and was operated by belts running from the permanent horizontal shafting in the mill, which shafting was driven by a water wheel under the mill, and connected with the main shafting by suitable gearing, &c.

Such machinery, thus situated and connected, constitutes fixtures and becomes a part of the mill or factory, and its unauthorized disseverance and removal, and the subsequent incorporation thereof into another mill, the sole property of the defendants, is, in our opinion, a practical destruction of the common property, within the letter and spirit of the case above cited. The action is therefore maintained.

Defendants defaulted, damages to be determined as per agreement.

FRANCIS O. J. SMITH, *in Equity*, *versus* NEAL DOW *& als.*

The right to sell an equity of redemption of real estate exists only by statute; and, as no statute authorizes the sale of two or more equities for one entire sum, such sale is void, without any statutory provision prohibiting it.

Therefore, if there be two mortgages embracing the same piece of real estate, whether other pieces are included in one of the mortgages or not, a sale on execution of the rights in equity of redemption under both mortgages, at the same time and for one sum, is illegal and void.

And such sale is void, not only as against the judgment debtor, but as against any one connected with the title, or against whom it is adversely used.

BILL IN EQUITY.

The bill sets forth, that James Smith of Portland, being possessed of certain real estate in said Portland, on March 31, 1836, mortgaged the same to Neal Dow; that, on January 23, 1841, J. G. Caunell, deputy sheriff, having an execution in favor of Cyrus S. Clark against Smith, seized and advertised the right of said Smith to redeem the mortgaged premises, and sold the said right at auction to the plaintiff; that said Smith did not seasonably redeem the same; that said Dow has entered into possession of the premises, and has sold and conveyed certain rights therein to the other defendants.

The bill further complains, that said Smith, being seized of certain real estate in said Portland, of which the foregoing mortgaged premises were a part, on May 1, 1837, mortgaged said real estate to Roscoe G. Greene; that the aforesaid deputy sheriff, on January 23, 1841, having the above mentioned execution, seized, advertised and sold at auction to the plaintiff said Smith's right to redeem the premises from said mortgage; that said Smith did not seasonably redeem the same; that said Greene, or some person claiming under him, has entered into possession of the premises, and received the rents, and has sold and conveyed certain interests therein. And further, that the plaintiff has caused demand to be made upon the defendants to account for the

rents and profits of the mortgaged premises, which they have neglected to do. Wherefore the complainant brings his bill for the redemption of the premises.

Copies of the mortgages to Dow and Greene, and also of the execution on which the rights in equity were sold, of the officer's return that he had sold said rights to the plaintiff for $256,09, and of his deed to the plaintiff, accompany the bill.

The defendants demurred to the bill.

The case was elaborately argued by

F. O. J. Smith, pro se;

Shepley & Dana, for Tyler, Rice, McKeen and Patten, defendants; and

E. H. Daveis, for Rand, Greene and Lamson, defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—The complainant, on Jan. 23, 1841, purchased at public vendue two equities of redemption of James Smith, to redeem two mortgages given by him embracing in part the same premises, which were sold on execution against said Smith, for the gross sum of $246,09. Having this title, he brings this bill against one of the mortgagees and his assigns to redeem the mortgaged premises.

It is urged in defence, that he has no such title as enables him to redeem or as requires these defendants to answer, because it appears by the bill that two equities of redemption were sold for an entire sum—and because such sale is illegal and void.

In *Stone* v. *Bartlett*, 46 Maine, 439, the complainant derived his title from a sale of two equities for one entire sum. In reference to such a title, the Court say:—"but the statute regards an equity as an entirety and does not authorize the sales of numerous equities for one sum. The equities are several, and the sales must be several." So in *Fletcher*

v. *Stone*, 3 Pick., 250, it was held that two rights in equity of redeeming several parcels of land from several mortgages, when sold on one execution, ought to be sold separately and not for a gross sum, for the debtor has a right to redeem one equity sold and not the other.

While the necessity of several sales as against the debtor is conceded, it is insisted that a joint sale, even if void, as against the debtor, cannot be avoided by strangers — that the mortgagees, and those claiming under them, are such strangers — and that they cannot interpose this defect in the complainants to defeat his bill. To support this proposition, reliance is placed upon *Fletcher* v. *Stone*, before cited, where it was decided that a joint sale could not be avoided by a stranger.

It is obvious there can be but one equity of redemption of one and the same mortgage, and the person having such equity alone can maintain a bill to redeem — and to him alone is the mortgagee to render his account and release his title. It would seem, therefore, if a sale on execution of two equities for an entire sum was void as against the debtor, he might most assuredly bring his bill against the mortgagee to redeem. If, in such case, the mortgagee could not contest the title of the purchaser, then he may bring his bill — and thus the mortgagee might be liable to two several bills, at the suit of the debtor whose equities were illegally sold, and at that of the individual by whom they were purchased. In other words, this doctrine would sustain two equities of one and the same mortgage, one of which must obviously be null, yet the good and the bad title alike receive the protection of the law. Such a result is manifestly absurd, yet it is difficult to perceive how the complainant can maintain his bill without coming to this conclusion.

If the sale in gross is inoperative against the debtor, his title is unaffected thereby, and remains in him unimpaired. The sale has not disturbed his rights. If so, he can convey it, and his creditor may seize and sell the same on execution. In such case, the question is, had the judgment

debtor a title? If it be not so, then the result is, that the debtor may have a title perfect in himself, which he cannot convey, and which his creditor cannot reach, which would be absurd.

In the case of *Fletcher* v. *Stone*, the Court say, and correctly, that "there is no clause (in the statute) authorizing or prohibiting the joint sale of two or more equities." But the right to sell an equity on execution, exists only by statute. If there be no statute authorizing the joint sale of two or more equities, there is no authority for such sale. They are invalid without statutory authority. There is no need of a prohibitory statute to render them so.

In support of the position that a joint sale of several equities for a gross sum is invalid, the Court, in *Fletcher* v. *Stone*, say:—"on this point, we are of opinion that the debtor has a right, by a fair construction of the statute, to redeem one equity, without redeeming the others, when several equities are sold on the same execution. This construction best agrees with the language of the statute, and generally the right of redemption is to be favorably considered. We think, also, that this right must necessarily be impaired, if not destroyed, should a joint sale be allowed to be valid as against the debtor. The principle of apportioning the relative value of property, which depends on opinion and is not founded on the basis of certainty, ought not to be resorted to except in cases of necessity."

The statute of this State, R. S., 1821, c. 60, §§ 17, 18, 19, under which the sale was made, is identical in language with that of Massachusetts, upon which the decision of *Fletcher* v. *Stone* was based. In the correctness of the views above cited we entirely concur. To sanction joint sales of numerous equities for one sum would defeat the debtor's conceded right of redeeming each equity at its own specific price as sold on execution.

It will thus be perceived that, nearly forty years ago, a joint sale of numerous equities for an entire sum was held to be void as against the judgment debtor. But, if void as

against him, how can it be valid as against any one? The rights of the purchaser depend upon a strict compliance with the provisions of the statute. The statute gives authority to sell several equities jointly and for a gross sum, or it does not. If it does not, then no title whatever can be acquired by proceedings unauthorized by law. If it does, then the debtor cannot defeat the title thus conveyed. The sale is not invalid as to the debtor and valid as to every body else. The officer can, or he cannot, legally sell numerous equities for a gross sum. If he can, how can the debtor avoid the sale? If he can avoid it, it must be for defects in his procedure — that is, because the several equities should have been sold for distinct sums; — and, if so, the right of avoidance is equally with his grantee or his judgment creditors. The sale of numerous equities on execution for an entire sum, if unauthorized by statute, is as invalid as would be that of the fee at auction. The consent of the debtor can no more confer authority upon an officer to sell than it can jurisdiction upon the Court to decide.

The sale cannot be both valid and invalid — valid when the debtor chooses so to consider it — invalid when he declines to give his assent. The statute gives authority to sell, as in the present case, or it does not. If it does, neither the debtor nor any one else can treat the sale as null. If it does not, all may. The debtor can avoid only because it is a nullity. If null as to him, all others may with equal success contest its validity.

The Court say truly, in *Fletcher* v. *Stone*, that, as against the debtor, the authorizing a joint sale of equities would deprive the debtor of his right of redeeming a particular mortgage, from the impossibility of determining the precise sum for which it was sold, and which should be tendered for its redemption. Hence, it was decided, that the sale should not be in that mode — or, if so made, that as to the debtor, he might avoid them. If he can, it has been seen that the right of contesting their validity cannot be limited to him alone.

Further, it is obvious that where numerous equities are

sold for a gross sum, the proceeds would ordinarily be less than when each equity is sold separately. The amounts to be redeemed would vary. Purchasers might be willing to redeem one mortgage and not another, yet they might be forced to bid on two equities when they intended only to redeem one. Hence, the price of the equities sold together would be less than the aggregate sum received from the separate sale of each equity. These views, as applied to the several sales of distinct parcels of land, have been adopted in equity. In *Woods* v. *Monell & al.*, 1 Johns. Ch., 502, Chancellor KENT says:—"it is, in general, the duty of the officer to sell by parcels, and not the whole tract in one entire sale: To sell the parcels separately, is best for the interest of all parties concerned. The property will produce more in that way, because it will accommodate a greater number of bidders, and tends to prevent odious speculations upon the distresses of the debtor."

"The demandant," (a subsequent attaching creditor,) remarks WILDE, J., in *Fletcher* v. *Stone*, "cannot be prejudiced by the mode of sale unless he can show that the amount of the sale was thereby reduced, and that if the equities had been sold separately there would probably have been a surplus of money after satisfying the tenant's execution." It would seem that, in such case, the joint sale of numerous equities for one gross sum may be avoided by a subsequent purchaser of one of the several equities thus jointly sold. It would seem, therefore, that the joint sale is void, not only as against the judgment debtor, but as against judgment creditors whenever it can be shown that separate sales of the several equities sold would have netted more than their joint sale. Here, too, the question again recurs—does the statute authorize both modes of selling? If so, the relative results as to the greater or lesser proceeds of sale, cannot affect the conclusion. Of two modes of sale, both authorized by law—one cannot become illegal, because, in the judgment of a jury, it may be less productive than the one which they may think should have been pursued. This

would make titles depend, not upon their conformity with the requirements of the statute, but upon the uncertain judgment of a jury as to the most eligible mode of sale, when, by the assumption, both may, as to third persons, be right. There is but one right mode of procedure. There may be many wrong ones.

Nothing is better established than that a party claiming title by proceedings *in invitum* must bring himself within the provision of the statute, under and by virtue of which he derives his right. The defendant is not to be disturbed, except by one having superior right, — and such superiority of right must depend on proof of a strict compliance with the requirements of law. No matter who may be the adverse party, though his title may be fraudulent as to creditors, he is none the less permitted to test the legality of proceedings against his grantee and to insist that he show a full compliance with the provisions of the law. "Whenever," remarks BELL, C. J., in *Russell* v. *Dyer*, 40 N. H., 173, "in order to make out his title to the land, he, (the judgment debtor,) introduces his levy, he fails, if that appear to be defective, whoever may be the adverse party. The debtor himself may object, and the fraudulent grantee, having his interest, stands in no worse position in this respect, because he has taken a conveyance which his grantor's creditors may disregard." These views received the sanction of this Court, in *Andrews* v. *Marshall*, 43 Maine, 278, in which, upon mature deliberation and satisfactory reasoning, the case of *Daggett* v. *Adams*, 1 Greenl., 198, was overruled.

"No doctrine," remarks BELL, C. J., in *Russell* v. *Dyer*, "has received more universal assent than that, in disposing of a debtor's lands by compulsory proceedings under a statute for the payment of his debts, the course prescribed is to be strictly followed. A failure to comply with any of the substantial requirements of the statute renders the proceeding void and leaves his title to the land unaffected." *Whittier* v. *Varney*, 10 N. H., 296; *Williams* v. *Amory*, 14 Mass., 20;

Benson v. *Smith*, 42 Maine, 414. It has been seen that the right to contest these proceedings is not limited to the judgment debtor—but that it is open to all, who are in any way connected with the title or against whom it is adversely used. It matters not whether the levy be upon the fee or upon an equity of redemption. A compliance with the requirements of the statute must in either case be shown.

The result to which we have arrived, is, we believe, in conformity with the uniform understanding of the profession. The debtor has a right to redeem each equity of redemption, when sold on execution, at the price for which it was sold, and interest. Each equity must be sold separately. If equities are sold jointly for an entire sum, the sale is void. The complainant, to maintain his bill, must show a statutory title. He has failed to do it, and the demurrer must be sustained. As he cannot by any amendments perfect his title, the bill must be dismissed.

Demurrer sustained.—Bill dismissed with costs.

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

DAVIS, J.—I concur in the result, and in all the opinion except what is said of the case of *Andrews* v. *Marshall*, 43 Maine, 278. I do not understand the appositeness of that case to the one at bar.

That related to personal property; this relates to real estate. In that, the party contesting the validity of the officer's proceedings was a *fraudulent* vendee; in this, no fraud is alleged. In that, the debtor expressly *consented* to the departure from the requirements of the statute; in this, no such consent is pretended.

In that case, the proceedings were not *in invitum*; and it was precisely upon that point that I believed the decision erroneous. See same case, 48 Maine, 26. The debtor's *consent*, that the officer might sell the goods at private sale, made such a sale valid; and the fraudulent mortgagee had no right to object. It was the same as if the debtor had himself sold them to a creditor. "When a sale is void as

against a creditor," says SHEPLEY, J., in *Frost* v. *Goddard*, 25 Maine, 414, "the creditor is not restricted to the simple mode of proceeding on legal process, by attachment or writ, or seizure on execution. The sale, as to him, being void, he may entirely disregard it, and obtain a satisfaction of his debt by a subsequent purchase of the debtor."

It is the *consent* of the *debtor*, when he owns the goods, that justifies the officer in departing from the requirements of the statute. Such consent is a good justification, if he has possession of the goods, as against any *fraudulent vendee*, when the sale is in payment of a *creditor;* for, as between the fraudulent vendee and the creditor, the former has no rights.

But, in the case at bar, no such questions arise. It is not claimed that the mortgages were fraudulent; nor that any consent was given that both equities might be sold together by the officer, for one sum. His proceedings were therefore void.

DAVID BROWN *versus* MOSES WITHAM *& als.*

To render the doings of a town meeting legal, it should appear that attested copies of the warrant for the meeting were posted in public and conspicuous places, and that the places of posting were *within* the town.

THIS was an action of TRESPASS *quare clausum*, submitted on report. It was admitted that the defendants entered upon and crossed the land described in plaintiff's writ, claiming that a private way had been laid out by the town.

Vinton, for the plaintiff.

Howard & Strout, for the defendants.

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

RICE, J. — The question whether the defendants are liable,

in this action, depends upon the legality of the proceedings to lay out a private way over the land of the plaintiff on the petition of the defendants. There are several objections to those proceedings relied upon. The first is, that the meeting of the town at which the way was accepted was not legally warned.

Sect. 7, of c. 3, R. S., provides that such meeting shall be notified by the person to whom the warrant is directed, by his posting up an attested copy thereof in some public and conspicuous place in said town, seven days before the meeting; unless the town has appointed by vote, in legal meeting, a different mode, which any town may do. In either case, the person who notifies the meeting shall make his return on the warrant, stating the manner of notice, and the time it was given.

The return on the warrant is as follows:—

"New Gloucester, June 22, 1858.

"Pursuant to the within warrant, to me directed, I have notified the inhabitants of said town of New Gloucester, qualified as therein expressed, to assemble at the time and place, and for the purposes therein mentioned, by posting up an attested copy of such warrant at the Congregationalist, Baptist, and Universalist meeting houses; and at Sabbath day pond, and at the school house over the hill, on the 22d day of June, being seven days before said meeting.

"E. S. White, Constable of New Gloucester."

It does not appear from the return, or in any other manner, that attested copies of the warrant were posted in *public* or *conspicuous* places, or that the meeting houses named in the return, or the pond, or the "school house over the hill," or either of them, were within the town of New Gloucester, nor has the Court judicial knowledge that such is the fact. The notice, therefore, was clearly insufficient and the proceedings of the meeting void. *State* v. *Williams*, 25 Maine, 261; *Bearce* v. *Fossett*, 34 Maine, 575.

The defendants, therefore, fail in their justification on this point, and, according to the provision of the report, must be

defaulted for nominal damages. It is not necessary to consider the other objections. *Defendants defaulted.*

TENNEY, C. J., APPLETON, GOODENOW, DAVIS and WALTON, JJ., concurred.

WILLIAM HALL, *Complain't, versus* NATHAN DECKER *& al.*

Exceptions to the report of referees are not sustainable, if objections, in writing, are not filed as required by the 21st Rule of Court.

Where an action is referred by rule of court, without any condition or limitation, the authority of the Court is transferred to the referees, and they are made the judges of the law and the fact; and, if there is no suggestion of improper motives, on their part, their doings will not be inquired into by the Court.

EXCEPTIONS from the ruling of WALTON, J., in overruling the respondents' objections to the acceptance of the report of the referees and directing the same to be accepted.

This was a complaint under the statute for flowage of land, and was referred by rule of Court. The referees reported that this complaint was barred by a judgment of a former Court, obtained by the complainant against the respondents.

Holden & Peabody, for the complainant.

J. J. Perry, for the respondents.

The opinion of the Court was drawn up by

DANFORTH, J.,—By the 21st Rule of this Court, all objections to any report, offered to the Court for acceptance, shall be made in writing, and filed with the clerk, and no others will be considered. In the case at bar, no such objections appear to have been made, and, by the authority of *Mayberry* v. *Morse*, 43 Maine, 176, there is no ground for exceptions.

Neither is it perceived that there is any cause for excep-

tions if the objections had been properly set out in writing. It is claimed in plaintiff's argument that the referees exceeded their jurisdiction. By the rule of Court, the complaint appears to have been referred without any conditions or limitations. This transferred all the authority of the Court to the referees,—and, if they found any valid defence to the complaint, they not only had the right but it was their duty to say so. In their report they have said so. As they were the judges of the law as well as the fact, the Court cannot inquire into their doings, no suggestion having been made that they were actuated by any improper motives.

Exceptions overruled.

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

MICHAEL WALL *versus* HOWARD INSURANCE COMPANY.

The plaintiff was insured by the defendants $2000 upon his stock of clothing. He delivered to the company an account, on oath, claiming his loss to be $2400. On trial, more than three years afterwards, the jury assessed his damages at $1060. The verdict, on defendants' motion, was set aside, one of the conditions annexed to the policy being "that all fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on the policy."

ON MOTION to set aside the verdict.

This was an action on a policy of insurance upon the plaintiff's stock of clothing in his store at Portland, to the amount of $2000. The verdict was for $1060.

Shepley & Dana, for the plaintiff.

Rand, for the defendants.

The grounds for the motion will appear from the opinion of the Court, which was drawn up by

DAVIS, J.—The plaintiff procured of the defendants a

policy of insurance upon his stock of clothing, to the amount of $2000. The store occupied by him was destroyed by fire, Nov. 25, 1858. He claimed that the value of his stock on hand at the time was $2,400; and he commenced a suit upon the policy. The case was tried at the January term, 1860, and resulted in a verdict for the plaintiff, for the amount insured. That verdict was set aside by the full Court, on the ground that it was against the evidence. A new trial was had at the October term, 1861, resulting again in a verdict for the plaintiff, for the sum of $1,060. The counsel for the defendants filed a motion to have that verdict set aside.

There would seem to be the same reason to set aside the second verdict, as the first. The evidence was substantially the same. The ground of the defence was, that the amount of the plaintiff's stock was much less than claimed by him. As this appeared to be established by the evidence, the first verdict, for the full amount insured, was set aside.

The amount of the second verdict, exclusive of interest, is a little over nine hundred dollars. If the plaintiff had not *claimed* a greater loss than that, notwithstanding the suspicious circumstances attending it, we might not have disturbed the verdict.

It was the duty of the plaintiff, as soon as possible after the loss, to deliver to the company an account, on oath, of his loss or damage, as particular as the nature of the case admitted, stating the cash value of the property insured. *Conditions of Insurance, article* 9. This the plaintiff did, the next day after the fire, claiming the value of the goods destroyed to have been $2,400.

By note 3, to the same article of the conditions annexed to the policy, it is provided that "all fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on the policy."

The plaintiff made oath to his account, stating the value of the stock destroyed to have been twenty-four hundred

dollars. The jury, in their verdict, must have found it to have been about nine hundred, to which they added the interest after sixty days. If the difference had been less, we might have supposed that it resulted from some mistake, or error of opinion, that would not necessarily involve the plaintiff in any fraud. But, when the jury have found that his claim was for nearly three times the actual amount, we are not at liberty to account for it on the ground of error, or mistake. Assuming that the verdict is for the right amount, the inference cannot be avoided that the plaintiff, by rendering on oath a false account, attempted to defraud the insurers, and thereby forfeited all his rights under the policy. Under these circumstances, the verdict must be set aside, and a new trial granted. *Levy* v. *Baillie*, 7 Bing., 349.

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

JOHN W. NOBLE *versus* WILLIAM EDES.

A promissory note, where a payment has been made and indorsed thereon by *the maker*, will not be barred by the statute of limitations, until six years from such indorsement.

A verbal promise made to the maker of a note by the holder of it, to surrender it in payment of an account the maker had against a third person and which the holder of the note was not liable for, will not, unless it is executed, affect the note, as a payment.

EXCEPTIONS from the ruling of DAVIS, J.

This was an action of ASSUMPSIT on a promissory note.

A. A. Strout, for the plaintiff.

Perry, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—June 2, 1854, the defendant gave his promissory note to Henry L. Buck, for $95,60, payable in five

months. It was overdue when indorsed to the plaintiff. There was an indorsement of a payment of $78,00, dated Nov. 22, 1854, proved to be in the handwriting of the defendant. The writ was dated Nov. 10, 1860. The plea was the general issue, with a brief statement of payment, and the statute of limitations.

The jury were instructed that if the indorsement of the payment was in the handwriting of the *defendant*, that was sufficient evidence to authorize them to find a payment that would prevent the note from being barred by the statute of limitations. The correctness of the instruction cannot be doubted. Such indorsement was an admission by the defendant, that he had made a payment within six years before the suit was commenced; and, being made by the party *by* whom, and not the party *to* whom the payment was made, the effect of it has not been changed by statute. R. S., c. 81, § 111.

The defendant testified that Buck, while he held the note, wrongfully hauled away a quantity of shingles from his (the defendant's) mill, upon which he had a lien for sawing; that the shingles were owned by A. H. Pike; and that Buck afterwards agreed to give up the note in suit in payment of the defendant's bill against Pike for sawing the shingles. Buck denied that he made any such agreement. The plaintiff contended that, if he did, it was a promise to pay the debt of another, and was void, being without consideration. The defendant contended that Buck became personally liable to pay the bill for sawing, by hauling away the shingles after being notified that the bill had not been paid; and that such liability was a sufficient consideration for his promise to give up the note in payment of the bill.

The jury were instructed that if Buck agreed to consider the note paid by the discharge of the account against Pike, and the defendant thereupon discharged the account, the discharge of the one was a sufficient consideration for the discharge of the other; and that the note was thereby rendered void. But they were further instructed, that if the

agreement was an executory one, and never executed,—Buck agreeing at some future time to give up the note in payment of the account against Pike, but never having done it,—then such executory agreement did not discharge either the note or the account.

These instructions were sufficiently favorable to the defendant. If Buck hauled away the shingles wrongfully, and thereby became liable for the tort, he was not liable *upon the account* against Pike. His promise, (if he made such,) to surrender the note in payment of the account, unless it was executed, did not affect the note, as a payment of it. It did not render him liable upon the account. He might still have maintained an action upon the note; and the claim set up by the defendant would not have been available either in set-off, or as a payment. *Weeks* v. *Elliot*, 33 Maine, 488; *Mansur* v. *Keaton*, 46 Maine, 346.

Exceptions overruled.

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

ATLANTIC & ST. LAWRENCE R. R. CO., *petitioners for certiorari, versus* CUMBERLAND COUNTY COMM'RS.

Where, by statute, damages in a specified case were to be ascertained in the same manner that damages, occasioned by the laying out of highways, are, by law, determined; — if the county commissioners issue a warrant for a jury to assess the damages, on the application of persons claiming damages, without giving notice, to the party adversely interested, of the pendency of such application, the proceedings *under the warrant* will be illegal, and *certiorari* will lie to quash the erroneous proceedings.

THIS was a petition for a writ of CERTIORARI, commenced in the year 1854.

The case, upon copies of the record of the proceedings of the county commissioners, was presented for decision by

the Court of law in 1855. The questions, arising from these records, were re-argued, in 1863, by

P. Barnes, for the petitioners, and

Shepley & Dana, for the respondents.

The opinion of the Court was drawn up by

APPLETON, C. J. — The petitioners being authorized by the special Act of June 17, 1846, c. 310, to take certain land for depot purposes, instituted proceedings for the appraisement of damages before the county commissioners at an adjourned session of the June term, 1852. Notice, as appears by the record, was given of these proceedings.

At the following December term, the commissioners made their award by which they allowed compensation for all the land taken. All the land appraised was claimed by some owner or owners, who appeared before the commissioners, and in whose favor awards were made for the value of each parcel of land taken by the petitioners.

The award embraced the parcel of land called the Rowland Bradbury tract, which was claimed by numerous tenants in common, descendants of Bradbury, or their grantees.

The costs of this proceeding were paid by these petitioners.

Within a short time after these awards were made, the petitioners, as they allege, complied with the terms of the award and made the payments required thereby to most of the claimants, and particularly to those who claimed and had shown title to the Rowland Bradbury land.

On the 21st Sept., 1853, Joel Rand and others, the respondents in interest, filed their joint petition to the commissioners, alleging that they were tenants in common of the Bradbury land; that no damages had been awarded them for their interest, and praying for a jury. Thereupon, without notice to the railroad company, or to any other party, a warrant for a jury was issued.

The petitioners for a *certiorari* rely mainly upon the fact

that the warrant for a jury was issued without notice to them of the pendency of the petition therefor.

By the special Act of June 17, 1846, c. 310, the doings and proceedings of the commissioners in the premises are to be governed and conducted "in all cases in the same manner, and under the same conditions and limitations, as are by law provided for ascertaining and determining the damages occasioned by the laying out of highways. And the said commissioners are hereby authorized and required, on the written application of either party, to proceed to examine, hear and adjudicate, in the premises, and to cause their doings to be entered as of record on the records of their doings as county commissioners."

By R. S., 1841, c. 25, § 8, under which the petition of Rand and others was filed, it is enacted that, "any party, aggrieved by the doings of the commissioners in estimating damages, * * may have a jury to determine the matter of his complaint, on his petition pursuant to the fifth section of this chapter, *unless* he shall agree with the parties, adversely interested, to have the same determined by a committee, to be appointed under the direction of the commissioners."

The present petitioners claim that, by the language of this section, as well as by the repeated decisions of the Supreme Court of Massachusetts upon the construction of a statute of that Commonwealth, almost identical in the words used, no warrant for a jury should have issued without notice to them of the pendency of the petition therefor, that they might show cause why it should not be granted. It is obvious that there could be no agreement with parties adversely interested, unless there should be an opportunity given to make the agreement. The order for a jury was not to issue until that opportunity was had, and that could not be had, if the warrant for a jury were issued before notice should be given, that one was desired.

It was decided in *Central Turnpike Corporation, petitioners*, 7 Pick., 13, upon an application for a jury, to assess

the damages sustained by the location of a road, that notice should be given to persons interested, to show cause why a warrant for summoning a jury ought not to be issued. In *Hinckley, petitioner*, 15 Pick., 447, referring to language similar to that just cited, the Court say:—"This provision clearly implies, that the parties are to have an opportunity to agree upon the amount of damages, or on a special committee to assess them, before a jury is ordered, and, for this purpose, that they are to have notice of the application, before the order passes." In *Porter* v. *County Commissioners*, 13 Met., 479, an order for a jury was made without notice to the adverse party. "Such an order," remarks DEWEY, J., "could only be made after due notice to the corporation, or, what is equivalent, an appearance by them. The order being thus wholly illegal, no duty devolved upon the petitioner to call out the jury in pursuance of such order; and he might properly treat it as a nullity. The proper order upon the petition has not been made, viz.: an order of notice upon the corporation to show cause why a jury should not be ordered upon the petition." The necessity of notice to those adversely interested is recognized as indispensable in *Brown* v. *Lowell*, 8 Met., 172. *Field* v. *Vt. & Mass. R. R.*, 4 Cush., 150.

In the last revision of our statutes, the necessity of notice is equally implied as in the one which preceded it. R. S., 1858, c. 18, § 8.

The appearance of the present petitioners before the sheriff's jury was no waiver of objections to its irregularity, because neither the sheriff nor the jury could sustain the exception, or act upon it, if it had been taken. *Hinckley, petitioner*, 15 Pick., 447.

But it by no means follows because the warrant for a jury has issued prematurely, that therefore all proceedings should be quashed. They may be quashed in part and affirmed in part. *Hopkinton* v. *Smith*, 15 N. H., 155. The issuing a warrant for a jury, without notice to parties adversely interested, was erroneous. The proceedings consequent upon

such warrant should be quashed. This would leave the petition still before the commissioners, who, upon and after notice to the railroad corporation, might issue another warrant, in case the parties should not agree upon a committee, unless some valid and sufficient plea in bar of all further proceedings should be interposed. *Brown* v. *Lowell*, 8 Met., 172; *Porter* v. *Co. Commissioners of Norfolk*, 13 Met., 479; *Com.* v. *Blue Hill Turnpike*, 5 Mass., 420; *Com.* v. *West Boston Bridge*, 13 Pick., 195.

Whether the respondents in interest have title to the premises in question, and if so, how far, and to what extent they are concluded by the previous proceedings had after notice given, may hereafter require grave consideration.

Certiorari to issue.

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

JOHN H. HUMPHREYS *versus* GEORGE E. NEWMAN.

E. H. purchased a parcel of land which was conveyed to his wife, and joined with her in a mortgage back to secure a part of the purchase money. He erected a dwellinghouse and other buildings on the land, which he intended as a gift to his wife, with no design to defraud creditors. Subsequently, he became insolvent; and one of his creditors attached the buildings and sold them on execution as his personal property. In an action of trover, by the purchaser against the tenant in possession, who claimed as grantee of H. and wife, — it *was held*: —

That when an erection, though made with the consent of the owner, is with the express or implied agreement of the owner of the soil and the person making the erection, that it shall become and remain a part of the freehold, it must be regarded as real estate and not as personal property.

That the purchaser acquired nothing by the sale on execution, if the buildings became the property of the wife by accession and the intention of herself and husband, the judgment debtor having no title to the property, and even if the buildings were the property of the debtor, the title to them would enure to the mortgagee, and the debtor, by the covenants of his deed of mortgage, would be estopped to assert title to the land or buildings.

The mortgage having been recorded, was notice to the purchaser of the prior rights of the mortgagee.

Humphreys *v.* Newman.

The defendant in possession, having the equity, of redemption, represents the title of the mortgager, and, like the mortgager, would be liable to the mortgagee, in trespass, if he had removed the buildings.

THIS was an action of TROVER for the conversion of a dwellinghouse and outbuildings, and was submitted upon an agreed statement of facts, and depositions; the Court to draw inferences from the facts, and such of the evidence, as is legally admissible, as a jury might.

The buildings in controversy, situated on High street, in Bath, were erected by Ephraim Harding, upon land belonging to his wife whom he married in December, A. D. 1850, both of them being at that time residents of Bath. The buildings were so erected with and by the knowledge and consent of the wife, and at the time of the sheriff's sale of the same to the plaintiff hereinafter referred to, were occupied by the said Ephraim Harding and wife. The deed of the lot to Mrs. Harding makes part of the case. For the erection of these buildings, John H. Humphreys & Co., furnished materials to the amount of $453,51, taking the said Ephraim Harding's note therefor, which note was dated July 28, 1854, payable in four months. This note was indorsed to John C. Humphreys, one of said firm, and, on the sixth day of December, 1854, suit was commenced thereon, in which the buildings in controversy were attached, December 9, 1854, as the personal property of the said Ephraim Harding, and the officer's return of the attachment thereof was duly and seasonably filed and recorded in the city clerk's office in Bath, according to the statute regulating the attachment of personal property not easily removed. In this suit such proceedings were regularly had that judgment was rendered therein at the October term of the S. J. Court in Cumberland county, 1855, and, upon the execution issued thereon, the said buildings were seized and sold in season to preserve the attachment on the original writ and in conformity with the law regulating the seizure and sale of personal property on execution, and struck off to the plaintiff on the premises, for the sum of $500, he being the highest

bidder therefor. At the time of this sale, the buildings were occupied by the said Ephraim Harding and his wife, and the said Ephraim was informed of the sale and made no objection, and being in feeble health, was not removed, though the officer made a formal delivery of the buildings to the purchaser. The said Ephraim Harding remained in the house till his death, which occurred February 2d, 1856. On the 30th day of November, A. D. 1858, the plaintiff, having previously repeatedly notified the defendant that he claimed the buildings as his, finding the defendant in possession of them, made a formal demand upon him for them, and the defendant refused to surrender them, claiming them as his own. The buildings at this time were worth, to remove, $675, and it is agreed that, if the plaintiff is entitled to recover, judgment shall be rendered for $556, being the amount of the original judgment in favor of John H. Humphreys & Co., against said Harding, with interest thereon from October 23, 1855, the time of its rendition, till the rendition of judgment in this suit and costs.

The foregoing is the case as presented by the plaintiff's proof. The defendant offers to prove, and it is agreed as matter of fact that he can prove, if permitted so to do by the Court, the plaintiff objecting to all and singular the facts and evidence offered by the defendant as irrelevant, not pertinent to the issue, incompetent and inadmissible, except so far as he has himself herein before made them part of the case; that, at the time of said attachment by Humphreys, the title to said lot of land, on which said buildings were standing, was in said Harding's wife, and was conveyed to her by deed from Freeman Clark, dated March 25, 1854, which deed was duly acknowledged and recorded March 31, 1854. That, on said 25th day of March, 1854, said Harding and his wife made a joint mortgage deed of said lot back to said Clark, to secure their joint notes for $400 and interest, and said mortgage was duly acknowledged and recorded April 3, 1854, and was finally paid, and discharged by said Clark, March 5, 1861, the note secured thereby be-

ing paid by one Palmer, to whom the defendant had sold the property subject to the mortgage. Said buildings were erected in the spring and summer of 1854, the house with a cellar under it and underpinned with stone and brick, and the outbuildings adjoining and connecting with it.

On the first day of December, 1854, John B. Swanton and others, creditors of said Harding, brought sundry suits against him, and on that day caused to be attached all the real estate of said Harding in the county, which attachment was duly returned and recorded in the registry of deeds, and the actions entered and continued from term to term, until the August term, 1855, when judgment was obtained in favor of said creditors and execution issued, and thereupon on the twenty-eighth day of September, A. D. 1855, being in season to preserve the lien acquired by the original attachment, there was seized and sold on said execution in conformity with the laws regulating the seizure and sale on execution of rights of redeeming mortgaged real estate, all the right in equity which the said Harding had of redeeming the said Clark lot on the day of the original attachment; said right was sold to one Edward K. Harding, and the sum received was applied to the payment of said execution and of other executions then in the officer's hands, the receipt for which payment the defendant offers as a part of this case, viz.: — one of Merritt & Robinson, dated November 17, 1855; one of S. J. & W. H. Watson, dated Jan. 28, 1856; one of Bronson & Sewall, dated Nov. 6, 1855 — said Harding being the highest bidder therefor; and, in pursuance of said sale, said Harding's interest in the lot aforesaid was duly deeded by the officer to said Edward K. Harding by deed, dated Nov. 17, 1855, duly acknowledged and recorded Nov. 17, 1855, which deed is offered by defendant as part of this case. Said Ephraim Harding and his wife, on the sixth day of November, A. D. 1855, by their joint deed acknowledged and recorded the same day, which deed defendant offers as part of the case, quit-claimed to said Edward K. Harding, said lot of land "with the buildings

thereon situate," which buildings are those now in suit. The defendant Newman holds under said Edward K. Harding by deed of warranty, dated June 23, 1856, and acknowledged and recorded June 26, 1856.

From the deposition of E. K. Harding, it appears that he was remotely related to said Ephraim Harding; that deponent paid his own money to the officer, for the equity of redemption, about $650, (which sum, with the amount he paid to discharge other demands claimed as *liens* on the property, amounted to more than $1400.) Said Ephraim was doing business as a grocer and fitter out of vessels, in the years 1853 and 1854, and built parts of two vessels in those years. Told deponent that he had bought the land, and was going to build a house on it, and give it to his wife; that he was able to do so. He failed in consequence of the failure of insurance companies which had insured a vessel in which he was largely interested.

From the deposition of Mrs. Harding, it appears that she paid no part of the price of the land—it was wholly paid by Mr. Harding. He told her he had bought it for her—to build a house on for her, so that she would have a home if anything should happen to him:—That she lived near the lot and visited the house often while it was being built. Her husband did not speak of it as his, but called it her house. That she consented to the erection of the buildings in the expectation that they were to be hers. She had no means of her own to purchase the land or erect buildings.

Shepley & Dana, for plaintiff.

The debt of plaintiff was created by furnishing materials for Ephraim Harding to build a house and outbuildings on land of his wife, by her permission, in the spring and summer of 1854. Note therefor given July 28, 1854, payable in four months. Suit on it commenced Dec. 9, 1854, and buildings attached. Judgment obtained October term, 1855, and buildings seized and sold on execution and purchased by plaintiff. All these proceedings regular. These build-

ings were personal property of Harding. *Russell* v. *Richards*, 10 Maine, 429, and 11 Maine, 371; *Hilborne* v. *Brown*, 12 Maine, 162.

The title of the plaintiff is therefore good, and he, having demanded possession and been refused it, is entitled to judgment unless that title is defeated by the testimony in defence.

It appears that, when the buildings were erected, the land had before been mortgaged by Harding and wife to Clark. Suits were commenced by Swanton and others, creditors of Harding, December 1, 1854, and all his real estate attached. Judgment was obtained, execution issued, and Harding's right of redeeming sold, on Sept. 28, 1855, and purchased by E. K. Harding, who received a deed from the officers. These proceedings were regular.

E. K. Harding acquired no title by these proceedings. When the attachment was made of real estate of Ephraim Harding, he had no real estate in the premises.

Should it be contended that he owned the lot of land deeded to his wife because he paid for it—the answer is, that the husband paid for only $500 of the $900, the price of the land; the note for $400 was signed by his wife and she mortgaged the land to secure payment of it. The husband, by proof in defence, gave the land to his wife. There could, therefore, be no resulting trust in favor of the husband. 2 Story's Eq., § 1202.

"If a purchase be made by a husband in the name of his wife it will not be considered as an implied trust, but she will, it seems, be beneficially entitled, for a *feme covert* cannot be a trustee for her husband." 2 Maddock's Ch. Practice, 146, and cases cited in notes. Hill on Trustees, by Wharton, 98*, and notes; Adams' Eq., by Wharton, 165, note 1; *Baker* v. *Vining*, 30 Maine, 121.

The husband having no title to the land at the time of sale of the equity, the purchaser of that equity did not obtain any title. E. K. Harding obtained a title to redeem the lot by the deed made to him by Ephraim Harding and

wife on Nov. 6, 1855. This deed is silent respecting the buildings on the lot. The title might have passed by it if the buildings had not been attached eleven months before as the property of the husband. Being under attachment, if they were his personal property, he could not convey any title except subject to that attachment.

The only mode in which E. K. Harding could have obtained title to the buildings would seem to be by the conveyance to him by Ephraim Harding and wife, she being the owner of them.

She was not the owner of them.

The declarations of Ephraim Harding respecting it are not legal testimony, and must be excluded. Even if they could be received as testimony, they have no tendency to prove that the wife owned the buildings: they only exhibit a statement that "he was going to build a house, * * * also give it to his wife." Such expression of future intention could not confer any title to what did not then exist.

The testimony of Elizabeth Hodgkins, formerly the wife of Ephraim Harding, respecting his declarations of intention, is not legal evidence. If that testimony could be received, it has no tendency to prove that she owned the buildings. She says: — "he intended to give the house to me and said it should be mine. I cannot recollect just the time."

This, at most, is only an exhibition of an intention, not an act of donation. It does not appear that the buildings then existed. From a subsequent answer, it appears to have been about the time of the purchase of the land. The husband does not appear to have attempted to give the buildings to his wife after they were built. That the buildings, when built, were his, and not his wife's, is quite apparent. They were built by him with his own means, by moneys and credits. Not built by him as the agent of his wife, so that they could become her property.

As E. K. Harding did not acquire any title to the buildings, he could not convey any to defendant Newman.

Evans & Putnam, for the defendant.

E. K. Harding, who is the real defendant in interest, and under whom defendant Newman claims, makes his title in two ways; 1st, by deed of land *and buildings* from Ephraim Harding and wife; 2d, by sheriff's deed of the equity of redemption.

As to the first title. This depends entirely on the question whether the dwellinghouse was rightfuly taken on execution as the personal property of Ephraim Harding. We claim that this whole transaction was the ordinary case of a gift of both house and land by a husband to a wife, made for laudable purposes, without intention to defraud. That no fraud was intended appears from the evidence in the case. Both Harding and his wife permitted the whole property to be sold for the benefit of his creditors.

That there was no fraud in law is apparent, because, while Humphreys' note is dated July 28, 1854, the land was purchased and the deed recorded the spring before, and the cellar commenced in May; while the frame was raised July seventh and eighth,—and *so existed as a house* before the note was given.

It is claimed by plaintiff that the house was personal property, because erected by the husband on wife's land, with her "knowledge and consent." We claim that it was built as a gift to the wife; was intended when built to be a part of the realty, and by the principles of law became realty. Whether a building erected on another's land, by consent or knowledge of the owner of the land, shall be realty or personal property, is a question of intention. "*Accessione et destinatione*," is the common language of the books on the question of fixtures, that is to say, both the *accession* and the *purpose* of the accession. It is true that, in many cases, the building has been declared personal property, where it only appeared that it was erected by the "consent" or the "permission" of the owner of the land, or when the circumstances were such as are usually considered among men as *implying a consent or permission;* but in all those

cases there was nothing to rebut the presumption that it was intended on both sides that the property should continue in the builder. No case can be found where a building was, by *compulsion of law*, ever regarded as personal property, *contrary to the intentions* of all parties in good faith expressed at the time of its erection.

Counsel commented on *Osgood* v. *Howard*, 6 Maine, 454; *Pullen* v. *Bell*, 40 Maine, 314; *Wells* v. *Bannister*, 4 Mass., 514; *Washburn* v. *Sprout*, 16 Mass., 449; *Milton* v. *Colby*, 5 Met., 78; *Sudbury* v. *Jones*, 8 Cush., 189; *Fuller* v. *Fuller*, 39 Maine, 521.

The result of all these cases is, that to convert the building to personal property, there must be a contract or agreement, or intention so to do. These may be either express, or implied, as they sometimes are, from very slight circumstances. Nowhere does it appear that there is in the mere fact of "knowledge and consent" any absolute implication or presumption of law that may not be overcome; and nowhere has a building, affixed to the soil, been held personal property, where a contract, agreement, or intention to the contrary appears from the evidence to have existed in good faith cotemporary with the erection.

Besides, if Mrs. Harding gave her consent to the erection of the house, it was a qualified consent. She supposed the home to be hers while building, and whatever consent she gave was with that expectation, and that her husband so understood it is apparent from his declarations all through the case. Parties claiming under him by subsequent title cannot avail themselves of the *consent* and reject the *qualifications*.

This is an action of trover brought by a person who never was in *actual possession*. Of course, then, however weak defendant's title, plaintiff cannot prevail unless at the date of the writ he had a right of immediate possession.

At that time the mortgage was outstanding. As towards Clark the house was undoubtedly a portion of the realty, and he held it with the land under his mortgage.

If, then, Humphreys had any interest, it was not perfect till Clark's mortgage was paid. He was never in possession, and had only the same rights as a person entitled to redeem personal property. That such a person cannot maintain trover, has been decided in *Rugg* v. *Barns*, 2 Cush., 596.

He was a mere trespasser in going upon the land to demand the house, not having any authority from the mortgagee; while Newman, being in possession as assignee of the mortgager and as tenant by sufferance, must be presumed to have been in rightful possession of all the mortgaged property by consent of Clark, the owner of the fee.

The opinion of the Court was drawn up by

APPLETON, C. J.—It appears that, on March 25, 1854, Freeman Clark conveyed to Mary E. Harding a tract of land in the city of Bath; that on the same day Mrs. Harding and Ephraim Harding, her husband, joined in a mortgage of the same premises to said Clark to secure their joint note, given in part for the purchase money; that Ephraim Harding, with the knowledge and consent of his wife, erected thereon a dwellinghouse and outbuildings, but with the expectation and intention on the part of both that the erections, so made, should become permanently affixed to, and a part of the realty; that, on Nov. 6, 1855, Ephraim Harding and Mary E. Harding conveyed to Ephraim K. Harding, for a valuable and sufficient consideration, the lot before referred to, "with the buildings thereon situate," who, on June 23, 1856, deeded the same to the defendant; and that this action is brought for the alleged conversion of the dwellinghouse and outbuildings thus erected.

The plaintiff, having a demand against Ephraim Harding, on Nov. 6, 1854, commenced a suit thereon, in which the buildings in controversy were attached as personal property, obtained judgment and caused the same to be sold on execution and became the purchaser thereof. On Nov. 30, 1858, he demanded these buildings of the defendant, then in

possession, under his title already set forth, who declined to surrender the same. Whereupon this suit was commenced.

The general presumption of law is, that whatever is annexed to the soil becomes part of the same. Buildings voluntarily erected on the land of another and without the consent of the owner become part of the real estate. *Pierce* v. *Goddard*, 22 Pick., 559. If the builder has an interest in the land as the husband of the tenant in dower, the building at once becomes a part of the realty. *Washburn* v. *Sproat*, 16 Mass., 489. So if he has an interest in the soil as reversioner or remainder man. *Cooper* v. *Adams*, 6 Cush., 87. A tenant by courtesy is created by operation of law, and no buildings erected by such tenant by consent of the wife will thereby become personal property. *Doak* v. *Wiswall*, 38 Maine, 570. But if a house is erected by one man upon the land of another by his assent, and, upon an agreement express or implied, that the builder may remove it when he pleases, it does not become a part of the real estate, but remains a personal chattel. *Dame* v. *Dame*, 38 N. H., 429.

The evidence satisfactorily establishes the fact, that it was the intention of Ephraim Harding, that the buildings by him erected, were to be, and remain a part of the freehold, and thus to become the property of his wife. Nor does the proof show any fraudulent intent on his part in so doing, he being solvent at the time.

When an erection, though made with the consent of the owner, is, with the express or implied agreement of the owner of the soil and the person making the erection, that it shall become and remain a part of the freehold, it must be regarded as real estate and not as personal property. *Sudbury* v. *Jones*, 8 Cush., 184; *Murphy* v. *Marland*, 8 Cush., 578; *Fuller* v. *Taber*, 39 Maine, 521. Such is the case before us.

If the buildings became the property of Mary E. Harding by accession, and the intention of her husband and herself was that such should be the result, then the plaintiff acquired

nothing by his sale on execution, for the buildings sold did not belong to the judgment debtor, and this action cannot be maintained.

Even if the buildings were the property of Ephraim Harding, the title to them would enure to Freeman Clark, the mortgagee. Harding having joined in a mortgage of the premises to him, would be estopped by the covenants of his deed to assert a title to land mortgaged or the buildings erected thereon. The mortgage having been recorded, the plaintiff must be held affected with knowledge of its existence and of the prior rights of the mortgagee.

When the demand was made, the mortgage to Clark was in full force and the equity of redemption was in the defendant. It is well settled that the mortgager has no right to remove buildings or other fixtures erected by him on mortgaged premises, after the execution of the mortgage. Ephraim Harding would have been liable in trespass to the mortgagee, though out of possession, had he, Harding, removed his erections. The defendant in possession, having the equity of redemption, represents the title of the mortgager, and would have no superior rights of removal to him. He, too, would be liable to the mortgagee if he had removed these buildings. He cannot be liable to the plaintiff for declining to do what he could not legally have done. He is not to be deemed guilty of a trespass for not committing one. *Corliss* v. *McLagin*, 29 Maine, 115; *Cole* v. *Stewart*, 11 Cush., 181; *Butler* v. *Page*, 7 Met., 40.

Plaintiff nonsuit.

DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

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

JOHN G. WOOD *versus* DAVID PENNELL *& als.*

Estoppels, *in pais*, operate only between the parties affected by them; and the limitation of their effect applies to partnership cases as well as to others.

Thus, if one holds himself out to be a partner of another, that does not make him, in fact, a partner, nor render him liable as such, except to those who are thereby led to believe he is a partner, and who give credit to the supposed firm upon such belief.

In the trial of such cases, the evidence will not be restricted to the transactions between the parties. The dealings, of the person sought to be held, are admissible to show, not only, that he held himself out as a partner, but that the fact has been one of such general notoriety in the community, that the plaintiff may be presumed to have given the credit on the strength of it.

A single admission to the plaintiff, with proof that he gave the credit upon it, will render the party liable, without any evidence of his general conduct.

A paper irrelevant to the issue is not made admissible for the reason that it was introduced in evidence, at a former trial, by the party now objecting to it.

EXCEPTIONS from the ruling of CUTTING, J., and on motion by defendants to set aside the verdict as being against law and the evidence.

This was an action of ASSUMPSIT on two notes of hand, one dated April 28, 1859, at New York, for $450, — the other dated January 10, 1860, for $500; both payable to the order of plaintiff, on demand with interest, and signed Harmon Pennell & Co.

Harmon Pennell died a few months after the date of the last note. The defendants deny their liability to pay the notes and that they were ever partners of Harmon Pennell.

The evidence introduced by the plaintiff is voluminous, which, it is claimed for him, tends to prove the defendants were actually the partners of said Harmon; if they were not his partners, that they have so conducted themselves respecting their business with him, that they are estopped to deny their liability to pay the notes in suit.

E. & F. Fox, for the defendants in support of the exceptions: —

The Court instructed the jury, "if the defendants were not the co-partners of Harmon Pennell, have they so held themselves out as such as to be now estopped from denying it? There is one thing, about which there is no controversy. Harmon Pennell has signed and issued many notes, at various times, signed Harmon Pennell & Co. What was his object in so doing? The acts and declarations of Harmon Pennell, which would tend to prove a co-partnership between himself and these defendants, would bind himself only, unless they were brought to the knowledge of defendants, and they were aware that he was obtaining credit on the strength of such co-partnership, and took no steps to deny its existence. This would amount to a holding themselves out, or allowing themselves to be held out as co-partners and might bind them as such; they might be as much bound as if they suffered their names to be used to deceive the community."

This is the whole charge on this subject, and it fails in one most important particular, which is requisite to render one liable as a partner, by allowing himself to be held out as such by others.

The *creditor* who seeks in this way to hold a person liable, *must be shown to have had knowledge of such holding out, and must have given credit* to such party, and the jury must so find, before they can charge the party; and without this, a plaintiff cannot recover.

Some of the older decisions countenanced a different doctrine, and held that it made no difference in such a person's liability, that the party seeking to charge him, did not know at the time, when he gave credit to the firm, that he had so held himself. Such is not now the law, and for good reason; the party is chargeable, not because he is a partner *de facto*, sharing the profits and deriving a benefit from the business, but because, by his action, he has induced the creditor to give credit to the firm, and he is therefore to be held accountable. *Vide* Smith's Leading Cases, vol. 1, p. 981, and cases there cited; *Pote* v. *Eyton*, 3 M. G. & Scott, (38 E. C. L., 54).

The same doctrine has been established by various Courts in this country.

In *Bendict* v. *Daveis*, 2 McLean, 347, if a person holds himself out as a partner in a concern, he is liable as such, though he may have no interest, *but it must appear that the creditor had knowledge of such holding out, at the time he gave credit to the firm.* Extracted from 5 U. S. Digest, 483.

Greenleaf, in enumerating the cases in which a liability as partner to third persons exists, divides them into five classes, and in vol. 2, § 484, 11 Ed., states the law in this respect as follows:—"4thly, where the parties are not in reality partners, but hold themselves out, or at least *are held out, by the party sought to be charged, as partners, to third persons, who give credit to them accordingly.*"—Citing Story on Partnership, § 84, which is in same language.

And in vol. 1, § 207, p. 291, he says:—"so, also, where one knowingly permits his name to be used, as one of the parties in a trading firm, under such circumstances of publicity, *as to satisfy a jury that a stranger knew it and believed him to be a partner, he is liable to such stranger, in all transactions in which the latter engaged and gave credit upon the faith of his being such partner.*

3d Kent, 28, (10 Ed.,) it is said, (note,) in a suit against partners, the jury are not called upon to decide whether a partnership actually existed, but only whether *it was held out to the plaintiffs* as existing.

On trial of *Fitch* v. *Harrington & al.*, reported 13 Gray, 469, before METCALF, J., among other instructions requested by the plaintiff, was the following:—"that Harrington's acts and declarations, if made publicly, though not brought to the knowledge of the plaintiffs, were competent evidence, that he held himself out as a partner, and thereby induced the plaintiffs to give credit to the firm, under the belief that he was a partner. The Court declined to give this instruction but ruled:—"If Harrington was not a member of the firm, yet if, by his acts and declarations, *which were brought*

home to the knowledge of the plaintiffs, he led them to believe that he was a member of the firm, and to give credit to the firm in that belief, he was liable to them in this action; that his acts and declarations to persons other than the plaintiffs, were evidence for the jury to consider, in determining the question, whether he was a member of the firm, but if such acts and declarations did not satisfy the jury, that he was a member of the firm, then *they were not evidence which would render him liable to the plaintiffs, unless knowledge of them was brought home to the plaintiffs and induced them to give credit to the firm in the belief that he was a member of the firm.*"

The verdict, for another instruction which was incorrect, was set aside, but the Court say, "the other instructions given to the jury, seem to us to have been *unexceptionable.*"

These instructions the Court is invited to examine, as they so clearly and imperatively point out, what is requisite to charge one, as a partner, who is not really a partner, on account of his actions, or holding himself out to others as a partner—they demonstrate, that it is no matter what one does or says of this nature, unless the party dealing with the firm has knowledge of his proceedings, and gives credit thereby to *him* as one of the firm—"they must be brought home to the plaintiff to render a party liable to him," and "the plaintiff must be thereby induced to give credit to the firm, in the belief he was a member of the firm."

Plaintiff having on former trial offered the inventory of Harmon Pennell's estate, we were at liberty to use it on present trial; by his actions and use of it as evidence, he gave it credit as correct and true. It is equivalent to an act or statement of plaintiff, which is evidence against him, and is in the nature of an admission, that its contents are true and have some bearing on the issue.

Shepley & Dana, contra.

Whether there was, or not, an actual partnership, was left to the jury under instructions to which no exceptions

were taken: so of the other question as to the consideration of the notes in suit.

These were matters exclusively within the province of the jury, and their finding is conclusive.

A part only of the instructions as to what would amount to such a holding out of the co-partnership as would make defendants liable is set out in the exceptions; but what appears, taken in connection with the testimony, is sufficiently favorable to them and could not have misled the jury. Some sentences in the charge relate incidentally to the question of actual co-partnership — but in regard to "holding themselves out" or "allowing themselves to be held out as co-partners," the jury were instructed that "the acts and declarations of Harmon which would tend to prove a co-partnership, would bind himself only, unless they were brought to the knowledge of defendants, and they were aware that he was obtaining credit on the strength of such co-partnership and took no steps to deny its existence." "This *might* bind them as co-partners."

Why, and under what circumstances defendants might be bound by the acts of Harmon so far as to make them liable here, were fully stated to the jury, who knew that plaintiff claimed to hold them on the credit he gave in the belief of their truth.

There is no error in the instruction that the acts and declarations of defendants, which were relied on by plaintiff as tending to prove an actual co-partnership, might, if proved to satisfaction of the jury, tend to show that there was a holding out of the co-partnership, if none existed in fact.

The last paragraph in the instructions relates entirely to testimony introduced by defendants, to show that witness, who spoke of having had knowledge of the firm name of Harmon Pennell & Co., had written letters and made out bills to Harmon Pennell individually; whence it was agreed for defendants that these persons had, in fact, not dealt with the firm or given credit to it.

The language of the presiding Judge simply amounts to

this, that a demand charged to one of several co-partners may really exist against the firm, and a payment of it by one would protect all.

The instruction is entirely correct and would not have been adverted to but that, without reference to the testimony, it might seem obscure.

Why, and under what circumstances, persons not actually partners are held as such, as between them and third persons, is stated in Story's Partnership, §§ 64–5. After quoting, with concurrence, the language of Chief Justice EYRE, in *Waugh* v. *Carver*, 2 H. Blackstone, 235, the author adds,—"Upon so clear and natural a doctrine, it seems unnecessary to cite at large the authorities in its support. They are uniform and positive to the purpose. This last class of cases may arise from the express acknowledgments of the parties, or by implication or presumption from circumstances. Thus, if a person should expressly hold himself out as a partner, and thereby should induce the public at large, or particular persons, to give credit to the partnership, he would be liable as a partner for the debts so contracted, although he should in reality not be a partner."

The decided cases on this subject are numerous, the current of authority sets entirely in favor of those who have dealt with others, in the belief that their acts, declarations and admissions are true. It is not deemed necessary to refer the Court to many of these cases.

In *Goode* v. *Harrison*, 5 B. & Ald., 147, ABBOTT, C. J., says, "a person may be sued as a partner who never was in reality a partner. If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as such, and he is bound by that representation. It is not necessary, in fact or in law, that, to create a legal obligation, a partnership should be still continuing. The legal obligation may arise from the acts of the party at one time and his forbearance at another time."

In *Chase* v. *Deming*, 42 N. H., 274, BELL, C. J., says, "declarations, statements and admissions, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct has been thus influenced, and who would suffer any injury by their denial. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations. 1 Greenl. Ev., 240, § 207; 2 Smith's Leading Cases, 642; *Simons* v. *Steele*, 36 N. H., 73; same case, 22 Law Reporter, 609.

And our own Court has held, that, "to show that persons carry on business as partners, or as jointly associated, it is sufficient to prove that they have admitted the fact or have held themselves out as such." *Boyer* v. *Weston*, 16 Maine, 261; *Casco Bank* v. *Hills*, 16 Maine, 155.

One of the latest cases, where a party admitted himself a member of a firm, is *Finn* v. *Tompson*, 4 E. D. Smith, 276.

It may be argued that the relation between these defendants, as testified by them, shows that there was no partnership. But, whatever their arrangements *inter se* may have been, is of no consequence to third parties. *Bond* v. *Pittard*, 3 Mees. & W., 357.

Undoubtedly, the arrangement between the defendants was similar to that of defendants in *Doak* v. *Swann & al.*, 8 Maine, 170; *Barrett* v. *same*, 17 Maine, 180. See, also, *Farr* v. *Wheeler*, 20 N. H., 569.

But whatever this arrangement was is of no consequence in this case, and is only alluded to as one of the reasons *why* defendants, at the time, admitted a partnership.

But whatever the reasons of the admission of co-partnership, whether made for cause or without cause, is not of the slightest consequence. The admission was made, the plaintiff acted on the faith of it, and it is now too late to talk of anything but these two facts.

The opinion of the Court was drawn up by

DAVIS, J.—This case comes before us on exceptions, and a motion for a new trial, on the ground that the verdict is against the evidence.

The suit was upon certain promissory notes, payable to the plaintiff, and signed "Harmon Pennell & Co." They were given by Harmon Pennell, who died in May, 1860; and the plaintiff claims that the defendants were his partners; or, that they had so held themselves out as partners, in the community where they were engaged in business with him, as to be estopped from denying it.

The defendants were engaged in shipbuilding with Harmon Pennell, who took the principal charge of the business, making purchases, and giving notes, in the name of Harmon Pennell & Co. The Court instructed the jury that "the acts and declarations of Harmon Pennell, which would tend to prove a partnership between himself and these defendants, would bind himself only, unless they were brought to the knowledge of the defendants, and they were aware that he was obtaining credit on the strength of such co-partnership, and took no steps to deny its existence. This would amount to holding themselves out, or allowing themselves to be held out, as co-partners, and might bind them as such. They might be as much bound as if they suffered their names to be used to deceive the community."

These instructions must be interpreted in connection with the evidence. If a person should be aware that another was obtaining credit by representing him to be a partner, he would not necessarily be under obligation to take any steps to deny it. And, if he should neither do or say anything to give countenance to such representations, or to lead any one to believe them to be true, he would not be liable. If inquired of, or if the representations should be made in his presence, it would be his duty to deny their truth; otherwise not. But so far as any acts and representations of Harmon Pennell are proved in this case, they were so far within the personal knowledge of the defendants, and so

connected with the business in which they were engaged, that, if persons were dealing with them under the belief that they were partners, they must have known it, and should have undeceived them.

The counsel for the defendants does not complain of the instructions in this respect. But he contends that another important element was omitted by the Court, for the reason that, if the defendants did hold themselves out as partners of Harmon Pennell, they did not thereby render themselves liable *to the plaintiff*, unless *he knew* the fact, *and gave the credit in consequence of it.*

It is a general principle applicable to all estoppels in *pais*, that they operate only between the parties affected by them. The acts or statements of the party making them must be *known* to the other party; and the latter must thereby be induced to change his position. *Copeland* v. *Copeland*, 28 Maine, 525; *Morton* v. *Hodgdon*, 32 Maine, 127. For an estoppel can be asserted or pleaded only by one who has been affected by the act. *Miles* v. *Miles*, 8 Watts & Serg., 135; *Hicks* v. *Cram*, 17 Vt., 449; *Rangely* v. *Spring*, 21 Maine, 130. "In all cases where one party has been induced to take a particular course on the faith of statements made, or expectations held out, either expressly or by implication, by another, the latter will be debarred from pursuing any subsequent mode of action at variance with his former language and conduct, to the injury of the former." 2 Hare & Wallace's Leading Cases, 165.

Thus, though one has admitted his signature upon a promissory note to be genuine, he is not thereby estopped from denying it, unless the other party was induced to take the note, or was in some other way affected by the admission. *Hall* v. *Huse*, 10 Mass., 39, note.

This limitation of the effect of estoppels *in pais* applies to partnership cases, as well as to others. If one holds himself out to be a partner of another, that does not make him in fact a partner, nor render him liable as such, except to those who are thereby led to believe he is a partner, and

who give credit to the supposed firm upon such belief. The cases cited by the plaintiff clearly recognize this distinction.

In *Goode* v. *Harrison*, 5 B. & A., 147, it is said,—"if a person holds himself out as being a partner, till he gives notice that he has ceased to be so, *those who deal with the firm upon the faith of the supposed partnership* may consider him as such, and he is bound by that representation."

And, in *Chase* v. *Deming*, 42 N. H., 274, the rule is thus carefully stated:—"declarations, statements, and admissions, *which have been acted upon by others*, are conclusive against the party making them, *in all cases between him and the person whose conduct has been thus influenced*, and who would suffer any injury by their denial."

The instructions in the case at bar contain no such limitation. They assert a general liability against one who holds himself out as a partner.

It is true, that, in the trial of such cases, the evidence is not restricted to the transactions between the parties. The *general* conduct of the person sought to be held as a partner is proved. His dealings with others in the community are admitted in evidence in order to show, not only that he has held himself out as a partner, but that the fact has been one of such general notoriety in the community that the plaintiff may be presumed to have given the credit on the strength of it. A single admission to the plaintiff, with proof that he was thereby induced to give the credit, would have the same effect, and render any evidence of general conduct entirely unnecessary.

It is true, as the counsel for the plaintiff suggests, that the exceptions do not purport to contain all the instructions on the question of co-partnership; and, if those reported were not erroneous, we might presume that all other necessary instructions were given. But there can never be a *general liability* as a partner *by estoppel*. Therefore the assertion of the doctrine, without limiting it to the persons who were induced by the acts or admissions to give credit to the supposed firm, was essentially erroneous. It was not

correct as far as it went, only needing some other instructions, which may have been given, to state the whole truth. It was stating that to be true generally, which could not be true at all, except in some particular cases, which should have been specified. The whole question of the liability of the defendants turned upon the point of *the credit having been given by the plaintiff in consequence* of their acts or admissions; while the case as reported shows that the jury may not have regarded this point at all.

The inventory of Harmon Pennell's estate was properly excluded. It was irrelevant to the question at issue; and the plaintiff was not estopped from questioning its relevancy by having himself introduced it in evidence at a former trial. *Miller* v. *Baker*, 1 Met., 27.

Exceptions sustained.—New trial granted.

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

EDWIN S. HOVEY *versus* ALMON L. HOBSON.

The statutes of this State relating to real actions afford the tenant no defence on the ground that the purchase of the demandant's title constituted maintenance or champerty.

EXCEPTIONS from the ruling of RICE, J.

WRIT OF ENTRY. The demandant had introduced his evidence of title. The counsel of the tenant moved the Court to direct a nonsuit, on the ground that the testimony (elicited on cross-examination of plaintiff's witness) showed that the purchase of the premises demanded, by the plaintiff, constitutes champerty and maintenance. The motion was sustained and nonsuit directed by the presiding Judge. The demandant excepted.

A. Merrill, in support of the exceptions.

Rand & H. P. Deane, contra.

The opinion of the Court was drawn up by

DICKERSON, J.—Writ of entry. Exceptions to the ruling of the Judge at *Nisi Prius*, ordering a nonsuit for maintenance and champerty.

Maintenance signifies an unlawful taking in hand, or upholding of quarrels, or sides, to the disturbance or hindrance of common right; as where one maintains another by advice, assistance or money, without any contract to have part of the thing in suit. Champerty is a species of maintenance, and exists where one maintains one side in a suit with the agreement to have part of the proceeds of it. 2 Bouv. Law Dic., 9; 1 Hawkins' P. C., 535; 1 Russell on Crimes, 176.

All maintenance is strictly forbidden by the common law, from motives of public policy, as having a tendency to oppression, by encouraging and assisting persons to persist in suits which they would not otherwise venture upon. For all offences of this kind the offender is not only liable, at common law, to an action of maintenance at the suit of the party aggrieved, but also to be indicted as an offender against public justice. 1 Hawkins' P. C., 543.

The stat. 32, Henry 8, confirms all the previous statutes upon maintenance and champerty. Chapter 9 of that statute provides, that "no person shall buy or sell, or by any means obtain any pretended rights or titles, &c., to any manors, lands, &c., unless he who sells, &c., his ancestor, or they by whom he claims, have been in possession thereof, or of the reversion or remainder, or taken the rents or profits, by the space of a year before the bargain, on pain to forfeit the land, &c., so bought or sold." This statute, and the preceding ones, are in affirmance of the common law. 5 Com. Dig., 17, Title Maintenance; 3 Bac. Abr., 526.

In the early period of the administration of the common and statute law of maintenance and champerty, not only he who laid out his money to assist another in his suit, but he who, by his interest or friendship, saved him an expense he

would otherwise be put to, or officiously gave evidence without being summoned, was held guilty of this offence. This literal construction and application of the law produced such hardships, and was so repugnant to reason and humanity, that it was at length held, by a species of judicial legislation, that, where the person assisting in the suit of another had any interest whatever in the matter in controversy, distinct from that which he had acquired by an agreement with the suitor, he, in effect, became a suitor to that extent and was not guilty of maintenance or champerty. Very soon another step was taken by the courts in the same direction, and this law was held inapplicable, when the alleged maintainor was related to the suitor. Presently still another advance was made, and *Westminister hall* became no longer a closed temple of justice to several other like classes of suitors, but opened its doors also for those who sustained the relation of landlord or tenant, or master or servant to the suitor, or who were his professional advisers, or aided him from motives of charity.

The English common law and statutes against maintenance and champerty had their origin, if not their *necessity*, in a very different state of society from that which prevails at the present time, either in England or in this country. When this doctrine was established, lords, and other large land holders, were accustomed to buy up contested claims against each other, or against commoners with whom they were at variance, in order to harrass and oppress those in possession. On the other hand, commoners, by way of self-defence, thinking that they had title to land, would convey part of their interest to some powerful lord in order through his influence to secure their pretended right. The want of any sufficient written conveyances, and records of land titles, and the feudal relation of *villein* and *liege* lord, afforded great facilities for the combinations and oppressions which followed this state of things. The power of the nobles became mighty in corrupting the fountains of justice, and subverting the freedom and independence of the judicial tribu-

nals. It was to remedy these evils that the law of maintenance and champerty was introduced. Evils of such description and magnitude could exist only in a very imperfect and disordered state of society, where the ermine is entrusted to weak or corrupt hands, and the laws are ill suited to promote the welfare of the people. Instead of instituting a judicial system that should secure the trial of all causes upon their merits, the remedy sought was wholly to exclude a large class of suitors from the courts, for reasons foreign to the merits of their claims; or, in other words, to pronounce a suit vexatious and groundless before it had been tried. It is, perhaps, easier to see how such a rule of law would embarrass the freedom of trade, and the transfer of title, than to understand how it would restrain *unjust* litigation.

The chief safeguards against vexatious suits, which a more enlightened system of jurisprudence has provided, are to be found in the statutes for the limitation of actions, the statutes of frauds, the provision for the action of malicious prosecution, and the costs recoverable against the unsuccessful party. While these provisions operate as checks upon the abuse of the right of litigation, they do not impair the right itself. That they have proved adequate remedies for the evils of groundless litigation, is manifest from the comparative disuse into which the law of champerty and maintenance has fallen in later times, both in England and in this country, and the favorable experience of those States where it has ceased to be in force. Indeed, under a system of jurisprudence which provides such guaranties against vexatious suits, and secures the firm, pure and impartial administration of justice to all, what evils can arise from opening the courts of justice to suitors, where the proceeds of the suit are to be divided between him who brings the suit and him who contributes advice, expense or assistance in its institution or prosecution? Why should a rule of law be recognized and enforced, after the reason for it has ceased?

The English common law of maintenance and champerty,

however, was recognized by the Supreme Court of Massachusetts before the separation of this State from that Commonwealth, and is the law of this State unless it has been changed by statute. In *Walcott* v. *Knight*, 6 Mass., 421, it was held, that the purchase of a dormant title to lands, from a party not seized, by a stranger out of possession, if made wittingly to disturb the tenant in possession, constitutes the crime of maintenance, and is punishable by indictment. In *Swett* v. *Poor*, 11 Mass., 554, the Court say, that the stat. 32, Henry 8, c. 9, against buying and selling pretended titles, merely affirms the common law, and is part of the common law of Massachusetts. *Thurlow* v. *Percival*, 1 Pick., 415; *Lothrop* v. *Amherst Bank*, 9 Met., 489.

It was with a spirit and purpose kindred to that exhibited by the English courts in recent times, in their efforts to break the shackles which an age of feudalism had imposed upon the freedom of civil jurisprudence, that the Legislature of this State enacted, that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded." R. S. c. 73, § 1.

Sec. 4 of the R. S., c. 104, provides that "the demandant need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, shall be sufficient proof of his seizin."

These statutes dispense with the formality of livery of seizin, required by the common law, and of statute 32, Hen. 8, c. 9, and put every person who brings a writ of entry upon the strength of his own title. If he has the ownership, and the right of entry, his right to maintain his action is perfect. The meaning of these statutes is clear tand unambiguous as language can make it. If the legislature had intended to make cases tainted with maintenance and champerty exceptions to their operations, it would have used language suited to signify such intent; but they conain no exceptions, qualifications, or limitations; are abso-

lute in their terms and complete in their application to the subject matter. It makes no difference, in the purview of these statutes, whether the purchaser knew of the disseizin, when he made the purchase, or took the conveyance to aid the grantor in the prosecution of his claims, or to share the proceeds with him; they place property which a disseizee owns, and has a right of entry to, upon the same footing in respect to the right of conveyance with other property where the elements of ownership and seizin are united. The authority to interpolate exceptions into a statute by judicial construction, implies the authority to dispense with its actual requirements; this Court can do neither. Any other construction of these statutes is unauthorized by their spirit, contrary to their language, and subversive of the objects for which they were enacted. *Austin* v. *Stevens*, 24 Maine, 527; *Pratt* v. *Pierce*, 36 Maine, 448.

The learned counsel for the defendant has requested us to revise the decision in *Pratt* v. *Pierce*, and we have re-examined that case with some care. Our researches, however, have but confirmed our convictions of the correctness of that decision. We cannot overrule it without practising a species of judicial legislation for which this Court has as little taste as authority; but should it ever so far transcend its duty as to enter that field of experiment, it is to be hoped, that it will not be to thwart the purposes of beneficent legislation, by substituting therefor doctrines which have their origin in a semi-barbarous age, and which have long since fallen into disrepute with the occasion which elicited them.

The plaintiff having introduced his recorded deed of the demanded premises, and shown the heirship of his grantor together with his right of equity, was entitled to maintain his action, unless the defendant showed a defect in his title, or a better and paramount title in himself. The defendant showed no title in himself, but relied upon defeating the plaintiff's action on account of the taint of maintenance and champerty. We have before seen that it was not competent for the defendant to defeat the plaintiff's action for this

cause; and, therefore, the testimony upon this point, elicited from the witness Merrill, in cross-examination, against objection, having no legal effect upon the issue, was improperly admitted. The plaintiff had a right to have his cause tried, unembarrassed by such testimony.

Exceptions sustained. Nonsuit taken off, and cause to stand for trial.

APPLETON, C. J., and WALTON J., concurred.

CUTTING, J., concurred on the authority of the case of *Pratt* v. *Pierce*, 36 Maine, 448.

BARROWS, J.—I concur in the result reached in this opinion, because, the Supreme Court of this State, in the case of *Pratt* v. *Pierce*, 36 Maine, 448, gave a certain construction to the provisions of c. 91, § 1, of R. S. of 1841, which construction the Legislature must be considered as adopting by the subsequent substantial reënactment of those provisions in c. 73, § 1, of R. S. of 1857, with the decision of the Court in *Pratt* v. *Pierce* before them. *Myrick* v. *Hasey*, 27 Maine, 9; *Rutland* v. *Mendon*, 1 Pick., 154.

Such legislation, following such a decision, undoubtedly swept away the barriers which the wisdom of the common law and ancient enactments had raised to protect the community and the courts from the vile and vexatious practices of the speculator in dormant titles, who foments litigation from the most sordid motives, and perverts the principles which were designed to maintain justice, to the furtherance of his own base ends.

Why it should have been held, where a statute removed a technical bar to a recovery in cases where a party plaintiff had contracted innocently, in ignorance of the facts, that a formal exclusion, *by the law making power*, from its beneficent operation, was necessary to prevent him whose very standing in court accrued by the perpetration of an offence *malum in se* from availing himself of it, it is useless now to inquire. Indeed, the subsequent action of the Legislature precludes the inquiry. It seems to be now the doc-

trine of the law, that, no matter how deep "the taint of maintenance and champerty," the demandant in a real action is not now required to come into court with clean hands, but may successfully invoke the aid of the courts to enforce claims which are based upon a positive offence against good morals if not against law. I cannot say that it seems to me a very satisfactory advance from "the semi-barbarous times" when a different doctrine prevailed.

NOTE BY DAVIS, J. — I dissent from Judge DICKERSON'S opinion, as I do from *Pratt* v. *Pierce*, as applicable to this case. Where one buys a *lawsuit*, and takes a *deed* merely as *ancillary*, to enable him to *carry on* the suit *in his name*, for the benefit of both parties, it is *maintenance;* and I think such facts a good defence. If we have any decisions to the contrary, the sooner they are *reversed*, the better.

But, in a real action, such facts can be proved only *in defence*, under a *special plea*, or special brief statement. Whether they are *proved* is a question of fact for the *jury*. Therefore, if the plaintiff makes out his case, on the matter of *title*, the Judge has no right to order a *nonsuit* on the ground that he has also proved a good *defence*. *That* should be submitted to the *jury*.

HIRAM CAMPBELL *versus* HAMILTON MUTUAL INS. CO.

Where a policy of insurance upon the interest of a mortgager was to be void if the estate shall be alienated or incumbered by sale, assignment, or otherwise; and his right to redeem the property was seized and sold on a writ of execution; *it was held* that the sheriff's sale to a third person of the right of redemption was an *incumbrance* upon the property; and, if the title, thus acquired, is perfected by lapse of time, it constitutes an alienation of it.

ON AGREED STATEMENT BY THE PARTIES.

This was an action of ASSUMPSIT on a policy of insurance against loss by fire. On the fifteenth day of May, A. D. 1858, the plaintiff effected an insurance in the defendant company on his furniture for the sum of fifty dollars, and also on his interest as mortgager on his dwellinghouse, barn and shed adjoining, to the amount of three hundred dollars, said property being in Brunswick, said insurance to

continue for the term of five years to May 15th, A. D. 1863. All the property so insured was destroyed by fire on the tenth day of September, A. D. 1860.

The plaintiff, in his writ, bearing date the second day of January, A. D., 1861, claims the whole amount so insured. When said insurance was effected, there was a subsisting mortgage on said buildings and land belonging to them, which was made known to the defendants at the time. The plaintiff's right of redemption on said mortgage was seized on an execution against him in favor of one Jacob Brewer; which right to redeem was sold to a third person at a sheriff's sale, held on the twenty-first day of January, A. D. 1860, according to the provisions of the statutes regulating the seizure and sale of equities of redemption on execution by sheriffs.

Article 12th in the policy declared on contains the following clause:—"The interest of a person who is the mere purchaser or holder of an equity of redemption is not insurable; but the interest of the mortgager or mortgagee may be insured as such, the true state of the title being expressed."

Article 15th of the same contains the following:—"Where any property shall be alienated or incumbered by sale, mortgage, assignment, bond or otherwise, the policy shall thereupon be void, and be surrendered to the directors to be canceled; but if the grantee or alienee have the policy assigned to him, the directors may, upon his application to them within thirty days next after such alienation, and on his giving proper security, ratify and continue the same in force for his benefit, by their consent, signified in writing therein, signed by the secretary, with all the rights and subject to all the liabilities, to which the original party insured was entitled and subjected." The policy at the time of said loss had never been assigned or transferred, but belonged to the plaintiff.

Article 19th of said policy stipulates that,—"Policies void in part shall be void as to the whole." In the body of

the policy is a clause saying that, "all the property insured is subject to a lien by said company, to the extent of the interest of the person insured therein."

Orr, for the plaintiff.

Fessenden & Butler, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—The policy in the case before us, by its terms, is "accepted by the insured, subject at all times to the conditions and regulations of the Act of Incorporation and By-laws of said company, which conditions and regulations are hereby declared to form a part hereof."

It is provided by the By-laws, Art. 15th, that "when any property insured shall be alienated or *incumbered by sale*, mortgage, assignment, bond or *otherwise*, *the policy shall thereupon be void;*" and, by Art. 19th, "policies void in part shall be void in the whole."

It was held, in *Adams* v. *The Rockingham Mut. Fire Ins. Co.*, 29 Maine, 292, that an alienation had occurred, when the insured, upon his own application, had been decreed a bankrupt and his assignee in bankruptcy had been appointed. It was decided, in *Edes* v. *Hamilton Mut. Ins. Co.*, 3 Allen, 362, that, "if the owner of property, which is insured by a policy which contains an express provision that the by-laws of the company are declared to form a part thereof, mortgages the same in violation of one of the by-laws, the policy is thereby defeated. So when a by-law provides that all *alterations* in the ownership of property insured in any material particular shall make void any policy covering such property, unless consented to or approved by the directors, a mortgage of the property insured was held a material alteration in the ownership thereof. *Edmands* v. *Mutual Safety Fire Ins. Co.*, 1 Allen, 311.

The premises insured, at the time of their insurance, were subject to a mortgage, as appears by the application. While

the insurance was in full force, the equity of redemption was sold on an execution against the insured.

An incumbrance is defined to be "whatever is a lien upon an estate."

"The right of a third person in the land in question to the diminution of the value of the land, though consistent with the passing of the fee by a deed of conveyance, is an incumbrance. So is a lien by judgment or mortgage." Bouv. Law Dictionary. "Incumbrancer—one who has an incumbrance or legal claim upon an estate."—Webster's Dictionary. "Incumbrance—liabilities resting upon an estate." Worcester's Dictionary.

The estate insured was incumbered by the sale of the equity. It passed thereby from the insured unless redeemed. It was sold and the estate does not revest in the debtor except upon payment of the price for which it was sold. Before the title becomes perfect in the purchaser by lapse of time, it constitutes a lien or incumbrance upon the estate, which must be removed before any one could acquire an indefeasible right thereto. The equity of redemption was sold for a specific sum. That constituted an incumbrance upon the estate. The property insured was *incumbered by a sale* within the letter and the spirit of the by-law referred to and the policy thereby became void.

The sale of an equity of redemption, when the title thus acquired is perfected by lapse of time, constitutes an alienation. Before the right of redemption has expired, it must be regarded an incumbrance upon the estate.

Plaintiff nonsuit.

DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

SAMUEL T. AND LAURA S. WESTON, *in Error, versus* MOSES G. PALMER *& als.*

A judgment rendered against husband and wife — if in the original writ and record there is nothing to indicate the existence of that relation — will not be reversed on writ of error, because the action could have been defended on the ground that the contract sued on was made by the wife during coverture, if they had notice of the suit, neglected to make the defence and submitted to a judgment on default.

ON AGREED STATEMENT OF THE CASE by the parties.

WRIT OF ERROR to reverse a judgment obtained by the defendants in error against the plaintiffs in error, at the term of this Court for the county of Cumberland, in October, 1858, and rendered the 29th day of November, 1858. The writ is dated November 16, 1861.

The errors assigned are: —

1. That the said Laura, long before the purchase of said writ, to wit, at Augusta aforesaid, on the first day of July, 1850, intermarried with and took to husband the said Samuel T., and, at the time of the purchase of the said writ, and also at the time of giving the judgment aforesaid was, and yet is, covert of the said Samuel T., then and yet her husband.

2. That the said Laura, at the time of the purchase of said writ, was the wife of the said Samuel, and ever since has been, and it is not alleged in said writ that the cause of action therein declared on was a contract of the said Laura, entered into before her said marriage with the said Samuel T.

Plea, *in nullo est erratum.*

J. H. Drummond, for the plaintiffs in error.

Howard & Strout, for the defendants in error.

The opinion of the Court was drawn up by

WALTON, J. — The suit of *Palmer & als.* v. *Samuel T.*

and Laura S. Weston, was commenced June 25, 1858. Judgment was rendered on default, at the October term following. The record discloses no error. It was an ordinary action of assumpsit on an alleged joint promise of the defendants. Laura is not described as a *feme covert*. She is sued as a *feme sole*. Both defendants bear the same surname; yet, for aught that appears in the writ, they may have been brother and sister, or entire strangers. There is no allusion to the fact that they were husband and wife. No incapacity is disclosed on the part of either to bind themselves by a joint promise; nothing to show that either was exempt from such a suit; that either was under any disability to defend it; or that they did not have due notice of its pendency. In fact the record discloses nothing of which the Court could have taken notice to deprive the plaintiffs of their judgment.

The defendants in that suit now say, that the judgment against them was erroneous and ought to be reversed, because at the time of the making of the alleged promise, and also when the suit was commenced, Laura was the wife of the other defendant, and therefore not capable of binding herself by such a promise and not liable to be joined in a suit upon it. These errors, not being discoverable by the record, are not errors *in law*, but errors *in fact;* and, for the purpose of testing their sufficiency, it is to be assumed under the pleadings that they are stated truly.

Are these alleged errors sufficient to authorize and require a reversal of the judgment? It is an old and well established rule of law, founded in reason and supported by authority, that nothing can be assigned for error *in fact*, which the party might have pleaded to the action, but neglected so to do. The law requires vigilance; and when a party has once had his day in Court, a fair opportunity to make a defence, and has neglected so to do, it will be regarded as waived; and a defence once waived, cannot be recalled, when the other party, influenced thereby, has so changed his situation that he cannot be placed in *statu quo*.

"A *feme covert*, sued alone, may plead in abatement; but it must be pleaded, and cannot be assigned for error. * * * Generally, if a *feme covert* is joined, where she ought not to be, or omitted, when she ought to be joined, it will be good cause of abatement, *if pleaded.*" Story's Plead., 21. "Nothing can be assigned for error, which the party might have pleaded to the action, and had proper time so to do." Story's Plead., 367. "A man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his own folly to neglect the time of taking that exception." 3 Bou. Bacon, 375. "Nothing of which the party could have taken advantage in the Court below can be assigned for error *in fact.* * * * It cannot be necessary to discuss a point of practice uniformly established, and resting on the soundest reason." *Wetmore* v. *Plant*, 5 Conn., 541.

In *Skipwith* v. *Hill*, 2 Mass., 35, Chief Justice DANA says,—"I take it to have been decided, *generally*, that where a party has a right of appeal to this Court, and will not avail himself of it, he shall not afterwards be allowed his writ of error. Perhaps the rule has never been extended to a judgment on default, where no personal notice of the suit has been given. *But where, after legal notice of the action in the lower Court*, a defendant suffers himself to be defaulted, he ought not to be permitted to lie by, and, at any time within twenty years, come in and reverse the judgment *for a cause of which he might have availed himself in the original suit.*" In that case the judgment was reversed, because the defendant had had no notice of the suit, as appears by the remarks of Mr. Justice SEDGWICK. The rule is now well settled that a writ of error will not lie, where the party has had an opportunity to *appeal.* The rule is not applicable to cases where the defendant is an infant, or a person *non compos mentis*, for such persons are regarded as incapable of appealing, or doing any other act necessary to protect themselves against a groundless suit; nor does it apply to suits where there has been no legal service of the

writ. In *Hemmenway* v. *Hicks*, 4 Pick., 497, the counsel for the defendant in error moved to dismiss the writ, on the ground that the right to file exceptions was equivalent to a right to appeal. The Reporter says that the Court *appeared* to lean against the motion, and thereupon the counsel proceeded to argue other points in the case. But, in a recent case in New Hampshire, (*Peebles* v. *Rand*, 43 N. H., 337,) the Court held directly, that "a writ of error does not lie, where the party can avail himself of a bill of exceptions." The right of appeal is a bar to a writ of error, because it is a more speedy, cheap and convenient mode of correcting errors; and it is difficult to perceive why the same reasoning will not apply with equal force to the right to file exceptions; and why the latter right should not bar a writ of error equally with the former. This Court held, in *Lord* v. *Pierce*, 33 Maine, 350, that error does not lie to reverse a judgment of the District Court rendered upon default, if the action was in its nature appealable, and if no cause be shown why the defendant did not appear and answer. Chief Justice SHEPLEY remarked that—"writs of error have been sustained, where the plaintiffs in error have been defaulted in the original actions; but not in cases in which they chose voluntarily to suffer a default to be entered."

Authorities have been cited to show, that when a judgment is recovered against the wife, in a suit in which the husband is not a party, he may bring a writ of error to reverse it. Such is undoubtedly the law, for the judgment against the wife affects the husband, and, not being a party to the suit, he had no opportunity to defend it. But this furnishes no reason for reversing a judgment to which the husband is a party; for in such cases he should make his defence in the original suit.

The principle then seems to be well established, and it is believed that no case can be found in conflict with it, that when a person of legal capacity has had due notice of a suit against him, and has had a fair opportunity to defend it, but has voluntarily neglected so to do, and suffered judgment

to go against him by default, he cannot afterwards maintain a writ of error to reverse it, for any objection which was open to him in the suit before judgment.

In this case the husband and wife were both sued. Both had an opportunity to defend. Neither was under any disability. By the statutes then and still in force, a married woman could prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried; or she could do it jointly with her husband. (R. S., c. 61, § 3.) These provisions are unquestionably broad enough to authorize a married woman to defend a suit, the fruits of which, if not defended, would be an execution running directly against her property. Why then did they suffer themselves to be defaulted? Their learned counsel, in his very able argument, says that it cannot be denied that, if the original suit had been defended, it could not have been maintained; that the coverture of Laura would have been a defence. Then why did they not defend it? The presumption is, that for some reason satisfactory to themselves, they did not wish at that time to make such a defence, and chose to waive it. They now claim that, because they then had a legal defence, (it may well be doubted whether it was an equitable one,) which they chose not to avail themselves of, the judgment is erroneous and ought to be reversed. We think otherwise. They have had their day in Court. They have once had a fair opportunity to try the same questions which are now presented. They chose not to avail themselves of it, and the law will not allow them another. *Writ dismissed.*

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

ELIZA JORDAN, *in Equity*, *versus* JOSHUA STEVENS *& als.*

Whatever may have been supposed to be the law in regard to the validity of deeds to take effect *in futuro*, it is now well settled, in this State, that such deeds are not for that reason void.

In this State, jurisdiction in equity, in cases of "mistake," is expressly conferred by statute. Nor is it, in terms, limited to mistakes of *fact*. The Legislature may be presumed to have used the word as generally understood in equity proceedings.

Where the mistake is one of *law*, and where there are other elements, not in themselves sufficient to authorize a court of equity to interpose, but which, combined with such mistake, should entitle the party to be relieved, the Court will afford relief: —

Thus, although there be no actual fraud, if one is unduly influenced and misled by the other to do that which he would not have done, but for such influence, and he has in consequence conveyed to the other property without any consideration therefor, or purchased what was already his own, the Court will, if it can be done, restore both of the parties to the same condition as before.

SUIT IN EQUITY, submitted on bill, answers and proofs.

The case was argued in writing by

Howard & Strout, for the complainant; and by

E. & F. Fox, for the respondents, — who cited *Hunt* v. *Rousmanier, Adm'r*, 1 Peters' S. C. R.; *Bank* v. *Daniel*, 12 Peters, 56; *Stewart* v. *Stewart*, 6 Clark & Fin., 964.

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

DAVIS, J. — Jonathan Stevens, the father of the parties to this suit, died in November, 1857, leaving personal property valued at about $3000, and real estate worth nearly $5000. The plaintiff, being a widow, had worked in his family for many years, receiving therefor one dollar a week. A short time before his death he gave her a *life lease* of his homestead in Portland, worth about $2000, *to take effect upon his decease*. Whether he did this for the reason that he thought that he had not paid her enough for her services, or because she *needed* a larger share of the property than

the other heirs, does not appear, and is immaterial. He died intestate, leaving seven children, and the issue of another not living.

The property leased to the plaintiff was described as situated "on Chestnut street." After the death of her father, the plaintiff had the lease altered so as to read "Wilmot street." This was done at the suggestion of some of the defendants. And besides, as the property was otherwise sufficiently described, the mistake of the street did not affect the lease, and the alteration was immaterial.

It is contended that the lease was void, because it was not to take effect *until a future day*. But, whatever may have been supposed to be the law in regard to the validity of deeds to take effect *in futuro*, it is now well settled in this State that such deeds are not for that reason void. *Wyman* v. *Brown*, 50 Maine, 139.

But some of the defendants thought the lease to the plaintiff was invalid, and so informed her. Taking their testimony as true, which we do not question, they did not *intentionally* deceive her on this point. They actually thought there was a defect of which they could take advantage. She was unlearned in every respect, not being able to write her own name. It is evident that she put confidence in them, believing them to be better informed than herself. And supposing, from their representations, that her title to the *homestead*, by the lease, had failed, she was induced by them to relinquish all her interest in the *whole estate* of her father, in consideration of a new life lease from them of the same property embraced in her first lease.

One-eighth of the estate, subject to her life interest in the homestead, must have been worth nearly or quite eight hundred dollars. This she conveyed to them. Their new lease to her *was of no value whatever;* for the title was already in her. Can she obtain relief in equity?

It is claimed that she has no remedy, because there was no *fraud;* and the *mistake* was not one of *fact*, but *of law*.

In this State, jurisdiction in equity, in cases of "mistake,"

is expressly conferred by statute. Nor is it, in terms, limited to mistakes of *fact*. The Legislature may be presumed to have used the word as generally understood in equity proceedings. And therefore we shall have to inquire whether courts of equity have been accustomed to grant relief in cases like the one before us.

This question has frequently arisen, in this country, and in England; and authorities are not wanting, in both countries, in support of the doctrine, that no distinction should be made between mistakes of *law* and mistakes of *fact*.

It is quite true, as Judge REDFIELD observes, (1 Story's Eq., § 130, note,) "that the distinction between mistakes of law, and mistakes of fact, so far as equitable relief is concerned, is one of *policy* rather than of *principle*." And yet it may not be the less necessary to maintain and observe it. No government could be administered at all, under which ignorance of the *criminal* law should be held a sufficient excuse for violating it. And the same principle is applicable to the *civil* law. This is not on the ground that *every one is presumed to know the law*. For though this is often repeated as an axiom, a presumption so variant from the truth cannot be recognized by the law. The ground on which the doctrine rests is this,—that it is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except on the principle that the *rights* and *liabilities* of every one shall be the *same as if* he knew the law.

If all contracts made in ignorance of the law were to be held invalid, there would be no certainty in business, and no security in titles. All rights of property would be endangered; and the most important encouragements for industry and enterprise would be taken away. It is *indispensable*, therefore, that the obligation of contracts should be maintained, unless there is some stronger reason for annulling them than a mere mistake of the law. *Champlin* v. *Laytin*, 18 Wend., 407.

This question is discussed at length by Judge STORY; and

nearly all the English and American authorities are referred to, and many of them examined. 1 Story's Eq., c. 5, Redfield's edition. But while the weight of authority is clearly against granting relief *merely* on account of a mistake of the *law*, it seems to be conceded in nearly all the cases, and expressly decided in many of them, that there are exceptions to this rule. *Hunt* v. *Rousmanier*, 1 Pet., 15; *Bank of U. S.* v. *Daniel*, 12 Pet., 32.

Instead of saying that there are "exceptions" to the rule, it would probably be more correct to say that, while relief will *never* be granted *merely* on account of the mistake of the law, there are cases where there are *other elements*, not *in themselves* sufficient to authorize the Court to interpose, but which, *combined with* such a mistake, will entitle the party to relief. It is important therefore to inquire *what it is* that, with a mistake of the *law*, will justify the interposition of the Court, where there is no fraud, or accident, or mistake of *fact*.

If a party, who himself knows the law, should *deceive* another, by misrepresenting the law to him; or, *knowing him* to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of *fraud*. So that such a case is within neither the rule nor the exception.

It has sometimes been said that, when money or other property has been obtained under a mistake of the law, which the defendant *ought not in good conscience to retain*, he should be compelled to restore it. *Northrup* v. *Graves*, 19 Conn., 548; *Stedwell* v. *Anderson*, 21 Conn., 139. This is just, as a *principle*, but entirely indefinite, as a *rule*. It proposes nothing but the opinion of the Court in each case, on a matter in regard to which there may be great differences of opinion. It overlooks the *public* interests involved in maintaining the obligation of contracts. Generally, *as between the parties*, a mistake of *law* has as equitable a claim to relief, as a mistake of *fact*.

It is believed that in nearly all such cases, where relief has been granted, in addition to the intrinsic equity in favor

of the plaintiff, two facts have been found; (1,) that there has been a marked disparity in the position and intelligence of the parties, so that they have not been *on equal terms;* (2,) and that the party obtaining the property *persuaded* or *induced* the other to part with it, so that there has been "undue influence" on the one side, and "undue confidence" on the other. 1 Story's Eq., 120. When property has been obtained under such circumstances, and by such means, courts of equity have never hesitated to compel its restoration, though both the parties acted under a mistake of the law. And there would be still stronger reasons for granting relief in such a case, if the party from whom the property had been obtained, *had been led into his mistake of the law by the other party. Sparks* v. *White*, 7 Humph., (Tenn.,) 86; *Fitzgerald* v. *Peck*, 4 Littell, (Ky.,) 127.

Thus, in *Pickering* v. *Pickering*, 2 Bea., 31, Lord LANGDALE set aside certain agreements entered into under a mistake of the law, on the ground that "the parties were not on equal terms;" and that the plaintiff acted under the influence of the defendant. And the same thing was done in *Wheeler* v. *Smith*, 9 How. U. S., 55, because the parties "did not stand on equal ground;" and the plaintiff "did not act freely, and with a proper understanding of his rights."

This question has arisen more frequently in cases where parties have been mistaken in regard to their titles to real estate. Thus, in *Bingham* v. *Bingham*, 1 Ves., (Sen.,) 126, the defendant sold to the plaintiff property which he already owned; and the Court compelled a restoration of the purchase money. It may have been, as BRONSON, J., suggests, in *Champlin* v. *Laytin*, 18 Wend., 407, on the ground that the defendant "misled" the plaintiff in regard to his title. But the correctness of the decision is not questioned by Lord COTTENHAM, in *Stewart* v. *Stewart*, 6 Clark & Finnell, 964.

Judge STORY suggests that such a case "seems to involve, in some measure, a mistake of fact, that is, of the fact of *ownership*, arising from a mistake of the law." 1 Story's

Eq., §§ 122, 130. And, in *King* v. *Doolittle*, 1 Head, (Tenn.) 77, the decision is put on that ground. But if all the other facts are agreed, and known to the parties, the question of "ownership" can be nothing but one of *law*. And in such cases, as in others, courts of equity should not interfere, unless it appears that there was a difference in the condition of the parties, so that, instead of both acting voluntarily, one was misled or unduly influenced by the other. Nor will the Court then interpose, in the absence of fraud, unless the *defendant*, as well as the plaintiff, can be restored substantially to the same situation as before. *Crocier* v. *Acer*, 7 Paige, 137.

Nor, where there is a real controversy between parties, and the case is one of any doubt, will the Court set aside a *compromise* fairly made by them, though it should afterwards appear that one has thereby received property to which he was not legally entitled. *Steele* v. *White*, 2 Paige, 478; *Trigg* v. *Reed*, 5 Humph., 529. On the contrary, courts of equity encourage such compromises. But here, too, as in other cases, if the parties are not on equal terms, and one *misleads* the other, and obtains property thereby against right and equity, as well as against law, he will be compelled to restore it. "If a party, acting in ignorance of a plain and settled principle of law," says the Vice Chancellor, Sir JOHN LEACH, "*is induced* to give up a portion of his *indisputable property*, under the *name* of a compromise, a court of equity will relieve him from the consequences of his mistake." *Naylor* v. *Winch*, 1 Sim. & Stu., 564. And though this was a *dictum*, the principle was fully applied by the Supreme Court of the United States, in *Wheeler* v. *Smith & als.* previously cited. And the same doctrine has been recognized by this Court in the case of *Freeman* v. *Curtis*, *post*. And, in both of these cases, relief was granted, not on the ground that a mistake of the law *alone* entitles one to relief; but that, though there be no actual fraud, if one is unduly influenced and misled by the other to do that which he would not have done but for such influence, and he

has in consequence conveyed to the other property without any consideration therefor, or purchased what was already legally his own, the Court will, if it can be done, restore both of the parties to the same condition as before.

The case at bar is one of this kind. The parties were not on equal terms. The plaintiff was ignorant, in business affairs, as well as in other respects. Having confidence in the defendants, she relied upon what they told her. It does not appear that she doubted the validity of her father's lease to her, until such doubts were communicated to her from them. The proposition for her to release her interest in all the other property did not originate with *her*, but with *them;* and she was induced to accept it by the *fear*, which *they* had impressed upon her, that she otherwise would have to give up the homestead. She acted under their influence. They believed that there was a defect in the first lease, and they meant to take advantage of it. As was said by the Master of the Rolls, afterwards Lord KENYON, in *Evans* v. *Llewellyn*, 1 Cox, 333, "though there was no fraud, there was something like fraud; for an undue advantage was taken of her situation. The party was not competent to protect herself; and therefore this Court is bound to afford her such protection."

The bill is sustained, with costs. And the defendants must be decreed to pay her a distributive share of the personal estate with interest from the time of distribution, making her equal with them, and to release to her one-eighth of all the real estate, and account to her for her share of the rents and profits of the portion not occupied by her.

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

EBEN MCLELLAN, *Executor, in Equity, versus* WOODBRIDGE C. OSBORNE *& als.*

Where one had taken a bill of sale of a part of a vessel, absolute in form, but designed as collateral security, if afterwards he assumes to act as an owner, pays bills against the vessel, and suffers judgment to go against him on default, when sued as an owner, — such acts afford sufficient evidence to hold him liable, in a suit in equity, by a co-owner, for contribution.

So, if the vendee afterwards purchases and pays for the part of the vessel so held by him, but receives no other instrument of transfer, such purchase and payment will, between the parties, be operative to pass the title.

And, if that part of the vessel be afterwards sold on a writ of execution to the creditor in the execution as the vendor's property, and by his and the creditor's consent the sale was revoked and vacated, and the officer directed to make no return of the sale on the execution, the former vendee cannot claim that the sale on execution divested him of his title in the suit in equity by the co-owner.

SUIT IN EQUITY.

The bill alleges that Thomas McLellan, complainant's testator, on the twenty-seventh day of July, 1857, became owner, with defendants, of barque Susan W. Lind; said complainant of three-eighths, said defendant Woodbridge C. Osborne of three-eighths, said defendant Amos Chase of one-eighth, and said defendant Samuel H. Sweetser of one-eighth; and so continued until the eighth day of September, 1859.

That said complainant, in his capacity as part-owner, by and with the consent and request of defendants, has collected and paid over to them, from time to time, their respective portions of the freights; and, in said capacity, and by their consent and request, has expended large sums of money of his own, in and about said barque, in providing supplies and making repairs necessary for her profitable employment, and in paying her debts.

That there are still outstanding claims against said barque for which he and defendants are liable by reason of said part-ownership; and that no settlement of the accounts and

affairs of said part-ownership has been made between him and defendants, though he has requested the same.

That he has expended as aforesaid thirty-six hundred dollars more than he has ever received; and that particularly he has been compelled to pay the whole of a judgment obtained by Nesmith & Sons in the Circuit Court of the United States, which was for a debt of said part-ownership, and to the payment of which said defendants by reason of said part-ownership should have contributed.

That, upon a true and just settlement, it would appear a considerable balance is due from each of defendants to complainant. And prays an account of all such part-ownership affairs, payment of outstanding bills and contribution from defendants.

Upon the decease of Thomas McLellan, the original complainant, Eben McLellan, executor, came in and duly revived the suit.

The bill was taken *pro confesso* as to Sweetser, by consent.

Amos Chase, in his answer, denies "that he became and continued to be an owner as alleged in the bill;—that he never had any legal claim, or pretended to have any, to one-eighth part of the vessel; that Tristram Clark of Biddeford, a former owner of one-eighth, being indebted to one Samuel F. Chase and this defendant, proposed that they should receive of Thomas McLellan, the managing owner of said vessel, the earnings of his, said Clark's, one-eighth part during his absence at sea, towards the payment of his indebtedness to them;" and that "accordingly said defendant received of said Thomas McLellan the earnings of said one-eighth part of said vessel;" that during all the time they received said earnings, the title to the vessel was in said Clark, as exhibited by the records and documents of the custom house in Portland, and no part of said vessel ever appeared by said records and documents to be owned by said Chase and this defendant, or by either of them; and this was well known to said Thomas McLellan, who, as managing owner,

when clearing said vessel, made oath before the proper officer in said custom house, that the said Tristram Clark and others named were the owners of said vessel. That, in the month of November, 1855, said one-eighth of the vessel was advertised and sold as the property of said Clark on an execution against him in favor of one Hanscomb; that said Thomas McLellan was the owner of the judgment and execution; that one *Williams* became the purchaser, at said sheriff's sale; that since the sale, he, (said Chase,) has never received, nor applied for, any part of the earnings of the vessel, nor claimed to have any interest in her; that said McLellan has never advanced or expended any money, at his request, in providing supplies or in making repairs.

The defendant *Osborne* denied his ownership as stated in the bill of plaintiff, and alleged that he held three-eighths of said barque as collateral security for the indebtedness of one Royal Williams; and the said Royal Williams, at all the times aforesaid, was the real and true owner of the portion of said barque so held by this defendant; and defendant is informed, and believes, said Thomas McLellan knew that said Williams was owner as aforesaid, and that this defendant held the same as security as aforesaid; that it is not true that the said Thomas McLellan has ever, by and with the consent of defendant, collected and paid over to this defendant any portion of the freight and earnings of said barque; but when, from time to time, defendant has demanded of him the earnings of said three-eighths, said Thomas has refused to pay the same to this defendant, and has retained and claimed to retain the earnings of said three-eighths, to be applied to the payment of the indebtedness of said Royal Williams to himself, and defendant never received any part of the earnings of said vessel; and that said Thomas never did, by and with the request and consent of this defendant, from time to time, expend any sums of money whatever about said vessel, in providing supplies or making repairs.

The complainant filed a general replication to each of said answers.

From the deposition of *Tristram Clark*, it appears, that, in the year 1847, he became owner of one-eighth of said barque; continued owner till 1854. In 1849, he transferred the same to Samuel F. and Amos Chase, as collateral security, and authorized them to transact the business and receive the earnings of the vessel, to be applied in liquidation of his indebtedness. The transfer was, in form, absolute, but between the parties considered a mortgage. In 1854, he settled with said Samuel and Amos and sold them his one-eighth, but gave no other bill of sale at that time, as the first was thought to be sufficient. After that time he did not claim to have any interest in the vessel.

Samuel F. Chase died about the year 1862. The bill of sale was prepared at Saco. No enrolment or register of the vessel, nor any copy thereof, was there when the bill of sale was written. Deponent gave a note in part payment of the vessel when he purchased, which afterwards came into the hands of McLellan, who called on him for payment of it. It was afterwards sued. To the deponent's knowledge, the execution has not been paid.

Complainant's proofs tended to show that Amos Chase, in 1855 or 1856, claimed to be a part-owner of the vessel; had knowledge of the repairs while they were being made; consulted the master whether it was advisable to sell her on her arrival at a foreign port; and, at several times during the years 1853 and 1854, had received payments of the earnings of the vessel.

The execution of *Hanscomb* v. *Clark* was returned without any indorsement of satisfaction.

In the bill of sale to Osborne of three-eighths of the vessel, dated July 22d, 1857, there were no conditions of sale expressed. It appeared from the register, issued from the custom house at Portland, dated Sept. 21, 1858, that he had sworn that he was owner of three-eighths, Sweetser of one-eighth, &c.

From the deposition of one of the firm of Nesmith & Sons, of New York, it was in evidence, that the vessel was consigned to them in the summer of 1859; that Osborne came to their office and represented himself as an owner of the vessel; called several times and desired information in relation to the business of the vessel. He made no objection to their acting as the vessel's agents. He did not state that he held the part of her as security; said he was an owner of the vessel.

There was evidence that McGilvery & Co., of Portland, had a demand against the owners for ship chandlery and stores furnished in September, 1858, for the vessel. A suit was commenced upon it, and judgment recovered. While the action was pending, Osborne called upon the attorney of McGilvery & Co.; did not deny his liability to pay it, but stated that McLellan, as ship's husband, would settle it. Judgment was recovered, on default, against Sweetser and Osborne as surviving owners.

For the purpose of proving the ownership of Osborne, two letters, written by him, were introduced by the complainant.

Nesmith & Sons brought an action upon their account of $2603,80 in the Circuit Court of the United States for the District of Maine, and judgment was rendered on default, against said Sweetser, Osborne and McLellan.

There was evidence tending to prove that Thomas McLellan was the plaintiff in interest in the action of *Hanson* v. *Tristram Clark;* that, by McLellan's direction, one-eighth of the vessel was seized as the property of Clark, and sold to one Williams, as the agent of said Thomas McLellan. Amos Chase was present at the sale and forbade the sale, claiming that part of the vessel as his. The sale was abandoned and the officer made no return on the execution.

The defendants, Amos Chase and Osborne, introduced testimony tending to verify the allegations in their respective answers.

Evans & Putnam, for complainant.

Shepley & Dana, for Amos Chase.

Anderson & Webb, for Osborne.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiff's testator was a part-owner of the barque Susan W. Lind; and, from 1857 to 1859, he paid certain bills against the vessel. He brings this bill in equity against the defendants for contribution, and for a final adjustment of the accounts. The only question now presented, is, whether the defendants were part-owners at the time the bills against the vessel were contracted.

Osborne received a bill of sale of three-eighths of said vessel, in 1858. Though absolute in form, it was probably designed as collateral security for his liabilities. But, however it might have been originally, he appears soon afterwards to have assumed the management and control of the vessel as one of the owners. His letters to McLellan, the testimony of Nesmith, and especially the fact of his paying bills against the vessel, and suffering himself to be defaulted, and judgment to be rendered against him, in suits upon other bills, are satisfactory evidence that he was a part-owner, and is liable as such.

In regard to Amos Chase, the testimony of Clark is positive, that he sold one-eighth of the vessel to him and his brother Samuel, in 1854. No bill of sale was then given, because there had been a previous conveyance, which the parties thought sufficient. But they paid Clark for it; and, if the conveyance was invalid as to third parties, it was valid as between themselves. They became the actual owners of one-eighth, and had the rights, and were subject to the liabilities of part-owners, with some exceptions which do not apply to this case.

The testimony of Clark is confirmed by the fact that Amos Chase afterwards repeatedly claimed to be an owner.

It is argued that Chase lost his interest by the sale on ex-

ecution, as the property of Clark, Nov. 10, 1855. That such a sale was made, there can be no doubt. But the parties to it were McLellan, who owned the execution, and Clark, the debtor, who had the record title of the interest in the vessel. Williams, who acted for McLellan, did not claim the vessel under the sale. Clark did not claim to have the debt discharged by the sale. And McLellan gave up all claim, and ordered the officer not to make any return of his doings. Thus, by the consent of all the parties interested, the sale was vacated and revoked. Chase is not in a position to claim that it was valid, and that it divested him of his title.

Samuel F. Chase having deceased, his representatives should have been made parties to the bill. If an amendment shall be offered and allowed for that purpose, the bill will then be sustained, and a master can be appointed to determine the rights and liabilities of the parties, unless the representatives of Samuel shall claim a further hearing.

If not amended, the bill must be dismissed.

APPLETON, RICE, GOODENOW and WALTON, JJ., concurred.

RALPH DAY *versus* CHARTER OAK F. & M. INSURANCE CO.

D. received a deed, absolute in form, of certain real estate, to secure him against loss for liabilities he had assumed or might assume for the grantor; he afterwards gave him a written agreement to re-convey, if he should be indemnified. The property was insured by D. without disclosing the nature of his interest therein; — one of the conditions in the policy being, that "property held in trust" — to include that "held as collateral security" — must be insured as such: — *Held*, in an action on the policy, that the property was held by D. as collateral security and therefore "held in trust," within the meaning of the policy.

Where, by the terms of a policy, it is to be void if the assured does not show that he has accurately represented the nature and extent of his interest in the property insured, if there are several different parcels, valued separately, — one of which he held as collateral security, and another, he had no interest in — his omission to disclose these facts is fatal to his right to recover for any portion of the property covered by the policy.

EXCEPTIONS from the ruling of DAVIS, J.

This was an action on a policy of insurance. The general issue was pleaded and joined. The execution of the policy, the burning of the property during the life of the policy, and the preliminary proofs of loss, were admitted.

It appeared by testimony introduced by the plaintiff, that he did not own at the time when the policy was issued the following articles described in it, and he did not claim to recover therefor:—"Press cutter, gearing, belting and shafting, steam pipe and fixtures for warming mill, fire pumps and hose and gearing."

In defence it was insisted that, the plaintiff was not entitled to recover for any loss, because it appeared from the application made by the plaintiff for the insurance, that he stated in it, that among other insurances on the property, was one of $2500 at the Kensington, on fixed machinery, and it appeared from plaintiff's own statement of loss to the Kensington company that one of the items or articles insured by that company was "fixed machinery, shafting, &c." It appeared in testimony, that the plaintiff, at the time of effecting this insurance, was not the owner of the "press cutter, gearing, belting and shafting" named above. In relation to this matter the jury were instructed that, if the plaintiff failed to prove that he was the owner of all the property described in each separate item, which was in part owned by him, he would not be entitled to their verdict, but, as it appeared that he did not own and did not claim to recover for any part of the item including shafting, the defence on this ground failed. It was also contended in defence, that plaintiff could not recover because it appeared by plaintiff's own testimony that he was not at the time the owner of all the property insured. The jury were instructed that he might recover for the loss on such items as were separately valued and wholly owned by him, if they were satisfied that he owned all of each separate article or item which he claimed to own, although he did not own the whole named in the policy. It appeared on testimony, that Josiah F.

Day conveyed to the plaintiff the paper mill in which the property insured, so far as personal, was placed, and other real estate, by deed dated March 17, 1859, and received a contract from the plaintiff for a reconveyance of that estate upon certain terms therein named, dated April 12, 1859. The defendants contended that, from this deed and contract, it appeared that the real estate insured, consisting of "bleach room and building attached," was held in trust, as explained in note to the third condition of insurance named, as annexed to and making part of the policy." It appeared that the bleach room and building attached were themselves erected upon the land and adjoining to the principal mill. The jury were instructed that the plaintiff did not hold that portion of the real estate insured "in trust" within the terms and meaning of the policy, and that the defence on this point also failed.

The verdict was for the plaintiff, and the defendants excepted to the instructions of the Court.

Shepley & Dana, in support of the exceptions:—

Three points are presented by the exceptions.

First.—It appears in the policy that the "press cutter, gearing, belting and shafting" in the paper mill, were insured. It was stated in the application for insurance, in answer to the 26th question,—"what amount is now insured on the property, in what offices, and for whose account?" "2500, in the Kensington, on fixed machinery," making no disclosure that shafting was there insured. That insurance was in fact, as it appears by exceptions, on "fixed machinery, *shafting*," &c. There was therefore an insurance, in the Kensington company, on shafting, not disclosed to the Charter Oak company.

The jury were instructed that, as it appeared in testimony that the plaintiff "did not own, and did not claim to recover for any part of the item including shafting, the defence on this ground failed."

The plaintiff caused the shafting to be insured as his own

property, and it was so insured, and he concealed the fact that it was then insured by the Kensington company. The policy in this case declares—"and this policy is made and accepted upon and in reference to the application, * * * and the terms and conditions hereunto annexed." Reference was made in the policy to the application. The application, therefore, becomes part of the policy, and the statements made in it are warranties. *Williams* v. *New England Mut. Fire Ins. Co.*, 31 Maine, 219; *Philbrook* v. *same*, 37 Maine, 137. The plaintiff cannot recover without a strict compliance with them. *Battles* v. *York County Mut. Fire Ins. Co.*, 41 Maine, 208; *Farmers' Ins. and Loan Co.* v. *Snyder*, 15 Wend. 481; *Kennedy* v. *St. Lawrence M. Ins. Co.*, 10 Barb., 285.

It is admitted that there was no compliance in this case; the instructions did not require it. The excuse presented and adopted by the instructions, is, that the defendants were not injured by it. That is not a valid excuse. If it were, the burden in all cases would be imposed upon the insurer to prove that he had been injured by non-compliance with a warranty. This, in most cases, he could not do. The law does not require that he should. To hold that the insured may recover without a compliance with his warranty, when the insurer has not been injured thereby, is to make an entire change in the law of insurance, and one productive of great litigation and mischief, to ascertain whether a want of good faith and a failure to comply with a warranty by one party, has been injurious to the other party. Among the first conditions on which the policy was issued, is this—"If any person insuring any property at this office shall make any misrepresentation or concealment * * * such insurance shall be void and of no effect." It is no part of this condition that such misrepresentation or concealment should prove to be injurious to the company.

The fifteenth condition requires that the plaintiff should show the truth of all statements and warranties before he

can recover, without regard to their materiality or injurious effect.

Second. — It appeared that the plaintiff did not own all the property insured by the policy; that the premium was single for a risk of $1700, on all the property specifically enumerated with *videlicet* stating the value of each separate item.

The jury were instructed that, "if they were satisfied that he owned all of each separate article or item which he claimed to own, although he did not own the whole named in the policy, he might recover for the loss on such items as were separately valued and wholly owned by him."

Here is a false representation, "or misrepresentation, or concealment" respecting the ownership of the property in violation of the first of the conditions which in such case declares the policy void. The fact that there was a separate valuation of each item cannot change the aspect of the case.

"The insured must represent truly his interest in the property insured or his policy will be void." *Battles* v. *York County M. F. Ins. Co.*, 41 Maine, 217.

In the case of *Lovejoy* v. *Augusta M. F. Ins. Co.*, 45 Maine, 472, the plaintiff procured insurance of $250 on his store and $500 on goods in it. He did not own the store. Let it be noticed that there was a separate valuation and insurance on different descriptions of property, as in the present case. And yet the decision was, "the contract of insurance was entire, and the representation by the plaintiff in his application for insurance, of his ownership of the store, being a material fact, and being false, the policy was therefore void."

The truthfulness of the representation respecting the ownership of the store, could be of no greater importance and could have no different effect than one respecting any other property insured by the policy. The fifteenth condition requires that, "in any suit or action the plaintiff must show the truth of all statements and performances of all terms, conditions and warranties, before he can recover."

Third. — It appears that the plaintiff, by a contract bearing date on April 12, 1859, engaged to reconvey the real estate, including the paper mill named in the application, conveyed to him by Josiah F. Day, on March 17, 1859. And in that contract the plaintiff declares "said conveyance was made to me with the intent and purpose of indemnifying and securing me for sundry advances heretofore made and hereafter to be made by me to the said Josiah F. Day, and to protect and save me harmless from all liability on any negotiable paper to which I have heretofore or may hereafter become a party at the instance and for the accommodation of the said Josiah F. Day." This was "property held in trust." Not in trust as the law would regard it. But in trust as the parties in a note to the third condition have declared the meaning of these words as used by them. As defined by them, those words include "property held as collateral security." This is declared in the contract to be held "as security aforesaid," and it becomes at law collateral to the contracts made by Josiah F. Day to pay the plaintiff all money advanced by him, and to save him harmless from his indorsements.

The third condition provides that property held in trust must be insured as such, "otherwise the policy will not cover it." The "bleach room and building attached" were insured. The case finds that these were "erected upon the land and adjoining the principal mill."

"The jury were instructed that the plaintiff did not hold that portion of the real estate insured 'in trust' within the terms and meaning of the policy, and that the defence on this point failed."

If he held it as collateral security the instructions were erroneous.

The property must be held as collateral security in all cases where the party holding it has other means to which he may resort in the first instance and by the use of which he may obtain a judgment against his debtor.

Such was the condition of the plaintiff in this case. The

contract to reconvey, and the declarations contained in it, show that the real estate was held as collateral security as plainly as it would have done if it had been stated in words.

Rand, contra.

The answer to the 26th question was not erroneous in omitting to state that there was other insurance (in Kensington Co.) on the *shafting:* — Shafting in Kensington Co. is *shafting of fixed machinery*, while shafting in this policy is *shafting of press cutter*. But, as the plaintiff did not own and does not claim to recover for item of "press cutter and shafting," if there be any error, it is immaterial, and the instruction was correct.

As the property was insured *in lots or items* — each item by itself — and a particlar sum in each item, the instruction on that point was correct.

The case in 45 Maine, 472, and cases there cited, are based upon *misrepresentations*, and are cases of mutual insurance companies, and liens. In this case there is no representation that plaintiff owned *all the property in the policy*. It does not appear in any part of the case that the "bleach room," &c., were so constructed as to constitute them *real estate;* and plaintiff's assignment of April 12, 1859, applies only to *real estate*.

But plaintiff did not hold the property "in trust" in the sense in which those words are used in the policy. He held by an *absolute warranty deed* dated long before the agreement. This point affects only this item.

The opinion of the Court was drawn up by

WALTON, J. — The plaintiff's right to indemnity under his policy is not absolute but conditional. One of the conditions is, that "property held in trust," — which term, as therein used and explained, includes "property held as collateral security," — must be insured as such; otherwise, the policy will not cover it; and one of the questions presented is, whether any portion of the property included in

the plaintiff's policy was thus held by him at the time he obtained his insurance.

On the 17th of March, 1859, Josiah F. Day conveyed to the plaintiff certain real estate, including a portion of the property covered by the plaintiff's policy, and, on the 12th of April following, took from the plaintiff a writing, in which he says:—"said conveyance was made to me with the intent and purpose of indemnifying and securing me for sundry advances heretofore made and hereafter to be made by me to the said Josiah F. Day, and to protect and save me harmless from all liability on any negotiable paper to which I have heretofore or may hereafter become a party, at the instance and for the accommodation of the said Josiah F. Day. Now, therefore, I do hereby acknowledge and declare that I hold said property as security aforesaid." He then promises and agrees that, upon payment of such sums as he shall have thus advanced, or paid on account of the notes, &c., he will reconvey the premises to said Josiah F. Day, or to such other person as he may appoint. It is not denied that the facts are correctly stated in this writing, nor is it pretended that the plaintiff held the property by any other title than as therein stated at the time he obtained his insurance.

The deed conveying this property to the plaintiff being upon its face absolute, the Court might not admit parol evidence to show that the property was held as security merely; but here is a writing signed by the plaintiff, in which he acknowledges and declares that the property is so held by him; and, if he should be indemnified against the negotiable paper referred to, and his debt paid, without recourse to the property thus held, he would then hold the property as a mere naked trustee, without consideration; and, if applied to for the purpose, this Court would be obliged to take notice of the fact, and compel him to reconvey it to Josiah F. Day, or such person as he might appoint, according to the agreement. The fact is legally established by the writing, and it seems impossible to escape the conclusion that

this property was held by the plaintiff as collateral security; and was therefore "held in trust," within the meaning in which that term is used and explained in the third article of the conditions which were annexed to and made part of the plaintiff's policy. The last clause in that article is as follows:—"Note.—By 'property held in trust,' is intended, property held under a deed of trust, or under the appointment of a court of law or equity, *or property held as collateral security; in which latter case this company shall be liable only to the extent of the interest of the assured in such property;*" and the fourteenth article provides for an assignment to the company of the interest of the insured in property so held, in certain cases, if required, together with the debt or payment secured thereby. Therefore the fact, that the plaintiff held this property as collateral security, was important to the defendants, and should have been stated in the plaintiff's application.

It is admitted that a considerable portion of the property included in the plaintiff's policy was not owned by him; and another question presented is, whether he can recover for such portions of it as he did own, and was valued separately in the policy.

It is a well settled principle that, when required by the terms of the policy, the insured is bound to show that he has stated truly and accurately the nature and extent of his interest, or his policy will be void. One reason for this, in respect to mutual companies, is, that they have a lien on the property to secure the premium notes; but this is not the only reason, and the principle has been applied to cases where no such lien existed; and to cases where the policy covered different parcels of property, valued separately, and the omission to state the true title and interest of the insured applied only as to part of the parcels. It is always material to the insurer to know what the interest of the insured is; for if valid policies could be obtained without interest, or for an amount far exceeding the interest of the insured, without disclosing the fact, such risks would be ex-

tremely hazardous by reason of the temptation which such policies would hold out to a wilful burning of the property.

Besides; insurers have a right to determine for themselves what facts are material to be disclosed, and upon what terms and conditions they will insure property; and when a risk has been assumed upon the express condition that the title or interest of the insured has been truly and accurately stated in the application, it would not only be in violation of well settled rules of law, but contrary to the plainest dictates of an enlightened morality, for the Court to disregard the condition and extend the liability of the insurers to a risk which they never agreed to assume.

The third article of the conditions which are annexed to and made part of the policy now under consideration, requires "the true title of the insured and the extent of his interest" to be represented to the company and so expressed in the policy, in writing, otherwise the insurance shall be void; and the fifteenth article provides that, "in any suit or action, the plaintiff must show the truth of all statements, *and performance of all terms, conditions and warranties, before he can recover.*" These, by the express terms of the policy, are conditions precedent to the plaintiff's right to recover, and yet they have not been performed. The plaintiff did not represent his true title and the extent of his interest to the company as required, and has not, therefore, shown a "performance of all terms, conditions and warranties" necessary to entitle him to recover. One portion of the property included in his policy, (the bleach room and building attached,) of the estimated value of three hundred dollars, was held by the plaintiff as collateral security, but was not so represented to the defendants, or insured as such; and another portion of the property included in his policy, (the press cutter, gearing, belting and shafting; steam pipe and fixtures for warming the mill; fire pumps and hose and gearing,) of the estimated value of three hundred and fifty dollars, the plaintiff had no interest in. These omissions are fatal to the plaintiff's right to re-

cover for any portion of the property included in his policy. *Battles* v. *Ins. Co.*, 41 Maine, 217; *Lovejoy* v. *Ins. Co.*, 45 Maine, 472; *Richardson* v. *Ins. Co.*, 46 Maine, 394; *Gould* v. *Ins. Co.*, 47 Maine, 403; *Davenport* v. *Ins. Co.*, 6 Cush., 340; *Smith* v. *Ins. Co.*, 25 Barb., 497; *Patten* v. *Ins. Co.*, 38 N. H., 338.

Exceptions sustained—
Verdict set aside and New Trial granted.

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

ELLERY H. STARBIRD *versus* INHABITANTS OF SCHOOL DISTRICT NO. 7 IN FALMOUTH.

An action lies against a school district for money collected for a tax illegally assessed and paid under duress, where the collector has deposited it with the town treasurer, it being by statute subject to the order of the district.

Where there is no district agent, or he neglects or refuses to call a district meeting, the selectmen are, by c. 11, § 17; of R. S., authorized to call it; but such vacancy or refusal must exist and be shown, to render the proceedings of such meeting valid.

ON REPORT.

This was an action of ASSUMPSIT, to recover back money paid, under protest, to the collector of the defendant corporation, to discharge a tax, which the plaintiff contended was illegally assessed.

It appears from a report of the evidence, that, subject to the plaintiff's objection, the defendants "also read from the records of the district an amended return" of the person notifying a district meeting, and to whom the warrant was directed, made upon the warrant, "under oath, similar to his original return, with the addition of the fact, that the copies posted were true copies of the warrant, and attested by him. The amendment was made without any authority from the Court."

Drummond, for the plaintiff.

Fox, for the defendants.

The opinion of the Court was drawn up by

RICE, J.—The evidence shows that the money, for the recovery of which the action was brought, was paid under duress, provided the tax was not legally assessed against the plaintiff. It also appears satisfactorily, that the money, at the date of plaintiff's writ, was in the hands of the treasurer of the town of Falmouth. The town treasurer holds money thus placed in his hands, subject to the order of the district, (R. S., c. 11, § 41,) and, for that purpose, is made by statute the agent of the district. The district, then, in legal contemplation, held the money paid by the plaintiff. There does not appear to be any question as to the election and qualification of the several town officers who have participated in the transaction under consideration, nor as to the manner of assessment or to the form of the commitment of the tax, or of the collector's warrant.

Was the meeting at which the money was voted for building the school-house legally called and warned? These are the controverted questions in the case.

The statute points out three modes in which the meetings of school districts may be called. Such meetings may be called in such mode as the district at a legal meeting may determine. R. S., c. 11, § 19. Or, by the agent on the written application of three or more legal voters, stating the reasons and objects thereof. R. S., c. 11, § 17. Or, when there is no agent, or when he neglects or refuses, they may be called by the municipal officers on like application. R. S., c. 11, § 17.

In this case the meeting was called by the selectmen on the written application of more than three legal voters in said district. It does not appear in the record nor by any other evidence in the case that there was no agent, nor that he neglected or refused to call a meeting of the district.

Nor is it absolutely essential that the record should show this fact. *Soper* v. *School District No.* 9, *in Livermore*, 28 Maine, 193. But, to give the selectmen authority to act in the matter, the *fact* that there was no agent, or that he neglected or refused to act, should exist and be shown. The authority not following within the general line of their official duties, but being derived from specific statute provision, cannot be presumed to exist without proof. The case falls within the well established principle that nothing can be presumed in favor of the jurisdiction of parties acting under special authority. *Little* v. *Merrill*, 10 Pick., 543; *Rossiter* v. *Peck*, 3 Gray, 539; *Barrett* v. *Crane*, 16 Vt., 246; *Betts* v. *Bagley*, 12 Pick., 572; *Bennett* v. *Burch*, 1 Denio, 141; *Short* v. *Spier*, 4 Hill, 76.

The amendment in the return of the person who notified the meeting was authorized by R. S., c. 3, § 8.

The certificate of the person required to give the notice is made evidence by the statute, c. 11, § 18, and, like the return of an officer, in a collateral proceeding, must be held to be conclusive. *Saxton* v. *Nimms*, 14 Mass., 315.

The facts do not exhibit a case of particular merit. Whether the money recovered will prove an adequate compensation for the exhibition, is not for us to determine.

The plaintiff must have judgment for the amount of money paid, with interest from the time of payment, and costs.

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

CHRISTOPHER DYER *versus* MOODY F. WALKER.

Items of credit, which were merely partial *payments* of plaintiff's account, where the defendant kept no account and had no charges against the plaintiff, do not constitute the accounts "mutual" within the meaning of the saving clause of the statute of limitations.

REPORTED from *Nisi Prius* by DAVIS, J.

This was an action of ASSUMPSIT upon a note and an account annexed to the writ.

The defendant pleaded the general issue, and the statute of limitations.

An auditor was appointed by the Court, whose report contained all the evidence offered.

Upon this evidence the defendant claimed that all the items of charge in the plaintiff's account, which accrued more than six years before the commencement of this action, amounting to $420, were barred by the statute of limitations.

The auditor reported "that the plaintiff proved delivery to the defendant of the articles specified in his account, at the several dates named, to the amount of $567,93. This amount embraces all items charged in plaintiff's account, to the defendant, except the following, viz.:—

"1857, May 19, Discount on note,	$2,00,
" Sept. 10, " " "	2,00,
"Average interest,	186,24."

"In relation to the first two charges, the plaintiff testified that they were sums actually paid for discount of two notes of the defendant, given in payment on those days, but there was no evidence of any agreement that the defendant should be charged with money paid for their discount. These charges are therefore not proven. The charge of average interest, $186,24, was testified by plaintiff to be the usual charge by tailors of interest after six months from delivery of goods, and that defendant had previously been charged and had paid, without objection, similar charges of

interest after six months from the delivery of goods, and well understood the custom; and that this account, as it accrued, had been from time to time, and at various times presented to defendant, and payment demanded. I have allowed the amount charged therefor, $186,24. The sums credited by plaintiff to defendant, on account, viz.:—

Pew rent from 1851 to 1854,	$30,00,
May 19, 1856, Note,	100,00,
Sept. 10, 1857, "	100,00,

appear to be right in amount, though the last item should bear date Sept. 15, 1856, and not Sept. 10, 1857. I have allowed all these items.

"If the credits named above were not such payments as would make said accounts "mutual and open accounts current," then that amount was barred by the statute of limitations. The account and transactions between the parties appearing to me to be such as to make this an open account current, I have allowed said items as charged."

The following is reported as the true account between the parties:—

"Moody F. Walker, To Christopher Dyer,		Dr.
"To clothes delivered and work done for said Walker, from March 1, 1850, to June 13, 1858, as per account annexed to writ,		$567,93
"To average interest to date of writ,		186,24
		754,17
"Contra,	Cr.	
"By pew rent from 1851 to 1854,	$30,00	
"1856, May 19,—By Note,	100,00	
"1856, Sept. 15, " "	100,00	230,00
"Balance due plaintiff, June 9, 1862,		$524,17"

The note sued is *barred* by the statute of limitations and is not allowed.

The presiding Judge ruled that the account was not barred, and ordered judgment for the amount reported by the auditor.

Fox, jr., for the plaintiff.

S. C. Strout, for the defendant.

The opinion of the Court was drawn up by

WALTON, J. — This is an action of assumpsit upon a note and account. The defendant pleaded the general issue and the statute of limitations. The case was sent to an auditor, who reported that, on the day of the purchase of the plaintiff's writ, the defendant was indebted to him, for balance of account, five hundred and twenty dollars and seventeen cents.

The defendant claimed that all the items of plaintiff's account, which had accrued more than six years prior to the date of the writ, (June 9, 1862,) were barred by the statute of limitations. This would embrace charges to the amount of four hundred and twenty dollars and forty-one cents, leaving the balance due the plaintiff of only one hundred and three dollars and seventy-six cents.

The plaintiff relies upon the saving clause in the statute of limitations, which provides that "in all actions of debt or assumpsit, to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to accrue at the date of the last item proved in such account. (R. S., c. 81, § 99.)

The defendant denies that the plaintiff's action is "to recover the balance due upon a mutual and open account current." He says that the account between them was not *mutual* within the meaning of the saving clause above quoted; that the account is all on one side; that he had no account against the plaintiff, and never made any charges against him; that the sums credited on the plaintiff's book were mere payments, — *partial* payments, — leaving a balance against him; that such partial payments do not create the element of mutuality, which will convert an account on one side only into a *mutual* account; that, to create the element of mutuality, each must have such charges against the other, as would support an action; that a payment goes to

extinguish so much of the other's claim, but gives no cause of action to the party making the payment.

The auditor was of the opinion that the payments did make the accounts *mutual*, and reported accordingly. The presiding Judge at *Nisi Prius*, being of the same opinion, "ruled that the account was not barred, and ordered judgment for the plaintiff for the amount of the auditor's report." The defendant was thereupon defaulted, and the case, by consent, was reported to the full Court, who are to render judgment for the plaintiff if the ruling of the presiding Judge was correct; otherwise the case is to stand for trial.

This Court seems to have held, in *Theobald* v. *Stinson*, 38 Maine, 139, that, to create the element of mutuality in accounts, it is necessary that each party should keep a book, and have charges upon it against the other. In that case, the Court say:—"There is no evidence that the defendant's intestate kept any books, or made any charges whatever. * * *If the defendant's intestate, then, kept no account, the question of mutuality becomes immaterial.*" And this is in accordance with the views of the Supreme Court of New York, in *Edmonstone* v. *Thomson*, 15 Wend., 555. In that case, SAVAGE, C. J., speaking for the Court, says:—"Accounts are *mutual* where each party makes charges against the other in his books, for property sold, services rendered, or money advanced," &c.

In this case, it does not appear, and is not claimed, that the defendant kept any account, or had any written charges against the plaintiff. The accounts, then, were not *mutual*, within the meaning of the saving clause in the statute of limitations; and the ruling of the presiding Judge was not correct; and the action must stand for trial.

Default taken off.

Action to stand for trial.

APPLETON, C. J., CUTTING, KENT, BARROWS and DICKERSON, JJ., concurred.

GEORGE LEWIS *versus* GEORGE BREWER, JR. *& als.*

In an action on a bond of a poor debtor who had taken the oath, it is not competent for the plaintiff to invalidate the record of the justices, by proof that the citation, to the creditor, was not under seal.

The objection should be taken on the hearing before the justices; and, if overruled, *certiorari* to quash the proceedings is the appropriate remedy.

The record of the justices in a suit on a poor debtor's bond, cannot be impeached collaterally when offered in evidence.

THIS was an action of DEBT upon a poor debtor's bond, given to relieve the principal obligor from arrest on execution. The parties agree upon the following statement of facts:—

The defence is the record of proceedings before two justices, by whom the debtor had been allowed to take the oath prescribed by the statutes for his discharge from the arrest. The plaintiff objects to the sufficiency of these proceedings on the ground that the citation to the creditor, issued by one of the magistrates, was not under seal, and that, therefore, the magistrates had not jurisdiction, and the record of their proceedings is not a sufficient defence; and relies, in support of the objection, upon R. S., c. 113, § 23. This is the only ground of objection.

It is admitted by the defendants that the citation was not under seal, provided it is open to the creditors to prove such fact, the justices having certified in their record that they have examined the citation and return and found the same correct.

Barnes, for the plaintiff.

Fessenden & Butler, for the defendants.

The opinion of the Court was drawn up by

WALTON, J.—When a person, arrested on execution and released upon giving a poor debtor's bond, desires to dis-

close, the law requires that the citation to the creditor should be under seal. R. S., c. 113, § 23.

If the justices, selected to hear the disclosure, certify in their record, that they have examined the citation and return and find them correct, is it competent for the plaintiff, in an action upon the bond, to invalidate the record by showing that the citation was not under seal? This is the only question in the case.

Our statutes for the relief of poor debtors have always required the justices to examine the citation and return, and to adjudicate upon their sufficiency before proceeding to examine the debtor; and this Court has repeatedly held, that their adjudication was final and conclusive, and that evidence is not admissible, in an action upon the bond, to contradict the record in these particulars.

By the Act of 1856, c. 263, incorporated into the R. S. of 1857, (c. 113, § 48,) it is provided that evidence may be received to show that no legal service of the citation was made, though it may contradict the record and certificate of the magistrates who administered the oath. But this provision applies only to the service of the citation, leaving adjudications upon the sufficiency of citations in other respects unaffected and conclusive as before. So held in *Baldwin* v. *Merrill*, 44 Maine, 55. The phraseology in the Revised Statutes is slightly different from that in the Act of 1856, but the meaning is the same.

It is admitted by the defendants, that the citation in this case was not under seal, provided it is open to the plaintiff to prove such fact.

The justices having certified in their record that they had examined the citation and return and found the same correct, the Court is of opinion that it is not competent for the plaintiff to invalidate this record, by proof that the citation was not under seal.

If a party desires to take advantage of such a defect, he should call the attention of the justices to it, in which case they would undoubtedly hold the citation to be insufficient.

If not, the aggrieved party could apply for a writ of *certiorari* to quash their proceedings. But the justices' record cannot be impeached collaterally, when offered in evidence in a suit upon the bond. *Plaintiff nonsuit.*

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

NATHAN BARNES *versus* THE UNION MUT. FIRE INS. CO.

When a policy of insurance was to be void if there should be any alienation or change in the title, any material change, though not by alienation, will have that effect.

Thus, where the plaintiff obtained insurance on an undivided half of a dwellinghouse, and afterwards, on the petition of his co-tenant, partition was made on judgment rendered therefor, *it was held* to be equivalent to an alienation and a purchase.

The policy being void as to the building, the plaintiff could not recover for loss of furniture insured thereby. The contract being indivisible, was wholly void, if void in part.

REPORTED from *Nisi Prius* by DAVIS, J.

This was an action on a policy of insurance, to recover for loss insured against.

F. O. J. Smith, for the plaintiff.

T. M. Hayes, for the defendants.

The facts in the case, bearing on the questions considered, are fully indicated in the opinion of the Court, which was drawn up by

DAVIS, J.—The plaintiff applied for insurance on "one half, in common and undivided," of certain buildings, and household furniture therein. In answer to the question, "who owns and occupies the buildings," he answered, "the applicant owns and occupies the property." A fair construction of this representation of title is, that the applicant was the owner of an undivided half of the property described, and the sole owner of the *property to be insured.* This representation was true.

The by-laws of the company are expressly made a part of the policy, as conditions of the insurance. By the sixteenth article, it is provided that, " when the title of any property insured *shall be changed*, by sale, mortgage, or *otherwise*, the policy shall thereupon be void."

The insurance in this case was for six years. The policy was dated Nov. 15, 1851. Upon a petition for partition, duly prosecuted by the other tenant in common, upon which judgment was rendered Jan. 20, 1857, the premises were divided, and the plaintiff became the owner of a particular half thereof, in severalty. The buildings were destroyed by fire, April 1, 1857.

The partition of the property may not have been an *alienation*, as understood in matters of insurance. But when a by-law provides that any alteration or change in the title shall make the policy void, any material change in the title will have that effect, though it is not by an alienation. *Edmands* v. *Mutual Safety Fire Ins. Co.*, 1 Allen, 311; *Campbell* v. *Hamilton Mutual Ins. Co.*, *ante*, *p.* 69.

The title, in the case at bar, was materially changed by the partition. The effect was equivalent to an alienation, and a purchase. The plaintiff no longer owned any interest in the entire property, while he did own the entire interest in a part of it. It was the same as if he had given his cotenant a deed of his interest in a specific part, and had received from him such a deed of the other part. His title no longer corresponded with the policy, in nature or quantity. He insured but one undivided half of *the part which he owned after it was divided*. And, after the division, he owned no part of the *other half*. If he could recover at all, which he cannot do, it would be for only *one-fourth* part of the whole, — or, for an undivided half of the part which he continued to own after the partition.

The furniture was separately valued in the policy; and it is claimed that the plaintiff is entitled to recover for the loss of that, if he fails to recover for the loss of the buildings. But the provision in the by-laws is that, if the title

is changed, *the policy* shall be void. And besides, it has been decided by this Court, that such a contract of insurance is indivisible, and, if rendered void by the assured in any of the items of property insured, the whole policy is void. *Lovejoy* v. *Augusta M. F. Ins. Co.*, 45 Maine, 472; *Gould* v. *York County Mut. Fire Ins. Co.*, 47 Maine, 403; *Day* v. *Charter Oak Ins. Co.*, *ante*, *p.* 91.

Plaintiff nonsuit.

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

(KENT, J., held that the representation of the plaintiff, as to occupancy of the building, was either a misstatement or a concealment of a material fact.)

JABEZ C. WOODMAN, JR., *versus* SILAS H. CHURCHILL.

The deposition of a person, taken while he is under sentence of death, having been convicted of murder, is made legal testimony by c. 53 of the laws of 1861, which provides that "no person shall be incompetent to testify in *consequence* of having been convicted of any criminal offence."

Where a party attempted to impeach the character of a witness for truth, and it appeared that the witness had lived many years in a certain town, the other party was allowed to inquire of witnesses introduced to sustain his character — "what is his general character for truth *in that town?*" — *It was held*, that the form of the question, in respect to reputation and *locality*, must depend on the testimony in regard to the position and business of the witness.

EXCEPTIONS from the ruling of CUTTING, J.

Vinton & Dennett, in support of exceptions.

J. C. Woodman, *contra.*

The questions presented by the exceptions will fully appear from the opinion of the Court, which was drawn up by

DAVIS, J. — By c. 53 of the laws of 1861, it is provided that "no person shall be incompetent to testify in any court,

or proceeding at law, *in consequence* of having been convicted of any criminal offence."

George Knight was convicted of murder in the first degree; and, while under sentence of death therefor, his deposition was taken by the defendant, to be used in the case at bar. This was one mode of testifying in the case. The question would not seem to require any argument. He was clearly within the terms of the statute. And, whether his incompetency, before the statute, arose from "infamy" or "civil death," or both, each of these was a "*consequence* of having been convicted." The statute therefore prevented either of them from rendering him "incompetent to testify." His deposition was properly admitted.

The reputation of Isaac Knight, another witness, having been attacked, the plaintiff had the right to sustain him. Knight having been proved to have lived in Poland for many years, a witness was asked,—"what is his general reputation for truth *in Poland?*"

The question in such cases should be a general one, upon the examination in chief, not only in regard to the *reputation*, but in regard to *locality*. It would not be proper to restrict it to a small space, nor to a few persons. Nor, on the other hand, should the question be broader than the reputation. The extent of this differs in different persons. The form of the question in this respect must depend on the testimony in regard to the position or business of the person whose character is attacked. Under the circumstances proved in this case, the question is not materially different from the usual form, "among his neighbors," or, "where he is known," or, "in the place where he resides." It was for the excepting party to make it appear that the place to which the question was limited was too large, or too small, or not the right place, to make it a fair test of the general reputation. As this does not appear, the exceptions must be overruled.

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

JOHN R. COREY *& al., in Equity, versus* CHARLES H. GREENE *& al.*

A demurrer to a bill in equity will not be sustained, on the ground that the plaintiffs have not levied their execution upon the premises, which, it is alleged, the judgment debtor had purchased and had caused to be conveyed to the other defendant in the bill, to defraud his creditors, he never having had any *legal estate* therein.

SUIT IN EQUITY. This case was heard upon demurrer to the bill.

Rand, for the plaintiffs.

M'Cobb & Kingsbury, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.—This case is presented upon a demurrer to a bill in equity. The plaintiffs allege that they recovered judgment against Greene, one of the defendants, in October, 1861, for $167,33, debt, with costs of suit; that execution was duly issued thereon Nov. 19, delivered to the sheriff, and by him returned in no part satisfied; that, after contracting the debt for which the judgment was rendered, Greene purchased certain real estate, which is described, causing the deed thereof to be given first to one Stephen K. Dyer, Nov. 13, 1860, and afterwards, Sept. 16, 1861, by him to the other defendant, Horton, neither of whom paid any part of the consideration therefor; that, since said purchase, Greene has occupied the premises, and built a house thereon; and that all this was done with the intent, and for the purpose, of defrauding them. The bill prays for a decree for a conveyance of a portion of the property by Horton, or payment of the debt, or such other relief as the plaintiffs may be entitled to in equity.

It is objected, that the bill cannot be sustained, because the execution was not levied upon the premises, or a portion thereof sufficient to satisfy it. And, it is true, that the

creditor must exhaust his remedies *at law*, before he can claim relief *in equity*.

Thus, if the debtor at any time has had the *legal title* to the estate, and, after the debt was contracted, conveyed it for the purpose of defrauding his creditors, such deed is void, in contemplation of law, and the creditor may still levy his execution upon it, and then establish the fraud by proceedings in equity. In such a case a levy is necessary; and, without it, a court of equity will make no inquiry into the question of fraud. *Webster* v. *Clark*, 25 Maine, 313. The levy is essential to transfer to the creditor the *debtor's* title. The proceedings in equity are necessary to divest the *fraudulent grantee* of any title. A *deed* from the *debtor* to the *creditor* will transfer his title, the same as a levy, and be sufficient to sustain a bill in equity. *Traip* v. *Gould*, 15 Maine, 82.

But, in cases where the debtor has never had the *legal estate*, but has paid the purchase money, and caused the land to be conveyed by the grantor to a third person, whether the deed be regarded as valid, or invalid, *he* has never had any title that could be seized on execution. A levy in such case is therefore unnecessary. A return of *nulla bona* is all that is required to lay the foundation for a suit in equity. *Hartshorn* v. *Eames*, 31 Maine, 93. This case, therefore, did not need to be "reconciled" with that of *Webster* v. *Clark*, previously cited, as was attempted in *Dana* v. *Haskell*, 41 Maine, 25. In *Webster* v. *Clark*, the debtor had been the *legal* owner. In *Hartshorn* v. *Eames*, the debtor had never had any legal interest in the *real estate* that could be levied upon, but only an equitable interest, which was conveyed to his father "by his procurement." *See page* 102.

Nor is the case of *Dockray* v. *Mason*, 48 Maine, 178, in conflict with this. There a levy was made when it was unnecessary. A bill in equity alleging this, and also enough without it, was sustained upon demurrer, the attention of

the Court not having been called to this point, as it was immaterial.

The question presented is clear, both upon principle and authority. If a debtor purchases real estate, and causes the conveyance to be made to a third person, it creates a *resulting trust* in favor of the purchaser. And such an estate cannot be attached, or levied upon, by a creditor of the *cestui que trust*. *Russell* v. *Lewis*, 2 Pick., 508. The creditor, therefore, exhausts his remedy at law without any such levy. It is unnecessary because it would be nugatory.

We are aware that the same question has been decided otherwise in New Hampshire. *Pritchard* v. *Brown*, 4 N. H., 397. But we have derived our laws relating to this subject from Massachusetts; and the construction given to them by the courts of that State is entitled to great weight. And besides, as we shall see, this construction has been recognized in this State.

By our present statutes, "a levy may be made on land fraudulently conveyed by a debtor." R. S., 1857, c. 76, § 13. Previously the language was different; but the sense was not changed by the revision. "Any real estate of a debtor, in possession, reversion, or remainder, or *fraudulently conveyed*, may be taken in execution." R. S., 1841, c. 94, § 1.

This provision had its origin, in this country, in the Massachusetts Act of 1696. The first section, which was revised in 1784, provided that "all lands or tenements belonging to any person in his own proper right in fee," should be liable to be "taken in execution" for the payment of his debts. And the second section provided "that, when any person shall make sale or other alienation of any lands or tenements to him of right belonging, with intent to defraud his creditors of their just debts, &c., all such sales and alienations are to be deemed covinous and fraudulent, and shall be of no effect to bar any such creditor from such debt as is to him owing." Though this latter section was not in the revision of 1784, it was not repealed; and that lands so con-

veyed were liable to be taken in execution by existing creditors under that Act, or by virtue of the statute of 13 Eliz., c. 5, has never been questioned. Though not necessary, provision was expressly made for it in the Massachusetts Revised Statutes of 1836, and in our revision of 1841. But in neither State has it ever been held so to apply to any case of resulting trust as to require or authorize a levy thereon, where the debtor never had the legal title. In all such cases, if the trust is made to defraud creditors, as in all other cases of "fraud," where there is no adequate remedy at law, general jurisdiction in equity is given by statute; (R. S., c. 77, § 7;) and the creditor will be relieved in equity, after establishing *his claim* at law, upon proof that the debtor had in any way placed his property beyond the reach of legal process.

For these reasons, a levy upon land paid for by the debtor, and conveyed by his procurement to a third person, was held to be ineffectual to pass the title. *Howe* v. *Bishop*, 3 Met. 26.

In *Gardiner Bank* v. *Wheaton*, 8 Greenl., 373, in such a case, a bill in equity in favor of judgment creditors, *without any levy*, was finally sustained. And, though the distinction may not always have been noticed, no case can be found in either State, where the legal title was never in the debtor, in which a levy has been held to be necessary. If, in any such case, a levy should be made by a creditor, he might, perhaps, acquire a lien to the specific property, which would take priority of another creditor making no levy, or be good against a subsequent purchaser. But of this we need not express any opinion.

Nor is there any difficulty in affording relief in such cases. If the value of the property held in fraud exceeds the amount of the plaintiff's demand, there may be a decree that the grantee shall pay such demand, as in *Hartshorn* v. *Eames*. If the debt exceeds the value of the property, or the grantee has already paid other debts of the *cestui que trust* out of it, as in *Gardiner Bank* v. *Wheaton*, a

master may be appointed, as in that case, to determine the value of his remaining interest, for what sum he shall release it, and how much the creditor shall allow the debtor for it. Such questions often arise in proceedings for the redemption of mortgaged estates. The power of the Court is plenary, as well in regard to the *form*, as to the *amount* of relief to be granted. *Demurrer overruled.*

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

EBEN MCLELLAN, *Executor*, *versus* WOODBRIDGE C. OSBORNE *& als.*

The defendants became part-owners of a vessel at different times. The prayer in a bill in equity by one of them against the others, for an account, for that period during which *all* were owners, is right; if not thus limited, the bill would be bad for multifariousness.

If the plaintiff, by leave, amend his bill by introducing an additional defendant, costs will be allowed the defendants to the time of amending.

SUIT IN EQUITY. This case has been before the Court at a former term; *ante*, *p.* 85.

Evans & Putnam, for the plaintiff.

Shepley & Dana, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.—The *facts* in this case have all been determined upon a previous hearing. And, although a new party has been summoned in, and his answer has been filed, we do not see any reason to change our former conclusion. All the defendants were part-owners, with the plaintiff, of the barque Susan W. Lind, during the time for which he calls upon them to account.

And there is only one question of law which has not been determined.

The plaintiff became an owner prior to 1852, but, at what time, the case does not show. Sweetser, one of the defenddants, became an owner Nov. 11, 1852. The Chases became owners in 1854. Osborne became an owner in 1857. The bill prays for an account from July 27, 1857, to Sept. 8, 1859. The defendants contend that, if the plaintiff has the right to call upon them, as part-owners, to account, it is for the whole period, since *any one* of them became a part-owner with him; and that, as the plaintiff has split up his cause of action, by bringing this suit for *a part* of it, only, his bill must be dismissed.

That one cause of action, against the same person, cannot be divided so as to sustain *two suits*, is conceded. But, whether *one* suit cannot be maintained upon *part of an account*, though there are previous accounts unsettled, which may have to be examined, and which may, perhaps, be barred by the judgment, is a different question.

But, could the plaintiff have maintained a suit for an account against all the part-owners for the whole time during which any one had been an owner, thus embracing periods of time when some of the defendants were not owners? Can part-owners at one time thus be joined with other part-owners at another time, in one suit, for an account for the whole period? Would not such a bill in equity be multifarious?

Although the part-owners are tenants in common of the *vessel*, in regard to the *business* of the vessel, and their rights and liabilities for profits and losses resulting therefrom, their relation to each other is the same as that of partners. Abbott on Shipping, c. 111; Story on Partnership, § 441. And, although the accounts, by the ship's husband, may be, for convenience, kept in the name of the vessel, every transfer of any share, by any owner, necessarily creates a new partnership in the business. No part-owner can be held, unless by some extrinsic contract, to account, in any adjustment of profits and losses, except for the specific time during which he was such part-owner. He therefore

has no interest whatever in any other accounts. The case is precisely analagous to a continuing partnership, from which some members have withdrawn, and to which others have been admitted, from time to time. That, *as to each other*, every such change makes a *new firm*, with rights and liabilities entirely distinct from the previous firm, no one will deny.

"If a joint claim," says Chancellor WALWORTH, "against two or more defendants, is improperly joined, in the same bill, with a separate claim against one of those defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them, all or either of the defendants may demur to the whole bill for multifariousness." *Swift* v. *Eckford*, 6 Paige, 22; Story's Eq. Pl., § 271; 1 Dan. Ch. Pl., 384.

Thus, a bill praying for an account of two distinct firms, made up, in part, of the same persons, was held bad for multifariousness. *Griffin* v. *Merrill*, 10 Md., 264. So a demurrer to a bill against an administrator, praying for an account for rents and profits received by his intestate in his lifetime, and also received by himself individually, was sustained. *Latting* v. *Latting*, 4 Sandf. Ch., 31. And, in a case precisely in point, where three persons had successively withdrawn from a firm, reducing the number from five to two, a bill praying for an account and settlement of the partnership concerns *for the whole time*, was held to be bad for multifariousness, and was dismissed. *White* v. *White*, 5 Gill, 359.

The plaintiff was therefore right in praying for an account only from the time Osborne became a part-owner, all the other owners having become such before that time. Osborne has no interest in the plaintiff's claims against the other owners, or their claims against the plaintiff, upon accounts arising before he became an owner. Had an adjustment of those accounts been prayed for in this suit, it would have been bad for multifariousness. Those accounts cannot

be adjusted except by a suit in which all and only those who were *then* part-owners shall be parties. If such a suit is important to protect the rights of any of the defendants, as between them and the plaintiff, they have the right to commence it; and the Court have the power, if justice requires it, to withhold the final decree in this case, until that can be investigated.

The bill must be sustained, and a master appointed to examine and state the accounts between the parties.

The bill, as originally filed, must have been dismissed for want of proper parties. This objection was taken by the original defendants, and was sustained by the Court. By an amendment, Samuel F. Chase, administrator, has been made a party. Therefore, we give the defendant costs up to the time when the amendment was allowed, to be deducted from the plaintiff's costs, which will be allowed for the whole time.

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

WILLIAM S. DOUGLASS *versus* SAMUEL DURIN.

Mortgages of real estate and the debts thereby secured, being, by law, assets in the hands of an administrator, a quitclaim deed by the heirs of the mortgagee, before foreclosure, will not operate as an assignment of the mortgage.

And, if the administrator be an heir and a releasee of the other heirs, his deed of quitclaim will not so operate, where he does not convey in the capacity of administrator.

EXCEPTIONS from the ruling of DAVIS, J.

This was a WRIT OF ENTRY to recover a parcel of land in Raymond.

The demandant claims under a mortgage from one Allen to William B. Douglass, who died about the year 1844, intestate. Louisa D. Johnson, Emery Douglass and the

demandant are the heirs of said deceased. The said Louisa, by deed of quitclaim, conveyed her interest to said Emery and he, by quitclaim, to the demandant. Said Emery was administrator of the said deceased but did not quitclaim in that capacity. There had been no proceedings for the purpose of foreclosing the mortgage.

The exceptions state that, "with other appropriate instructions, the presiding Judge instructed the jury that said quitclaim deed, from Emery Douglass to the plaintiff, operated as an assignment of said mortgage."

The tenant filed also a motion to set aside the verdict as against the law and the evidence.

The questions raised by the bill of exceptions, and the motion, were argued by

E. Douglass, for the demandant, and by

P. R. Hall, for the tenant.

The opinion of the Court was drawn up by

DICKERSON, J. — Writ of entry. The demandant claims title by quitclaim deed from Emery Douglass. A deed of quitclaim, Louisa D. Johnson to Emery Douglass, and a copy of a deed of warranty, William B. Douglass and Samuel *Durin, jr.*, were put into the case by the demandant. Demandant also introduced a mortgage deed, William D. Allen to William B. Douglass, containing this description: "Two certain pieces of land in said Raymond, with the shingle mill and dwellinghouse thereon, being the same land that I have this day bought of said Douglass and Samuel *Davis, jr.*, by deed, to which reference may be had for a more particular description of said land."

The demanded premises were the same described in this mortgage.

The case does not show the date of these deeds, nor is their date material for the determination of the questions presented. William B. Douglass died some nineteen years ago. The demandant, Louisa D. Johnson and Emery Douglass,

were the sole surviving children of William B. Douglass; Emery Douglass was at the same time the administrator of said William B. Douglass.

The presiding Judge instructed the jury that the quitclaim deed from Emery Douglass to the plaintiff operated as an assignment of the mortgage, William D. Allen to William B. Douglass. The verdict was for the demandant and the tenant excepted to this ruling.

As in a writ of entry the demandant must rely upon the strength of his own title, we do not deem it necessary, under the state of the demandant's evidence, to consider the testimony introduced by the tenant.

Was the quitclaim deed of Emery Douglass to the demandant an assignment to him of the Allen mortgage?

In this State there can be no valid assignment of a mortgage of real estate by parol; it must be by deed of the party who has a right to the mortgage. This may be done by an indorsement upon the mortgage or by a separate deed. *Vose* v. *Handy*, 2 Maine, 322; *Smith* v. *Kelley*, 27 Maine, 237; *Dwinell* v. *Perley*, 32 Maine, 197; *Parsons* v. *Wells*, 17 Mass., 419.

A deed of quitclaim of the premises, in usual form, by the mortgagee to a third party, operates as an assignment of his interest as mortgagee. *Dockray & al.* v. *Noble*, 8 Maine, 278; *Dixfield* v. *Newton*, 41 Maine, 221; *Hunt* v. *Hunt*, 14 Pick., 374; *Freeman* v. *McGaw*, 15 Pick., 82.

Emery Douglass had never taken any valid assignment of the Allen mortgage, and could give no title as assignee of that mortgage. All the deed he had was a quitclaim from Louisa D. Johnson, who had no assignment of the Allen mortgage. The demandant, Emery Douglass, and Louisa D. Johnson were, it is true, the sole surviving children of William B. Douglass, the mortgagee, but there does not appear to have been any foreclosure of the mortgage or distribution of his estate among his heirs, and the mortgage and mortgage notes being assets in the hands of his administrator, the demandant could not maintain this action, as

heir, and grantee of the other heirs of the mortgagee, even if he had brought this action in that capacity. But this action is brought upon a mortgage, and the only ground upon which it can be maintained is upon proof that Emery Douglass gave his quitclaim deed to the demandant, in his capacity as administrator of William B. Douglass. Under the Massachusetts statute of 1789, very similar to our statutes, which makes mortgaged lands, and the debts secured thereby, assets in the hands of the administrator, it has been held, that a quitclaim deed of the administrator of a mortgagee operates as an assignment of the mortgage. *Crocker* v. *Jewell*, 31 Maine, 306.

The case, however, shows that, in executing his deed to the demandant, Emery Douglass acted in his private capacity. His conduct, in first acquiring the claim of Louisa D. Johnson, one of the heirs of the mortgagee, is perfectly consistent with this fact. If he had claimed to act as administrator of the mortgagee, he would have had no occasion to do this. The demandant, too, seems to have acted upon the theory that the demanded premises descended to the heirs like unincumbered real estate, and not to have claimed title from Emery Douglass, as administrator of the mortgagee, otherwise he would have taken an administrator's deed, if, indeed, Emery Douglass was administrator of William B. Douglass when he deeded to the demandant, which is by no means rendered certain by the evidence reported.

As the verdict must be set aside, we have no occasion to consider the other branch of the exceptions, or the motion to set aside the verdict as against evidence.

Exceptions sustained and verdict set aside.

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

*STATE *versus* JAMES JONES AND GEORGE M. PIKE.

Where two are jointly indicted, and one only pleads guilty, his testimony is admissible for the other respondent on his trial.

THE case was presented on EXCEPTIONS, taken by Jones, to the ruling excluding the testimony of the co-defendant, on his trial.

Anderson & Webb, for the prisoner.

The *Attorney General*, for the State, submitted the case without argument.

The opinion of the Court was drawn up by

KENT, J. — The respondents were jointly indicted for inciting one Pendexter to set fire to and burn a building. On arraignment, Pike pleaded guilty and Jones pleaded not guilty. On the trial of Jones, he offered Pike as a witness, who, being objected to by the government, was excluded by the presiding Judge. To this exclusion, Jones filed his exceptions.

The general rule of law is, that parties to the record, in a criminal case, cannot be witnesses for each other. The recent statute, (1861, c. 53,) removes all objection to the witness on the ground of infamy, by reason of a conviction for a criminal offence. But this does not affect the question arising from the fact that the witness is a party to the record.

There are, however, exceptions to the general rule. One is, that if no evidence is given against one of several joint defendants, the Court may order his acquittal and he may be used as a witness by them. 1 Hale's P. C., 306; 2 Hawkins' P. C., c. 46, § 94; *Sawyer* v. *Merrill*, 15 Pick., 17.

The question in this case is, whether a co-defendant, after a plea of guilty on his part, may be called as a witness by the other defendant. It seems to be settled that he cannot

* The opinion was the only paper in this case that was received by the Reporter.

be thus called whilst the charge in the indictment is pending and undisposed of against him. And this, whether he is to be tried separately or jointly, or at the same term, with his co-respondent, or not. *People* v. *Bills*, 10 Johns., 95; *Commonwealth* v. *Marsh*, 10 Pick., 57; *People* v. *Williams*, 19 Wend., 377. But, after a party has been adjudged guilty or not guilty by a verdict, or has voluntarily admitted his guilt by plea, he has no longer any interest in the proceedings in Court to determine the guilt or innocence of the others named in the indictment. "He has ceased to be a party to the issue to be tried." *Com.* v. *Smith*, 12 Met., 238.

If the defendant, who is offered as a witness, has been convicted by a verdict of guilty, he may be a witness for the others, before sentence, or, after sentence, if not thereby rendered infamous. The same result necessarily follows where he is convict by plea of guilty. *Regina* v. *Ford & al.*, 1 Carr. & Marshman, 111, (41 E. C. L. R., 66,) *Ballard* v. *Noaks*, 2 Pick., 45; Blackford, 119; Wharton's Am. Cr. Law, § 794. *Exceptions sustained.*

New trial granted.

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

COUNTY OF YORK.

JOEL E. MOULTON *versus* INHABITANTS OF SANFORD.

If there are two efficient, independent proximate causes of an injury sustained by a traveller upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received "through such defect;" and the town is not liable therefor. And it makes no difference that the traveller himself was in no fault.

EXCEPTIONS from the ruling of GOODENOW, J.

This was an action on the CASE to recover for personal injuries, and for damages to plaintiff's horse and wagon, alleged to have been occasioned in consequence of a want of railing on a bridge in the highway in the defendant town.

Kimball & Miller, for the plaintiff.

Low, for the defendants.

The facts are sufficiently stated in the opinion of the Court, which was drawn up by

DAVIS, J. — The plaintiff, according to his own testimony, was crossing a bridge over a narrow stream in the town of Sanford, when his horse was frightened by some animal jumping into the water. The bridge was of sufficient width, and well built; but there was no railing. The horse being thus frightened, and unmanageable, ran so near the edge that the body of the wagon was detached from the forward wheels, and thrown off into the stream.

As the primary cause of the accident, — not *remote*, but *proximate* and efficient — was one over which the inhabitants of the town had no control, and for which they were not responsible, no argument would seem to be necessary to show that they ought not to be held liable, even if the ques-

tion were new. But the case is clearly within the principle laid down in *Moore* v. *Abbott*, 32 Maine, 46.

That case was tried by SHEPLEY, C. J.; and he instructed the jury "that the town was not liable unless the accident occurred, and the injury was occasioned, by the defect in the way or bridge alone; and that, if the accident happened by the joint effect of a defect in the way, and a defect in the harness, rendering it unsuitable or unsafe, although such defect were not known, and the plaintiff was not in fault for want of knowledge, he would not be entitled to recover." These instructions were sustained, on exceptions, by the full Court, in an opinion the intrinsic force of which it will not be easy to overturn. As the extracts here quoted are from the instructions given to the jury, and not from the opinion of the Court, they cannot be called the *dicta* of the Judge who delivered it.

This decision has never been questioned by the Court in this State. It is referred to and recognized in *Coombs* v. *Topsham*, 38 Maine, 204; and in *Anderson* v. *Bath*, 42 Maine, 346. The question, therefore, might be considered as settled, beyond controversy. But, as it is still a subject of discussion in other States, it may be well to re-examine it.

Two causes, both of them proximate, may concur to produce an injury. When one of these is a defect in the highway, and the other any fault of the plaintiff, it is not claimed that he can recover. But when one of the causes is a defect in the way, and the other is some occurrence for which neither of the parties is responsible, is the town liable to the party injured?

This question was raised in the case of *Hunt* v. *Pownal*, 9 Vermont, 411. It was afterwards before the courts in Maine and in Massachusetts, in 1849 and 1850, neither being aware that it was before the other. In Massachusetts the Vermont decision was at first sustained. *Palmer* v. *Andover*, 2 Cush., 600. In this State, in the case before cited, it was declared to be unsound.

Towns are liable for injuries to tavellers only when they are received "through a defect" in the way. When any other efficient, independent cause contributes directly to produce the injury, it cannot with certainty be said to have been received through the defect. For in such case the other cause might have produced the injury if there had been no defect; and the damages caused by both jointly cannot be apportioned between them. Such has been understood to be the rule in this State.

If there is any reason why this rule should be relaxed in other cases for damages caused by negligence, it does not apply to such suits against towns. These corporations do not, like railroad companies, undertake to carry passengers for hire. There is no privity between a town and the travellers who pass through it. The town is under no obligation to them, arising from any contract, or any natural relation. If the roads are not safe, the neglect is of a public duty only, having no foundation except in a special statute. It was proper that a remedy should be given for injuries caused solely by the neglect of towns, not only as an indemnity to individuals, but as an inducement to greater diligence and care. But the statute is in its nature penal, as well as remedial, and ought to be construed strictly. The language imposing the liability does not fairly embrace any case in which any other efficient cause, besides the defect in the way, contributes to produce the injury.

Nor is there any necessity, in order to make the remedy available, to extend the liability by construction. The sympathy of juries is always strongly in favor of the person injured. The danger of abuse is not in *limiting* the remedy, but in *enlarging* it. If towns are to be held liable for injuries occasioned in part by other causes than their neglect, they will be made practically insurers of the safety of travellers against all accidents, however inevitable, if they happen upon a defective road, and are not caused by their own carelessness. This could never have been the design of the statute. All persons are liable to meet with accidents and

injuries, at home, and abroad. This is no reason why they should call upon the community for compensation. Misfortune alone, though it happens to a traveller upon the highway, gives him no valid claim against the town in which he meets it, unless it is reasonably certain that it would not have occurred but for the neglect of such town.

The case of *Palmer* v. *Andover* concedes that this certainty should always be established; but the rule laid down in that case does not secure it. It assumes such certainty under circumstances which render it impossible. It was probably for that reason that one member of the Court, generally understood to have been Chief Justice SHAW, dissented from the opinion. The law is there stated as follows:—

"When the loss is the combined result of an accident, and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault on the part of the plaintiff, and the accident be one which common prudence and sagacity could not have guarded against, the town is liable."

This is a correct rule, if there are any cases in which it can be applied. But how shall the jury determine "that the damage would not have been sustained but for the defect?" If there is a latent defect in the harness, or in the carriage, and it fails at a place where the road is defective, by what means can it be made certain that it would not otherwise have failed where there was no defect in the road? If a horse is frightened by seeing a railroad train, or hearing the report of a gun, or by the sudden appearance of some object by the wayside, he may become unmanageable, run away, and cause damage to person or property. The injury may happen at a place where the road is defective. But, if there is no defect in the way, it may occur by turning the corner of a street, or by meeting another carriage, or by one of many other causes for which the town is not responsible. So long as the primary cause continues in force, that only is certain; everything else is uncertain. If I *care-*

lessly fire a gun in the street, and thus cause the fright, and no *independent* cause combines with it, I may be liable for the result. *Moody* v. *Ward*, 13 Mass., 299. That this is one cause of the injury, however occurring, there will be no doubt. But, if it had not caused the injury in one way, no one can tell whether it might not have caused it in another. What other circumstances might have combined, or what would have been the effect of any particular combination, could no more be determined in any case, than the combination of colors in a kaleidoscope. To instruct the jury to decide whether "the damage would have been sustained but for the defect," would be sending them into the field of mere conjecture.

When a horse becomes unmanageable, unless his condition is caused by a defect in the highway, such defect is not the primary cause of an accident to which it contributes. A witness, on being asked to state the cause of such an accident, would give that which caused the condition of the horse. So long as the primary cause continues in operation, it may occasion the damage; and, if it happen upon a defective road, it is by no means thereby rendered certain that it would not otherwise have occurred upon one not defective. For it is clearly true, as was said by SHEPLEY, C. J., in *Moore* v. *Abbott*, "that no proof can establish the fact," that the damage would not have been sustained but for the defect, "so long as it appears that some other cause contributed to the result."

It is argued that, if a traveller's horse becomes unmanageable, he needs a good road all the more. That is conceded. But, under such circumstances, no perfection in the road can insure his safety. Nor does it follow that the town is bound to indemnify him if the way is defective. The remedy cannot be presumed to have been given by the statute to any except those who have safe carriages and horses, under their control at the time. It is the "safety" of such "travellers" that towns are bound to secure, so far as it can be done by good roads. R. S., c. 18, § 37. They are not

bound so to make their roads that travellers shall be safe when their horses are frightened and unmanageable. If they need a more perfect way at such a time, it is because they are involved in a danger not caused by any neglect of the town, and for which, in whole or in part, the town ought not to be held responsible.

In holding that the damage must be caused by the defect in the way alone, it is intended, that the town is not liable if any other independent proximate cause contributes to the result. The maxim that the proximate, and not the remote cause, is to be regarded, applies here as elsewhere. As a defect in the way, when it is only a remote cause of the injury, will not render the town liable, so if the defect is a proximate cause, a remote contributing cause will not prevent the town from being liable. All discussion of remote causes is therefore out of place. For the rule goes to this extent only — that if, besides the defect in the way, there is also another proximate cause of the injury, contributing directly to the result, for which neither of the parties is in fault, the town is not liable.

Nor does the rule apply to a case where the injury is produced by a *chain* of *dependent* causes. Or, rather, in such a case, the *primary* cause is held to be the *sole* cause, acting through agencies *produced by itself*. If the primary cause is wrongful, and not too remote, the author may be liable for the result. When any *intermediate* agency is the result of *negligence* in any other party, the question of liability is often difficult. But, as the contributing cause in the case at bar was *independent*, no such difficulty arises.

Notwithstanding the case of *Palmer* v. *Andover*, we understand this rule now to be the law in Massachusetts. In the case of *Marble* v. *Worcester*, 4 Gray, 395, SHAW, C. J., in giving the opinion of the Court, says, — "Upon the true construction of the statute, the town is responsible only for the direct and immediate loss occasioned by the defect in the highway. And it follows as a consequence, that if the damage arises from a more remote cause, or from any ef-

ficient concurring cause, without which it would not have happened, or from pure accident, in either case it is not a loss for which the town is liable."

"It is no argument," he continues, "against this conclusion, that if the town is not liable in such a case, a suffering party is without remedy. The loss must fall within the same category with the infinite number of cases where persons sustain great losses from pure accidents and misfortunes, for which no person is responsible, and where the loss must finally rest where it falls."

The doctrine is stated in another form by the same eminent jurist, in *Murdock* v. *Warwick*, 4 Gray, 178. "In order to recover of a town for a defect in its highway, the traveller must not only drive with due care and skill, but must be using a proper horse and vehicle, with a strong and suitable harness; and, if there be any defect in these particulars, and such defect contribute to the disaster, the town is not liable, although the way be defective. The reason is, because it is impossible to know what proportion of the damage is occasioned by one, and what by the other; or, whether there would have been any damage at all but for the traveller's own default." *Rowell* v. *Lowell*, 7 Gray, 100.

We are aware that these cases, and that of *Moore* v. *Abbott*, have recently been controverted, in a very able opinion, by the Supreme Court of New Hampshire, in the case of *Winship* v. *Enfield*, 42 N. H., 197. But, whatever may be the weight of authority, which we do not question, we are satisfied that the law, as held in this State and Massachusetts, is sustained by sound reason, by a fair construction of the statute, and by a proper application of established rules of evidence; while the opposite doctrine would render the towns, with many of their numerous roads almost unavoidably imperfect, the insurers of travellers against all accidents occurring thereon, from whatever cause, unless occasioned by their own negligence.

In the case at bar, the direct, primary cause of the injury was one for which the town was in no degree responsible.

Without it, it is probable that the accident would not have happened; while with it, if there had been no defect in the bridge, it is by no means certain that the damage would not have been sustained. The jury should have been instructed that, upon the facts stated by the plaintiff in regard to the cause of the accident, he was not entitled to recover.

Exceptions sustained.

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

APPLETON, C. J., RICE, and DICKERSON, JJ., dissented.

APPLETON, C. J.—By R. S., 1857, c. 18, § 61, "if any person receives any bodily injury or suffers any injury in his property *through any defect or want of repair or sufficient railing* in any highway, town way, *causeway or bridge*, he may recover for the same, in a special action of the case, of the county, town or person, obliged by law to repair the same, if such county, town or person had reasonable notice of the defect or want of repair." The plaintiff must be in exercise of ordinary and common care, and, if while thus in the exercise of ordinary and common care, he receives a bodily injury "*through any defect*," &c., in a highway which the defendants are bound to keep in repair, and of the existence of which they had reasonable notice, he is entitled to recover compensation in damages for the injury thus received.

The statute says, "*through* any defect or want of repair or sufficient railing." It does not add the word *alone*. It is not for us to intensify the rigor of the statute. It rarely, if ever, happens that an injury occurs through a *defect alone*, though it may occur through a *defect*. The coëxistence of other facts must be assumed, without which, the event in question would not have happened. The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condi-

tion is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event.

It seems to have been thought that, in *Moore* v. *Abbott*, 32 Maine, 46, the rule was established that the injury must occur through the *defect alone*—thus intensifying the statute and relieving a town from liability, whenever there is found a coöperating cause, however slight in its importance, and though it be one for which the plaintiff is not responsible and when the same result would or might have ensued, without such coöperation. But, in determining what is decided, it is important to see what is presented for decision—for it is the point decided, and not the reasoning of the Court, by which the result is arrived at, which has the binding force of an authoritative exposition of the law. In that case, SHEPLEY, C. J., instructed the jury that the town was not liable "unless the accident occurred and the injury was occasioned by the defect in the way or a bridge *alone*, and not by the joint effect of the defect in the way and a defect in the horse and wagon, or either of them; that, if they should be satisfied the accident happened by the joint effect of a defect in the wagon and a defect in the harness, rendering it unsuitable or unsafe, although such defect in the harness was not known and the plaintiff was not in fault for want of knowledge, the plaintiff would not be entitled to recover." The only question here arose between the plaintiff and defendants as to the extent of the plaintiff's responsibility for his harness and his wagon. The existence of extraneous facts, for which neither party was responsible, and their effect upon the liability of the defendants, were not involved in the discussion. They were in no way before the Court. Whether the plaintiff was responsible for a defect in the wagon or harness, of the existence of which he was ignorant, and without fault for his ignorance, was the question, and the Court held he was thus responsible; in other words, that he warranted the goodness of his wagon, harness, &c., and could not recover if the injury occurred in any degree through defects in them.

This doctrine was reäffirmed in *Coombs* v. *Topsham*, 38 Maine, 214, and in *Anderson* v. *Bath*, 42 Maine, 346. To this extent only have the decisions gone. In New Hampshire the Supreme Court have decided somewhat differently, having held, in *Winship* v. *Enfield*, 42 N. H., 197, that "where the vices of the horse or the defects in the wagon may have contributed to the injury, if there was also fault on the part of the town that contributed to the same result, the defendants will be held liable, provided the plaintiff was without fault." All that is there required is ordinary care on the part of the plaintiff in reference to his horse, harness, &c., and, if that be shown, he is not held responsible for any secret or unknown defect, the ignorance of which is not imputable to him as a fault. But, in this State, the plaintiff, guarantees against all defects latent or patent in his wagon, horse and harness. In none of the cases in this State was the effect of accidental and extraneous causes, over which neither party had control and for which neither was responsible, considered or discussed.

The question here presented is, how far either party is to acquire rights or to be relieved from liability in consequence of the intervention of accidental causes, or the existence of facts over which neither party has control and for the occurrence of which neither party is in fault, the party suffering damage being in all respects free from fault, and the town being guilty of neglect, its road being out of repair.

The inquiry here arises, whether a town, guilty of neglect, its roads out of repair, with reasonable notice of their condition, the plaintiff omitting no precaution, — in the exercise of the requisite degree of care, — is to be exonerated from liability because the horse was frightened by the lightning, the act of God — by the firing of a gun, the act of man — by the unexpected presence of an animal, tamed or untamed — by the crash of a falling tree — and being frightened and passing with accelerated speed over a defective road or bridge, receives an injury, when, but for the fright, he might, *perhaps*, have passed over in safety or with greatly increased

chances of safety. The horse may be frightened without fault on the part of the driver. He may be frightened, and yet be a docile and well broken animal. The fright thus suddenly caused may hasten his speed. He may thus become unmanageable, or manageable with more or less of difficulty. In this condition he passes over a defective road. If the road had been in suitable repair the horse would have passed in safety. The horse steps into a hole and breaks his leg. Is not the accident "*through the defect?*" May it not be *through the defect*, though, without the fright, it might or might not have occurred. A horse on the walk and not frightened — or, being driven very slowly, may pass over almost any defect. But the driver has a right to anticipate a good road, and that the town has done its duty. Are towns to be exempted from the liability imposed by the statute, in those cases where good roads and railed bridges are specially needed? A defendant town, guilty of neglect, with its roads out of repair, by way of answer to a suffering but faultless plaintiff, pleads in bar that his horse was frightened, that the fright increased his speed and the dangers arising from their neglect, and thus coöperated with their neglect in producing the injury, and, therefore, that they should be excused from the performance of their duty. One would hardly deem the answer satisfactory — or that, when the demand is most imperative for a good road, the town should be relieved from its obligation of having one.

But it may be said that it cannot be assuredly certain that the injury was received "through the defect." But that is for the jury. The difficulty of decision is one inherent in every case of this description. It is the ever recurring question of causation — by what, by whom, how was an event caused. But the preëxistence, or the coëxistence of other facts, more or less important, is not incompatible with the fact of the injury having been received *through the defect*. It may happen *through the defect*, when a horse is frightened, though it would not have happened without such fright. It may be more likely to happen to a horse frighten-

ed than to one not—yet it may nevertheless happen *through the defect.* The fright may have increased the probability of its happening or diminished the chances of its avoidance, but, notwithstanding all this, if it was received *through the defect,* why is not the town liable? All that the statute requires is, that the injury happen "through the defect."

But the inquiry is made, "how shall the jury determine that damage would not have been sustained *but* for the defect?" That is not the true issue. It is rather, did the injury happen without fault in any way on the part of the plaintiff and through the existing defect? The horse is at the place where the defect is, with more or less of fright and with more or less of speed—being there, without fault on the part of the driver, he steps upon a defective plank, or into a hole, and breaks his leg. Was the injury through the defect? The fright did no harm—the speed did no harm—the horse would not have been there at such speed and in such fright without the intervention of some extraneous event by which it was caused, and an injury might not have been received. Or, without fright or unusual speed, the same weight of the slowly stepping horse upon the rotten plank might have been attended with the same result. The driver being there, as he was—under the circumstances, in time and space as then existing, and being without fault, the road being defective, may not the injury be received through such defect, and, if so, is not the town liable? Is the contingency of its not happening, if there had been no fright, to exonerate the town? Are the jury, groping in the dark, to guess what might have happened upon an hypothetical state of facts, which did not occur, or to decide upon what did occur. Is the town in fault, neglectful of its duty, to be exonerated from liability because of a possibility, for the certainty cannot be known, that, without the intervention of a given fact, for which neither is responsible, the accident might not have happened.

But it may be urged that the liability of the defendant

town can never be established, so long as it appears some other cause contributed to the result. But, what other cause? Here is one antecedent, and for which the plaintiff may not be responsible. In one sense the whole antecedent past contributed to the result—for without such antecedent past the actual present would never have been. The chain of antecedent causes runs back into the regions of an illimitable past. How far is the antecedent fact to be removed from the injury, to be deemed not to have contributed to its occurrence? The harnessing the horse—the passing over the road to the place of the accident, are antecedent facts, equally with the firing of the gun or the falling of a tree. Had the plaintiff started earlier or later, there would have been no fright. The presence of the horse at the time and place of the accident, concurred equally with the firing of the gun, to bring about the result. Yet neither produced the injury. It was subsequent. It was caused by the defective plank failing to sustain the weight of the horse thereon—and it would have failed equally whether the horse had been frightened or not, had the same step in each case been made with equal force upon the same rotten plank.

It is apparent, if the law be as it is insisted to be, that, in case of a fright and an injury subsequently received, the town can never be made liable, however defective and dangerous the road—however careful the driver—however strong the harness, and however docile the horse. The fright will be caused by the act of the plaintiff, or by something extraneous and existing without his interference. If the fright was caused by the plaintiff's negligence, this will bar his recovery. If caused by some event for which neither party is responsible, then, as it may have contributed to the injury, though, in many cases, it can never be known that it would not have happened without such fright, the town is to be relieved from the consequences of its own neglects. There can be no case where a fright, however caused, will not protect a town from liability for a road however defective, or a bridge however dangerous. The

conclusion of the whole matter, then, would be, that where the danger is the greatest, the responsibility is the least—a conclusion to which we do not feel disposed to accede.

In cases of the description considered, the existence of an antecedent fact producing the fright, for the fright precedes the time when the horse comes in contact with the defect in the highway, should never necessarily exonerate the town, because, notwithstanding the fright, the injury might have been received "through the defect." Besides "*causa proxima, non causa remota spectatur.*" The defect is *causa proxima*, the cause most immediately antecedent to the injury, and through which it was received—the one in the closest proximity to the injury consequent. The plaintiff, in the case supposed, has been guilty of no neglect—the defendant has been guilty of neglect—and an accidental event, occurring without the intervention of either party, though coëxisting with the defect, is not to relieve the defendant from a liability justly arising from an omission of duty. *Norris* v. *Litchfield*, 35 N. H., 276; *Palmer* v. *Anderson*, 2 Cush., 600; *Hunt* v. *Pownal*, 9 Vt., 411; *Kelsea* v. *Glover*, 15 Vt. 711; *Clarke* v. *Barrington*, 41 N. H., 45; *Winship* v. *Enfield*, 42 N. H., 197.

EDWARD FREEMAN *versus* HENRY F. CURTIS.
MIRIAM SWETT *versus* SAME.

The general rule in equity is the same as in actions at law, that money paid or other property conveyed under a mistake of law, with a full knowledge of all the facts, cannot be recovered back.

But when one person induces another, without any consideration, to convey real estate to him, under their mistake of fact arising from their ignorance of the law, and the property cannot in good conscience be retained, a reconveyance will be decreed upon a bill in equity therefor.

Thus:—The defendant, having no legal interest in an estate, represented to the plaintiffs, who were the only heirs of the decedent, that some persons

had informed him that certain others were joint heirs with them, while other persons had informed him, that they, the plaintiffs, were the only heirs; that the others, claiming to be heirs, had conveyed to him their several interests therein, to enable him to contest a will by which a portion of the property had been devised to strangers, he giving them back an agreement to pay them their several shares of one-twelfth each, of the proceeds thereof; and the plaintiffs thereupon, being ignorant of the law regulating the descent and distribution of estates, and consequently being mistaken as to who were the heirs of said decedent, conveyed their interest in the estate, without any consideration, receiving an agreement to pay them one-twelfth each of the proceeds thereof: — Upon these facts, *it was held*, that, if the defendant knew that the plaintiffs were the only heirs, and that they were ignorant of that fact, he obtained the property from them fraudulently; if neither of the parties knew who were the legal heirs, no consideration having been paid for the property, the defendant ought not, in good conscience, to retain it; and the plaintiffs were entitled to a decree for a reconveyance.

BILLS IN EQUITY. These cases were heard on bills and answers. Written arguments were furnished by

P. Eastman & Son, and by *T. M. Hayes*, for the complainants, and by

Bourne, Sen'r, for the respondent.

The substance of the allegations in the bills and of the answers of the defendant thereto, appears from the opinion of the Court, which was drawn up by

DAVIS, J. — As these cases are in all respects alike, we may refer to them as one.

They are each presented to the Court upon the bill and answer. The answer is therefore to be considered as true; and no part of the bill is to be considered true which is denied by the answer. Applying this rule, we gather the following statement of facts: —

Hannah O. Curtis, of Wells, died January 29, 1861. Although she left a will, the validity of which is denied in the answer, the principal controversy relates to a large portion of her property not disposed of thereby. This descended to her heirs at law. As she left no lineal descendants, nor any husband, nor father, nor mother, nor brother, nor sister, the plaintiffs, being an uncle and an aunt, a brother and sister of her mother, are her heirs.

There are also several cousins of the deceased, who are the descendants, *in another line*, of her grandfather, Samuel Curtis. One of these is the defendant. It is not claimed that they are her heirs.

After the death of Hannah O. Curtis, the defendant at once began to interpose in the settlement of the estate, as if he had been one of the heirs. He went to the plaintiffs and "*informed* them that Hannah O. Curtis was dead." As they lived in York, and she died in Biddeford, they probably did not know it until so informed. He also informed them that she left a will, signed, as he believed, "when she was of unsound mind."

He also admits that he represented to them, that the deceased left estate not disposed of by the will; that he had been informed by some that it would descend and be distributed equally to her cousins, — by some that it would belong to the cousins who were the descendants of Samuel Curtis, — and by others, that the uncles and aunts would be entitled to the whole; that the descendants of Samuel Curtis ought in justice to receive one half of the estate; "that the defendant was willing to make that distribution if the plaintiffs were;" and that they consented thereto.

He also exhibited to them several deeds, given by Joseph Curtis and others, to him, "of all their interest in said estate," he giving back to them an agreement to pay them a specified portion of the amount he should realize out of it. Thereupon they assented to his proposition, gave him deeds of all their interest in the estate, and he gave to them an agreement to pay them each one-twelfth part of the amount realized from it.

They now claim that their deeds were obtained by the fraudulent or improper conduct of Curtis, the defendant, and were given under a mistake in regard to their rights. They therefore pray that he may be compelled to reconvey to them.

It is urged, by the counsel for the defendant, that the plaintiffs must have known their relationship to the deceased,

and that, if there was any mistake on their part, it was a mistake of *law*, and not of *fact*. And, it is contended, that against such a mistake equity will afford no relief. 1 Story's Equity, §§ 111, 113.

The same rule is applicable in equity, as in actions at law to recover back money paid, which is an equitable action. And whenever *money* can be recovered back *at law*, on the ground that it has been paid by mistake, *other property* may be recovered back at law, or *in equity*. *Moore* v. *Mandlebaum*, 8 Mich., 433.

The general rule is the same at law as in equity, that, in the absence of fraud, money paid under a mistake or through ignorance of *the law*, with the knowledge of all the *facts*, cannot be recovered back. *Norton* v. *Marden*, 15 Maine, 45; *Peterborough* v. *Lancaster*, 14 N. H., 382; *Elliott* v. *Swartwout*, 10 Pet., 137. But this was said, by MORTON, J., in *Haven* v. *Foster*, 9 Pick., 112, to be a vexed question. The rule is at least subject to some exceptions. And it has been held in many cases, that, though there has been no actual fraud, if there has been any *improper conduct* on the part of the payee, or, if he ought not in good conscience to retain it, money paid to him under a mistake of the law may be recovered back. *Silliman* v. *Wing*, 7 Hill, 159; *Northrup* v. *Graves*, 19 Conn., 548; *Renard* v. *Feidler*, 3 Duer, 318; *Covington* v. *Powell*, 2 Met., (Ky.,) 226; *Culbreth* v. *Culbreth*, 7 Geo., 64.

The rule is quite as stringent in equity, as in suits at law. If relief is ever granted for a mistake of law, it is an exception, depending upon the particular circumstances of the case. *Hunt* v. *Rousmanier*, 1 Pet., 1, 15. And yet the rule is not imperative. "A mistake of law is not *ordinarily* a ground of relief in equity." *Mellish* v. *Robertson*, 25 Vt., 603. But it has never been decided "that a plain and acknowledged mistake in law is beyond the reach of equity." MARSHALL, C. J., in *Hunt* v. *Rousmanier*, 8 Wheat., 174.

It is very clear from the answer of the defendant, as well as from the bill, that the plaintiffs were ignorant of the law

relating to the descent and distribution of estates; and this ignorance of the law involved them in a mistake of *fact*, as to who were the heirs of Hannah O. Curtis. And where the mistake is one both of law and fact, though the latter is the result of the former, relief will be granted, when justice and equity require it. *King* v. *Doolittle*, 1 Head, (Tenn,) 77.

If the defendant was as ignorant as the plaintiffs, the mistake was mutual. If he was not ignorant, then he knowingly took advantage of their ignorance, and obtained the deeds fraudulently.

He alleges that his father, "Ralph Curtis, *in his lifetime*, informed him that the estate of Hannah O. Curtis would descend and be distributed among all the cousins;" and that "he fully believed that such was the law of the State." But what information he received, or what he believed, *in his father's lifetime*, is immaterial. His belief and information, *at the time when he obtained the deeds of the plaintiffs*, are the matters of importance.

He alleges the truth of what he said to the plaintiffs,—that he had been informed by some persons that the estate would descend to the cousins; and, by others, that it would descend to the uncles and aunts. But the answer does not disclose *when* he was so informed. It may have been many years before the death of Hannah O. Curtis that some persons, ignorant of the law, had informed him that the cousins would inherit her estate; while there is nothing in his answer inconsistent with the supposition that he had *recently* been informed, by persons learned in the law, consulted by him as counsel, that the plaintiffs were the only heirs. It would have been the most natural course for him to pursue, to consult counsel; and, as he does not allege his ignorance *at that time*, we are hardly at liberty to infer it.

It is difficult to understand upon what ground the defendant could have supposed it proper for him to intermeddle with the estate. We cannot avoid the impression that he knew, when he procured the deeds of the plaintiffs, that he had no legal interest in it. But, if otherwise, in the most

favorable view for him, it was *doubtful* whether he had any interest. Under such circumstances, why did *he* undertake to settle the estate? Or why did he proceed on the assumption that *he had* a legal interest in it? As a prudent man, regarding the rights of others, as well as his own, he would have consulted counsel before doing anything.

Having procured deeds from others, whose interest was as doubtful as his own, he approached the plaintiffs. His representations to them were adapted to give them the impression that their interest was as uncertain, at least, as his. The exhibition of his deeds from other persons, and the suggestion that the object of conveying all their interests to one, was, the better "to contest the will," produced the effect which must have been designed. The plaintiffs, without the slightest consideration, conveyed to him the whole estate, receiving nothing in return but an agreement to pay them each one-twelfth part of the proceeds. The means resorted to, in order to obtain the property, were obviously improper; and the defendant ought not in good conscience to retain it. It is not a case where one, through ignorance of the law, has settled a claim against him that could not have been enforced; or has entered into a contract for which he has received any consideration. There was nothing between the parties as a basis for any negotiations. There was no claim of the one against the other, valid, or invalid. It was an isolated act of obtaining a release of five-sixths of a valuable estate, without any pretence of any consideration, through the ignorance of the parties giving it. Whether the defendant was also ignorant, or not, it would be a reproach to the law if he could now be permitted to retain the fruits of such a proceeding.

The bills are sustained, with costs for each of the plaintiffs. A decree will be made in each case that the defendant reconvey all the estate conveyed to him. And, if any further relief is necessary, it will be granted.

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

EDMUND WARREN *versus* GEORGE T. JONES.

The defendant sold plaintiff all his "apparatus for making soap — all ashes and soap on hand," &c., "*also all his trade and customers :*" — *Held*, that the last clause contains no such latent ambiguity as would require that the construction of the contract should be submitted to a jury, with parol testimony tending to show the intention of the parties : —

That the real intention of the parties cannot be doubtful when the entire contract is considered; and a sale of "all his trade and customers," must be legally interpreted, that the defendant would not interfere with the plaintiff within the circuit of his usual custom; and, evidence that he had so done, was admissible : —

Such a contract is not against the policy of the law, and, if it were, the defendant should not be permitted to make that defence while he retained the consideration paid.

EXCEPTIONS from the ruling of GOODENOW, J.

This was an action on a contract of sale of the defendant's apparatus for the manufacture of soap, the ashes and soap on hand, and the good will and trade in Kennebunk and vicinity.

The plaintiff opened the case to the jury, and offered the following evidence, viz. : — That on and prior to the 16th day of October, 1858, the defendant was engaged in the business of the manufacture and sale of soap in the towns of Kennebunk, Kennebunkport, Wells and Lyman; and had carried on and was then carrying on trade with customers residing in those towns; that, on that day, the defendant, by a parol contract, agreed with the plaintiff that, in consideration that he would purchase of him, the defendant, the several items named in a writing hereafter named, and would pay him therefor the sum of $200, he, the said defendant, would do no more business in said manufacture and sale of soap within the towns aforesaid, or trade with the customers aforesaid; that the plaintiff accepted the terms of said agreement, and did purchase the several items named in said writing, and, that after said agreement was completed, and the consideration of $200 paid by the plaintiff

to the defendant, the plaintiff wrote the writing merely as a receipt for the consideration paid, and not as embodying the agreement aforesaid; that the said agreement was executed by the said defendant; that the parol agreement aforesaid was the principal inducement for the plaintiff to make the purchase aforesaid, and that immediately after the said agreement, the plaintiff commenced the business of the manufacture and sale of soap in the towns aforesaid, and traded with the customers aforesaid; that the defendant, contrary to his said agreement, soon after, to wit, on the 17th day of December, 1858, again commenced and continued, to the day of the date of the writ, the manufacture and sale of soap within the towns aforesaid, and traded again with said customers; that, in consequence of his so doing, the plaintiff was greatly injured in his said business, and was obliged, in a short time, to discontinue his said business altogether, and to sell out at a great sacrifice, because the convenience and necessity of the towns aforesaid, and of the customers aforesaid, did not require and would not support an additional soap manufactory.

The plaintiff also offered to prove that the defendant, several days after the completion of the agreement aforesaid, and, after the execution of said writing, admitted that he had agreed as aforesaid with the plaintiff not to engage again in the manufacture and sale of soap aforesaid, within the aforesaid towns, or trade again with said customers.

The defendant objected to the admission of the aforesaid evidence, on the ground that there was a written contract, which was produced by the plaintiff, and is the writing before referred to.

The plaintiff denied that there was any such written contract, but admitted that he took the writing, at the time and manner aforesaid and for the purpose above stated, but that it did not embody, and was not intended to embody, the aforesaid verbal agreement. There was no other consideration for said agreement of defendant than that above stated, but the plaintiff offered to prove that seventy-five dollars

of said purchase money was paid in consideration of said agreement.

The Court ruled that the evidence offered by the plaintiff was inadmissible to add to, alter or control said written contract.

The plaintiff, then, under the ruling of the Court, amended the writ by adding a new count upon said paper, and offered in evidence said writing, the execution of which was admitted, and then again offered all the evidence above stated. But the Court ruled that the action could not be maintained, and ordered a nonsuit. The plaintiff excepted.

Bourne & Stone, in support of the exceptions.

Dane, contra.

The opinion of the Court was drawn up by

CUTTING, J.—In our view, of this case, it becomes unnecessary to consider the rulings of the Judge at *Nisi Prius*, made previous to the amendment of the writ, by the insertion of the new count on the written contract, which was as follows, viz.:—

"Kennebunk, Oct. 16, 1858.

"Mr. Edmund Warren,

"Bo't of George T. Jones,

"All the apparatus for making soap, consisting of boilers, leaches, bbls., tubs, &c.; also, all the ashes and soap, &c., now on hand; also, one wagon, one pung-double runners; *also, all my trade and customers.*

"Rc'd payment by cash and notes,

"George T. Jones."

Upon the introduction of this written contract, or bill of sale, it was incumbent on the Judge to give the legal construction, unless it embraced some latent ambiguity; in which event he should have submitted the construction to the jury, together with such parol testimony as might tend to the ascertainment of the intention of the parties.

It is only the last clause in the contract, which leads to any embarrassment. But, in our opinion, the perplexity was not so great as to need the intervention of the jury.

Taking the whole contract together, can there be any doubt as to the real intention of the parties? In short, the plaintiff purchased "all the defendant's apparatus for making soap," the real value of which might depend in a great degree upon subsequent competition in that business in the neighborhood, where the same had been successfully carried on by the vendor, whom the vendee might well fear as a successful rival. To avoid such a contingency, the defendant conveyed "all his trade and customers," which, being legally interpreted, must mean that he would not interfere with the plaintiff within the circuit of his usual custom. The plaintiff offered evidence that he had so interfered, which we think should have been admitted. We are also of the opinion that the contract was not against the policy of the law; if otherwise, it is not for the defendant to invoke it and at the same time retain the consideration.

Exceptions sustained,—Nonsuit taken off,—
And the case is to stand for trial.

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

LUTHER BRYANT *versus* JOHN B. FAIRFIELD.

If an execution is extended upon land of the debtor, and it is set off to the creditor in satisfaction of the judgment, and such judgment is afterwards reversed upon a writ of error, the debtor is entitled to the land again:—

And he may recover it of one who purchased it of the creditor before the reversal of the judgment, without notice of any defect therein:—

Or, if he has not been evicted, such grantee of the creditor cannot maintain an action to recover it of him.

ON AGREED STATEMENT OF FACTS.

This was a WRIT OF ENTRY. From the case it appears that, at the January term of the Supreme Judicial Court for York county, 1855, one Josiah F. Leach recovered judgment against one Asa Leach, his father, for the sum of

$624,24, debt, and $8,23, costs, on which execution was issued and satisfied by a levy and extent upon land described in the plaintiff's writ, on the twentieth day of February, 1855, which execution was duly returned and said levy duly recorded. On the eighteenth day of April, 1855, said Josiah F. Leach executed a deed of warranty of the demanded premises to the demandant, which was duly recorded. Said Asa Leach died intestate in October, 1855, and administration upon his estate was duly granted to Nathaniel Leach of Kennebunkport, in said county, in May, 1856. On the fourteenth day of August, 1857, said Nathaniel Leach, as administrator of said Asa Leach, brought a writ of error, returnable to the September term of said Supreme Judicial Court for York county, to have said judgment reversed upon the ground that there was no legal service of said writ, and that, at the time that the service of the original writ in said suit purported to have been made upon him, and for a long time before that date, and, from that time until his death, said Asa Leach was a person *non compos mentis* and incapable of taking care of himself or of manageing his business affairs; that said suit was duly entered in said Court, and continued from term to term, until the May term of said Court, 1860, when said Court ordered that said judgment of said Josiah F. Leach against said Asa Leach be reversed.

It further appeared that said Nathaniel Leach, as administrator of said Asa Leach, in September, 1860, obtained license from the Court of Probate for said county of York, to sell and convey all the real estate of said Asa Leach, for the payment of his debts and incidental charges, and that, pursuant to said license, he sold, as the property of said Asa Leach, the land described in the plaintiff's writ, to the defendant, on the eighteenth day of March, 1861, by his administrator's deed of that date duly executed and recorded in said registry of deeds; and that, on obtaining said license and making said sale, said administrator observed all the requirements of the law; that said Asa Leach was

seized in fee of the demanded premises, at the time of the levy aforesaid; that he was then in possession of the same, and continued in possession until his death, except so far as the possession was divested by the levy aforesaid, and the seizin and possession delivered to the creditor; that said Josiah lived upon the premises at the time of the suit and levy against said Asa Leach, and continued to occupy, with the consent of said Bryant, until after said sale by said administrator to said Fairfield; that said Asa Leach was a person *non compos mentis*, at the time that the service of the original writ of said Josiah F. Leach against him purported to have been made, and for a long time before that date, and from that time until his death; that said Asa Leach, being *non compos mentis*, as aforesaid, had no guardian at the time of the commencement of said suit against him, nor during the pendency of the same in Court; that he had no attorney and made no appearance in Court, but said judgment was recovered against him by default.

That said Luther Bryant was present at the time of said sale, and notified said Fairfield, and all other persons, that he was the owner of the demanded premises, and forbade the sale thereof, and cautioned said Fairfield, and all other persons, against bidding for or purchasing the premises.

That said Luther Bryant will testify that, at the time of the alleged purchase by him of the demanded premises, he knew of no defect in said judgment of said Josiah F. Leach against said Asa Leach, and never was apprized of any alleged defect, and knew nothing of the condition of the mind of said Asa until after the writ of error was brought; that the alleged purchase by him was in good faith, and that he paid a valuable consideration for said premises.

S. W. Luques, in his argument for the demandant, cited Wharton"s Digest, Title Error, p. 777; *Allen* v. *Dundas*, 3 Term R., 129; *Granger* v. *Clark*, 22 Maine, 128; *U. S. Bank* v. *Voorhees*, 1 McLean, 221; *Woodman* v. *Smith*, 37 Maine, 21; *Haskell* v. *Sumner*, 1 Pick., 459; *U. S.*

Bank v. *Bank of Washington*, 6 Peters, 8; Bacon's Abr., Title Error; *McJilton* v. *Lever*, 13 Ill. R., 487, and cases cited; *McLagar* v. *Brown*, 11 Ill. R., 519; *Lovat* v. *German Reformed Church*, 12 Barb., 67; *Somes* v. *Brewer*, 2 Pick., 184.

Bourne & Stone, for the tenant.

The opinion of the Court was drawn up by

DAVIS, J.—The grantor of the demandant, having recovered a judgment against the owner of the land in controversy, extended his execution upon the land, and had it set off to himself in satisfaction of the judgment. After he had conveyed the land to the demandant, his judgment was reversed upon a writ of error. It is admitted that he was an innocent purchaser; nor is any wrong imputed to the judgment debtor, under whom the tenant claims. It is a case where one of two persons may suffer, when no fault is charged against either. Each one has a remedy against the original plaintiff, in case of loss, either by the judgment against him upon the writ of error, or by an action upon his covenants of title and warranty. There are no equities that can affect the case. The title to the land must be determined by the strict and technical rules of law.

There were two modes at common law, in the old English practice, of obtaining satisfaction of a judgment. By a writ of *fieri facias* the sheriff seized and sold the chattels of the debtor, and paid the debt from the proceeds. Or, by a writ of *levari facias*, for want of chattels, the sheriff took the debtor's lands, and appropriated the rents thereof to the payment of the judgment, until sufficient had been received for that purpose.

The statute of 13 Edward 1, c. 18, provided for a writ of *elegit*, by which the sheriff took the chattels, and, for want thereof, a moiety of the lands of the debtor. If he took chattels, they were appraised by a jury summoned for that purpose, and delivered to the creditor at their appraised value, in payment. If he took lands, the rental value there-

of was appraised, and they were delivered to the creditor for a term sufficient to satisfy the judgment.

The statute of 25 Edward 3, c. 13, provided for a writ of *capias ad satisfaciendum*, upon which the body of the debtor could be taken and held until he should satisfy the judgment.

Generally, the creditor could not have all these writs upon the same judgment, but he could elect which to take. In some cases, however, by a special provision of statute, one writ was issued which embraced them all, commanding the sheriff to take the chattels, lands, and, for want thereof, the body of the debtor. This was substantially the same as our writ of execution in this State, though the mode of selling, appraising, or disposing of the lands, or chattels, was different. Chattels, under our statutes, are sold, as upon the old writ of *fieri facias;* while lands are appraised, and delivered to the judgment creditor, generally in fee, but sometimes for a term, as upon the old writ of *elegit.*

A writ of *elegit*, when extended upon lands, and the officer's return thereon, were the judgment creditor's muniments of title. As there were no registry laws, the *elegit* was not recorded. It was therefore essential that it should be returned. *Putten* v. *Purbeck*, 2 Salk., 563.

A judgment, though erroneous, is valid and binding until it is reversed. An execution issued thereon is a full and sufficient justification of the officer who acts by virtue of it, and obeys its commands. And, if he *sells* the chattels of the debtor, the purchaser acquires a good title, though the judgment be afterwards reversed. *Kennedy* v. *Duncklee*, 1 Gray, 65.

The proceedings in this State upon writs of error are the same as at common law. R. S., c. 102, § 7. By c. 138, § 2, of the laws of 1860, it is provided "that, when a debtor's property has been sold by virtue of a writ of execution, and the judgment is afterwards reversed on a writ of error, the title of the purchaser of such property, at such

sale, shall not be affected thereby." This statute merely affirms what has long been the settled doctrine at common law.

According to the English decisions, when a judgment is reversed upon a writ of error, brought by the original defendant, after payment, his remedy depends upon *the manner in which the execution has been satisfied.* If the sheriff has seized and *sold* his property upon the execution, he cannot recover it back; for the officer was justified in selling, and the purchaser acquired a good title. He can only have judgment against the original plaintiff for the amount for which the property was sold. *Backhurst* v. *Mayo*, Dyer, 363; *Dr. Drury's case*, 8 Coke, 281. But, if *the property is delivered to the creditor*, upon an appraisal, as required by a writ of *elegit*, the debtor is entitled to the specific property again. "For the delivery being to the plaintiff himself, it is in law but a bare delivery in specie which ought to be returned in specie again, and doth not alter the property absolutely, but attends the execution, to be good or bad, as the execution." *Hoe's case*, 5 Coke, 90, London ed., 1826, vol. 3, p. 183, note. And, if the creditor sells it before the judgment is reversed, his vendee acquires no better title; for the sale not being required by law, the debtor may recover back the specific property again. *Goodyere* v. *Incé*, Cro. Jac., 246.

Thus, upon the reversal of an outlawry, the party whose lands have been taken is entitled to have them restored. "For by the reversal it is as if no outlawry had been." *Ognell's case*, Cro. Eliz., 270. Nor does it make any difference that the lands, in the meantime, have been sold. "For it is not like a sale made by the sheriff; for the sheriff sells it by authority of law. * * * If the outlawry is reversed, it is as if there was no record; and, therefore, the term being sold, it is tied with the condition, into whosesoever hands it cometh, that if the outlawry is reversed, the term is reduced to the owner." *Eyre* v. *Woodfine*, Cro. Eliz., 278; 2 Hawkins' P. C., 462.

No case in this country has been cited, in which, after an execution has been satisfied by an *extent* upon lands, and a

sale of the lands by the creditor, the debtor has recovered back his lands, upon a reversal of the judgment. In *Horton* v. *Wilde*, 8 Gray, 425, the form of action was not appropriate to raise the question. But, in several cases where the execution has been satisfied by a *sale of chattels*, the general doctrine has been stated according to the English authorities. Thus, in the case of *Kennedy* v. *Ducklee*, 1 Gray, 65, METCALF, J., says, "when a judgment on which execution was regularly issued, is reversed, the property which was taken from the judgment debtor is not restored to him, but restoration is made to him of the amount of money for which the property was sold. There is an exception to this rule, when the property is delivered to the judgment creditor himself, on a writ of *elegit*. In that case the property is restored to the judgment debtor, upon a reversal of the judgment." And, in *Gay* v. *Smith*, 38 N. H., 171, the Court say, "if, upon a *fieri facias*, the sheriff sells to a stranger a term for years, or any personal chattel, and afterwards the judgment is reversed, the party shall be restored only to the money for which the term, or the goods, were sold, and not to the term itself, or the chattels, because the sheriff has sold them by the command of the *fieri facias*. But, if a man has an *elegit*, and the sheriff delivers him a lease by *extent*, and afterwards the judgment is reversed, the debtor shall be restored to the term, and not to the value."

The effect of such a reversal is therefore different in the different States. For while in some of the States equitable interests in lands, like chattels, are *sold* upon the execution by the sheriff, and, in others, the *land itself* is thus sold; in many of them the execution is *extended* upon lands, and they are appraised and set off *to the judgment creditor himself*, as upon an *elegit*. 1 Washb. Real Prop., 464, note. The cases cited by the counsel for the plaintiff, in which the syllabus states the doctrine generally, that the debtor, upon the reversal of the judgment against him, cannot recover back lands taken to satisfy the execution, arose in States

where the land was levied upon by *a sale*, and not by an *extent*.

Thus, in North Carolina, when lands are *sold* by the sheriff upon the execution, if the judgment is afterwards reversed, the plaintiff in error cannot recover the lands again, but must take judgment against the original plaintiff for the amount for which the lands were sold. *Bickerstaff* v. *Dellinger*, 1 Murph., 272. The same reason is given for a similar decision in Illinois. *McJilton* v. *Love*, 13 Illinois, 487.

The writ of *elegit* was so named, because the creditor had his *election*, after obtaining his judgment, either to sue out that writ, or a *fieri facias*, or a *capias*. In this State the creditor sues out a writ of execution that embraces them all, and *he then has his election in regard to its enforcement*, by a sale of chattels, an extent upon lands, or arrest of the body. If he elects to have it *extended upon the lands* of the debtor, his title will depend upon the validity of his judgment, and must fail upon its reversal. Any one who purchases the land of him must run this risk; and there is no greater hardship in this than in any other case of failure of title. He may take care to be secured by the covenants in his deed; and, if he distrusts the ability of the grantor, he need not purchase.

According to the agreement of the parties,

Judgment must be entered for the tenant.

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

APPLETON, C. J.,—By R. S., 1857, c. 102, § 7, "the proceedings upon writs of error, not herein provided for, shall be according to the common law, as modified by the practice and usage in this State and the general rules of Court."

Errors may be of law or of fact. In the former case, the original judgment will be affirmed or reversed. In the latter it will be affirmed or recalled. That in error of fact the judgment should be recalled, is fully established by the earliest authorities. "Si l'erreur soit erreur en fait et nempe in

record comme sur Infancy, le judgment serra *que pro errore prædicto judicium prædictum revocetur* sans dire *et aliis in recordo.*" Rolles' Abr., 805, 9. And, with this, the later decisions are in accord.

Nor is the distinction thus established without important consequences.

In reversing a judgment for error of fact only, the proceedings complained of as erroneous are reversed, and all prior proceedings remain unimpeached. Hence the original plaintiff, after reversal, may proceed with his suit without commencing *de novo*. Thus, when the error assigned is the appearance of an infant defendant by attorney, the Court will reverse the plea and subsequent proceedings, and let the declaration stand. *Dewitt* v. *Post*, 11 Johns., 460. "The whole cause is removed from the Court below and the record is here, so that we might award a *venire de novo*, if so, we may direct the infant to plead *de novo*." *Arnold* v. *Sanford*, 15 Johns., 534. That, in such case, the cause should be remanded for trial, is affirmed to be the law in Vermont, in *Barber* v. *Graves*, 18 Vt., 290. The question seems not to have been determined in New Hampshire. *Beckley* v. *Newcomb*, 4 Foster, 359. In this State, where judgments were reversed in proceedings before a magistrate, for a fine for neglect of military duty, the causes were uniformly tried in the Court in which the writ of error was pending.

It would seem, however, that the judgment can only be recalled when the Court in which the error of fact existed is the same by which it is corrected; for the Court can recal nothing but its own acts. *Camp* v. *Bennett*, 16 Wend., 48. According to the authorities, the proper entry in the case, *Marsh, in error*, v. *Leach*, should have been that the judgment was recalled. An analogous error in the judgment, as entered up, is referred to in *Camp* v. *Bennett*, which was subsequently corrected.

The error of fact, which the writ of error was brought to reverse, was the insanity of the defendant. But that was no error of the Court. The proceedings were according to

the due course of the common law, but the judgment was decided to be erroneous, from the mental incapacity of the defendant in the original action of *Leach* v. *Leach*. The plaintiff, in that action, might have had a good cause of action in whole or in part. It would seem, therefore, that the judgment should have been recalled, for error *dehors* the record. "The first judgment is recalled for error *dehors* the record," remarks PLATT, J., in *Dewitt* v. *Post*, 11 Johns., 460, "but, according to the forms of entries in such cases, the *proceedings* are not reversed and annulled. Tidd's Prac. Forms, 304." Had this entry of revocation been made, the plaintiff, in the original suit, might have proceeded with his cause, after a guardian for the insane defendant had been appointed, and have recovered such judgment as the evidence in the cause should satisfy the jury, before which it was tried, he was entitled to. When the judgment is recalled, it is as though no judgment had been obtained.

In the present case, it appears that there was a judgment rendered, an execution issued, a levy on the lands of the debtor, and a conveyance of the title thus acquired by the creditor to the present plaintiff, long before the proceedings were instituted to reverse or recal the judgment in question. The officer, it is well settled, was protected by the judgment while in force, for whatever he did before its recal or reversal.

The question here to be determined, is the effect of the reversal or recal of the judgment rendered in the action, *Leach* v. *Leach*, upon the levy made on the execution issued therein.

Whether the judgment be recalled or reversed is immaterial, so far as regards the effect upon the levy previously made.

It seems well settled that when personal property or chattels real are sold on execution, the title of the purchaser is protected, notwithstanding the judgment is reversed. But, wherever there is an extent, the title of the judgment creditor fails, notwithstanding he may have aliened the estate

levied upon to a *bona fide* purchaser. In *Dr. Drury's case*, 8 Co., 143, it was held that, if the sheriff sell a term under *fieri facias*, which is reversed for error, the termor cannot maintain ejectment to recover against the vendee under the sheriff. "But, if the term be extended on *elegit*, and the judgment is reversed for error, the term shall be restored. *Bathurst's case*, Dyer, 363; Cro. Jac., 246; for the delivery being to the plaintiff himself, it is in law but a bare delivery *in specie*, which ought to be restored again in specie, and doth not alter the property absolutely, *but attends on the execution to be good or bad as the execution* — but, if there had been a sale by the sheriff to a stranger, it had been otherwise." *Hoe's case*, 5 Co., 90, note. "So, though the tenant, by *elegit*, has aliened the term, it seems that the defendant shall be restored. According to Coke's report of this case, the term, after the levy, '*had come into two or three hands;*' yet a writ of restitution was awarded. Cro. Jac., 246. So, if a termor for years is outlawed, he shall be restored to the term, on the reversal of outlawry, though it has been sold by the king to whom it was forfeited." *Goodyer* v. *Junce*, Metcalf's Yelverton, 180, n. The distinction between a sale and an extent has been observed in the decided cases in this country. In *Bickerstaff* v. *Dillenger*, 1 Murph., 272, the Court held, that real estate upon which there had been an extent must be restored, upon a reversal of the judgment, to the debtor.

Upon the reversal of a judgment the plaintiff in error is to be restored to all he has lost by the judgment thus reversed. If property has been sold, he is entitled to restitution for the amount for which the goods were sold, not for their value. If sold below their actual value he has no remedy for the difference between such value and the price obtained. *Gay* v. *Smith*, 38 N. H., 171. When there has been an extent, the plaintiff in error is to be restored to the lands upon which the levy has been made. *Murray* v. *Emmons*, 6 Foster, 523; *Little* v. *Bunce*, 7 N. H., 485.

The judgment, having been recalled or reversed, the levy attends upon the execution and follows its fate.

The deed of the infant, or of the insane person, may be avoided, when one arrives at manhood and the other becomes sane. *Roof* v. *Stafford*, 7 Cow., 179; *Gibson* v. *Soper*, 6 Gray, 279.

If infants and the insane may avoid their own acts, they may equally avoid a judgment rendered against them, when, from nonage or mental incapacity, they were incompetent to defend. It may be hard that the plaintiff should fail. It is none the less hard if the infant and the insane are to be deprived of their estates by judgments rendered against them, when thus incapacitated to defend their rights.

ISAAC N. DAVIS *& als. versus* BENAJAH BUFFUM.

When chattels are so far annexed to the freehold as to become fixtures, they pass to a grantee of the land unless expressly excepted in the conveyance; but, if he was aware that the fixtures had been annexed by a lessee, then in possession, he would acquire no right by the conveyance to prevent the removal of them by the lessee before the expiration of his lease.

All fixtures are, for the time being, part of the freehold; and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and if this is not done, the right to remove is lost; and trover cannot be maintained for a refusal to give them up.

The mere giving a deed of land leased, the lessee continuing in quiet possession, cannot be deemed a conversion of fixtures, which the tenant has the right to remove during his term.

If, at the time of demand, the defendant had neither actual nor constructive possession of the property; no right to it nor control over it, and therefore could not comply, a demand and refusal only will not support an action of trover.

ON REPORT from *Nisi Prius*.

This was an action of TROVER for a box board sawing machine, an edging saw and table, a cutting saw and appar-

atus and two mill saws, all alleged to be of the value of five hundred dollars.

Howard & Strout, for the plaintiffs.

T. M. Hayes, for the defendant.

The facts in the case sufficiently appear from the opinion of the Court, which was drawn up by

APPLETON, C. J. — On the 7th of January, 1854, the defendant leased his saw mill to Samuel Mitchell and A. C. Grant, who put the machinery, which is the subject matter of the present suit, in the same. After remaining sometime in possession of the premises leased, they assigned the lease and sold the machinery to the plaintiffs, who thereupon entered and occupied. During their occupation, and before the expiration of the term, the defendant, by deed of warranty, dated Dec. 15th, 1854, conveyed his mill, "being known as the Buffum mill, * * with the privileges and appurtenances thereto belonging," to Joseph Dane, jr., and Oliver Perkins, jr., to whom the plaintiffs attorned, paying to them rent during the residue of the term, which expired the last of July, 1855, when they quit the premises, leaving their machinery therein. On or about the 1st of September following, they made a demand upon the defendant for the articles in controversy.

It appears in evidence that the defendant, before executing his deed, claimed the machinery to be so affixed to the mill as to have become a part of the realty and not removeable — and that his grantees, after its execution, claimed that they were owners of the same, but neither they nor the defendant ever interfered with the plaintiffs' possession or use of the same during the continuance of the lease, nor then, nor at any other time, prevented their removing the same.

When chattels are so far annexed to the freehold as to become fixtures, they pass, in all cases, to a grantee of the land, unless expressly excepted in the conveyance; *Preston*.

v. *Briggs*, 16 Vt., 124; and become the property of a mortgagee as against a mortgager. *Butler* v. *Page*, 7 Met., 40; *Corliss* v. *McLagin*, 29 Maine, 115. So the judgment creditor acquires them by a levy on the real estate of his debtor. *Trull* v. *Fuller*, 28 Maine, 544. But, in the case at bar, Dane and Perkins were aware of the plaintiffs' lease and their rights under the same, and could, therefore, acquire no rights as against them, though, perhaps, they might have had a claim against their grantor on the covenants of his deed. *Powers* v. *Dennison*, 30 Vt., 752.

As between landlord and tenant, the latter may, during the continuance of his lease, remove fixtures erected by him for purposes of trade, manufacture or ornament, when the removal can be effected without permanent injury to the freehold. But this removal must be made during the continuance of the lease. In *Leader* v. *Honewood*, 94 E. C. L., 544, it was held that an out going tenant has no right to enter for the purpose of severing and removing fixtures, after the expiration of his term and a new tenant has been let in possession. The general rule is, "that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised the right to remove." *Heap* v. *Barton*, 12 C. B., (74 E. C. L.,) 274. "All fixtures," observes REDFIELD, J., in *Preston* v. *Briggs*, 16 Vt., 124, "for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover cannot be maintained for a refusal to give them up." And such seems to be the law as determined in *Stockwell* v. *Marks*, 17 Maine, 455; in Massachusetts, in *Gaffield* v. *Hapgood*, 17 Pick., 192; in *Shephard* v. *Spaulding*, 4 Met. 416; in New Hampshire, in *State* v. *Elliott*, 11 N. H., 540, and *Conner* v. *Coffin*, 2 Foster, 541; and in Connecticut, in *Burr* v. *St. John*, 16 Conn. 522. It was, however, held by JARVIS, C. J., in *Heap* v. *Barton*, 12 C. B., 274, "that the tenant may remove the fixtures, notwith-

standing the term has expired, if he remains in possession of the premises." But the plaintiffs' right of removal, whatever it was, remained unimpaired and unaffected by the defendant's deed to Dane and Perkins, and they might at any and all times have exercised it, during the lease, had they so chosen.

This being an action of trover, the only question presented is, whether the plaintiffs have shown an act of conversion on the part of the defendant.

The plaintiffs claim to recover on the ground that the defendant's deed to Dane and Perkins was *per se* a conversion — before the expiration of his lease.

But this is not so. When that deed was executed the plaintiffs were in the undisturbed enjoyment of their property and so remained during the whole duration of the lease. The deed of the defendant conveyed nothing he did not own; certainly not to grantees with notice of all the facts. The giving a bill of personal property in the possession of a third person, who is the owner of the same, without any other interference therewith or delivery thereof, is not, as against such owner, a conversion by either the person giving or receiving such bill of sale. In *Fuller* v. *Taber*, 39 Maine, 519, the plaintiff brought an action of trover for a building, which had been placed on the land of another by his precedent consent, or subsequent assent. The defendant, when a demand was made, said he had bought it and paid for it. The Court instructed the jury that, taking a quitclaim deed of the land and building and putting it on record, would not *of itself* constitute a conversion on the part of the individual so receiving the deed. Neither can the mere giving a deed of land leased, the lessee continuing in quiet possession, be deemed a conversion of fixtures which the tenant has the right to remove during his term. The lease was as valid after as before the deed. The rights of the lessee remained the same. The deed was no more a conversion of the tenant's fixtures than it was a breach of the covenants of the lease. The mere taking a mortgage

of personal property from one having no title and recording the same, without taking possession of the mortgaged property or interfering with the same, constitutes no conversion for which trover will lie. *Burnside* v. *Twitchell*, 43 N. H., 390.

The demand of the plaintiffs in September, after they had quitted the premises, constituted no conversion. A demand and refusal are not necessarily a conversion but only evidence from which a conversion may be inferred. After the expiration of the lease the tenant's right of removal ceased. "Fixtures," remarks ALDERSON, B., in *Winshall* v. *Lloyd*, 2 Mees. & Wels., 450, cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment that expires he cannot remove them; and trover cannot therefore be maintained for them." In *McIntosh* v. *Trotter*, 3 Mees. & Wels., 184, it was held that a lessee could not, even during his term, maintain trover for fixtures which were *attached to* the freehold, and that a sale of them was not a conversion. "Would trover lie for a crop of standing corn?" inquired PARKE, B. Nor could the tenant maintain trover against his landlord for not permitting him to enter after his lease had expired, to remove fixtures which he had erected. *Stockwell* v. *Marks*, 17 Maine, 455.

When this demand was made, the defendant had neither actual nor constructive possession of the property demanded. He had no right to it nor control over it. He could not therefore comply with the demand. In such cases a demand and refusal only, will not support an action of trover. *Kelsey* v. *Griswold*, 6 Barb., 436. A defendant, in an action of trover, cannot be deemed guilty of a conversion of the property upon evidence of a demand and refusal merely, unless the property was in some way subject to his control. *Yale* v. *Saunders*, 16 Vt., 243. So if the defendant has not the power to comply. *Carr* v. *Clough*, 6 Foster, 280; *Boobier* v. *Boobier*, 39 Maine, 406. *Plaintiff nonsuit.*

DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

SAMUEL HANSON *versus* OLIVER DOW *& als.*

If a writ contain specific counts upon promissory notes, and also general money counts, with no specification of the demands to be offered to support them, an attachment of real estate by virtue of such a writ will create no lien thereon, notwithstanding it may appear that the amount for which judgment has been entered up, as damages, is the same with that of the notes at the time judgment was rendered.

BILL IN EQUITY. The case was heard on bill, answers and proofs. The defendants controverted the validity of the plaintiff's title to the estate which he sought to recover, on the ground, that the attachment by virtue of which he claimed title, was invalid, because the writ on which the attachment was made, contained general money counts without any specification of the claims to be proved under them.

Eastman & Chisholm, for the plaintiff.

As to the defendants' denial, that "the plaintiff's demand, on which he founds his action, and the nature and amount thereof, are substantially set forth in proper counts, or a specification thereof is annexed to the writ," in that case, we say:—

The statute is not intended to prevent the insertion of general counts in the writ. Such general counts will not invalidate an attachment, provided the demand on which he founds his action, and its nature and amount, are substantially set forth, &c.

This was done in that case.

The first count was on a note dated June 12, 1857, payable in four months, for	$205,00
Interest from its maturity, 18 months, and 8 days, to April 20, 1859,	18,71
The second count was on a note dated June 29, 1857, four months, for	255,00
Interest from its maturity, 17 months, 22 days, to April 20, 1859,	22,58
Which make precisely the amount of the debt and judgment,	501,29

It appears by the writ, with the minutes thereon of debt and costs, that the debt in the judgment was made up of the two sums of $223,71 and $277,58, being the exact amount of the two notes at the date of rendition of judgment, April 20, 1859.

It is thus clearly manifest, that the two notes constituted "the demand on which he *founded his action*," and that the sums intended in the general counts were *identical* with those in the special counts, in which, "the demand," its "nature and amount," were "substantially" and accurately "set forth."

We think the Court will not ignore this evidence, so palpable upon the face of the papers.

The practice of inserting general counts, in connection with special ones, is so very common, that doubtless many levies, and titles resulting from them, may depend upon attachments on writs similar to the present; and we think that this Court will not go beyond the statute, and decide, upon grounds so purely technical, that the existence of a general count should invalidate an attachment, where the special counts, upon which judgment was actually rendered, fully conform to the requirements of the statute.

The case of *Fairbanks* v. *Stanley*, 18 Maine, 296, cited by defendants' attorneys, relates to an attachment of *personal* property. Judge SHEPLEY, in giving the opinion of the Court, says:—"The statute of 1838, c. 344, requiring all liens on real estate, created by attachment, and the amount of them, to appear on record, made it necessary to deprive the party of the right to prove, under the money counts, any demand not specifically designated. The effect was to restrict the party to a certain, definite mode of declaring, or to limit his proof."

Here, it is evident, the proof was *limited* to the two notes *declared on*.

We understand it to be the invariable practice of this Court, never to render judgment upon any general count, until the plaintiff files a bill of particulars, that the record

may show specifically the nature of the demand upon which the judgment is rendered; so as to bar another suit for the same cause:

This rule of practice negatives the supposition that the judgment could have embraced anything more than the two special counts upon the two promissory notes.

In *Saco* v. *Hopkinton*, 29 Maine, 268, cited by defendants' counsel, the writ upon which the attachment was made contained two counts; one, indebitatus assumpsit, for $1500, according to account annexed; and the account annexed was—"To balance due on account, and interest, $150." The other count was for $1500, money lent and accommodated; had and received; paid, laid out and expended. The opinion of the Court, in that case, fully warrants the presumption, that, if the bill of particulars, folded up in the writ, and upon which judgment was rendered for $688,96, had been properly *annexed* to the writ at the time of service, it would have been taken as "an exposition of the claim," or, in the terms of the statute, a "specification" of the demand, intended and referred to in the general counts; and that the attachment would have been held valid. The Court say, "*neither* of the counts, *nor* the account annexed, furnish the necessary information, such as the statute requires," &c., implying that, if *either* of the counts had given a specification of the claim, it would have been sufficient.

Howard & Strout, for the defendants.

The opinion of the Court was drawn up by

RICE, J.—We do not find sufficient evidence in this case to establish the charge of fraud against any of the defendants. Nor are there any superior equities in favor of either party. It is the ordinary case of creditors seeking, through different instrumentalities, to avail themselves of the effects of a common debtor, by conveyances from him, or by legal process against him.

William Harmon, by virtue of a contract in writing from Oliver Dow and Almon L. Hobson, dated February 2d,

1849, had the right to a conveyance of the land now the subject of controversy, on certain conditions, which the plaintiff alleges have been performed. The defendants claim under mesne conveyances from said William Harmon. The plaintiff claims to hold the rights of said Harmon under the contract above referred to, by virtue of an attachment on a writ in favor of Joseph Hobson, jr., against said Harmon, on which the officer, on the 18th of June, 1858, attached "all the right, title, interest, estate, claim and demand of every name and nature, of said Harmon, in and to any and all real estate in the county;" which attachment was duly recorded, the action seasonably entered in Court, judgment recovered, Harmon's interest under said contract sold on execution, and conveyed by the officer to the plaintiff, by deed dated June 25th, 1859. Under this deed, the plaintiff now claims a decree against the defendants, or such of them as hold the legal estate, for a specific performance of the contract, from Dow and Hobson to William Harmon, in accordance with its terms and conditions.

The defendants deny the right of the plaintiff generally, and especially deny that any lien upon the estate in controversy was created by virtue of the attachment on the writ, Hobson, jr., against Harmon, referred to above.

This question becomes material, as the plaintiff concedes that, if he fails to establish a lien by virtue of that attachment, he is not entitled to recover, unless the evidence produced satisfies the Court that the allegations of fraud on the part of the defendant are sustained.

The writ, on which the attachment was made, contains four counts, each purporting to be for different causes of action. Two of the counts are for notes specifically described and two are money counts.

Section 30 of c. 81, R. S., provides for the recording of attachments on real estate, to create a lien thereby.

Section 31, of the same chapter, provides that no such attachment, though made and notice thereof given, as directed in the preceding section, shall be valid, unless the

plaintiff's demand, on which he founds his action and the nature and amount thereof, are substantially set forth in proper counts, or a specification thereof is annexed to the writ.

There does not appear to have been annexed to the writ any specification of the claims to be proved under the money counts. This omission, the defendants contend, is fatal to the validity of the attachment and, consequently, decisive of the plaintiff's claim.

It was well remarked by WELLS, J., in the case of *Saco* v. *Hopkinton*, 29 Maine, 268, that "the intention of the statute must have been to require an attaching creditor to furnish such information by his writ, to subsequent attaching creditors and purchasers, as would enable them to know what his demand was, and that it should be so specific as to prevent any other demand from being substituted in the place of the demand sued."

That case failed for want of specifications. But, it is contended by the plaintiff, that the reason for that decision does not apply in this case, inasmuch as in that case all the counts were general, whereas in this, there are two specific counts upon notes, on which it is to be inferred the judgment was rendered, as those notes, with legal interest added, produce the precise sum for which judgment was entered up. This coincidence may raise a presumption that the fact is as claimed, but such presumption is by no means conclusive. The same result might have been produced by legitimate evidence under either of the money counts.

The plaintiff seeks to obtain the estate by the aid of legal process, and not by the voluntary act of the original debtor. To succeed, he must show that the provisions of the statute have been strictly pursued. This he has failed to do, and, consequently, must fail in his object.

Bill dismissed with costs for defendants.

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

KENT, J., did not concur.

HULDAH DALTON *versus* ASA DALTON, AND HAYES *& al., Trustees.*

If an executor, for a note belonging to the estate of the testator, take a new one payable to himself, which he collects by a suit in his own name, the funds never having been mingled with other property, but remain in the hands of the attorney collecting them; he will be entitled to the same in his capacity of executor, although the attorney has been summoned as his trustee, in a suit by one of his creditors.

EXCEPTIONS from the ruling of RICE, J.

This was a TRUSTEE PROCESS. The supposed trustees disclosed that, prior to the service of the plaintiff's writ on them, the said Asa Dalton left with them for collection a note against Joseph Hobson, jr., payable to said Asa, on which the said Hobson paid to said trustees $362,77, which was in their hands at the time of said service, subject to the order of the said Asa. That, since said service, they had been notified by said Asa Dalton, that the said sum so collected by them of Hobson belonged at the time of its collection and still belonged to the estate of Benjamin Dalton, deceased, and that he, the said Asa, claimed the same as the executor of the said Benjamin.

Thereupon the said Asa made written application to the Court, setting forth said claim, and praying to be allowed to become a party, as executor aforesaid, to prosecute his alleged claim to said fund, and was admitted to become a party for that purpose, and thereupon filed his allegations of said claim; and the plaintiff in this suit answered in writing thereto, by way of plea, that, at the time of service of said writ on said trustees, the said fund was not the property of the said Asa as executor, nor of the said Benjamin's estate, but was the property of the said Asa Dalton in his own right, and tendered an issue to the country, which issue was joined, by said executor.

It was proved and admitted, that, on April 1, 1851, the said Hobson gave his note to the said Benjamin Dalton, then living, for $247,78, in six months and interest.

The said Benjamin died prior to 1856, leaving a large estate, some sixty thousand dollars, as stated by one of the executor's witnesses. The last will of said Benjamin was proved in 1856, and the said Asa was appointed his executor. On the 1st day of November, 1857, the said Asa called on said Hobson for payment of said note to Benjamin, that being the day he was first informed of its existence. Hobson replied that it was not convenient for him to pay at that time, but he would renew it. That Hobson then figured up the interest and made a new note for the amount, with a surety, payable to Asa Dalton, which said Dalton received, and surrendered the old note to Hobson.

The said Asa Dalton, on calling for payment of said note, said to Hobson that he wanted the money to buy a house with.

The note so taken by said Asa from Hobson on Nov. 1, 1857, was afterwards left by said Asa with said Hayes & Nye, the trustees, for collection, and they entered the same on their register of demands, as the property of Asa Dalton. And, in 1858, brought a suit on said note in the name of Asa Dalton, (not as executor,) which suit was afterwards settled by said Hobson, and the said Hayes & Nye received thereon the sum by them disclosed. No copy of the inventory of said Benjamin's estate, nor any evidence of the state of said Asa's accounts as executor, either by records or copies of records of Probate Court, or otherwise, was produced in evidence.

The plaintiff in the action, on trial of said issue, contended that the said Asa, by giving up to Hobson the said note to Benjamin, and taking therefor a note to himself, in his own name, and not as executor, and by bringing an action thereon in his own name, (not as executor,) and by said note being so left with and entered by Hayes & Nye on their register, (not as executor of Benjamin,) and the receipt of the proceeds thereof by them as aforesaid, the said sum in the hands of said trustees had become, and was, the property of the said Asa Dalton, in his own right.

But the Court instructed the jury that the said note or fund did not thereby, as matter of law, become the property of said Asa, by the said giving up of said old note to Hobson, and taking said note of November 1st in his, the said Asa's own name, and bringing suit upon the same in his own name, and the said entry by his attorneys, and said leaving said note with them, and said payment to them by Hobson; nor by any nor all of said facts. That, if there were ear marks upon the property or fund, by which it could be traced back to Benjamin Dalton's estate, if the surrender by said Asa of a note payable to said Benjamin was the consideration of said note of Hobson to Asa, and the proceeds could be traced to the present funds in the supposed trustees, the property would not be changed from Benjamin's estate, and vested in said Asa, in his own right, as matter of law, by said facts, and acts of Asa. The verdict was, that the fund belonged to Benjamin Dalton's estate.

After the verdict the Court ordered the trustees to be discharged. The plaintiff excepted.

Chisholm, in support of the exceptions.

I. T. Drew, *contra*.

The opinion of the Court was drawn up by

Davis, J.—This case was before the Court in 1860, and was sent back in order to have the question tried by a jury, whether the funds belonged to the principal defendant, in his own right, or to the estate of which he had the charge as executor. Although we expressed no opinion as to the *fact*, if the taking a new note was *conclusive*, it was useless to send the case to a jury trial.

The title to all property is presumed to be in some person, known or unknown. So that, upon the death of any person, the title to his real estate vests immediately in his heirs, and that of his personal estate in his executors or administrators. But the executor, unlike the heir, has the title *in trust*, only. He is only responsible *as trustee*. He

may sell it; but it cannot be taken by his creditors. For the trust attaches to it, wherever it may be, until the executor has sold it, or accounted for it to the estate, at the appraised value. R. S., c. 64, § 44.

Nor do the debts due the testator become his. Like the other personal estate, they are under his control. He may release or discharge them. And, in case of any malfeasance, he is liable for waste. If he should allow a note due the estate to be renewed, he must take the new note payable to himself. If, in any such case, he would be estopped from denying payment to himself, such a rule would be applied only for the benefit of the estate, *against the executor*. No case can be found in which the executor, or any private creditor of his, has had the benefit of any such rule, to divert funds *from the estate*. That would be permitting the executor to take advantage of his own wrong.

In the case of *Coburn* v. *Ansart & Trustee*, 3 Mass., 319, the note collected was payable to Ansart *as executor*. This was the only fact disclosed; and the attorney was charged as trustee. There was no evidence whatever that the funds belonged to the estate; there was no claim by the executor, as such; and this must have been the ground of the decision.

In the case at bar, though the executor took a new note payable to himself, which has been collected by a suit at law, the funds have never been mingled with other property, but they are now in the hands of the attorneys, for the benefit of whatever party is entitled to them. "Property covered by a trust," says MERRICK, J., in *LeBreton* v. *Pierce*, 2 Allen, 8, "may always be reclaimed, wherever it may be found; and no change of its form, state, or condition, can relieve it from, or divest it of the trust. It is of no consequence into what form, different from the original, the change may have wrought it,— whether it be that of goods, chattels, notes, stock, or coin; for the product, as a substitute for the original thing, still follows the nature of the thing itself, so long as it can be ascertained to be such."

There is an exception to this rule, in favor of *bona fide* purchasers, for value, without notice of the trust. But the exception does not apply to the case before us. The instructions given to the jury were in accordance with these principles; and the exceptions must be overruled.

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

PERKINS GALE *versus* THE INHAB'TS OF SOUTH BERWICK.

The inhabitants of a town cannot be legally assessed to pay a reward offered by the vote of a town for the apprehension and conviction of a person who has committed a murder therein; the contract of the town was therefore unauthorized.

ON STATEMENT OF FACTS.

This was an action of ASSUMPSIT to recover the amount of a reward offered by a vote of the defendant town, for the apprehension and conviction of the perpetrator of a murder that had been committed therein.

In defence, it was contended, that the town exceeded its authority in voting such offer of reward.

Howard & Strout, for the plaintiff.

It appears by the agreed statement, that a man had been murdered in South Berwick, and that the murderer was not known, or had escaped. That, to insure his detection and conviction, the inhabitants of the town, at a legal town meeting, authorized the selectmen to offer the reward claimed. And that the plaintiff is entitled to recover, if the defendants are responsible for the offer.

It was for the interest, peace and safety of the inhabitants, that the offender should be brought to justice and secured against further invasions upon them. They might well fear that he was lurking among them, seeking only other opportunities to strike down, in secret, other objects

of his jealousy, cupidity, or malevolence. They were justified in using prompt and efficient means to allay the fears and excitement of that community. Nay, they were bound to exert the right of self-protection to the utmost, by immediate action. *Offering rewards* for the detection of felons is known to be a most efficient measure for securing it. It became, as it were, a necessity, in this instance, springing from the moral sense, and self-respect of the inhabitants themselves. Good order, peace, health and common convenience of the inhabitants demanded it.

Although it may be true that towns are not authorized to make any contract for the payment of money which they are not authorized to raise money to discharge by taxation; yet they can raise money to indemnify its officers for a liability, which they may incur in good faith, in the discharge of their duties, even when they have exceeded their legal rights and duties, and where the town was under no previous obligation to indemnify such officers. *Nelson* v. *Milford*, 7 Pick., 18; *Bancroft* v. *Lynnfield*, 18 Pick., 566.

A town may raise money to pay for a public clock; to build a market-house; construct reservoirs, lamp posts, fences, and to purchase fire engines, &c., and generally, for such purposes as may be necessary and proper to preserve the peace, good order, health and common convenience of the inhabitants. *Hardy* v. *Waltham*, 3 Met., 163; *Allen* v. *Taunton*, 19 Pick., 485; *Spaulding* v. *Lowell*, 23 Pick., 71; *Willard* v. *Newburyport*, 12 Pick., 227; *State* v. *Merrill*, 37 Maine, 329; R. S., 1840, c. 5, § 22; R. S., 1857, c. 3, § 27, rule *second*.

In *Croshaw* v. *Roxbury*, 7 Gray, 378, the Court, per SHAW, C. J., held that the defendants were answerable for $500, the amount of reward offered, although the statute of Massachusetts, 1840, c. 75, authorized an offer of only $200, as a reward, by towns and cities. And it appears to have been so held by the Court, upon the ground, that the body of the inhabitants having made the offer, they were bound by it, although the statute conferred no authority for offer-

ing such a reward. That decision must have rested upon public policy and municipal independence in matters of that sort. The principles governing that case would control in this, even without any aid from statute provision. The Court there held, that the statute last cited imposed no restriction upon the body of the inhabitants in any town, as to the amount to be offered; and it cannot be pretended that any is put upon them by the statutes of this State.

J. N. Goodwin, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—A murder having been committed in the defendant town, the inhabitants, at a legal meeting, directed the selectmen to offer a reward for the detection of the murderer, which they did. The murderer was detected, arrested and convicted through the agency of the plaintiff, who, being entitled to the reward according to the terms upon which it was payable, brings this suit therefor. As the money to pay must be assessed and collected, the inquiry arises, whether the defendants have any power to assess and collect for such purpose, as, if they have not, they can have none to make a contract which, if performed, would require such assessment and collection.

The power of towns to raise money, is given by R. S., 1857, c. 3, § 26, and is in these words:—"The qualified voters of a town, at a legal town meeting, may raise such sums as are necessary for the maintenance and support of schools and the poor; for making and repairing highways and town ways and bridges; for purchasing and fencing burying grounds; for purchasing or building and keeping in repair a hearse and house therefor for the exclusive use of its citizens; *and for other necessary town charges.*" The words, "other necessary town charges," do not constitute a new and distinct grant of indefinite and unlimited power to raise money at the will and pleasure of a majority. They embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the powers conferred

upon towns. Accordingly, they have ever received a liberal construction. Thus, in *Willard* v. *Newburyport*, 12 Pick., 227, it was held that a town has authority to provide for a clock, and to assess the expense thereof upon its inhabitants. So towns are authorized to raise money to repair fire engines, used for the purpose of extinguishing fires, as in *Allen* v. *Taunton*, 19 Pick., 485; and to appropriate money for the construction of reservoirs, to supply water for their use, as in *Hardy* v. *Waltham*, 3 Met., 163; or to build a market-house, as in *Spaulding* v. *Lowell*, 23 Pick., 71.

But, while towns may undoubtedly contract any and all liabilities, arising in the performance of their municipal duties, whether directly or impliedly imposed, they cannot transcend their legal obligations and incur liabilities neither directly nor indirectly arising in the course of their performance. Thus, in *Tash* v. *Adams*, 10 Cush., 252, it was held that a town could not lawfully appropriate money to commemorate the surrender of Cornwallis. In *Hood* v. *Lynn*, 1 Allen, 103, it was decided, that a town could not lawfully raise money for the celebration of the fourth of July. In *Bussey* v. *Gilmore*, 3 Greenl., 191, the raising a tax for the discharge of a contract, entered into by a town with the corporation of a toll bridge, for the free passage of the bridge by the citizens of the town, was held to be illegal.

The power given by statute to towns to raise money for "necessary charges" extends only to those which are incident to the discharge of corporate duties. *Bussey* v. *Gilmore*, 3 Greenl., 191. It is no part of the duty of a town to take charge of, or supervise, the criminal proceedings which may be instituted in behalf of the State, unless when such duty is specifically imposed. Towns are under no legal obligation to aid in the detection or conviction of offenders. The enforcement of the criminal law is entrusted to its appropriate officers. The authority to offer rewards for the apprehension of offenders, by R. S., 1857, c. 138, § 4, is conferred, in certain cases, upon the Governor. No

power is given to towns, to raise money for their detection or conviction, by any statute of this State, and none can exist by implication. In Massachusetts, by statute, 1840, c. 75, this power, to a limited extent, is conferred. The vote of the town was unauthorized and in excess of their corporate powers, and is not binding. *Hooper* v. *Emery*, 14 Maine, 375; *Stetson* v. *Kempton*, 13 Mass., 272.

Plaintiff nonsuit.

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

THOMAS DAY *versus* EDWARD H. C. HOOPER.

The parties, by an agreement under seal, (not in the statute form,) submitted a controverted matter to arbitrators, who, in addition to damages, awarded costs which were not included in the agreement; although the award, as to costs, was unauthorized, it was good as to the damages; it being well settled that an award may be good in part, and bad in part, — and, if separable, the good will be affirmed.

Where a deed of land was to be given, when the arbitrators should report the amount to be paid therefor, if the deed conform to the terms of the agreement, it will be sufficient; although the description in the deed, may not define with certainty the boundaries of the land conveyed.

If such a submission contain the condition, that judgment rendered on the report shall be final, and does not provide for the return of the report to some Court, an action of debt may be maintained upon the award.

ON AGREED STATEMENT OF FACTS.

This was an action of DEBT on an award of arbitrators, made by virtue of a written submission entered into by the parties under their seals. The agreement recites that the parties "have agreed and do hereby agree to submit the matter in controversy between us, hereinafter stated, to the determination of (three referees named) and judgment rendered on their report, or that of a majority of them, shall be final."

The other material portions of the agreement are recited

in the opinion of the Court, and the material parts of the award of referees, stated.

The case was argued by

Fales, for the plaintiff.

J. M. Goodwin, for the defendant, argued, that the agreement, if in other respects valid, was void for uncertainty. The description of the land which each was to have was too uncertain to pass a title. The parties had agreed to quitclaim to each other and thus divide the land in the proportion of two-fifths and three-fifths; separated by some indefinite unlocated line between them, with no description, bound or other *criteria*, to determine and locate the particular land which each was to have, except the vague statement that each one was to have land next adjoining his homestead. Of what shape each one's land was to be; at what angle it was to intersect the boundary line of the whole parcel, it is impossible to tell from anything stated in the recital of the agreement as contained in the submission.

2. The submission, which is in the form of a statute submission, (except that the Court to which the report is to be made is not specifically named, and the submission is not acknowledged before a justice of the peace,) expressly provides for the judgment to be rendered upon the report or award of the referees. The parties consequently acquire no new rights, the one against the other, until such judgment has been rendered. The liability of the defendant was made to depend, not only on the contingency that the report would be against him, but on the condition that the plaintiff obtained a judgment upon the report. The judgment was to be final; not the report.

The counsel cited and commented on the following cases: *Worthen* v. *Stevens*, 4 Mass., 448; *Kingsley* v. *Bill*, 9 Mass., 198; *Bowers* v. *French*, 11 Maine, 182.

The opinion of the Court was drawn up by

Appleton, C. J. — The agreement to refer, between these

parties, recites that the plaintiff and defendant "are owners in common and undivided, the said Day of three-fifth parts and the said Hooper of two-fifth parts of a certain lot of land, being the same conveyed to them in the above proportions by deed of William P. Haines, executor of the last will and testament of Sally McIntire; said deed bearing date April 30, 1859,—and the said Day has agreed to convey by deed of quitclaim to said Hooper *the three-fifth parts of said land next adjoining the homestead lot of said Hooper*, and the said Hooper has agreed to convey by deed of quitclaim, to said Day, the two-fifth parts of said lot next adjoining the homestead lot of said Day—the wives of the said Day and Hooper, respectively, to release dower therein.

"Now the said referees are to determine and award what sum of money (if any) the said Hooper shall pay to the said Day, in consideration of said conveyance to said Hooper, by said Day, of said three-fifth parts of said land; and said referees are also to determine and award what sum of money (if anything) the said Day shall pay to said Hooper in consideration of said conveyance to said Day, by said Hooper, of said two-fifth parts of said land; and the said Day and the said Hooper hereby mutually and severally bind themselves, each to the other, in the sum of one hundred dollars, for the performance of their respective agreements as above written."

This agreement was made under seal. The referees named therein met and heard the parties, and awarded that the defendant pay the plaintiff twenty-five dollars and costs of reference, taxed at fifteen dollars, and make the stipulated conveyance. The plaintiff, after the award was published, made a tender of a deed of "the three-fifth parts next adjoining the homestead of the said Hooper," of the tract conveyed to them by William P. Haines, referred to in the submission, which is particularly described, and concluding as follows:—"meaning and intending hereby to convey to said Hooper that three-fifth parts in quantity of the above describ-

ed land, which lies next adjoining said Hooper's said homestead lot, so that said Hooper may own and hold the said three-fifth parts in severalty."

To the maintenance of this suit various objections are interposed.

(1.) The referees allowed costs when they were not authorized so to do by the submission.

To this extent the referees exceeded their authority, and, so far, their award is void. But nothing is better settled than that an award may be good in part and bad in part—and, when they are separable, the good will be affirmed.

It is insisted, that the deed, which was tendered, is void for uncertainty.

(2.) The deed conforms to the terms of the submission. The parties agreed what should be respectively conveyed from the one to the other, and the conveyance tendered conforms to that agreement. This is all the defendant can require.

(3.) The submission was not under the statute. It is not acknowledged and does not provide for the return of the report of the referees to any Court. Indeed, it is entirely wanting in all the elements of a statute reference. The parties mutually bind themselves, under seal, each to the other, to abide the award of the referees agreed upon, and no reasons are perceived why they should be relieved from their contracts. It was not necessary, that the report of the referees should be returned to Court. The cases cited, we do not think, are applicable to the case at bar.

Defendant defaulted.

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

SAMUEL B. GILPATRICK *versus* THE CITY OF BIDDEFORD.

If the officers of a town, in constructing or repairing a public way, dispose of the waste rocks, or earth, for the benefit of some individual, in such a manner as to improve a private way belonging to him, the repairs so made upon the private way are made for the owner of it and not for the town; and the town is not thereby estopped from denying its location, in an action to recover for injuries sustained in consequence of defects in such way.

The statute, (§ 62, c. 18 of R. S.,) which estops a party to deny the location of a way, if such party has made repairs thereon within six years before the injury complained of, assumes the existence of a way *de facto*, in actual use at the place of the injury; and, although the party cannot deny the location of the way where the repairs are made, he may deny that the place where the injury occurred is the same way.

The fact that the way is "continuous" is not the only fact to be taken into consideration, in deciding whether the injury and the repairs are both upon the same way; that, being a question of fact, is to be determined by the jury and must depend on the circumstances of each case.

The distance from the place of injury to the place of repairs; the length of time the way has been used; the locality, whether in a city or in the country; whether there are intersecting roads or streets, are proper elements to be considered in deciding the question, besides the fact of *continuity*, or apparent oneness of the way.

The acts of a street commissioner of a city, within the scope of the trust committed to him, are *prima facie*, the acts of the city; whether they are within the general authority conferred upon him is a question for the jury.

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

This was an action on the CASE, to recover damages for an injury received by the plaintiff by reason of a defect in a way in the city of Biddeford.

There was evidence tending to prove that, for a series of years, there was a way, wholly in Biddeford, reserved by the proprietors of the lands adjoining, for the use of the lots adjoining, extending from Pool street, a public road in Biddeford, north-easterly, until it entered the north-east end of another public road in said city, called the Nelson road; and that during these years this reserved way had been used by such travellers as chose to travel over it, without inter-

ruption. That, in this reserved way and near the end of Nelson road, was a steep hill; that, to render the ascent of this hill easier, certain persons, in their private capacity, twelve or fourteen years prior to June, 1863, had filled in a large quantity of stones, which they had levelled and covered with earth, so as to make a better way up the hill, about a rod in width, over which people travelled on foot and occasionally with carriages. That, from the bottom of this hill to Pool street, was about thirty-one rods; the hill was about six rods in its ascent. That no part of the way, from the top of the hill to Pool street, had ever been wrought previous to 1855, but it had been travelled over by such persons as chose to use it. That, in the summer of 1855, and within six years before the injury to the plaintiff complained of, being the first year of the city government of Biddeford, the commissioner of streets of said city, legally appointed, caused work to be done on the north-west portion of said reserved way, from Pool street toward said hill and to the line of one Ladd's lot, near the top of said hill. That he caused ledges in such reserved way to be blasted and excavated, and a portion of the materials removed from such excavations were filled into cavities in other parts of said way, and also caused these excavated and filled portions of the way to be gravelled for a road.

There was evidence tending to prove that some of these materials, being large stones, by the direction of the street commissioner, were dumped upon the hill mentioned, upon the stones and earth which had been placed there a few years before, by the private persons before mentioned, and that these stones, so placed by the direction of the street commissioner, were by his direction levelled and covered with smaller debris and earth taken from the excavations in other parts of the way. That this work upon the way, by the commissioner, was continued for several days, by several laborers and, at least, one ox-team, and payment for the labor was made in the usual way of paying for labor on the streets of the city. That, by this labor, the way from above

the hill to Pool street, was made more passable, and the way down the hill improved; that, after this labor, the way from Pool street to the Nelson road was used by travellers on foot and with teams and carriages, who chose to go there, until 1860, when the way from Pool street to the line of Ladd's lot, near the top of the hill, was located by the city pursuant to statutes.

The defendants introduced evidence tending to prove that the remaining portion of said way, extending from Ladd's lot to the Nelson road, a distance of about six rods, and including the place where the injury happened, had not been established as a public way, or accepted by the city of Biddeford as such; that part of the distance was over and down a steep and rough ledge of rocks, and obviously unsafe for travel; that on application the city had expressly refused to accept or establish it as a public way; that the stones were dumped over the hill and down the ledge, not for the purpose of repairs, but to get them out of the way; and that, in attempting to pass there, the plaintiff was not in the exercise of ordinary care and prudence.

That, on May 18, 1861, the injury occurred to the plaintiff on the hill, and at the place where the stones had been filled in and levelled and covered, by the private persons before mentioned, and that it was caused by some of the stones which had been placed there, either by those persons or the street commissioner.

The presiding Judge instructed the jury that, if repairs were made upon the way in question by the city of Biddeford, within six years before the injury, it would not be competent for the city to deny the location thereof; but, to have that effect, what was done must have been intended for repairs; that if, in dumping the stones blasted out of the ledge, down over the hill, the object was merely to get rid of them, such dumping would not constitute repairs within the meaning of the law. That, if the plaintiff would bring his case within the provisions of R. S., c. 18, § 62, the burden of proof was upon him to show, not only that

repairs were made, but that they were made, either by express authority of the city or by its duly authorized agents, acting within the scope of their authority; that the mere fact, that repairs had been made by a street commissioner upon a way which the city was under no legal obligation at the time to keep in repair, would not be sufficient. That, if a private way had been opened, from Pool street to the bottom of the hill, it would be competent for the city to establish the whole or part of it as a public way; that, if only part of it had been thus established, repairs upon such part would not render the city liable for an injury upon the other part to which such repairs were not intended to apply. That repairs upon one part of a way, not legally established, would not estop the city from denying the location of another part of the same continuous way to which such repairs were not intended to apply, and which the city never intended to accept or to become responsible for.

The plaintiff's counsel requested the presiding Judge to instruct the jury:—That, if the way from Pool street to the bottom of the hill was one continuous way, forming a communication between two public ways of the city, and the city was under no obligation to keep any part of it in repair, but did make repairs upon any portion of such way within six years before the injury was received, it would be liable for the injury. That acts by public officers, in their official capacity, are in law presumed to be rightly done, and the burden of proving the contrary rests upon the party alleging it.

The Judge declined to give the requested instructions. The verdict was for the defendants. The plaintiff excepted.

The questions, thus presented, were argued by

E. R. Wiggin, in support of the exceptions.

J. M. Goodwin, contra.

The opinion of the Court was drawn up by

DAVIS, J.—This is an action to recover damages occa-

sioned by a defect in one of the streets in the city of Biddeford. In order to prove the location of the street, the plaintiff relied upon evidence of repairs made by the street commissioner upon a continuation of the street. That portion of the street where the repairs were made had been legally located before the accident occurred; but the repairs proved were made before it was located. There was no proof of the location of that part of the street where the plaintiff was injured, except the evidence of repairs upon the other portion of the street. It was not admitted that any repairs were made there; the counsel for the city contending that the street commissioner merely deposited there earth and rock excavated in repairing another street, for the purpose of getting rid of them, not intending thereby to repair the street, or private way, upon which they were thus thrown.

The jury were instructed that, in order to have the effect of estopping the city from denying the location of the street, "what was done must have been intended for repairs; that if, in dumping the stones, which were blasted, down over the hill, the object was merely to get rid of them, such dumping would not constitute repairs, within the meaning of the law."

This instruction was correct. If the officers of a city or town, in constructing or repairing a public way, dispose of the waste rocks or earth for the benefit of some individual, in such a manner as to improve a private way belonging to him, the repairs so made upon the private way are made for the owner of it, and not for such city or town. In doing such work, or in doing the work in the particular manner, the workmen are, *quoad hoc*, the agents of the individual, and not the agents of the city or town. The authority conferred by the city or town contemplates no such purpose or result.

The counsel for the plaintiff requested the Court to instruct the jury "that, if the way from Pool street to the bottom of the hill was *one continuous way*, forming a com-

munication between two public ways of the city, and the city was under no obligation to keep any part of it in repair, but did make repairs upon any portion of such way within six years before the injury was received, it would be liable for the injury."

The jury were instructed "that, if a private way had been opened from Pool street to the bottom of the hill, it would be competent for the city to establish the whole, or a part of it, as a public way; that, if only a part of it had been thus established, repairs upon such part would not render the city liable for an injury upon the other part, to which such repairs were not intended to apply."

Taking the instruction given, with that which was requested, as it was probably intended, it amounts simply to this,—that repairs upon a way in public use are not *conclusive* evidence of its location *to the entire extent to which it may be* "*continuous.*"

By the R. S., c. 18, § 62, it is enacted that, "when it appears that the party defendant has, within six years before the injury, made repairs on the way or bridge, it shall not be competent for him to deny the location thereof."

The statute assumes the existence of a way *de facto*, in actual use at the place of the injury. The repairs must be shown to have been made upon *such way*. How far from the place of the injury may the repairs be, and still be held to be "on the way?" The instruction requested affirms that *continuity* is the only test; that so far as the way is "continuous," it is the *same way;* and the making of repairs is conclusive evidence of location. The instructions given denied this, and were correct.

A "continuous" way through the entire length of a town may have been opened in successive parts, at different times. A part of it may have been located as a town way; another part by the county commissioners; and another part may be a mere continuation made by the owner of the adjacent land, as a private way. Can it be said to be the fair meaning of the statute that repairs made upon one extreme of

such a way will estop the town from denying the location of the other extreme, at a distance of miles? If not, then the fact that a way is "continuous" is not the only fact to be taken into consideration, in deciding whether the injury and the repairs are both upon the same way. No definite rule can be given for determining this question. It is one of *fact*, for the jury. The statute must be applied reasonably, according to the circumstances of each case. The *continuity*, or apparent *oneness* of the way, from the place of the injury to the place of repairs, is one element to be considered. The length of time during which it has been so used is another. The *distance* between the two points is another, and generally a more important one. But the importance of this will depend upon the locality, whether in a city, or in the country; and whether there are intermediate crossing or intersecting roads or streets. For it is well known that in cities the owners of lots often open private streets, in order to make such lots saleable, long before they are located. And, as they are generally located in short sections, repairs at one point would, of itself, be but slight evidence of location at another.

The instruction requested mistakes the point to which the estoppel provided by the statute is intended to apply. A town cannot "deny the location" of *the way where the repairs are made*. It may deny *that the way where the injury occurred is the same way*. And, if it is proved that the former was legally located, while the latter was not, that will show that the two places are not upon the same way. In that case the repairs at one point are no evidence of location at the other.

Practically there is seldom any difficulty in applying the statute. Repairs within six years can be easily proved, at the place of the injury, or on either side of it. And in cases, like the one at bar, where there is any doubt, the statute operates substantially to change the burden of proof, and places the town in a position where it must show, in order to repel the presumption, not only that there was no

legal location at the place where the injury occurred, but that the way was legally located at the place where the repairs were made. If no legal location is proved at either point, and the way appears to be one and the same at both, the town being estopped from denying the location at one, it may be presumed at the other if not too remote.

The counsel for the plaintiff requested the Court to instruct the jury, "that acts done by public officers, in their official capacity, are in law presumed to be rightly done; and the burden of proving the contrary rests upon the party alleging it."

This request was not pertinent. The question was not, whether repairs made by the street commissioner "in his official capacity" were "*rightly done;*" but whether the repairs were in fact made *in his official capacity*. The request *assumes* this, and raises another question. His *right* to make them might be contested by the owner of the land, in an action of trespass against him; or, by the city, in an action by him to recover pay for his services. He had no such right, unless the way had been legally *located*. The plaintiff did not claim that he otherwise had any such right. The design was not to prove the *right*, which depended on the *location;* —but to prove the *location*, by the *official* act. And the only question, therefore, was, whether he made them "in his official capacity," as the agent of the city. Or, did he make them in his private capacity, for himself, or for some other person?

The ambiguity of the request seems to have misled the Court. The jury were instructed that, "if the plaintiff would bring his case within the provisions of the statute, the burden of proof was on him to show, not only that the repairs were made, but that they were made either by express authority of the city, or by its duly authorized agents, acting within the scope of their authority; *and, that the mere fact, that repairs had been made by a street commissioner, upon a way which the city was under no legal obligation at the time to keep in repair, would not be sufficient.*"

The first branch of this instruction was obviously correct. But the second branch assumes the very point in controversy, — "that the city was under no legal obligation at the time to keep the way in repair;" — when the repairs were proved for the sole purpose of establishing such obligation. Literally it was correct. If it had been conceded that the city was under no legal obligation to keep the way in repair, it would not have been erroneous. But then, there would have been an end of the plaintiff's case. The obligation to repair was the sole ground of any liability for the defect. This being the very point in issue, the instructions should not have assumed its determination in favor of the defendants.

Repairs made upon streets in actual public use, by a street commissioner of a city, may well be presumed, in the absence of any evidence to the contrary, to have been made by the city. His acts, upon matters within the scope of the trust committed to him, are, *prima facie*, the acts of the city. Whether they are within the general authority conferred upon him, is a question for the jury. *Thayer* v. *Boston*, 19 Pick., 511. If he makes repairs upon a private way, not acting in behalf of the city, but for himself, or for another, the city is not liable for his acts, nor is it estopped from denying the location of such way.

As the instructions given, in connection with those requested, may have misled the jury on this point, a new trial must be granted.

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

EDWARD E. BOURNE *& al., Ex'rs, versus* CHARLES WARD.

When a note is silent as to consideration, in a suit between the original parties, the plaintiff, to be entitled to recover, should aver and prove a consideration:

But, if the note contains the words "value received," or words of equivalent import, the note itself will be evidence, not only of the promise, but, *prima facie*, of the consideration:

Thus, a note given to L., for a specified sum, "*for his three-sixteenth interest in the Thorn & Co. acceptance for* $7000, *given on account of barque Waverly and remaining unpaid*," is sufficient evidence, *prima facie*, of consideration.

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

ASSUMPSIT upon a contract in writing.

Bourne & Bourne, jr., in support of the exceptions.

J. Dane, contra.

The opinion of the Court was drawn up by

WALTON, J.—This is an action on a promissory note, and comes before the Court on exceptions to the ruling of the presiding Judge in directing a nonsuit. The defence is want or failure of consideration. The nonsuit was directed upon the ground that the plaintiff had failed to prove a consideration. The plaintiff contends that the ruling was wrong in holding that he was required to prove a consideration. He contends that, in actions on promissory notes, a consideration is presumed and need not not be proved. Negotiable notes, when they have passed into the hands of indorsees, in the usual course of trade, enjoy the privilege of having a consideration presumed. But notes not negotiable, and notes that are negotiable while in the hands of the original promisee, enjoy no such privilege. *Bristol* v. *Warner*, 19 Conn., 7; *Delano* v. *Bartlett*, 6 Cush., 364; *Burnham* v. *Allen*, 1 Gray, 496.

When a note contains the words "value received," or words of equivalent import, the note itself will be evidence, not only of the promise, but, *prima facie*, of the conside-ra

tion. But, when the note is silent as to the consideration, in a suit between the original parties, the plaintiff must aver and prove a consideration, or he will not be entitled to recover. There are *dicta* and, perhaps, decisions to the contrary, but reason and the weight of authority are in favor of the rule as here stated.

The note in suit is not negotiable, nor does it contain the words "value received," but the plaintiff contends that it contains words of equivalent import; and in this we think he is right. The note is as follows:—"Six months from date, I promise to pay Thomas Lord, the sum of six hundred fifty-six $\frac{25}{100}$ dollars, *for his* $\frac{3}{16}$ *interest in the Rollin Thorn & Co. acceptance, for* $7000, given on account of barque Waverly, and remaining unpaid." It is contended in defence that, although this note very clearly points out and identifies the consideration, it does not acknowledge the receipt of it,—that the whole language, taken together, amounts to no more than a proposition or offer to pay the sum therein named for Lord's interest in the acceptance referred to. But we think the note cannot be construed as a mere proposition or offer. We think it contains an unconditional promise "to pay" for Lord's interest, which implies an indebtedness on the part of the promisor, for that interest, and that it had been transferred to him. We think the note alone is sufficient, *prima facie*, to prove, not only the alleged promise, but also the consideration.

Exceptions sustained.

Nonsuit taken off.

New trial granted.

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

JOSEPH W. HANSON *& als., appellants from the decision of the County Commissioners of York county.*

The Act incorporating the city of Biddeford confers upon the county commissioners power to lay out, within that city, any part of any new county road that shall be laid out in any adjoining town and shall pass into and through the city.

Where the commissioners erroneously decided that they had no jurisdiction in such a case, and the petitioners appealed to this Court, the appeal was held to be well taken. (R. S. of 1857, c. 18, § 34.)

EXCEPTIONS from the ruling of GOODENOW, J.

This was an APPEAL from the decision of the county commissioners of the county of York, "that they have no jurisdiction under the petition" of said Hanson and others; which petition was to lay out a county road from a certain point in the town of Lyman, thence through a portion of the town of Dayton to the city of Biddeford to Chestnut street, thence along said street to Main street, &c.

At the term of the Supreme Judicial Court, when the petitioners' appeal was entered, their counsel moved for the appointment of a committee as the statute provides; the respondents objected, on the ground that an appeal does not lie, in such cases, and moved that the appeal be dismissed, which the Court ordered. Thereupon the appellants excepted.

I. T. Drew, in support of the exceptions.

Tapley, contra.

The opinion of the Court was drawn up by

APPLETON, C. J.,—The road, as petitioned for, is a county road, running from a designated point in Lyman, through Dayton, to the line of the city of Biddeford, thence, through a part of Biddeford, to Main street in said city. By the Act of 1855, incorporating the city of Biddeford, c. 408, § 7, it is provided that "the county commissioners for York

county shall have power to lay out, within said city, any part of any new county road that shall by them be laid out in any adjoining town or towns, and shall pass thence into or through said city, according to the provisions of law," &c. The county commissioners, therefore, manifestly erred in supposing they had no jurisdiction over the road in question.

The appeal was properly taken. By R. S., 1857, c. 18, § 34, all parties interested, who appear at the time of hearing before the county commissioners, may appeal, and, it is not questioned, that the petitioners are parties interested, nor that they so appeared. The appeal, therefore, was erroneously dismissed. *Exceptions sustained.*

Appeal allowed.

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

TRISTRAM SCAMMAN *versus* THOMAS HUFF *& als.*

If it does not affirmatively appear from the justices' certificate of discharge of a poor debtor, or from the proofs in the case, that the justices were "disinterested," the certificate will not defeat an action on the bond. DAVIS, J., *dissenting.*

If seasonably moved for, the Court will allow an amendment of the certificate.

ON REPORT.

This was an action of DEBT, on a poor debtor's bond.

E. R. Wiggin, for the plaintiff.

Tapley, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—By R. S., 1841, c. 148, § 24, and by R. S., 1857, c. 113, § 25, the examination of a poor debtor is required to be "before two disinterested justices of the peace and quorum of the county." According to the form

of the certificate prescribed by § 31 of each of the Acts, the fact of the disinterestedness of the magistrates by whom the oath is administered, should appear on the face thereof. "We, the subscribers, two disinterested justices of the peace and quorum," is the language ordained by the Legislature. But the form prescribed is not followed.

It is neither shown by proof, nor by the certificate of the magistrates, that they were disinterested. That should affirmatively appear. In levies of executions the statute requires that the appraisers should be disinterested. If that be not shown by the return of the officer making the levy, it is void, *Russ* v. *Gilman*, 6 Greenl. 106; *Pierce* v. *Strickland*, 26 Maine, 277. So here, the records of the magistrates should show all the facts authorizing their official action. At any rate, their capacity to act should in some way be shown. It has not been done. There is no presumption in favor of the jursdiction of inferior magistrates, and, as there is no proof on the subject, we are not authorized to infer the performance of the conditions of the bond.

If, as was probably the case, the magistrates were disinterested, their record or certificate might, perhaps, have been amended in conformity with the truth, but no motion to that effect has been made.

Defendants defaulted, to be heard in damages.

RICE, KENT, WALTON and DICKERSON, JJ., concurred.

DAVIS, J.—An *appraisal* upon the levy of an execution, is not a *judicial* proceeding.

The *certificate* of the justices, upon a poor debtor's disclosure, is no part of the record. It is a paper given to the *debtor*, merely for his benefit. If *that* is insufficient, it does not follow that the *proceedings* were not correct, and according to the statute, and the bond.

Though required by statute, it is no more necessary for the justices to be *disinterested* in such a case, than in any other judicial proceeding. *Pearce* v. *Atwood*, 13 Mass., 324. But the fact that they are disinterested is not *put into*

the record in every case, in all inferior courts. If that is to be held necessary, then very few judgments of such courts can stand. If nothing is presumed *in favor* of the jurisdiction of such courts, nothing ought to be presumed *against it.* The record should show that the *case*, and the *parties*, were within the jurisdiction conferred by statute. But, when the record shows no such *want* of jurisdiction, an *extrinsic matter*, that would have had to be specially pleaded, presenting an issue of *fact*, ought not to be presumed, without proof. In other words, when any one would invalidate the judgment of an inferior court on the ground of *interest*, the burden of proof is upon him.

DANIEL W. LORD *versus* JOSEPH E. WILLARD.

The defendant wrote the plaintiff, — "Let E. W. have what flour he may want, on commission, and I will be responsible for the amount sold by him, for you, on commission." Such an agreement will not sustain assumpsit for goods sold and delivered to the defendant, as it is not a contract for the *purchase* of goods, nor authority *to sell* any to E. W. on his account.

EXCEPTIONS from the ruling of APPLETON, J.

This was an action of ASSUMPSIT, upon the written agreement of the defendant with the plaintiff, dated January 15, 1853, in these words; — "Let my brother, Evat Willard, have what corn and flour he may want, on commission, and I will be responsible for the amount sold by him, for you, on commission." This writing was read in evidence without objection. The plaintiff was then called by his counsel and testified that, in the summer of 1853, he delivered to Evat Willard corn and flour to the amount of about $1500. They were sold and delivered on the defendant's credit. *That*, Evat Willard was a man of no property or responsibility; he had refused to give him credit. Sold the goods on the credit of the defendant.

The plaintiff further testified, that he received the writing of the defendant, from Evat Willard, immediately after its date. That he has received payments, at several times, of Evat Willard. The last goods delivered to said Evat was on May 12, 1853.

The writ contained a count for goods sold, &c., and general money counts.

On defendant's motion, the Court directed a *nonsuit* of the plaintiff to be entered, to which order the plaintiff excepted.

Tapley & Smith, in support of the exceptions.

Appleton & Goodenow, *contra*.

The opinion of the Court was drawn up by

DAVIS, J. — The defendant, Joseph E. Willard, gave the plaintiff a written agreement, dated Jan. 15, 1853, of which the following is a copy: —

"Let my brother, Evat Willard, have what corn and flour he may want, on commission, and I will be responsible for the amount sold by him, for you, on commission."

Upon this agreement the plaintiff delivered to Evat Willard corn and flour to a large amount, the date of the last delivery being May 12, 1853. He testified, at the trial, that he "*sold* the goods, on the credit of the defendant." The action is assumpsit for goods sold and delivered. Some payments were made by Evat Willard, the last of which was Nov. 6, 1855. The writ is dated Oct. 4, 1859. One of the defences is the statute of limitations.

The contract of the defendant was not for the *purchase* of goods. He neither bought any corn and flour himself, nor did he authorize the plaintiff *to sell* to his brother, on his account. But he proposed to the plaintiff, if he would make his brother an agent, to sell corn and flour *for him*, he, the defendant, would be responsible for the amount so sold. The defendant limited the terms and conditions of his responsibility; and the plaintiff could claim nothing without conforming to them.

If Evat Willard had been a factor of the plaintiff, and had sold goods for him, a suit could not have been maintained for the proceeds without a previous demand. And the statute of limitations would have begun to run from the date of such demand. But, in this case, no such demand is alleged, or proved. It is obvious that there are no data for applying this defence. The right of action never accrued.

Neither count charges the defendant for any liability incurred by Evat Willard as an agent of the plaintiff; nor would the evidence support such an action. The transaction was not within the terms of the defendant's agreement; and the nonsuit was properly ordered.

Exceptions overruled.

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

HENRY B. METCALF & *al. versus* GEORGE C. YEATON.

The plaintiffs sued as assignees under the insolvent laws of Massachusetts, which can operate only *intraterritorially*.

It is no cause for exception that they were allowed to amend their writ by striking out the words descriptive of the character in which they sued.

The production of notes given to the insolvent debtor, and by him indorsed in blank, is *prima facie* evidence of ownership. Being the holders of the notes, they may fill up the indorsements, so as to make them payable to themselves.

ON EXCEPTIONS and STATEMENT OF FACTS.

This was an action of ASSUMPSIT on two promissory notes hereafter described. The plaintiffs were described in the writ as citizens of Massachusetts, and as assignees of Joel M. Holden of Newton, in said State, an insolvent debtor. At the first term, in May, 1863, the plaintiffs moved for leave to amend their writ, by striking out the words describing them as assignees. The defendant objected on the ground that the writ was not thus amendable; but WALTON, J., presiding, overruled the objection and allowed

the amendment to be made; to which ruling the defendant excepted.

At the May term, 1864, the parties agreed upon a statement of facts, for the decision of the case by the full Court.

This action is upon two promissory notes signed by the defendant, given for a good and valuable consideration, and dated at Boston, in the Commonwealth of Massachusetts, one upon the 11th day of June, 1860, and the other on the 13th day of August, 1860; the first note being for $119,38, and the other for $119,39, each payable in six months from its date to Joel M. Holden or order. Said Holden, before the maturity of said notes, indorsed each of them in blank, to the Blackstone Bank in Boston, where they were discounted, which is the only indorsement he ever made of said notes.

Yeaton did not pay them when due (nor has he since) but they were paid and taken up at maturity by said Holden, as indorsee, to prevent their being protested, and afterwards said Holden went into insolvency under the statutes of Massachusetts, and the plaintiffs were duly appointed under said statutes the assignees of said Holden, and a commission issued to them, as such, under said statutes, on the 13th day of March, 1861.

The notes declared on came into the possession of the plaintiffs, under and by virtue of the proceedings in insolvency with said blank indorsement thereon, and none other, together with all of the other property of said Holden, and they still hold said notes, as such assignees, and for the benefit of the creditors of said Holden. They never paid any consideration to said Holden for said notes, but he surrendered said notes to the plaintiffs, as said assignee, under the decree and order of the Court of Insolvency for the County of Middlesex and Commonwealth of Massachusetts, (they having been appointed and commissioned by said Court, as said Holden's assignees, as aforesaid,) and in order to obtain his discharge under the insolvent laws of said Commonwealth.

The plaintiffs claim in this suit to recover as indorsees of said Holden, as by the writ and other pleadings in said suit (which with the two notes declared on are to be copied and made part of the case) appear. At the time said notes were made, the plaintiffs and defendant and said Holden were citizens of Massachusetts, but prior to the commencement of this suit, the defendant became and still is a citizen of Maine.

It is also admitted and agreed that this suit is brought with the approbation and consent of said Holden.

H. H. Hobbs, for plaintiffs.

Tapley & Smith, for defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — The writ originally described the plaintiffs as assignees. The Court allowed an amendment by striking out the words descriptive of the character in which they sued. This amendment was within the discretion of the Court and furnishes no ground of exception. *Lester* v. *Lester*, 8 Gray, 437.

The notes in suit were payable to Joel M. Holden, or order, and by him indorsed to the Blackstone bank, but, not having been paid by the maker at maturity, they were taken up by the indorser. The plaintiffs are the holders of the notes thus indorsed and remaining unpaid. Their production by the plaintiffs is *prima facie* evidence of their ownership of the same. *Lord* v. *Appleton*, 15 Maine, 270; *Pettee* v. *Prout*, 3 Gray, 502; *Golder* v. *Foss*, 43 Maine, 364. The plaintiffs being the holders have the right to fill up the indorsement, so as to make the notes payable to themselves.

The insolvent laws of Massachusetts operate only within its territorial limits. The plaintiffs could no more sue as assignees than as administrators deriving their authority from and under the statutes of that State. *Beaman* v. *Elliot*, 10 Cush., 172; *Brush* v. *Curtis*, 4 Conn., 312; *Upton* v. *Hubbard*, 28 Conn., 274.

The defendant has not paid the notes, nor has he shown any defence to the same. A payment of the judgment rendered in this case will afford him ample protection.

Defendant defaulted.

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

COUNTY OF OXFORD.

ELEAZER A. HOLMES *versus* CHARLES DURELL.

If a surety on a note indorses thereon a payment as having been made by himself, the statute of limitations will be no bar to an action against him, commenced within six years from the time of such payment, notwithstanding he may have paid the money as the agent of the principal, if he did not disclose that fact.

And so, if the money thus paid was received from the sale of property pledged to him by the principal, to indemnify him against loss by becoming surety.

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

ASSUMPSIT upon a promissory note signed by Stevens & Staples, the defendant and three others. From the case it appeared that Stevens & Staples were the principals in said note, which was of the tenor following:—"Oxford, April 18, 1848. For value received, I promise to pay E. A. Holmes, or order, three hundred dollars in one year and interest." The defendant pleaded the statute of limitations. Two of the several indorsements were admitted to be written in the hand of the defendant, and these payments purported to have been made by him.

The facts in the case, and the questions of law argued by the counsel, will be readily perceived from the opinion of the Court.

Virgin, for the plaintiff.

Perry, for the defendant.

The opinion of the Court, (the case having been argued and determined in 1865,) was drawn up by

KENT, J.—The only question in the case is, whether the payments made by the defendant, one of the signers on the note in suit, takes it out of the operation of the statute of limitations. The last payment was made within six years before the commencement of the suit, by the defendant, who himself made the indorsement of the payment, which was in money. Several payments had been made on the note—one of which was made, soon after it became due, by the defendant. This payment was less than six years before the last payment by the defendant above stated. If the payments and indorsements were operative, so far as the statute of limitations is concerned, there was no time when the statute barred an action on this note against the defendant. It also appears that the four last signers, including the defendant, were sureties for the first signers, and that this fact was known to the plaintiff when the note was executed.

It is not denied by the defendant that the payments and indorsements made by him prevent the operation of the statute, unless that result is avoided by the other fact, which he claims that he has established, viz., that the payments were made from the funds of the principals in his hands.

The result of the evidence on this point seems to be, that the defendant and other sureties on this and another note to a third party, held certain real and personal property as collateral security, which was disposed of from time to time and the proceeds applied to the payments on this and the other note. The evidence leaves the exact facts somewhat in obscurity. The defendant himself states generally, that "he did not pay his own money or funds; that he paid nothing but money," and that the sums indorsed by him were paid from the funds of the principals. He gives no explan-

ation or statement of the facts beyond these general allegations.

It would seem probable, from the testimony of Mr. Perry, that the last payment of five dollars was made by the defendant, after he had received that sum from the sale of a gig, one of the articles held by the sureties as collateral security. When the payments were made, the plaintiff was not informed, and did not know, that the payments were made from any other money than that of the defendant's; "nothing being said, as to whose money it was."

The case, stated most strongly for the defendant, raises the question, whether such a payment, so made, takes the case out of the operation of the statute, if it is proved that the payment was made by money received by the defendant from the sale of collateral securities.

The ground on which effect is given to a partial payment and indorsement, is, that it is a distinct admission that, at the time of payment, the debt is still unpaid and subsisting. There are two parties interested in this admission and payment. The debtor is interested to have the debt diminished and in having the indorsement on the note as evidence of the fact. The creditor, who has a right to regard all the signers as equally bound to him, whether sureties or principals, is interested, not merely in the sum paid, but also in the fact that, by such payment, the party making it admits a subsisting debt at the time, which admission, as to him, will be binding for six years from its date. If, at the time of payment, the party discloses that he is paying the money of the principal, received from him for that purpose as his agent, and that it must be so regarded, then, of course, the principal only would be bound. But why should a creditor be deprived of the right, which the law gives him and which rests upon the fact that the debtor has made a voluntary payment, in person, and has indorsed the payment, as made by himself without disclosing any other fact? The creditor has a right to rest in security on the strength of such a payment and indorsement, for six years. It is, as if the debtor

had given a new note on that day. It is a fixed, statute right. But if, before the expiration of the six years from the payment, but more than that time from the first promise, a suit is instituted, is it just or legal for the debtor to then come in and say, what he ought to have said at the time, "I made this payment from the funds of the principals in my hands"?

But further, this is not a case, where the surety took money from the principal merely to carry it to the creditor. At most, it is the case where the surety has, before payment, received money from the sale of goods held as security. When this money was received by him, it became his own. He might use it for other purposes, leaving his liability on the note, and paying it at his leisure, accounting to the principal for the sum he had received from the collateral security. It was not, strictly speaking, the principals' money which he paid, but his own money. It was simply what he had obtained from his security, changed into money. If he had kept the property and paid the money on the note, would it be contended that he paid over money of the principals, entrusted to him for that purpose? Does it alter the case when the property held is changed into money and the surety pays over the same amount on the note? It is a payment by the surety.

The counsel for the defendant cites and relies upon the case of *Lime Rock Bank* v. *Mallet*, 42 Maine, 349. There are manifest distinctions between that case and the one at bar. In that case, no question arose in relation to the *statute of limitations*. The question there was, what effect a subsequent payment by a surety had upon the case, where, as it was contended, there had been an extension of credit without the assent of the surety, which operated as a discharge of the defendant before the payment. The payment had no effect to take the case out of the statute, as in this case. The plaintiff thereby acquired no fixed, legal right by the act. He was not led to rely upon the act, as one operating as a new promise. The Court say—"the

bank was not injured by this payment through the agency of the defendant, when no longer holden on the note." The money was in fact, in that case, furnished by the principal to be paid over by the surety, which commission he executed. It was therefore considered as a payment by the principal, and the fact that no disclosure was made at the time, of the agency, was of no consequence, as the condition of neither party was affected thereby. But, in this case, when the payments were made, the debt was subsisting and the debtor liable, and, as we have seen, the plaintiff had a right to rest upon the payment by the defendant, as a renewal of his promise, which would remain good for six years thereafter, if he made no disclosure of the facts, but indorsed it as paid by himself. The plaintiff may have been thus led to delay the suit against the defendant. At all events, it very seriously affects his rights and subjects him to a total loss of his debt, if the defendant can now defeat the effect of the payments thus made, by showing that he made the payments from funds furnished to him in fact by the principals. We think that the case cited does not cover this case in the essential points named, even if we could find, on the evidence, that the money paid by the defendant was in fact the money of the principals, furnished to the surety to be directly paid over on the note. Our opinion on the case is, that the defendant must be defaulted.

Defendant defaulted.

Judgment for amount due on note.

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

STATE *versus* EPHRAIM GILMAN.

On the trial of an indictment for murder, the prisoner's testimony before the coroner's inquest upon the body of the person alleged to have been murdered, given without objection by him, before his arrest, though after he had been charged with the murder, and after being cautioned that he was not obliged to testify to anything which might criminate himself, and not purporting to be a confession, is admissible as evidence against him.

ON EXCEPTIONS to the ruling of GOODENOW, J.

INDICTMENT FOR MURDER.

The question raised by the exceptions is stated in the opinion of the Court.

Howard & Strout, for the prisoner.

The deceased, Harriet B. Swan, was found in bed and lifeless, on the morning of June 18, 1861. The prisoner had resided in the family of the deceased more than two years. He was *accused by the daughter, that morning, of being the murderer of her mother.* On the same day, a coroner's inquest was held on the body of the deceased, before which the prisoner was called by the coroner, and sworn, and testified. His testimony was taken down in writing by one of the jury, and signed by the prisoner. The exceptions state that "he was cautioned before giving his testimony, that he was not obliged to testify to anything which might criminate himself," "and that he made no objections to giving this testimony."

It does not appear by whom the prisoner was thus "cautioned," but it does appear that he was *without counsel.*

The coroner had authority to summon the witness, or to issue subpœnas for witnesses to be served as in other cases, and it was his duty to administer the prescribed oath to each witness. But it was not his *duty* to *caution* or to *instruct* the witnesses, before they gave their testimony. R. S., c. 139, §§ 5, 6, 9.

The exceptions present the question whether the prison-

er's testimony, thus taken, was admissible, against objections, on his trial for the alleged murder.

We hold that his testimony should not have been received, but should have been excluded.

I. Upon principle.

By the common law, *nemo tenebatur prodere se ipsum, vel accusare*, "and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men." 4 Black. Com., 295.

"Nor shall he be compelled to furnish or give evidence against himself." Const. of the United States, Amendment, Article 5.

"He shall not be compelled to furnish or give evidence against himself." Const. Maine, Art. 1, § 6.

The prisoner was legally sworn, and required to testify. The proceedings were in a measure compulsory against him. He could not object to testifying, without quickening suspicions then existing against him, as shown by the accusations of the daughter.

He was without counsel, or adviser, so far as the exceptions show. He was then writhing under the charge of murder directly cast upon him, and *in danger of prosecution for murder*. He was indeed *suspected, and he knew it*. Under the crushing weight of the suspicion and charge, he could not have been unembarrassed or self-possessed; and could not have testified freely and calmly. His confessions and statements, under such circumstances, were neither *free* nor voluntary. And it does not alter the case, that, being without counsel or adviser, he did not object to testifying, or to being sworn; or that he was "cautioned before giving his testimony, that he was not obliged to testify to anything which might criminate himself," by somebody, but by whom it does not appear. By somebody, perhaps, whose caution was meaningless and unnoticed.

He was not told that the testimony he should then give might be used as evidence against him; or that he was not

bound by each and all of the requirements of the oath administered to him. R. S., c. 139, § 5.

Although the prisoner did not make a *confession*, in his testimony before the Coroner's Inquest; yet he detailed, with great particularity, a series of facts and circumstances which led to his immediate arrest, confinement and subsequent prosecution; and on which the government rely for his conviction. These statements or admissions were *extorted* from him by an official examination, and in the course of judicial proceedings. So the prisoner was compelled, though probably unconsciously, to weave the web for his own pall.

Disguise it as they will, the prisoner was made to condemn himself, if the facts stated by him can justly lead to his condemnation. For without his admissions thus obtained, — thus cruelly drawn from him, the government could not have claimed a conviction, as we have a right to infer, from the fact that they were pressed into evidence at the trial.

A judicial oath administered to one whose mind is agitated and disturbed by an inquest upon the body of one whom he is suspected and accused of murdering, would naturally prevent free and voluntary mental action; and this is the reason why evidence thus given should be excluded, on his trial for the offence.

The head and heart alike revolt at the suggestion of obtaining testimony by *torture*, for any purpose, and especially for the conviction of a capital offence, and where the tortured is made to condemn himself.

There was *moral torture* brought to bear upon the prisoner before the inquest, and the testimony obtained from him is supposed to be fatal. It is invoked for his condemnation.

Such testimony must be regarded by the Court as, not only not *free and voluntary*, but *unreliable*. It is too strategic and inquisitorial — and ought not to have been received. Neither truth nor justice requires such means to establish a criminal charge.

The oath prescribed by statute, (R. S., c. 139, § 5,) is as follows: —"You solemnly swear that the evidence which you shall give to this inquest, concerning the death of the person here lying dead, shall be the truth, the whole truth, and nothing but the truth, so help you God." This oath was administered by the coroner to the prisoner, as a witness before the inquest; and it was an *inducement* and more, presented to him, to confess and disclose all, concerning the subject matter of the death, as under Divine sanction. Was it not a solemn declaration and injunction to him, to tell all he knew of the matter, if he desired the help of God? What higher inducement could have been held out to him, in order to obtain a full confession?

If the coroner had said as much to him, without the sanction of an oath, — as if he had said you had better confess, — you ought to tell all you know about it — or you must do it, if you want the favor of God — it is very clear that a confession or admission thereupon made would not have been received as evidence against the prisoner. Was the inducement less effective, when made under the form and solemnity of an oath?

The course proper to be taken by the coroner, in cases like this at bar, is very clearly stated by GURNEY, B., in *Rex* v. *Greene*, 5 C. & P., 312, (24 Eng. C. L., 581,) as follows: — "A prisoner ought to be told that his confessing will not operate in his favor: and that he must not expect any favor because he makes a confession; and that if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition, it ought to be left entirely to himself whether he will make any statement or not." The rule and the directions apply with equal force where the person is compelled to testify, for the purpose of establishing his own connection with the crime — of which he was then suspected and accused of being guilty. If the coroner had pursued the course, and

had given the instructions suggested by Baron GURNEY, and which have been sanctioned by a long usage in England, at least, the statements of the prisoner, if made after such caution, might, perhaps, have been properly received against him on his trial.

In this respect the English statute, 11 & 12 Victoria, c. 42, § 18, deserves the highest commendation and respect for the humanity of its provisions, for parties charged with felonies or misdemeanors. So of the statute of New York, Part 4, c. 2, Title 2, §§ 14, 15. 1 Archbold's Cr. Practice, by Waterman, *132. "Such, (says the author) is the humane provision of the English law, to prevent a prisoner from committing himself, by any unadvised admission, which otherwise, in his confession and agitation arising from the proceedings against him, he might make without calculating on its consequences.

"It is in the true spirit of fairness towards the prisoner, which distinguishes the administration of criminal justice in this country, from its administration in any other country in Europe."

II. Upon authority.

There has been an apparent conflict of authorities on the question presented in this case, resulting in part from imperfect statements of the cases, and the principles settled, and from the different nature of the jurisdictions of courts, as well as from different statute regulations. Those cases involving simply the construction of the statutes 1 and 2 Phil. & M., c. 13; 2 and 3 Phil. & M., c. 10; 7 Geo. 4, c. 64; and 11 and 12 Vic., c. 42; and being cases of confessions and declarations of prisoners, under arrest, can have little application to this case, except by way of analogy and illustration.

But the cases most cited in elementary treatises and discussions, and which have a direct bearing on this, are referred to in 2 Russell on Crimes, 857—860, and notes; 1 Archbold's Crim. Law, 412; Roscoe's Crim. Ev., 45; 2 Stark. Ev., 28; 1 Greenl. Ev., §§ 224—226, and are much

discussed in some of the cases to which we shall refer hereafter.

The cases in which the previous statements of a person, *made under oath*, can be offered against him, on trial for crime, may be arranged in three classes.

1. Where the oath was administered to him in some proceeding, in which the crime itself was not under investigation directly.

2. Where it was administered by a magistrate in some preliminary examination as to the crime.

3. Where it was taken before a coroner's inquest.

Rex v. *Merceron*, 2 Stark. R., 366, *Regina* v. *Wheater*, 2 Moody's Crim. Cases, 45, belong to the *first* class.

Rex v. *Lewis*, 6 Car. & P., 161, (25 Eng. C. L., 373,) *Rex* v. *Davis*, 6 Car. & P., 177, (25 Eng. C. L., 381,) *Rex* v. *Haworth*, 4 Car. & P., 254, (19 Eng. C. L., 502,) belong to the *second* class. In the first two, the proof offered at the trial was rejected; but, in the third, it was received, upon the ground that the statement was made by him "before the prisoner was either *charged* or *suspected* of any crime." And so it was held in *Rex* v. *Tubby*, 5 Car. & P., 530, (24 Eng. C. L., 691.)

The cases of *Regina* v. *Owen & als.*, 9 Car. & P., 83, (38 Eng. C. L., 60,) *Regina* v. *Owen & als.*, 9 Car. & P., 238, (38 Eng. C. L., 149,) *Regina* v. *Wheeley*, 8 Car. & P., 250, (34 Eng. C. L., 375,) *Regina* v. *Sandys*, 1 Car. & Marsh., 345, (41 Eng. C. L., 191,) and the case referred to in the note to *Haworth's* case, belong to the *third* class. And, in *Owen & als'*. *first* case, and in *Sandys'* case, the evidence was received *de bene* only, and the question was reserved for the fifteen Judges, and never afterwards considered, as in both cases the prisoners were acquitted; while, in the *second* case of *Owen & als.*, and in *Wheeley's* case, and the case cited in the note to *Haworth's* case, the evidence was rejected.

This classification, as stated by SELDEN, J., in *Hendrickson's* case, discloses the striking fact, that there has, so far

as appears, never yet been a single *reported decision* in England, in favor of the admissibility, under any circumstances, upon a trial for murder, of the examination of the prisoner before a coroner's jury.

The two cases in which it was received, reserving the question, have not the weight of decisions, even at the assizes; because that is the only mode in which the opinion of the Court *in banco*, in England, can be obtained. So far as authority goes, therefore, there are *three decisions* at the English assizes against, and *not one* in favor of its admissibility.

In *State* v. *Broughton*, 7 Iredell, (North Carolina,) 96, the prisoner had been examined before the grand jury, on oath, respecting the murder for which he was subsequently indicted. His statements before the grand jury were admitted against him, on his trial, on the ground that they were voluntary. But it does not appear that, at the time of the examination, the prisoner was implicated or suspected of the crime; and his statements were not likely to have been affected by his position at the time of testifying, or by attending circumstances. But this case, though somewhat peculiar, expressly recognizes the correctness of the decision in *Lewis'* case.

In *The People* v. *Hendrickson*, 6 Selden, (N. Y.,) 13; same case, 1 Parker's Cr. Cases, 396, 423, the authorities were fully examined and much discussed. The case was tried at Oyer & Terminer, at Albany, July, 1853, when the statements of the prisoner, upon oath, before the coroner's inquest, were offered, and received, on his trial for the murder.

Exceptions were taken on that and other grounds by the prisoner, after verdict against him. WRIGHT, Justice, at Chambers, sustained the exceptions, so far as to allow a writ of error, mainly on the ground of the exception to the admission of such statements, as evidence against the prisoner.

In the Supreme Court, opinion by HARRIS, Justice, the judgment of the Court at Oyer & Terminer was affirmed.

The case then went to the Court of Appeals, where the judgment was affirmed by a majority of that Court, *voting* 6 to 2. The opinions by WRIGHT, and HARRIS, and PARKER, in the Court of Appeals, review the cases somewhat at length. And the opinion of SELDEN, Justice, dissenting, in the Court of Appeals, is very searching, critical and thorough, and under our law and practice, conclusive against the admissibility of this evidence.

In *The People* v. *McMahon*, 1 Smith's R., 384, Court of Appeals, N. Y., 1857, it was held that such evidence was not admissible on the prisoner's trial for murder. And it was then distinctly held that "a judicial oath administered when the mind is agitated and disturbed by a criminal charge, may prevent free and voluntary mental action, and this is the reason for excluding evidence thus given." The statements, thus offered and rejected, had been made by the respondent upon oath, before a coroner's inquest, in reference to the death of the person, for whose murder he was afterwards indicted. He had been arrested by a constable, though without warrant, and taken before the coroner on suspicion of being the murderer of his wife, upon whose body the coroner was then holding an inquest.

In *Commonwealth* v. *King*, 8 Gray, (Massachusetts,) 501, the testimony of a person given under oath, before a coroner's inquest, to investigate the origin of a fire, and where the punishment by statute could be only imprisonment not exceeding ten years, was admitted, on his subsequent arrest and trial for the supposed offence. But the testimony was given before any prosecution was instituted against any one; and it would seem before any suspicion attached to the prisoner, and before he was in any manner implicated. He could not have been conscious, when testifying, that any suspicion rested upon him, and his mind was not agitated or disturbed by any such consideration.

His statements were free and voluntary, and without embarrassment apparently.

It is submitted that that case cannot properly be invoked, as sustaining the position taken by the government in this case. In that, the offence was but a misdemeanor; in this, it is capital, and that would constitute a marked distinction between the two cases, even if there were no other difference.

No other reported case has been found in the Reports of that State.

In this State, the testimony has been excluded invariably, until offered in this case.

In *State* v. *Knight*, 43 Maine, 11, on the trial of the prisoner for murder, his testimony at the coroner's inquest, before any arrest was made, was offered and excluded, and the prisoner was convicted.

In *State* v. *Coffin*, tried in Oxford county, August term, 1861, such testimony was in like manner offered and excluded.

There is a manifest distinction between the examination of a person upon a direct inquiry as to a crime with which he is subsequently charged, and his testimony in another case. This distinction is clearly stated and maintained by Mr. Greenleaf. After having stated the decision in *Rex* v. *Lewis*, he says:—"This case may seem, at the first view, to be at variance with what has just been stated, as the general principle in regard to testimony given in another case, but the difference lies in the different natures of the two proceedings. In the former case, the mind of the witness is not disturbed by a criminal charge, and, moreover, he is generally aided and protected by the presence of counsel in the cause, but in the latter case, being a prisoner subjected to an inquisitorial examination, and himself at least in *danger of an accusation*, his mind is brought under the influence of those disturbing forces, against which it is the policy of the law to protect him." 1 Greenl. Ev. § 226. *The*

People v. *Hendrickson*, 6 Selden, (N. Y.,) 13, the dissenting opinion by SELDEN, Justice.

And the distinction is just as clear and cogent, where the witness, though not a prisoner at the time, is subjected to an inquisitorial examination, *conscious that he is suspected, and in danger of a prosecution;* for his mind would be subjected to the same disturbing forces, against which it is the dictate of humanity, as well as the policy of the law, to protect him.

If it be wrong to wring from a person, under prosecution, testimony to support it, it is equally wrong to do so, to procure his prosecution.

Drummond, *Attorney General*, for the State.

The opinion of the Court was drawn up by

RICE, J.—To elicit truth is the object of human testimony. All rules for the production of testimony are constructed with a view to accomplish this object. Testimony, therefore, which, in the opinion of the lawgiver, tends to this end, is received, while that which is of an opposite or even doubtful tendency, is rejected as untrustworthy and incompetent.

In criminal cases, the common law is more guarded in its rules for the introduction of testimony, than in civil proceedings, and, from its regard for life and liberty, excludes many facts and circumstances as being of doubtful tendency which it receives unchallenged in civil suits. Of this character are certain classes of confessions of parties charged with crime.

In civil proceedings all the admissions or confessions of a party may be given in evidence against him. In criminal cases such confessions, to be admissible, must not only be voluntarily made but without undue influence also.

That no one is bound to accuse or betray himself, are maxims of the common law. Nor shall he be bound, in a criminal case, to furnish or give evidence against himself.

Const. of U. S., Art. 5, Amendments; Const. of Maine, Art. 1, § 6.

In the case at bar, the government was permitted to introduce, on trial, against the prisoner, the testimony which he had given before the coroner's jury, when the cause of the death of the person for whose murder he was then on trial was under investigation. At the time of the investigation before the coroner, the prisoner had not been arrested, though it appears in the case that he had been charged with the murder. He was cautioned, before giving his testimony at the coroner's inquest, that he was not obliged to testify to anything that might criminate himself; and he made no objection to giving his testimony. His testimony contained no confession that he had any knowledge of, or in way participated in, the death of the deceased. On the other hand, he denied all such knowledge or participation.

The question presented is, was this testimony in the eye of the law voluntary, and given without improper influence?

The objection is, that it was under oath, and therefore, in legal contemplation, compulsory.

Prior to the statutes of 1 and 2 Phil. and Mary, c. 13, 2 and 3 Phil. and Mary, c. 10, and 7 Geo. 4, 64, the examination of a prisoner before the magistrate, touching his guilt or innocence, was not warranted by law, for, at the common law, his fault was not to be wrung out of himself, but rather to be proved by others. 1 Phil. Ev., 114, n.

Under these statutes, the practice of examining the prisoner when charged with crime seems to have originated in courts of common law. This practice has been very carefully regulated and guarded by the more recent statute of 11 & 12 Victoria, c. 42, in which the mode of proceedings on the part of the magistrate is very minutely pointed out.

Under the earlier statutes, the information against the prisoner before the magistrates are to be taken on oath; the account given by the prisoner ought to be taken without oath. If the prisoner has been sworn, his statements cannot be received; and, if the written deposition of the prisoner

purports to have been taken on oath, evidence is not admissible for the purpose of showing that, in point of fact, he was not sworn. 1 Phil. Ev., 113; 2 Russ. on Crimes, 855; *Rex* v. *Smith*, 1 Stark. R., 242; *Rex* v. *Rivers*, 7 Car. & P., 177; *Rex* v. *Walter*, 7 Car. & P., 267; *Rex* v. *Davis*, 6 Car. & P., 177.

The prisoner is not to be examined on oath, for this would be a species of duress and a violation of the maxim that no one is bound to criminate himself. 4 Stark. Ev., 52.

It is worthy of remark, that this practice of examining the prisoner before the magistrate seems to have originated in a desire to compel the magistrate to discharge his duty, rather than to extract evidence from the prisoner prejudicial to himself.

Hence the preamble to c. 13, 1 & 2 Phil. and Mary, among other things, recites "that one justice of the peace in the name of himself and one other of the justices, his companion, not making the said justice party nor privy unto the case wherefore the prisoner should be bailed, hath often times, by sinister labor and means, set at large the greatest and notablest offenders, such as be not repleviable by the laws of the realm; and yet rather to hide their affection in that behalf, have signed the cause of their apprehension to be but only *suspicion* of felony, whereby the said offenders have escaped unpunished, and do daily, to the high displeasure of Almighty God, the great peril of the king and queen's subjects, and the encouragement of all thieves and evil doers. For the reformation whereof § 4 provides:—

"That the said justices, or one of them, being of the quorum, when any such prisoner is brought before them for any manslaughter or felony, before any bailment or mainprize, shall take the examination of said prisoner, and information of them that bring him, of the facts and circumstances thereof, and the same, or so much thereof as shall be material to prove the felony, shall put in writing before they make the same bailment; which said examination, together with said bailment, the said justices shall certify to

the next general goal delivery to be holden within the limits of their commission."

Chapter 10, 2d & 3d Phil. and Mary, contains similar provisions relative to the examination of prisoners *suspected* of manslaughter or felony. Neither of these Acts provide that the prisoner, or "those who bring him," shall be examined on *oath*. But c. 64, 7 Geo. 4, § 2, provides that the magistrate shall take the examination of the prisoner, and the information *upon oath* of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, in writing. These examinations, thus reduced to writing, were made competent evidence against the prisoner upon trial. Being armed with this inquisitorial power, and, by law, compelled to use it, the certified examinations made by the magistrate become most potent evidence against the prisoner, and, to protect him, as far as practicable, in his common law rights of not being obliged to criminate himself, courts stood by the letter of the statute and refused to receive any statement of the accused, which had been made by him before the examining magistrate under oath, on the ground that such sworn statements were not voluntary confessions, but coerced self criminations.

The courts, in some cases, went still further and not only excluded the sworn statements of the accused, when made before the examining magistrate, but also statements of the accused when made before other tribunals as witnesses, under oath. Thus, in *Rex* v. *Lewis*, 6 Car. & P., 161, the prisoner was examined as a witness before a magistrate, before any specific charge was made against any one, but, on the conclusion of the examination, the prisoner was committed for trial. The examination was offered on trial, but was rejected by GURNEY, B., on the ground that the examination was not perfectly voluntary.

In *Regina* v. *Wheely*, 8 Car. & P., 250, a party, who was charged with murder, made a statement before a coroner at the inquest, which was taken down. The statement was

apparently on oath. ALDERSON, B., excluded the testimony on trial, and also excluded parol testimony to show that the statement really was not made on oath.

In *Regina* v. *Owen & als.*, 9 Car. & P., 238, the depositions of the prisoners, taken before the coroner on oath, were rejected on their trial for murder, though they had been received when the same parties were on trial for rape upon the person with whose murder they were subsequently charged.

In a note to *Howarth's* case, 4 Car. & P., 254, it is stated that in a case at Worcester, where it appeared that a coroner's inquest had been held on the body, and it not being suspected that B was at all concerned in the murder of A, the coroner had examined B on oath as a witness. PARKE, J. would not allow the deposition of B, so taken on oath, at the coroner's inquest, to be read in evidence on the trial of an indictment afterwards against B for the same murder.

These cases were all *Nisi Prius* decisions, and evidently follow the cases before cited, which were based upon the statutes to which reference has already been made. The analogy between the two classes of cases is very close, especially when the examination was with reference to the subject matter for which the prisoner was subsequently tried, and where at the time he was conscious of the jeopardy in which he stood. But they do not fall under the same statute or technical rule.

There is another class of cases in which the same kind of testimony, with little apparent distinction of circumstances, has been admitted. Thus, in *Rex* v. *Merceron*, 2 Stark. R., 366, which was an indictment against the defendant for misconduct as a magistrate, it was proposed to prove on the part of the prosecution what had been said by the defendant in the course of his examination before a committee of the House of Commons, appointed for the purpose of inquiring into the police of the metropolis, where he had been compelled to appear. It was objected by the defendant that the examination, having been made under compulsory pro-

cess from the House of Commons, it was not voluntary, and therefore not admissible, but ABBOTT, J., admitted it.

In *Rex* v. *Howarth*, 4 Car. & P., 254, which was an indictment for forgery, the counsel for the prosecution called the clerk of the magistrate by whom the defendant had been examined, who stated that, before the prisoner was either charged or suspected of having committed any offence, he was called as a witness against one Shearer who was tried for forgery, and swore to a deposition, which, being offered in evidence, was admitted by PARKE, J.

In *Rex* v. *Tubby*, 5 Car. & P., 530, it was proposed to read a deposition made by the prisoner when not under any suspicion, which was objected to, but VAUGHAN, B., remarked, "I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it the statement of the *prisoner* upon oath? Clearly it is not, for he was not a prisoner when he made it."

The learned Baron evidently had in his mind the statutes which have been cited, and, perceiving that the case did not fall within their provisions, that is, perceiving that the defendant was not under examination for the offence when the deposition was given, admitted it though under oath.

In the case of *Regina* v. *Wheater*, 2 Moo. Cr. Ca., 45, which was an indictment for forgery, on trial the examination of the prisoner on oath as a witness, before the commissioners of bankruptcy, concerning the bills alleged to have been forged, was held admissible as evidence against him. The case was subsequently examined before all the Judges except PARKE, J., and GURNEY, B., who held that the evidence was properly admitted.

In *Regina* v. *Owen & als.*, 9 Car. & P., 83, on an indictment for rape, the statements made by Owen on oath, at the inquest, held on the body of the person ravished, was admitted in evidence by WILLIAMS, J., against objection. The prisoners in this case were acquitted, but were subsequently tried for the murder of the same person, and the

same statement was offered but rejected. This case has been cited above. 9 Car. & P., 238.

In *Regina* v. *Sandys*, 1 Car. & Marsh., 345, the prisoner was tried for murder, and her deposition, taken at the coroner's inquest, was received in evidence against her, by ERSKINE, J., who reserved the point of its admissibility for the consideration of the fifteen Judges.

The foregoing are among the leading English cases upon this subject. With the exception of *Wheater's* case, they were *Nisi Prius* decisions. So far as they fall within the provisions of the statute, the reasons on which they were made is obvious. So far as they are outside of the statute, it is not easy to discover any principle or rule by which they can be reconciled. In point of numbers merely, the authority would preponderate in favor of admitting the evidence, and that preponderance is increased when it is remembered that *Wheater's* case has the sanction of the whole Court.

In this country, the reported cases bearing upon this question are not numerous. In New York and several of the other States, statutes exist relative to the examination of persons charged with crime, of a character similar to the English statutes. In this State, however, we have no such statute provision.

In the case of *People* v. *Thayer & als.*, 1 Park. Cr. Ca., 596, Isaac Thayer, one of the prisoners, voluntarily appeared before the committing magistrate and gave evidence when the case of one of the other prisoners was on examination. The Court held that he could not object to the admission as evidence against himself, of the statements he had made under oath on that examination.

In *Hendrickson* v. *The People*, 6 Selden, (N. Y.,) 13, the statement of Hendrickson, made on oath before the coroner, before he was charged with the crime for which he was subsequently indicted and tried, was on his trial admitted in evidence against him. The case was subsequently carried to the Court of Appeals, where it received a very

full examination, both by counsel and the Court, and the admission was held to be right by a majority of the Court, in an opinion by PARKER, J. SELDEN, J., delivered an able dissenting opinion.

In *People* v. *McMahon*, 1 Smith, (N. Y.,) 384, the defendant had been arrested by a constable without warrant, and brought before a coroner who was then holding an inquest on the body of the deceased, for whose murder the defendant was subsequently indicted, where he was examined as a witness on oath, without objection on his part. His statements then made were offered in evidence against him on trial. The question of the admissibility of the evidence was presented to the Court of Appeals, and held inadmissible in an elaborate and learned opinion by SELDEN, J. See also *Commonwealth* v. *King*, 8 Gray, 501.

In this State, in *Knight's* case, also in *Coffin's* case, the statements of the prisoners before the coroner's inquest were offered, but not admitted. These were trials at *Nisi Prius*, and it does not appear whether the parties had testified voluntarily, or were admonished of the right to withhold their testimony, or were called and sworn like other witnesses.

From a review of the cases to be found in the books, most of which are *Nisi Prius* decisions, and made without much consideration, it will be found difficult to deduce a *rule* based upon any general principle. Most of the cases have turned upon the question whether the prisoner was or was not *sworn* when the statement offered in evidence was made. The origin of this rule, so far as it has excluded such testimony, as has already been stated, is based upon statutory provisions. Being without statute in this State, and having no settled judicial rule established by our courts, we are at liberty, or rather required, to settle the question under the provisions of our constitution, and in accordance with general principles.

A free and voluntary confession of guilt, made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is ad-

missible in evidence as the highest and most satisfactory proof, because it is fairly to be presumed that no man would make such a confession against himself, if the facts confessed were not true. 2 Russ. on Cr., 824; Gilb. Ev., 123; *Lamb's* case, 552.

The general rule is, that all a party has said, which is relevant to the question involved, is admissible in evidence against him. The exceptions to this rule are where the confessions have been drawn from the prisoner by means of threats or promises, or where it is not voluntary, because obtained compulsorily or by improper influence. *Hendrickson* v. *People*, 6 Seld., 13.

The true test of admissibility in this class of cases is, was the statement offered in evidence made *voluntarily*, *without compulsion*? If this proposition be answered in the affirmative, then the statement is clearly admissible in principle; but if not *voluntary*, if obtained by any degree of *coercion*, then it must be rejected, as well by the rules of the common law as by positive constitutional provision.

Does it follow that because a statement is made upon oath, in a proceeding where the circumstances of the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? May not a man depose on oath as freely as he may speak when unsworn? And, if so, do his statements become any less reliable than when made without the sanction of an oath?

But the argument is, that, as a witness, he is sworn to state "the truth, the whole truth, and nothing but the truth." And that the impressiveness of obligation, and the solemnity of the occasion, would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can in no just sense be said to be voluntary. As a general proposition, this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights, and informed that he is under no legal obligation to

disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. He may testify as freely as he may speak.

If it be said that, though a party in such a situation may be under no legal constraint, he may nevertheless feel under a degree of moral compulsion, and from that cause feel impelled to make self-criminative statements, the answer is, that this moral pressure bears with no greater force upon him when on the stand voluntarily, than in other situations. A party who finds himself surrounded with circumstances calculated to cast suspicion upon him, will undoubtedly feel the necessity of making explanations. He may be conscious that a failure to explain will tend to strengthen suspicion already resting upon him. But such considerations have never been deemed good cause for excluding declarations which he may choose voluntarily to make. Under such circumstances, and with a view to divert suspicion from himself, he may make incorrect statements, or, impelled by fear, or, in hope of improving his situation, he may confess himself guilty. Still, the law holds all such statements or confessions, when made self-moved, and without foreign influence, to be admissible in evidence against him. It may be unfortunate, and be deemed a defect in the law, that while these statements or confessions thus made may be used against him, he is debarred upon trial from making any personal explanation thereof, yet such is the rule which the wisdom of ages has established, and by which we must abide until changed by legislative enactment.

The law protects the party against legal constraint as a witness, and against the influence of those who by their position may be in a situation to influence his conduct, by exciting his hopes or awakening his fears, and thus inducing him to make statements which may not be true, for the purpose of improving his condition. But it no more excludes

these voluntary declarations, statements or confessions, which are the result of his own moral convictions, the manifestation of his own free will, than it does his voluntary actions. The acts and declarations of persons guilty of crime generally furnish the key by which their guilt is brought to light. God in his providence has so ordered, that truth will disclose itself by words and actions, despite the most artful practices of the most skilful and practiced dissembler. To ascertain truth we have but carefully to observe the operation of these immutable laws. Falsehood is always inconsistent with truth and can seldom be made apparently to coincide with it. Hence the very artifices to which crime frequently resorts to conceal itself become the most efficient means of detection.

The declarations of accused persons are not necessarily *confessions*, but generally, on the other hand, they are denials of guilt, and consist in attempts to explain circumstances calculated to excite suspicion, and those denials are generally volunteered. Shall they, when thus made under oath or otherwise, be excluded from consideration? To do so would be manifestly to close the eyes of the ministers of justice to one of the most effectual means of detecting guilt.

Great care should undoubtedly be taken to protect the rights of the accused. His secret should not be extorted from him by the exercise of any inquisitorial power. He should be fully informed of his legal rights, when called upon or admitted to testify as a witness in a matter in which his guilt is involved. No officious party should be permitted to extract confessions from him, by operating upon his hopes or his fears. But his *voluntary* statements, declarations or confessions, like his *voluntary* actions, wherever or whenever made, are legitimate and proper matters for judicial consideration, so far as they bear upon and tend to illustrate the question of guilt or innocence.

In the case at bar, the prisoner, when on the stand before the coroner's inquest, was properly advised of his rights. He acted under no compulsion. He made no confessions.

On the other hand, his statements were evidently designed to repel suspicion. There was no attempt to ensnare him. His statements must therefore be deemed to have been voluntary, though made under oath. If they were inconsistent with surrounding circumstances, it is only another illustration of the proposition that falsehood is inconsistent with truth, and tends to its own exposure.

Exceptions overruled.
Judgment on the verdict.

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

JOEL HOWE *versus* BALL B. WILLIS *& al.*

The levy of an execution upon land held by the debtor, under a deed not recorded, will not be defeated by his subsequent surrender of his deed to his grantor, and the cancellation of it, for thereby they could not divest the creditor of the title he had acquired by the levy.

And, if the grantor afterwards executes a release to another party, such deed will convey no title to the premises.

It may be fairly inferred that the person taking such release had notice of the former deed, if the grantee in the first deed had, for years before the levy, been in the exclusive possession of the premises, and after the levy such releasee never claimed title to, entered upon the land, or interfered with the possession of the execution creditor.

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

This was a WRIT OF ENTRY, dated July 30, 1861.

At the November term of this Court, (second term,) the tenants pleaded the general issue, which was joined, and filed specifications of defence. At the November term, 1862, the tenant Willis filed a disclaimer, or consent that plaintiff might take judgment of part of the demanded premises.

The demandant read in evidence a deed of quitclaim of the demanded premises, from *Enoch Bartlett*, one of the tenants, to him, dated December 24, 1844, and recorded March 8, 1859.

The demandant here rested, claiming to have made out a *prima facie* case.

The tenants then opened their defence, claiming only that portion of the demanded premises not disclaimed as aforesaid.

It was agreed that Phineas Howard, senior, late of Hanover, in the county of Oxford, was the owner of the demanded premises, and it was claimed by both parties that their titles, respectively, were derived from him; and that "Howard's Grant," otherwise called "Howard's Gore," is a part of what is now Hanover, in said county. The tenants then offered an office copy of quitclaim from said Phineas Howard to Solomon J. Hayward, who married a daughter of said Phineas, dated Sept. 10, 1833, acknowledged May 21, 1835, and recorded January 3, 1859, covering the demanded premises. Also a deed of quitclaim from said Solomon J. Hayward and wife, and others, heirs at law of said Phineas Howe, and to the tenant Enoch Bartlett, dated December 30, 1858, and recorded January 3, 1859, of the demanded premises.

The tenants also offered in evidence a quitclaim deed from said Enoch Bartlett, one of the tenants, to Henry F. Blanchard, of the same premises conveyed by the said Phineas to said Solomon J. Hayward, dated January 1, and recorded January 9, 1860. Also a deed of warranty from said Henry F. Blanchard to Oliver S. Long, of same premises, dated October 4, and recorded October 31, 1860. Also a quitclaim deed from said Long to the tenant Willis, of the same premises, dated January 23, and recorded April 29, 1861.

The demandant then offered office copies of an execution in favor of Stephen Estes, and against John Peabody, which issued from the Circuit Court of Common Pleas, in the First Eastern Circuit, October term, 1820, in the county of Oxford, and was dated October 9, 1820, and the return of the levy thereof on the demanded premises. The tenants objected to the levy, but the objections were overruled and it

was admitted. The demandant then offered the following deeds, which embrace the demanded premises:—deed of quitclaim from Edmund Estes to John Estes, dated July 14, 1844, and, though not recorded, it was read in evidence by consent; deed of quitclaim from said John Estes to the demandant, dated Dec. 16, 1844, recorded March 8, 1859.

Deed of quitclaim from James Estes and others, who, it was admitted, were the sole heirs of Stephen Estes, to Peter C. Virgin, (office copy,) dated March 14, 1844, and recorded.

Deed of quitclaim, (office copy,) Peter C. Virgin to Enoch Bartlett, the tenant, dated March 19, 1844.

The demandant then called *Phineas Howard*, who testified that he resides in Milford, Massachusetts, and stated that he is 71 years of age; that he is son of Phineas Howard, senior; that he was born in Hanover, Maine, and resided there many years; that his father died about 14 or 15 years since.

"I know that my father wrote a deed of the demanded premises to John Peabody, then of Howard's Grant, (now called Hanover.) I saw him write the deed, and heard him read it to Peabody. I did not read it. Asa Howard and Lovina Howard witnessed it, and Francis Keyes, Esq., took the acknowledgment of the deed. He was of Rumford.

"My father then gave the deed to said Peabody. I know that he paid my father for the land, in neat stock, and a colt. Don't now recollect the amount. I knew Francis Keyes, he resided in Rumford, and is dead—died some years since. Asa Howard and Lovina Howard are both dead.

"Mr. Peabody, before mentioned, soon after built a house on the lot—a log house, and a barn—and lived there a number of years. I was about 15 years old when the deed was made. I was born in October, 1791; said John Peabody is dead. I lived with my father several years after the deed was made."

The demandant had seasonably notified the tenants to pro-

duce, at this trial, a paper in their possession, alleged by him to be the deed before mentioned from Phineas Howard, senior, to said John Peabody, which had never been recorded. The paper was produced by the tenants and it was handed to the witness — who was inquired of respecting it. He said he could not say that it was the same, the names of the signer and witnesses not now appearing on it.

Reuben B. Foster testified: — "I reside in Hanover. I knew Phineas Howard, senior, father of the witness, (Phineas Howard.) I was well acquainted with him. He has been dead about 15 years." The paper marked B, aforesaid, was handed to the witness. He stated, — "I have seen this paper before now. Enoch Bartlett, one of the tenants, said that there was a deed from Phineas Howard (senior) to John Peabody, and said he had got it in his possession — and it was produced. Col. Joel Howe, (the demandant,) went over to Bartlett's, and got it by Bartlett's request. I think that this is the paper."

Enoch Bartlett then said, "that the demandant had a good title, and he had the deed — and sent Joel Howe for it, and it was then produced. Bartlett said it was given to Peabody, and that Peabody gave it up, and that Howard took his name off. We did not then go into that.

"This was about four years ago last December, that I saw it. The demandant then requested his son to take a copy of it, and he took it; and this copy now shown to me by the demandant was the copy taken at that time. We used the old deed to run the land now demanded. We *then* run out the land by it. George E. Smith helped me run it at the demandant's request. The defendant Bartlett was there present, and knew that we run by it, and said that it was the right one to run by. He did not tell me where he got it.

"I had conversation with Phineas Howard and with John Peabody, about the land. I wanted to buy this tract, — the demanded premises, — called the Peabody tract, of Phineas Howard, senior. I went to him in 1826 in order to buy it.

He said, if I wanted to buy it, I must go to John Peabody to buy it, as he had once deeded it to said Peabody, and he had paid him for it. That he would deed it to me by Peabody's consent. He talked over the title — we spoke of it, (the title.) He said that Stephen Estes had levied on it, and that Peabody had given up the deed to him. He said he supposed that Peabody thought that, as the deed was not recorded, it would defeat the levy, by giving up the deed. I then went and saw Peabody about it. Peabody went off after that interview which I had with him. I then went to Phineas Howard, senior, again, to see if he would not then sell the land to me. But he said that Peabody had requested him to convey the premises to somebody in Vermont — and that he had so conveyed. Stephen Estes went away about 1810, was never back after that, so far as I know. I was well acquainted with him — never heard of him since. There was a rumor of his death, some two or three years after he left."

The deed of Solomon J. Hayward to Enoch Bartlett, one of the defendants, of the premises in controversy, describes them, as "known as the Peabody lot, and being the same premises as set off on execution in favor of Stephen Estes."

The case was withdrawn from the jury to be submitted to the full Court, who are to have jury powers as to the evidence.

The case was argued by

Howard & Strout, for the demandant, and by

D. Hammons, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — The parties to this suit claim to derive their respective titles from one Phineas Howard, who is admitted to have been the owner of the demanded premises.

It is satisfactorily proved that Howard, in 1806, by deed of warranty, duly acknowledged but not recorded, convey-

ed the land in controversy to John Peabody, who immediately entered into possession thereof, paid therefor, cultivated the land as a farm, and continued his occupation till 1820, when Stephen Estes acquired the title thereto, by virtue of a levy on an execution in his favor against said Peabody. By the levy, the estate, before in Peabody, was transferred to Estes, who, being once seized, is presumed to remain so seized until a disseizin shown. The legal seizin carries with it the possession. The estate thus acquired was conveyed by the heirs of Estes to Peter C. Virgin, in 1841, from whom, by various mesne conveyances, the plaintiff derives his title.

The plaintiff, therefore, must recover unless the tenants can impeach his title.

It is insisted that the levy is void, because the judgment creditor was dead at the time of the levy. But the proof entirely fails to show such to be the fact. From the testimony of Phineas Howard, jr., it is in proof that Estes was at home in 1820, when his attachment was made. From the officer's return it appears he delivered seizin to the creditor, who, having thus both seizin and title, is presumed to continue in possession until a disseizin is established. If the judgment debtor remained on the premises after the levy, it was as tenant to the judgment creditor.

It is in proof that Peabody, who lived on the place until 1823, after the levy, surrendered his deed to Howard, his grantor, by whom it was cancelled. But this cancellation could neither divest Estes of the title acquired by the levy, nor transfer to Howard the land he had previously conveyed. The estate of Estes was unaffected thereby. *Barrett* v. *Thorndike*, 1 Greenl., 72.

After the cancellation of the deed from Howard to Peabody, the former, on the 10th of Sept., 1833, released to Solomon J. Hayward, his son-in-law, the land in dispute. But this conveyed no title, for Howard had nothing to convey. He had parted with his estate in the premises to Peabody by deed of warranty twenty-five years before. Peabody had entered and continued in possession until the

levy; after which the judgment creditor became seized. Peabody, so long as he remained, must be deemed, in the absence of proof to the contrary, as his tenant at will. When he abandoned the premises the seizin would be in Estes, and the law would regard the possession to follow the legal title unless the contrary be shown. The possession of Peabody and of Estes continued for more than twenty-five years.

When Howard conveyed to his son-in-law he had no seizin of the premises, either by right or wrong. As the law then stood, a conveyance by one disseized was unlawful and void, and passed no title to the grantee. *Brinley* v. *Whiting*, 5 Pick., 348. But in the case cited, the one disseized had the title, but not the seizin. Much more then could not one, who had neither the seizin nor the title, convey by deed of quitclaim or release, what he did not own.

But Peabody had been for years in the open and exclusive possession of the lot in controversy, claiming it under his deed and improving it as his own. Hayward never claimed any interest therein; never went upon the land, nor in any way interfered with the possession of Estes or his heirs. Under the circumstances of the case, it is fairly inferrable that he had notice of the conveyance from Howard to Peabody. If so, his deed would be a fraud upon Estes, whose levy had been upon record nearly forty years.

The deed from Hayward to Bartlett, one of the defendants, was in 1858, and before the release from Howard to Hayward had been recorded. But the evidence shows that Bartlett, under whom the other tenant derives title, was fully aware of the existence of the deed from Howard to Peabody, and of the levy of Estes, for this levy is distinctly referred to in the release of Hayward, which constitutes his only title to the premises demanded.

As the grantee of Willis had no title, so he could convey none. *Defendants defaulted.*

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

ALBERT JEWETT *versus* WILLIAM C. WHITNEY *& als.*

In case of a grant by deed, the law presumes the party intended to convey something; but there is no presumption in case of a levy, and the party must rely upon the return of the appraisers and the officer to give him an estate not invalidated or rendered void by exceptions or qualifications.

The case of *Jewett* v. *Whitney*, 43 Maine, 242, re-examined and sustained.

A levy upon the land and privilege upon which a mill stands, excluding the mill, is void.

If the mill and land on which it stands are not included in the levy, no seizin *of that part* was delivered to the creditor by the officer, and the levy cannot aid him in sustaining a *possessory* title thereto, which he can only acquire by actual and exclusive possession, claiming as owner, continued for twenty years.

ON EXCEPTIONS to the rulings of DAVIS, J., and MOTION TO SET ASIDE VERDICT.

This was a WRIT OF ENTRY, dated October 20, 1858, commenced against William C. Whitney, who deceased while the suit was pending, and his heirs were admitted to defend. The estate demanded was "one undivided half of a certain gristmill, and one undivided half of the land on which it stands," &c.

The tenants pleaded the general issue, and claimed compensation for buildings and improvements.

Both parties claim title under Sumner Stone; the demandant, by sundry deeds; — the tenants, by levy.

On May 9, 1836, said William C. Whitney caused all said Stone's real estate, &c., in the county of Oxford, to be attached on a writ in his favor against said Stone. Judgment was recovered in that action in November, 1837, and, on December 11th, the execution that issued was levied on the premises in controversy, and other premises.

The premises are thus described in the return of the appraisers: — "And, also, one other tract of land situated in Waterford in said county, and on Crooked river, so called, it being one undivided half of said tract, with one undivided half of a water privilege sufficient for a gristmill, exclusive

of the gristmill now standing on said premises, said piece of land is bounded as follows, viz.: — Beginning at the slip floom-post at the south-west corner of said slip and runs south, fifty-three degrees west, four rods to a stake and stones standing by the road leading to the gristmill now standing on the premises; thence south, fifty degrees east, three rods and nine links to a stake and stones; thence north, sixty-five degrees east, three rods and thirteen links into the south-westerly branch of said Crooked river, about the center of said stream; thence up the center of said stream to the first mentioned bounds, which said tract of land and water privilege we have on our oaths appraised at the sum of two hundred dollars, which the one-half of said appraisal is one hundred dollars, and no more."

It appears, from the bill of exceptions, that the presiding Judge instructed the jury that the levy upon said premises was void, for the reason that it was a levy upon the land and privilege, upon which the mill stood, excluding the mill, which was admitted to be then standing thereon.

"The tenants further claimed that William C. Whitney had acquired a title of twenty years adverse possession before the commencement of this suit. Upon this point, the presiding Judge called the attention of the jury to the evidence that, before said levy, Stone had conveyed the premises to Barrows, who remained in possession until he sold his interest to the demandant; that there was no evidence that Barrows acknowledged any title of Whitney before his bond of Nov. 5th, 1841; and he instructed the jury that the transient seizin delivered to Whitney by the officer who made the levy, the possession of Barrows not being interfered with, was not such a possession as to constitute a disseizin of said Barrows, by said Whitney, and that, if there was no disseizin until 1841, if then admitted, it had not continued twenty years when the suit was commenced. And the jury were instructed that the evidence in the case on the question of title would authorize them to find a verdict for the demandant."

The tenants also claimed "that William C. Whitney, had been in actual possession six years or more when the suit was commenced, and that they were therefore entitled to the benefit of an appraisal of the increased value of the premises by reason of the buildings erected, and improvements made by him."

There was no dispute that said Whitney took actual possession, July 10, 1854, and that the demandant had then had possession several years, embracing that portion of the six years prior to July 10, 1854. The tenants claimed that he was in possession under his agreement for a deed from said Whitney, that he was therefore a tenant at will, and estopped from denying Whitney's title, and that his possession was the actual possession of the said Whitney.

The jury were instructed that, if the demandant took possession of the premises, under his agreement for a deed from Whitney, having no other claim of title thereto, he was estopped from denying Whitney's title, and his possession was the actual possession of said Whitney; that, if he took possession before his deed from Kilborn, of April 2, 1849, the jury might infer that he took possession under his agreement from Whitney; and that, in such case, if Whitney erected buildings, or made improvements before he had notice that he, the demandant, had acquired or was claiming title from any other source, the tenants were entitled to the benefit of having the increased value of the premises by reason thereof appraised.

But that, if the jury should find that Barrows had possession, claiming title under his deed from Stone, and took the bond from Whitney in 1841, in order to remove the cloud from his title, he did not thereby become a tenant at will of said Whitney, and was not estopped from denying Whitney's title. And if the demandant purchased the premises of Barrows and took his deed from Kilborn, (to whom Barrows had conveyed, taking back an agreement for a reconveyance,) and the demandant afterwards took possession under his deed from Kilborn, so made in pursuance of a

previous agreement with Barrows, then his negotiations with Whitney, if made to clear his title from doubt, did not make him a tenant at will of said Whitney, or estop him from claiming title against said Whitney, nor was his possession the actual possession of said Whitney.

Howard & Strout, and Whitman, for the tenants, in support of the exceptions.

It is agreed that the demanded premises were the property of Sumner Stone. The *demandant* claims title by deeds of Stone to Barrows, of Sept. 12, 1836; from Barrows to Kilborn, Sept. 13, 1836, (and quitclaim same to same, of Oct. 9, 1848;) and from Kilborn to the demandant, quitclaim, of April 2, 1849.

The tenants claim by attachment, the levy of execution upon same premises. Attachment, May 9, 1836; judgment, Nov. 20, 1837; and levy, Dec. 11, 1837.

The levy, being in due form, establishes the title of the tenants, as springing from the *attachment;* and this gives priority and precedence to their title. If the levy is sustained, the demandant's title must fail.

It appears that Wm. C. Whitney, the original party defending, recovered judgment for $4,817,73, against Stone, and that he was under the necessity of resorting to the real estate attached, in order to collect his debt, by levy of execution on twelve different parcels, including the demanded premises; and that, after every effort, he failed to collect the amount, by nearly two thousand dollars. It is to be presumed, therefore, that he would embrace all the property he could find to levy upon, and that he would not intentionally except anything from the levy, that would serve to pay the debt.

The demandant insists that the levy, *pro hac*, is void.

I. *The tenants claim that the levy was duly made, and that it is sufficient to invest them with the title to the premises demanded, from the date of the attachment.*

1. The levy embraces the land and gristmill and appurtenances demanded.

A levy is to be construed by the rules applicable to the construction of deeds of conveyance; the execution debtor being regarded as grantor. *Gibson* v. *Waterhouse*, 4 Maine, 231; *Pride* v. *Lunt*, 19 Maine, 115; *Jewett* v. *Whitney*, 43 Maine, 251. And such a construction should be given as will sustain the levy, if possible. *Grover* v. *Howard*, 31 Maine, 550.

The appraisers and officers, in their return, describe the tract of land by metes and bounds, on which the gristmill stood at the time, and set it out, (an undivided half of it,) to the creditor. They describe the gristmill as "now standing on the premises." This surely embraces *land* and *mill*. For a conveyance of *land* (and the levy operates as a conveyance) includes all fixtures upon it — as trees, houses, mills, wharves, &c.

The appraisers say, at the commencement of their proceedings, that they, "having all been duly chosen, appointed and sworn to the faithful and impartial appraisement of such real estate of the within named Sumner Stone, as should be shown to us to be appraised, in order to satisfy this execution and all fees, *have viewed the several tracts of land*, lying in the county of Oxford, shown to us by the within named William C. Whitney, the creditor, as the estate of the within named Sumner Stone, and the following is the description of *said tracts of land*, to wit." And then, in reference to the premises now in controversy, they say: — "Also one other tract of land;" that is, that they have viewed said tract of land "situated in Waterford, in said county," &c., "which said *tracts of land* above described, we have *appraised*, on our oaths, at the sum of two thousand, one hundred and twenty-nine dollars and fifty-eight cents, and no more; and we have *set out* the said tracts of land by metes and bounds to the creditor within mentioned, to satisfy this execution in part."

The demanded premises thus set out to the creditor, constituted the *gristmill privilege*, upon which the gristmill then stood, and upon which the new mill now stands.

2. By an exception of the *gristmill*, the privilege and every easement used with it would be included and excepted. So by a conveyance of a *gristmill*, *eo nomine*, the privilege and every such easement would pass. Or, as it is held, "a grant of a *mill* passes the right to the water also," and the land and privileges used with it. Coke Litt., 4–5; Bacon's Abr., Grant I, 4; *Carden* v. *Tuck*, Cro. Eliz., 89; 4 Cruise's Dig., (Greenl. Ed.,) Tit., 32, c. 21, §§ 40, 41, 42, and note; *Blake & al.* v. *Clark*, 6 Maine, 436; *Maddox* v. *Goddard*, 15 Maine, 218; *Rackley* v. *Sprague*, 17 Maine, 281; *Moore* v. *Fletcher*, 16 Maine, 63; *Wetmore* v. *White*, 2 Caine's Cases, 87; *Whitney* v. *Olney*, 3 Mason, 280; *Allen* v. *Scott*, 21 Pick., 25; *Johnson* v. *Rayner*, 6 Gray, 107.

The demandant contends that the *gristmill* was excepted, or excluded by the appraisers, from the levy. But, if they attempted to do so, it would present them in the absurd position of attempting to *set out to the creditor the premises*, and at the same time, and by the same act, *excluding* them from the operation of the levy.

3. *But in fact, no such exception, or exclusion of the gristmill was intended, or accomplished.*

The language of the appraisers and the return will not grammatically or fairly admit of any such conclusion. For the appraisers do not say that they *exclude* the gristmill; but they state that they *have viewed the tract of land*, &c., (the one undivided half,) "with one undivided half of a water privilege, sufficient for a gristmill, exclusive of the gristmill now standing on said premises." They are thus describing a *water privilege* which they had *viewed*, and which they say is sufficient for a gristmill exclusive of, or other than, the gristmill then standing on the premises, by way of recital. And their description has reference to the quality, extent or purpose of such water privilege, and not to the exclusion or exception of the mill.

They viewed the land and water privilege; but set out to the creditor the land, with its fixtures—the gristmill and

appurtenances, which go with the land, without any exception of any fixture whatever.

There are no apt words, or any certain description in the return, which could constitute an exception of the gristmill from the levy. Without such, no exception can exist. Shep. Touch., 77, 78; 4 Cruise's Dig., 327, § 68.

4. But, if the language used could be construed into an exception, it would be an exception of the gristmill, *with its privileges*—the use of the water, &c.; and these were all that were embraced in that portion of the levy under consideration. The whole of this portion of the levy or grant constituted, in common parlance, only the mill privilege, as before shown, with its appurtenances, including the gristmill. The exception and the grant (the levy) would then be coëxtensive. Under such circumstances, the exception would be inoperative and void, and the grant effective. As an exception "must only be a part of the thing granted; for if the exception extends to the whole, it will be void." And "it must be of such a thing as is severable from the thing granted—and of such a thing as he who excepts may retain it." (Authorities last cited.) A gristmill, severed from its privilege, ceases to be such in effect; and as such, could not be retained, by the debtor in this case, on the privilege, or be excluded from the levy, for any practical purpose.

The *appraisal* was of the *land*, and of course, with all its fixtures, as no exception was made in such appraisal; and at most, of a *water privilege* also — (an undivided half of each) — for that was supposed to be an additional privilege of water; — additional to what was necessary for the use of the gristmill. Since, by turning to the deed of Young to Stone, the debtor, it will appear that it conveyed "the privilege of water for said mill, (the gristmill,) and *privilege of flowing water as far as Samuel Warren's land extends.*" Thus showing that the debtor owned a privilege of flowing water more than sufficient for the gristmill then standing there.

This supposed water privilege the creditor might well be desirous to obtain by his levy, from his insolvent debtor; and hence the language used by the appraisers in their recital: "a *water privilege* sufficient for a gristmill, exclusive of the gristmill now standing on said premises." And this water privilege they appraised with the land — the gristmill there standing, with its privileges, being embraced in the appraisal of the tract of land.

But, if the debtor did not own any other water privilege than that which was necessary for the use of the gristmill, still the including of land, water or privilege not owned by the debtor, did not invalidate the levy. *Grover* v. *Howard*, 31 Maine, 546; *Atkins* v. *Bean*, 14 Mass., 404; *Cutting* v. *Rockwood*, 2 Pick., 443.

All the debtor's interest would pass by the levy, although it embraced more than his interest. Statutes 1821, c. 52, § 1; Statutes 1821, c. 60, § 27; *Howe* v. *Wildes*, 34 Maine, 566.

The case of *Jewett* v. *Whitney*, 43 Maine, 242, was trespass *quare clausum*, not necessarily involving the title to the premises; and the opinion, so far as it discussed the title, was upon points not material to the determination of the case.

There is no ground for the concluding that the appraisers "separated the premises into three distinct rights, namely, the *land* the *water privilege*, and the *mill*," or that either was excepted or reserved, as before mentioned. Nor was it quite correct in the learned Judge, to say that there was no mention made of the mill in the valuation; for in valuing the tract of land on which the mill is mentioned as standing, the appraisers must be regarded as valuing the mill with the land — because they did not except it from their valuation — nor did they intend to do so, and thereby leave the *mill* for the debtor, who was unable to discharge the debt, and which would be useless to him, but valuable to the creditor.

Whether the valuation was high or low, we cannot now

determine; nor is it a matter of inquiry, or of importance at this time.

The return shows a want of technical accuracy, in some respects, in completing the levy, as is common in such cases; and yet not sufficient to justify the conclusion, by the Judge, that there was an intention to exclude the gristmill, and defeat the grant — the levy. The creditor needed all the property, and much more, to pay his debt; and would he intentionally except any from his extent?

II. But if the tenants do not maintain their title by attachment, and levy of execution, in all respects formal, still they have shown a title by adverse possession for more than *twenty years* before the commencement of this suit. Attachment, May 9, 1836; levy, Dec. 11, 1837; commencement of this action, October 20, 1858.

The instructions of the presiding Judge were erroneous in the matter of adverse possession, and must have misled the jury.

They are based upon a supposed state of facts, that did not exist or appear at the trial.

1. Because it did not appear that Barrows was in possession of the premises at the time of the levy by Whitney. There was no evidence to that fact, or effect.

2. Because it does not appear that Barrows "remained in possession until he sold his interest to the demandant," as stated by the Court to the jury. It does not appear that he ever sold or conveyed his interest, which he derived from Stone, or otherwise, to the demandant. On Sept. 12, 1836, he received a deed from Stone, and on the succeeding day conveyed to Kilborn the premises, taking from the latter an obligation, not under seal, to convey to him, Barrows, upon his making certain payments specified — which were never made.

There is therefore no evidence to sustain the instructions — that Barrows was in possession at the time of the levy; or that Whitney acquired but a transient seizin by the levy; or that Barrows remained in possession; or that

there was any disseizin in 1841; or that Barrows sold the premises, or his interest, to the demandant.

3. Because it does not appear that Barrows ever held adversely to Whitney, or resisted, or pretended to deny his title at any time. Indeed, it does not appear that Barrows ever had, or ever claimed to have, any title to the premises, after he conveyed to Kilborn, in September, 1836. Nor does it appear, by any evidence in the case, that either Barrows or Kilborn ever denied or controverted the title of the tenants. But it does appear, that both Barrows and the demandant undertook to acquire it by purchase, from Whitney.

4. Because, by the levy, Whitney acquired actual seizin and possession of the premises, as of May 9, 1836, when his attachment was made. The debtor (Stone) was then in possession, and subsequently assisted in the levy, by choosing an appraiser. And there is no evidence to rebut the legal and just presumption that the creditor's seizin continued in himself, and those claiming under him, for more than twenty years in succession. *Bryant* v. *Tucker*, 19 Maine, 383; *Nickerson* v. *Whittier*, 20 Maine, 223; *Nason* v. *Grant*, 21 Maine, 160.

J. C. Woodman, contra.

The opinion of the Court was drawn up by

KENT, J.—In this writ of entry, the demandant claims "one undivided half of a certain gristmill, and one undivided half of the land on which it stands." He traces a title to himself in the premises, unless a title to the same passed by the levy introduced. The question of the construction to be given to the language of that levy was before the Court in the case of *Jewett* v. *Whitney*, 43 Maine, 242. It was then determined, after full argument, that "the defendant, by means of the levy, acquired no title to the mill or to the land on which it stands." This is the estate claimed in the writ. We see no good reason for reversing that de-

cision. It is true, that, in the argument now presented, a point is made, which does not appear to have been presented or considered in the former case. It is now urged, that the exception "of the gristmill now standing on said premises" amounts to an exception of all that was included in the levy — being in effect an exception of the mill, land and water privilege, and therefore void. It is contended that, an exception must be of a *part* of the thing granted, and that if it extends to the whole it will be void, as being absurd.

However correct this proposition may be, as an abstract principle of law, it does not appear in this case, from the description of the premises set out in the levy, that no part of the land could be used or separated from the mill privilege. No evidence was given on that subject, and there is no plan or description of the premises, by which the fact can be established. The demandant claims only the mill and the land on which it stands. The description in the levy, by metes and bounds, refers to "a road," and to stakes and stones, showing that a portion of land on the shore was included, and not merely the land on which the mill stands. The appraisement also declares, that it is a tract of land with half a water privilege,— said *piece of land* being bounded as follows, &c., and concludes with the words, "which said tract of land and water privilege we have appraised," &c. In this state of the case, we are not called upon to determine how far the general principle, above alluded to, would apply in case of a reservation or exception, covering, in fact, all that was before taken, made in a *levy*, and not in a grant. There may be reasons why a voluntary grantor should not avail himself of an exception, which in effect revoked the entire grant, which do not apply to a title by levy. It would be not merely unjust, but apparently absurd, for a man to make a grant by deed, and, in the same deed, to revoke or except from its operation every thing which he had before granted. But a levy, although a statute conveyance, is a proceeding *in invitum*. The debtor is not a willing or

an active participator in passing the title from himself to his creditor. The creditor must see that all the requirements of the statute are complied with, and, if he fail, through any deficiency of description, or in any preliminary proceedings, he will not succeed in his attempt to obtain a title. The levy must be such in itself that the estate, whatever it is, is thereby divested from the debtor. It may certainly be a grave question, whether a levy, which is *felo de se*, by its terms or its exceptions, can be made vital and operative to pass the estate, on the ground that the exceptions are inconsistent, and nullify the conveyance, first intended by the appraisers. The creditor may reject such a levy, but, if he accepts it, must he not be bound by its terms, and claim only what he has lawfully acquired within the terms of the statute? If, for any cause, he does not have a good and clear title set out to him by the levy, he simply fails to acquire what he undertook to obtain, and the estate remains, as before, in his debtor. In case of a grant by deed, the law presumes that the party intended to convey something. In case of a levy, there is no presumption, as there is no voluntary conveyance, and the party must rely upon the return of the appraisers and the officer to give him an estate, not invalidated or rendered void by exceptions or qualifications. These views appear to us reasonable and correct, but, as before stated, the present case does not call necessarily for a decision on this point.

The tenants also claimed that their ancestors acquired a title *to the premises sued for*, by an adverse possession of twenty years before suit, and except to the ruling of the Judge, that the transient seizin, delivered to Whitney by the officer who made the levy, the possession of Barrows not being interfered with, was not such a possession as to constitute a disseizin of Barrows.

The Judge, on the whole case, further instructed the jury, "that the evidence in the case, on the question of title, would authorize them to find a verdict for the demandant."

This ruling is undoubtedly broad and comprehensive. The question is, whether it was, on the facts proved, erroneous.

The tenants do not contend that prior to 1841, which was but seventeen years before this action was commenced, there was any *actual* possession and holding by Whitney. But they claim that, by the levy, Whitney acquired actual seizin and possession, and that the legal and just presumption is, that this seizin of the creditor continued in himself, and those claiming under him, for more than twenty years, in succession, before the date of the writ.

Whatever might be the effect of such proceedings upon the question of an adverse, continuous seizin and possession of twenty years, in cases where the premises demanded are clearly *included* in the levy, it is manifest, that nothing short of an *actual* and adverse occupation by the creditor of the portion which he claimed to be included, but which is found on trial not to have been so included in the levy, can establish a title by adverse occupancy. The ground on which a seizin and legal possession of the whole tract is inferred from the recording of a deed and the occupancy of a part is, that the deed covers and describes the *whole* tract, and thus gives notice to all of the extent of the grantee's claim. But it would hardly be contended, in such case, or in case of a levy, where there has been no actual possession and holding, by himself or tenant, of any part of the premises, that the seizin and momentary possession, inferred from the act of the officer, could extend to that portion which was not, in fact, included in the description of the estate.

The decision being, that the gristmill and the land on which it stands were not included in the levy, no seizin of *that part* was ever delivered to the creditor by the officer. It is outside of that levy — was never a part of it, and the title remained in the debtor. If the creditor, believing and assuming that the gristmill, &c., was included in his levy, had taken actual and immediate possession of it, and had kept that possession openly, notoriously, exclusively and adversely to every one, claiming it as his own for twenty years,

he might acquire a right thereto, which would avail him against every one. But he would acquire this right solely by virtue of his adverse *possession*, and not by virtue of anything contained in his levy.

The ruling of the Judge, on the question of title, was therefore correct.

It would seem, from the exceptions, that a question was raised by the pleadings and upon the evidence in relation to "betterments." The case, as reported, does not disclose what the verdict on this point was, and the counsel for the tenants, in their able argument, do not present any grounds of exception to the ruling of the Judge, bearing on this matter. Those rulings appear to us as favorable to the tenants as they had a right to require.

We see no reason to set aside the verdict on the motion. The case is peculiarly one of law. There is very little conflict of testimony or dispute as to facts.

Exceptions and motion overruled.

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

WALTON, J., having been of counsel in the former suit, did not sit in this.

RUFUS S. RANDALL *& als. versus* ALFRED LUNT.

A husband, although he be insolvent, may convey real estate to his wife, in payment of a note given her by him, for money of hers loaned him, if there be no intent to defraud or delay creditors.

The sons of a married woman deposited with her notes against her husband, to be used by her during their absence, "in any way she might think proper for her own benefit." Sometime afterwards she surrendered these notes, and also a note payable to herself, upon receiving a deed of certain real estate, made by her husband to her sons and herself. One of her husband's creditors attached the estate before the sons had knowledge of the conveyance, and afterwards levied thereon. In a suit brought by the wife and her sons against the attaching creditors to recover the estate, *it was held*, that

it was no cause for exception that the jury were instructed they would be authorized to sustain the conveyance if they should find from the evidence that the sons had constituted their mother the judge of her own necessities, and that she deemed the purchase necessary, — provided the transaction on the part of the mother was not done to delay or defraud creditors of her husband or intended in any way for her husband's benefit.

EXCEPTIONS from the rulings at *Nisi Prius* of TENNEY, C. J.

This is a WRIT OF ENTRY for a tract of land and buildings thereon, situated in Woodstock. The writ is dated September 24, 1860. Plea, general issue.

The demandants claim title by virtue of a warranty deed of the demanded premises to them, from Joseph Frye, dated March 15, 1856, acknowledged same day, and recorded March 17, 1856. Consideration named in the deed is $2000.

The demandant, Lydia Frye, is, and then was, the wife of said Joseph Frye. The other demandants are her sons, by a former marriage, — and were at sea, on foreign voyage, as masters of vessels, when said deed was executed as aforesaid — and did not return home for about a year after such execution of the deed. They made their home, when not at sea, at their mother's. They have been at home but rarely and for short periods, for ten years or more, last past. They have been of age during that time.

They had promissory notes of hand, payable to them or order, against said Joseph Frye, and other persons, amounting to some $1400 or $1500, which they left with their mother, but did not indorse them. Mrs. Frye held a note against her husband, which had been due for some three or four years, for $250, given for money which she had loaned to him, and which money she received from the sale of real estate owned by her, prior to her marriage with Joseph Frye.

The demandant, Rufus S. Randall, as witness, called by the demandants, testified that when leaving home, he gave his mother verbal directions, to use his money in any way

she thought necessary for her benefit; she did not mention, nor did I direct in what way she should use it. I told her she might use the notes in any way she thought proper, for her own benefit. That he designed this place as a home for his mother, and for himself when at home, — had no family of his own."

Mrs. Frye, the demandant, also called by the demandants, testified, — "My sons always told me if I wanted any money or thing, for me or my daughters, to go and get it and use it as I was a mind to. My daughters are own sisters to my sons. I have gone to their employers and got money, before this. I always went and got what I wanted. I deemed the purchase of this place necessary to constitute me a home, but had no design to delay or defraud my husband's creditors, in any way, — or to benefit him. The sons were not at home after the fall of 1855 until the summer of 1857."

On March 15, 1856, Mrs. Frye, the demandant, procured the deed aforesaid, to be executed to herself and sons, as before mentioned, in the absence of her sons at sea, as before named, and as consideration therefor, delivered to said Frye the notes before mentioned, due to herself, and her sons, amounting to, from $1600 to $1800. The notes, other than those of Mr. Frye, were good and collectible.

Said Joseph Frye was in debt and insolvent, when said deed was executed. The tenant claims title by levy of execution on said premises demanded, having sued and attached the same, for a debt due to him from said Joseph Frye before his said conveyance; and having obtained judgment and execution perfected a levy thereon.

His attachment on the original writ, and seizure on execution, were subsequent to said conveyance; but the attachment was made before the said Randalls returned from sea, and before they knew of the conveyance aforesaid. The respondent contended that the conveyance aforesaid was void and inoperative as against him, a creditor prior to the conveyance; — That Mrs. Frye was not authorized to pur-

chase the premises for her sons, in their absence and without any other authority than that testified to by said Rufus S. Randall, and Mrs. Frye; that the conveyance must be regarded as made to her only — and for the consideration of her note of $250 only, delivered up to her husband as aforesaid; that the evidences show no authority conferred on her, by her sons, to surrender or transfer their notes to her husband; that verbal authority would not be sufficient therefor, and for her to take conveyance of real estate to them; and would not be sufficient to enable her to take a conveyance to them, that should be valid against prior creditors, who attached, and seized, and levied on the premises before the said Randalls had accepted the deed and ratified such conveyance.

The presiding Judge overruled these objections and instructed the Jury: —

That, if Mrs. Frye was not authorized by her sons, John and Rufus, to make the purchase, then no title would pass to them, until they had ratified it; and that, if defendant's attachment was made before such ratification, it would be valid against the deed; that they would further find, from the evidence in the case, whether the sons, John and Rufus, had constituted their mother, Mrs. Frye, the judge of her own necessities; and, if they had, and she had deemed the purchase necessary to constitute her a home, that then they would be authorized to find for the demandants, provided the transaction, on the part of Mrs. Frye, was not done to delay or defraud creditors of her husband, nor intended to furnish a home for him, or to benefit him in any way.

The verdict was for the demandants, — and the tenant excepted.

Howard & Strout, in support of the exceptions.

Hammons, *contra*.

The opinion of the Court was drawn up by

Dickerson, J. — Writ of entry. Both parties claim to

have derived their title from *Joseph Frye*, husband of the demandant, *Lydia Frye;* the demandants, by warranty deed dated March 15, 1856, and the tenant by a subsequent levy of his execution issued on a judgment recovered prior to that date. The other demandants were sons of *Lydia Frye* by a former husband. As they were about to leave home, on a voyage to sea, they left with their mother, without indorsement, certain promissory notes, payable to them or their order, against Joseph Frye and other persons, amounting to $1400 or $1500. Lydia Frye held a note, then overdue, against her husband, for $250, given for money loaned to him, and being the proceeds of the sale of real estate owned by her prior to her marriage with him. She procured the deed of March 15, 1856, to be executed to herself and sons, during their absence at sea, and, as a consideration therefor, delivered to her husband, Joseph Frye, her own note and also the notes of her sons, before named, amounting in all, from $1600, to $1800. Joseph Frye was in debt and insolvent when this deed was executed.

The demandant, *Rufus S. Randall*, as witness, called by the demandants, testified that, when leaving home, he gave his mother verbal directions, to use his money in any way she thought necessary for her benefit; she did not mention, nor did he direct in what way she should use it. He told her she might use the notes in any way she thought proper, for her own benefit; that he designed this place as a home for his mother, and for himself when at home,—had no family of his own.

Mrs. Frye, the demandant, also called by the demandants, testified:—"My sons always told me, if I wanted any money or thing, for me or my daughters, to go and get it and use it as I was a mind to.—My daughters are own sisters to my sons. I have gone to their employers and got money before this. I always went and got what I wanted. I deemed the purchase of this place necessary to constitute me a home, but had no design to delay or defraud my husband's creditors, in any way,—or to benefit him. The sons

were not at home after the fall of 1855, until the summer of 1857."

The presiding Judge instructed the jury: — That, if Mrs. Frye was not authorized by her sons, John and Rufus, to make the purchase, then no title would pass to them, until they had ratified it, — and that, if defendant's attachment was made before such ratification, it would be valid against the deed; that they would further find, from the evidence in the case, whether the sons, John and Rufus, had constituted their mother, Mrs. Frye, the judge of her own necessities; and, if they had, and she had deemed the purchase necessary to constitute her a home, that then they would be authorized to find for the demandants, provided the transaction, on the part of Mrs. Frye, was not done to delay or defraud creditors of her husband, nor intended to furnish a home for him, or to benefit him in any way.

The verdict was for the demandants and the tenant excepted to the foregoing instructions.

The directions given to Lydia Frye, by the other demandant, Rufus S. Randall, were verbal and general in their character. She "was to use the notes *in any way* she thought proper, for her own benefit." She accepted the delivery of the notes under this stipulation and with this understanding. No one save herself was authorized to decide what disposition of the notes was "proper for her own benefit." This right was withheld, not only from her husband and his creditors, but also from her sons.

If she misjudged in the use she made of the notes, it was her misfortune, and her husband's creditors have no right to complain, if they were not delayed or defrauded thereby. The law certainly does not look with disfavor upon such acts of filial affection. The conduct of the Randalls in this respect was not only legal but praiseworthy. The right "to use the notes in any way she thought proper, for her own benefit," authorized the mother to use the whole or a part of them for her immediate benefit, or to have them discounted, and to invest the proceeds in public stocks, or to ex-

change them for real estate, that she might secure to herself a present and a future home. Her husband, moreover, had a right to prefer any of his creditors, even though they were his wife and her sons. The proof was ample to warrant the instructions of the Judge, and the finding of the jury thereon, that Mrs. Frye's sons have constituted her the judge of her own necessities. *Cole* v. *Littlefield*, 35 Maine, 439.

Mrs. Frye testified that she deemed the purchase of the place necessary to make her a home, and, under the instructions of the Judge, the jury found that fact. This was manifestly "for her benefit," and what she had a right to do, so far as her own note was concerned, under R. S., c. 61, § 1. But it is argued by the counsel for the tenant that Mrs. Frye had no right to take a deed; that, if she had, she could not take one running to herself *and* her sons, and further, that the deed of the 15th March, 1856, if otherwise valid, was inoperative for want of a valid delivery.

It is a familiar principle of law that where a distinct authority is given to do a certain thing, that authority carries with it an implied power to do whatever else may be necessary for that purpose; the greater includes the less authority. Having the right to use the notes "for her own benefit," and being constituted the sole judge of her necessities, as we have before said, Mrs. Frye may still have been unable, without great sacrifice, to give effect to the purpose of the deposit of the notes with her unless she had authority to take a deed. She might not have been able to obtain the money on the notes, except at a great discount, while at the same time the opportunity may have been presented to her to invest their proceeds in real estate that should make her a comfortable home through life. The doctrine contended for presents to her the alternative of submitting to the loss of a large per cent. of the fund designed for her benefit, or of enduring privation and want. It is a sufficient answer to this objection, that she was made the judge of what use of the notes would best promote her comfort; that she

chose to invest them in real estate, and that the rules of law do not prohibit her from so doing.

Nor is it a valid objection that the notes were not indorsed to Mr. Frye. In *Borneman, Admr.*, v. *Sidelinger & al.*, 15 Maine, 429, the Court held that a negotiable promissory note payable to order, may be the proper subject of a gift *causa mortis* without indorsement; that in such a case the equitable interest passes to the donee, and that, if there be a mortgage given as collateral security, it is held in trust for his benefit, and may be enforced in the name of the representative of the deceased, as the principal debt may be, also, if necessary.

The same doctrine has been repeatedly held in Massachusetts. *Grover* v. *Grover*, 24 Pick., 261; *Sessions* v. *Moseley*, 4 Cush., 87; *Bates, Admr.*, v. *Kempton*, 7 Gray, 382.

From her right to invest the proceeds of her own note, and those of her sons in real estate, results her authority to take a deed thereof in the name of all of them; and she had the same right to take delivery of such deed that she had to make the purchase.

Entertaining these views of the questions presented in the exceptions, we have no occasion to consider the validity of the levy.

Finding, therefore, no error in the instructions of the presiding Judge, we must overrule the exceptions.

Exceptions overruled and
Judgment on the verdict.

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

JAMES H. DUDLEY *& al. versus* INHAB'TS OF BUCKFIELD.

A sale of liquors was made in Boston to the selectmen of a town in this State, by the plaintiffs, who were not licensed to sell by the laws of Massachusetts; in their action against the town to recover payment therefor, — *it was held*, that an action could not be maintained, notwithstanding the town was by statutes of this State authorized to purchase.

ON STATEMENT OF FACTS.

This was an action of ASSUMPSIT to recover the price of intoxicating liquors.

The liquors were sold in Boston, Massachusetts, by the plaintiffs to the selectmen of Buckfield, who purchased them for that town in their official capacity. It was known to the venders and vendees, at the time, that they were to be carried out of that State and for sale in this State.

The laws of Maine and Massachusetts, regulating the sale of spirituous liquors, may be referred to. At the time of such sale to the defendants, it is admitted that the plaintiffs had no license to sell intoxicating liquors, under the laws of Massachusetts, c. 86 of 1860, R. S. It is further admitted by the plaintiffs, that the liquors sued for in this suit were not all imported, nor were they sold in the original importation packages.

Howard & Strout, for the plaintiffs.

S. C. Andrews, for the defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — This is an action of assumpsit to recover the price of a quantity of intoxicating liquors sold the selectmen of the defendant town, who purchased them in their official capacity. The kind of liquors sold is not stated. It was conceded the liquors were not all imported, nor sold in the original importation packages.

The sale was made in Boston. By R. S. of Massachusetts, of 1860, c. 86, § 28, all sales of intoxicating liquors

are prohibited except by persons duly authorized under the provisions of that chapter. It is said by the Supreme Court of that State, in *Wilson* v. *Melvin*, 13 Gray, 73, that "there is no legal presumption that the sale is unlawful, and there should hardly be, in favor of a defendant who has joined in the contract. As against the Commonwealth, the Legislature have required that the defendant, in a criminal prosecution, shall prove the authority under which he acts, when charged with a violation of the statutes prohibiting the unlicensed sale of intoxicating liquors; stat. 1844, c. 102; but they have imposed no such obligation upon parties, who seek the enforcement of contracts." If this rule is deemed applicable to the statute of 1860, it cannot avail the plaintiffs, as the case finds that *they had no license to sell.* Nor can the purpose, however legitimate, for which they were purchased, confer upon them that authority to sell, which they so much need to entitle them to recover.

By the Act of 1858, c. 33, § 5, the selectmen of any town "may purchase such quantity of intoxicating liquors as may be necessary to be sold under the provisions of this Act, and shall appoint some suitable person to sell the same at some convenient place within said town or city, to be used for medicinal, mechanical and manufacturing purposes, and no other." As the purchase was made by the selectmen in their official capacity, we must presume it strictly within the authority conferred upon them. Hence, although, by § 27 of the statute of Massachusetts, "any person may manufacture or sell cider for other purposes than that of a beverage, and unadulterated wine for sacramental purposes," we cannot assume, in the absence of all proof, that the selectmen purchased for such limited purposes—and when such purchase would not be in accordance with the statute under which they acted. *Plaintiffs nonsuit.*

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

ALBERT H. GERRISH *& als. versus* JOHN B. BROWN *& als.*

The Androscoggin River, at Berlin, though not technically a navigable stream, is of sufficient capacity to float logs, rafts, &c., and being so, is, by the law of this State, a public highway.

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, in legal contemplation, a public nuisance.

If a person obstructs a stream, which is, by law, a public highway, by casting therein waste material, 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 one specially damaged thereby.

If the owners of a mill cast the slabs, edgings and other waste of the mill into the river, to be floated away by the stream, and thereby the navigation of the river is obstructed, or the rights of private individuals are infringed upon, they will be liable to an action for the damage caused by their unauthorized acts.

ON REPORT.

This was an action on the CASE to recover of the defendants damages for throwing large quantities of slabs, edgings and other waste stuff from their sawmill at Berlin, into the Androscoggin River, and abandoning it to float down the river and mix with the plaintiffs' timber and fill up their pond or reservoir for logs, and greatly retarding the operations of their mill.

The plaintiffs offered testimony tending to prove the following facts: — that the Androscoggin River is a public highway, and has been used for many years for the purpose of floating rafts of timber and logs over and down the same; that, in 1854, they became the owners of Town's island, situated in Bethel, and formed by the Androscoggin; and of the main land opposite said island, and on the southerly part or branch of the river; that, in said year, they built a steam sawmill, at a large expense, on said main land and opposite said island, near the branch south of said island, and have been in the use and occupancy of the same ever

since; that they extended a slip from said mill to said branch for the purpose of drawing logs therefrom to said mill; that above Town's island, and separated from it by a narrow channel, is Clark's island—Town's island consists of about forty acres—Clark's island being much smaller; that the channel, northerly of Town's island, is about seventeen and that southerly of it is about six rods in width, and that about four-fifths of the waters of the river pass down the former and the other fifth down the latter channel; that, for the accommodation of their said mill, and to constitute said southerly branch opposite Town's island a reservoir, or mill pond, to detain and hold logs for the use and to be manufactured at said mill, the plaintiffs, in 1854, made the following erections; that they so constructed a boom from their said slip across the southerly branch that they could unfasten it at one end at pleasure and let it swing down stream with the current against the bank; that, about six rods above said boom, in the centre of the branch, they built a pier; that, about eight or ten rods further up stream, where said branch is about eleven rods in width, they constructed two other piers, opposite each other, and near to either shore, called jamb piers; that opposite, and extending above and southerly of said two piers, and flanked by a high bank, is about four acres of low land, of the plaintiffs', and on which, in high water, the plaintiffs could float logs for the use of their mills; that they extended a boom across the channel, between said islands, which could be loosened at the upper end at pleasure, and thus leave the channel unobstructed; that, about twenty-five hundred feet above Clark's island, they built a pier in the center of the river, and from it extended a guide boom to the head of Clark's island; also, another boom up stream from said pier about twenty-five hundred feet, to the northerly shore of the river, and fastened the same to a tree on the main land; that these acts were done with the consent of the owners of Clark's island and of the land owners upon each side of the river; that, when logs were running in the river, other than their

own, they would unfasten the upper portion of their boom from said pier and the lower portion from the head of Clark's island, and, from bends in the river and the force of the current, the upper portion would be carried against the bank, and the lower end of the other portion into the center of the stream; that they would unfasten the upper end of the boom between the islands, and one end of the boom at the slip, and the two latter would swing down stream, and thus leave the river entirely unobstructed; that, when logs of other owners were not running, they would swing and fasten all of said booms, and, by means thereof, and of said piers, be enabled to turn their logs into, and hold them, in said southerly branch, above their mills and below the head of Town's island; that, when said branch was thus filled, the logs and floating matter, which came down the channel and southerly of Clark's island, would pass off and down stream, in the channel between said islands; that, whenever the water was of sufficient height to float their logs into said southerly branch, or pond, large quantities of slabs and edgings, and other refuse stuff made at sawmills, for the past five or six years, would come down said river and be floated and carried into said branch, or pond, and that the same could not be separated from the plaintiffs' logs before entering said branch, or pond; that said slabs and edgings come down in such quantities as to occupy one-third of the space in said pond, and so intermix with and confine their logs, that they were unable to move them or adjust them for the purpose of being drawn up said slip; that said slabs and edgings prevented their swinging a boom on the bank of said branch opposite said low land, to hold logs for the use of said mill, while the logs of other owners were being passed by; that, while sawing at their said mill, it requires one man, at least, all the time, to separate said slabs and edgings from the logs and pass the same down stream, and that it frequently became necessary to stop the operation of said mill, employing about twenty-five men, to clear out and get rid of said refuse matter.

They also offered testimony tending to prove that it is, and has been the custom of mill and log owners on said river, to construct and use piers and booms necessary and proper to stop and hold logs for the use of their mills; and also to build such side dams to operate their mills as do not interfere with the navigation of the river. Upon cross-examination, there was also testimony tending to prove that mill owners on the river for years past had been accustomed to throw the slabs and other refuse stuff from their mills into the river, to rid themselves of it.

The plaintiffs also offered testimony tending to prove that defendants constructed mills at Berlin Falls, in the State of New Hampshire, in 1853, that they have manufactured from three to eight millions feet of lumber in the same annually; that two thousand feet of lumber produces about one cord of slabs and edgings, and that the defendants have thrown the same into said river at said falls; that the defendants' mills comprise two gangs, two single saws and other machinery; and that the slabs and edgings, thus thrown in by the defendants, are a part of the same floated down the river, and into their pond; that the natural current of the river would convey about one-fifth of the floating matter down and through said southerly branch, and the balance down said northerly branch, and that the northerly branch is of sufficient floating capacity for the use of the public; that no mills of anything like or near the manufacturing capacity of the plaintiffs' were erected on the Androscoggin prior to the defendants'.

The plaintiffs admit that there are two other large mills at said falls, and that the owners of the same have thrown their slabs and edgings into said river to some extent.

There was no proof offered of any obstruction or diversion of the water by means of any drift stuff lodging or sinking on the bed of the river or pond, and plaintiffs' proof tended to show that, in the natural state of the river, about four-fifths of the logs and drift stuff, or other floating material, would go down the northerly branch of the river, and

about one-fifth on the southerly branch; that, if it were not for the plaintiffs' sheer boom, not more than one-fifth of the defendants' stuff would go into the plaintiffs' pond, and but for the pier and booms of the plaintiffs, below their mills, that one-fifth could all pass on and not be detained.

The drift stuff, complained of in this action, is all floating drift stuff which would pass on and not be detained but for the piers and booms, and sheer booms of the plaintiffs.

Upon this testimony, the cause was, under the direction of the Court, taken from the jury, and, by consent of parties, submitted to the Court to determine whether, upon the testimony offered by the plaintiffs, this action can be maintained.

The case was argued by

D. Hammons, for the plaintiffs, and by

Shepley & Dana, for the defendants.

The opinion of the Court was drawn up by

RICE, J.—This case comes before us on a *quasi* report. It is not presented in conformity with the statute, and might, therefore, with propriety, be dismissed. It, however, involves questions of much importance, not only to the parties immediately interested, but to many other citizens of the State. For the purpose, therefore, of enabling those interested to adjust matters in controversy intelligently between themselves, or to present the points in issue before a Court and jury, we proceed briefly to consider the case as though the facts, which the evidence tended to prove, had actually been established by proof.

It would thus appear, that the Androscoggin river at the points whereon the mills of the respective parties are located, and between them, though not technically a navigable stream, is of sufficient capacity to float logs, rafts, &c., or, in other words, is a *floatable* stream, and, as such, by the law of this State, is deemed a public highway.

The plaintiffs are owners of a steam sawmill situated at Bethel, on the bank of said river, which is supplied with

logs floated down the same, and secured by means of piers and booms in that portion of the river which flows between Town's island and the south shore thereof, and also in a place of deposit, consisting of about four acres of land, owned by them, and upon which logs may be floated at high water. To facilitate the process of catching and securing logs, the plaintiffs have also constructed sheer, or guide booms, to be used temporarily, running from the head of Town's island to Clark's island, and from thence to the north shore of the river.

The defendants are the proprietors of an extensive milling establishment at Berlin Falls, some twenty miles above, on the same river, where they manufacture large quantities of lumber, the waste from which they cast into the stream, below their mills, to be floated away as it may, by the current.

The complaint of the plaintiffs is, that large quantities of this waste material, from the defendants' mill, comes down upon the stream, intermingled with their logs, runs into their boom, and greatly obstructs the moving of logs therein, and also prevents them from swinging a side boom on the bank of said river, opposite the place of deposit on their own land, to hold logs for the use of their mill, while the logs of other owners are being passed by.

The question is, whether the plaintiffs, without fault on their part, suffer injury from the unauthorized acts of the defendants. To determine this involves both law and facts. We can now only indicate the rule of law applicable to the case. The facts must be settled hereafter.

The plaintiffs' mill, not being a water mill, does not fall within the protection of the Mill Act. No question involving the right of flowage is presented. The question presented involves, simply, the legitimate use of the river, by the parties, as a public highway.

This subject, as it bears upon the specific questions at issue between these parties, has very recently received a somewhat extended and careful examination by this Court, in *Dwinel* v. *Veazie*, 50 Maine, 479.

It was therein decided, with special reference to casting into the water, to be floated away, edgings and other waste materials from sawmills, that 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, nor trash, nor the depositories 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.

If, therefore, a person obstructs 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.

A person who should cast, at random, filth or trash into a dock, or waste materials into a public river, to float or sink, as it may, without guidance or direction, can in no just sense be said to be in the use of such dock or river for purposes of navigation. The term *navigation*, as applied to waters which are used as highways, imports something different; it denotes the transportation of ships or materials, from place to place, under intelligent direction or guidance, and not the use of such waters as a mere receptacle of filth, or as a place for the deposit of worthless materials.

If, therefore, the defendants elect to cast the slabs, edgings, or other waste of their mills, into the river, to be floated away by the stream, they do so at their peril, and must see to it that they do not thereby obstruct the navigation of the river, nor infringe upon the rights of private individuals.

So, too, with regard to the plaintiffs. Like other citizens they may use the river as a highway *for purposes of navigation*, and, as incident to this right of navigation, the tem-

porary obstruction of portions of the river, while preparing their materials for transportation, or in securing them at the termination of their transit, would constitute no violation of law. In this respect, public streams are governed by the same general rules of law as are highways upon land.

A temporary occupation 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.

For such purpose, and as incident to the reasonable use of the river for running and securing logs, parties may use temporary sheer, or guide booms, to direct the logs or lumber into proper places, in which to detain them for use. *Dwinel* v. *Veazie*, before cited.

But they are not authorized, by the construction of piers and booms, to convert navigable streams into permanent places of deposit for logs or other materials, so as thereby to obstruct the navigation of such streams or rivers. If the plaintiffs have done so in this case, and have thereby contributed to the production of the injury of which they complain, so far they are remediless, as the Court will not interfere, when both parties are acting in violation of law, to determine which is the more culpable.

Whether the plaintiffs have been injured, by the unauthorized acts of the defendants, in the enjoyment of structures which they have a right to place upon the river, or in their use of the river as a highway, we are unable to determine from the case reported. We therefore remand the case to the county court to be tried in conformity with the legal principles above stated, in case the parties shall be unable to adjust their differences without the further interposition of a court and jury. *Case to stand for trial.*

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

ABNER DAVIS *& als. versus* HEZEKIAH WINSLOW *& als.*

Each person has an equal right to the reasonable use of navigable rivers, or public streams, as public highways.

What constitutes reasonable use depends upon the circumstances of each particular case, and no positive rule of law can be laid down, to define and regulate such use with entire precision.

In determining the question of reasonable use, regard must be had to the subject matter of the use; the occasion and manner of its application, — its object, extent, necessity and duration, and the established usage of the country.

So, too, the size of the stream, the fall of water, its volume, velocity and prospective rise and fall, are important elements to be considered.

In an action to recover for damages, sustained by the plaintiffs in consequence of the stoppage and detention of their logs by means of a boom erected by the defendants in Androscoggin River, the question of the reasonable use of the river, by the defendants, having been, *by consent* of both parties, submitted to the determination of the jury, — *it was held*, that thereby the parties waived the right to except to the instructions of the presiding Judge on that point.

EXCEPTIONS from the rulings and instructions of WALTON, J., at *Nisi Prius;* and ON MOTION of the defendants to set aside the verdict.

This was an action to recover for damages sustained by the plaintiffs, in consequence of the stoppage and detention of their logs by means of a boom erected by the defendants in the Androscoggin River, at Milan, in the State of New Hampshire.

The plaintiffs' case, as set forth in the first count in their writ, is, — "for that the plaintiffs, on the first day of May, A. D. 1861, and on each and every day between said first day of May and the day of the date of this writ, [October 22, 1861,] owned and possessed a large quantity, to wit: — five millions feet, board measure, of pine, spruce and hemlock board-logs and timber, which said logs and timber they had, on and between said days, deposited in and upon the Androscoggin River, at Milan, in the county of Coos, and State of New Hampshire, for the purpose of being floated and driven in and upon and down said river to the steam

sawmills of the plaintiffs, situated on the banks of said river, in said Bethel; and the plaintiffs aver that the said Androscoggin River, from its rise to its mouth, to wit, from the place where said logs and timber were deposited, in said Milan, to the said mills in said Bethel, on said first day of May was, ever since has been, and now is, a public highway for all persons to go upon and navigate with their boats and rafts of timber, and over and upon and down which to drive and float their logs, timber and lumber, at their free will and pleasure, and without any let or hindrance whatsoever. Yet the defendants, well knowing the premises, while the plaintiffs so owned and possessed said logs and timber, to wit, on said first day of May, and on divers other days and times, between said first day of May and the day of the date of this writ, and while said logs and timber were so landed and deposited in said river for the purpose aforesaid, did, by themselves, their agents and servants, unlawfully, unjustly and wrongfully keep and detain said logs and timber, at said Milan, by means of a certain boom then and there constructed and built in the said river, by the said defendants, whereby the free navigation of said river was obstructed. And the plaintiffs aver, that the defendants thereby, by means of said boom, then and there so obstructed the said river, at said Milan, as to render said river impassable and unnavigable, and unfit for the public to pass over and upon said river, with their boats and rafts of timber, and unfit and inconvenient to float logs and timber upon and down the same. And the plaintiffs further aver that, by reason of the aforementioned obstruction, their logs and timber were detained and kept back until after the rise of water in the said river had become unfit and unsuitable to float their said logs and timber, to such an extent, that they, the plaintiffs, were compelled to abandon a great portion of their said logs and timber, to wit, one million feet board measure, between said place of deposit, in said Milan, and their said mills, in said Bethel. And the plaintiffs further declare and allege, that they were put to a great expense,

to wit, an expense of one dollar for each and every thousand feet board measure, by reason of their detention at said Milan, caused by said boom, built by the defendants as aforesaid, in driving their said logs from said place of deposit thereof, in Milan, to their said mills, in said Bethel, over and above what they would have been to and at had not said boom been built. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiffs to have and recover the damage by them sustained in this behalf, and for which this action is brought."

It was admitted that the Androscoggin river, at the place in question, was a public highway, capable of, and being used for, floating logs and timber to market, and that the defendants, being owners of sawmills at Berlin Falls, in New Hampshire, on said river, erected, for their own convenience and the operation of their mills, the boom complained of, and that, at or about the time alleged, the defendants kept up said boom across said river, and thereby detained logs belonging to the plaintiffs, which were floating down said river, intermingled with logs belonging to the defendants, and thereby prevented said plaintiffs' logs from reaching their destination, at Bethel steam mills, so soon as they otherwise would have done, and that thereby the plaintiffs suffered damage.

The evidence produced at the trial is fully reported, and is too voluminous to be here inserted; its substance will appear from the arguments of counsel.

The defendants contended, that, under the circumstances proved in the case, they were justified in stopping and detaining the plaintiffs' logs in the manner which they did; that if the logs of the plaintiffs had, before reaching the booms in Milan, without any fault on the part of the defendants, become so intermixed with the logs of defendants, and of other persons, intended to be stopped and detained for manufacture at Berlin Mills, that the defendants could not stop and separate their own logs, and those of other

persons to be there stopped, without stopping the plaintiffs' logs also, in the manner they did; and, if that was a reasonable, proper and customary manner of separating logs, which had become intermixed in being driven to market, and there was no other practicable mode of accomplishing that object, the defendants would be justified in what they did, and had the right to detain the logs of the plaintiffs a necessary, reasonable and proper time for that purpose. And, if they used all reasonable and proper efforts to effect the purpose, and separate the logs as speedily as practicable, and detained them no longer than was necessary and indispensable, they were not liable for any damage occasioned thereby. And that, upon the evidence in the case, they had not detained them unnecessarily nor unreasonably.

The plaintiffs contended: —

1st. That the defendants had no right to detain their logs for any purpose nor for any period of time, to their damage, without being responsible for such damage.

2d. That if they had a right to stop and detain them at all, they could do so for a reasonable time only; and that what was a reasonable time was a question, under the circumstances of the case, for the jury.

3d. That the evidence in the case showed that the logs might have been sorted and turned by, as they arrived at Winslow's boom, by using proper care and diligence, and thereby the great accumulation of logs above his boom have been prevented.

4th. That, from the testimony of the defendant Winslow, it plainly appeared that the great accumulation of logs at his boom was a public nuisance, endangering booms, piers, mills and bridges, and that they had suffered special damages from it, and that therefore they were entitled to recover.

The presiding Judge, among others, gave the jury the following instructions: —

"The rights of the parties to use the river as a public highway to run their logs were equal. Each was bound to

exercise his right in a reasonable manner, and with a due regard to the equal rights of the others. A party may sometimes lawfully so use and occupy a public highway as temporarily to exclude others from a like use; but no one has a right to encumber a larger space, or for a longer time, to the damage and inconvenience of others, than is reasonably necessary to the beneficial enjoyment of his own right, and any incumbrance of a highway beyond this, to the injury of others, is unlawful. In this respect, what is unreasonable is unlawful; and what is unlawful is unreasonable. And when there are no facts in dispute, whether in a given case the use of a highway, to the injury of others, was reasonable or unreasonable, is ordinarily a question of law, to be determined by the Court. Such questions are sometimes called mixed questions of law and fact, on account of the difficulty of separating the law from the facts, so as to determine in advance what in every case will constitute an unreasonable or unlawful use. If in this case the defendants, for their own private purposes and convenience, and for the sole purpose of stopping their own logs and separating them from others, constructed their boom across the entire width of the river, thereby stopping, not only their own logs, but the logs of the plaintiffs without their consent, from the 28th of May to the 10th of June, so that by reason of the fall of water the plaintiffs could not run their logs that season, such a detention, in my opinion, was unreasonable and unlawful; and if the defendants thereby caused and permitted an accumulation of logs belonging to themselves and others, that formed a solid jam, extending, as variously estimated by the witnesses, from three-fourths of a mile to a mile and a half up the river, and such accumulation of logs endangered the breaking of the boom and the destruction of bridges, dams, mills and other property upon and near the river, as stated by the defendants, it seems to me that a public nuisance was thereby created. I do not intend to use the term in an offensive sense, but I cannot perceive why a public danger, thus created, does not

clearly come within the definition of a public nuisance; and it is a well settled principle of law, that when individuals receive special damage, — that is, damage which is immediate and direct, and not shared by the public, from such a nuisance, he may maintain an action therefor; and if the defendants, by means of their boom, created such a nuisance, and the injury complained of by the plaintiffs was caused thereby, they are entitled to recover. It has been urged in defence, that the plaintiffs' logs could not have been sooner released without increasing the danger of breaking the boom and thereby causing great loss to the defendants, and the destruction of property by the logs moving in a mass down the river. If such was the case, the error would consist, not in not releasing the plaintiffs' logs, and thereby increasing the public danger, after the jam had been formed, but in causing and permitting such an accumulation of logs; and if the necessity for detaining the plaintiffs' logs that length of time was unlawfully created, the defendants could not plead a necessity which they themselves had thus unlawfully created, in justification of the injury the plaintiffs had sustained. You may, however, determine for yourselves whether the detention in this case was, under all the circumstances, reasonable or unreasonable."

Both parties contended that the reasonableness or unreasonableness of the detention by the defendants of the plaintiffs' logs, was to be determined by the jury; and the jury were instructed that they might determine this question from the evidence in the case, with the consent of the counsel for both parties.

The verdict was for the plaintiffs. The defendants excepted.

Evans & Putnam, in support of the exceptions.

The rights of the parties to the use of the Androscoggin river, for floating of lumber to the place of its destination, are equal. Neither can wantonly or unnecessarily obstruct

the other, to his injury. Each is bound to the exercise of ordinary care and due diligence, but nothing more; the extent of the use, and the mode of enjoying it, must be such as is required by the nature, circumstances, and exigencies of the case, and in conformity with the usages of the country.

Embraced in the right to use the river for the purpose of floating timber or other commodities to market, is the right of stopping the articles so floated, at their place of destination, and of occupation of the river for that purpose, in a proper and reasonable manner.

The right to *float*, without the right to stop and secure, is no right. This also must be exercised with ordinary care and proper diligence. If, notwithstanding such care and prudence, damage ensue to others who have an equal right to the use of the river, it is the not infrequent case of "*damnum absque injuria.*"

In the case at bar, the defendants are not responsible for the injuries complained of, if those injuries were the *necessary and inevitable* results of the *lawful* use and occupation of the river. If there be no ingredient of negligence or wantonness in the act complained of, the action cannot be maintained. "But, where the injury is not to be traced to any evil motive, the rule is by no means universal that injury is always entitled to redress." 1 Hilliard on Torts, (2d ed.,) 107, § 18; Ib., 112, § 23.

The case at bar is like the case of several mills on the same stream. The upper have, of necessity, priority in point of time, over the lower in the use of the running waters. But this implies no superiority of rights. The rights are equal. Yet, if, in the proper use by the owner of the upper mills, the waters are stopped to the injury of the lower, no redress can be had. No *wrong* is done, though *injury* may be.

These are familiar doctrines, standing upon the soundest principles of right and justice, and supported by numerous authorities.

2 Gray, 394, *Thurber* v. *Martin*, the charge to the jury at the trial, was, that "every proprietor, at points further down the stream," shall have the enjoyment of it, "subject to such disturbance and interruption as was necessary and unavoidable in and by the reasonable and proper use of it," &c., &c., by those higher up. — p. 395. This held correct. p. 396.

The Court say, "in determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, * * * the general usage of the country in similar cases, and all other circumstances bearing upon the fitness and propriety of the use of the water in the particular case."

So, in 7 Gray, 348, *Chandler* v. *Howland & als.*, the Court say, "the doctrine of the most recent case, on this subject, requires the owner of the upper mill to use the water in such manner, that every riparian proprietor further down the stream shall have the enjoyment of it, substantially, according to its natural flow, subject to such interruption as is necessary and unavoidable, by the reasonable and proper use of the mill privilege above" *and seq.* 13 Met., 157, *Pitts & als.* v. *Lancaster Mills.*

Per SHAW, C. J. — "What is a reasonable use, must depend on circumstances; such as * * * the previous usage * * improvements," &c. "Detention no longer than necessary" for a lawful purpose. 12 Cush., 180, *Inhabitants of Shrewsbury* v. *Smith & als.*

30 Maine, 178, *Noyes* v. *Shepherd.* — Per SHEPLEY, C. J. — "The rules of law applicable to cases of injury occasioned by the lawful acts of one party, to the property of another, appear to be quite well settled. A person is required so to conduct in the exercise of his own rights, and in the use of his own property, as not to do an injury by his *misconduct* or by the *want of ordinary care* to the rights or property of another."

8 Met., 476, *and seq.*, *Cary* v. *Daniels*, discusses these general principles elaborately — q. v. compared to the rights

of use of highway — for which, see 14 Gray, 69, *Com.* v. *Temple.* "Again, * * * each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others, * * and to remove the obstruction within a reasonable time, to be determined by *all the circumstances of the case.*"

35 N. H. Rep. (4 Fogg,) 257, *Groves* v. *Shattuck*, action for damages by obstructions in a highway — question, "whether under *all the circumstances* attending, it *unnecessarily* obstructed the road" — see charge p. 260–1 — "if, in the reasonable use, causing no *unnecessary* obstruction" — this charge sustained — p. 264–5 — "cannot be a nuisance to use a street as they have been used" — cases cited, p. 267. "Necessity justifies actions which would otherwise be nuisances; not an *absolute necessity*, but a reasonable one." 9 Pick., 528, *Boynton* v. *Rees;* 1 Allen, 188, *Gahagan* v. *Bos. & Low. R. R.* See instructions, p. 188 — held correct, p. 190.

44 Maine, 167, *Dwinal* v. *Veazie*, and the more recent cases between the same parties, 50 Maine, 479, recognize and reaffirm the general principles established by the cases above cited.

"Reasonable care and skill is a relative phrase, and what this requires, is always to be determined by a consideration of the subject matter to which it is applied." 4 Allen, 276, *Cunningham* v. *Hall.*

"What is reasonable care, or due care, depends, in every case, on the subject matter to which the care is to be applied, and the circumstances attending the subject matter, at the time when care is to be applied." 3 Allen, 566, *Sullivan* v. *Scripture.*

"Negligence is said to consist in the omitting to do something that a reasonable man would do, or in the doing something a reasonable man would not do, causing, unintentionally, mischief to another. A party who takes reasonable care to guard against accidents arising from ordinary causes,

is not liable for accidents arising from extraordinary causes." 1 Hilliard's Torts, 131, § 38.

"The test of exemption from liability, for injuries arising from the use of one's own property, is said to be the legitimate use or appropriation of the property, in a reasonable, usual and proper manner, without any negligence, unskilfulness or malice." 1 Hill. Torts, p. 126, note a, cites 22 Barb., 297, *Carbart* v. *Auburn*, &c.

Applying these principles to the case at bar, we maintain that the instructions were erroneous; that the verdict was wholly unsustained by the evidence; and that great injustice will be done, if it be allowed to stand.

All the circumstances of the case are to be considered. What are they?

1. The defendants' logs had reached their destination. They were there to be separated and set apart from all others. The only mode of accomplishing this was to arrest the downward progress of the whole; and, for this purpose, there was no other method but a boom stretched across the river;—a mode in conformity with the *universal practice* and usage of the country, and without which the defendants would be deprived of their *equal* right to the lawful use of the river.

2. The intermingling of the logs of the plaintiffs, with those of defendants, was against the will of defendants, and without any fault on their part. They endeavored to prevent it, by the erection of a boom across the Magalloway, which defendants removed, against the remonstrance of plaintiffs, each acting by agents. The blame for intermingling, if any, was on plaintiffs.

3. The river, at the time in question, was at an unusual height, and the current consequently uncommonly rapid, rendering it more than ordinarily difficult to manage and control the floating timber; a fortuitous event, for which defendants are not liable. The accumulation of logs was also much larger than was anticipated or usual; also fortuitous, or occasioned by acts of plaintiffs.

The whole quantity received into the boom was about nine millions feet at board measure; and of these 8,267,579 feet belonged to the defendants, or to others, at whose request they were to be stopped there, leaving about 850,000 feet only, belonging to plaintiffs. Of these, about 450,000 were old logs, bought of Lynch, and 400,000 of new pine logs. Both these came from the Magalloway. The *old* logs (450 M.) were, by the *express agreement* of plaintiffs, to be detained at the boom for delivery, and to be counted.

Thus, of the *whole quantity* received and detained in the Milan boom, only about 400 M. — less than 1-20th part, were destined for places below. What, under such circumstances, was "*reasonable*" and proper for parties enjoying *equal rights*, to do? Was it "reasonable," that defendants should suffer the almost total loss of their very large stock of logs, and the consequent non-uses of their extensive mills, rather than expose the plaintiffs to the *temporary* inconvenience and comparatively small injury they would be likely to sustain, by a brief detention of their logs, so few in number?

4. The *new* logs of plaintiffs were, *at their request*, taken into a drive, *the whole of which* was destined for, and intended to be stopped at, the Milan boom; and this must have been known to some, if not all of them. The instructions of Lynch, one of the plaintiffs, were, "*to detain at the boom.*"

They knew that, by agreement between plaintiffs themselves, the old logs were to be counted and turned out at the boom, and therefore to be stopped there; and when they requested the new to be driven with the old, they must be held as assenting to have them stopped with the old. They therefore consented to the detention. "*Volenti non fit injuria.*"

"An action cannot be maintained to recover damages for an act which the plaintiff himself has expressly or impliedly authorized or sanctioned." 1 Hilliard's Torts, § 28, p. 185.

* * "A party is estopped or precluded from complaining

of an interference with his property, upon the ground that, by his own conduct or declarations, he has impliedly authorized such interference." Ib. § 31, p. 187.

The request by Lynch, one of plaintiffs, to stop his individual logs at the boom, knowing that it could not be done without stopping plaintiffs' also — they being in the same drive — was full license to stop plaintiffs' logs also.

Lynch admits that his pine logs were to be held back. The *new* logs of the plaintiffs do not appear to have been driven, because of their intermixture originally with the rest of the Magalloway drive. They were taken with it voluntarily, and because the plaintiffs wished it, and not because of necessity. They might have been left. If the plaintiffs voluntarily caused them to be intermingled with others, they should share the fate of others.

5. The evidence in the case shows no want of care and diligence, in any respect, or at any time, on the part of the defendants. The assortment and separation, and turning out of the logs, commenced and was prosecuted as early as practicable under the circumstances, and with every possible despatch. The testimony to this, places the matter beyond all controversy.

6. The instructions of the presiding Judge hold the defendants liable, for having allowed so large an accumulation to take place, thereby becoming dangerous to the community, and creating a public nuisance. We answer, that so far as this was occasioned by the unusual stage of the water, bringing an unexpected number of logs, it was an act of God; and so far as it was occasioned by the act of the plaintiffs, in removing the impediment we had placed in the Magalloway, it was their own fault; and, in either aspect, we are not liable.

It was out of the power of the defendants to prevent so large an accumulation, but by submitting to the almost total loss of all their own logs; a sacrifice they were by no means bound to make.

Further, the evidence does not show, and the result does

not warrant the assumption, that the mere *accumulation* of the logs, however great, was dangerous to the public, or constituted a nuisance. It was the undertaking *to move the logs*, for the purpose of separation, at such an *unusual state* of water, that constituted the danger and the nuisance; and from that we refrained.

Besides, the plaintiffs have no ground of complaint, or cause of action for anything that occurred, or was done, prior to 3d June, — the time when Gerrish demanded the logs to be turned out.

Up to that time, at least, they were detained by his and the other owners' consent. He was one of the owners, acting for the others; and yielded to the absolute and imperative necessity of the case, according to his own statement.

According to others, he consented to their detention until the water should have fallen two feet; which did not occur till some time after 3d, — and indeed after 10th or 11th June, — when the process of separation commenced.

Again, the maxim, "*volenti non fit injuria*," applies. See cases already cited.

If the prior accumulation constitutes the gravamen of the action, that is all condoned and waived by the subsequent assent of the plaintiffs; and the question will then be, were the defendants guilty of any negligence, or did they commit any wrong, by an unreasonably and unnecessary detention of plaintiffs' logs, *after* 3d or 10th June?

7. Gerrish, (plaintiff,) says that, on the 27th May, "few of our logs had come down." Of course, few only could then have been turned out; and "few," therefore, could have been detained. Was it reasonable to require that so great hazard should have been incurred, for so comparatively insignificant an object? The great mass of the Magalloway drive came in from 1st to 4th of June, and were turned out as soon thereafter as was practicable under the circumstances.

8. The policy indicated by our statutes, relied upon by

the plaintiffs at the trial, is in entire consonance with these views. R. S., c. 42, §§ 5, 6.

They recognize the impracticability of a separation of different marks of logs, intermingled together on running streams; and provide that the whole may be driven together. If driven together, because of the impossibility of a separation, why not stopped together for the same reason, when it becomes absolutely indispensable to stop them, for the lawful purpose of a separation, and securing to each owner his right?

9. It will not be pretended, that the doings of the defendants were wanton or malicious, or intentionally injurious to plaintiffs. Some slight effort was made at the trial, to show that the detention was desired by the defendants, because of the insufficiency of their side booms, lower down, to receive all their logs. Gerrish is the sole witness to this, and he is refuted by Gould and Winslow.

Some of plaintiffs' witnesses give conjectural opinions, that, if the logs came in *gradually*, at the rate of 500 M. a day, they might all have been sorted and turned out as fast as they came in. Vague speculations all. They came in day and night—not *gradually*, but tumultuously,—and could only be turned out by day. As near as can be ascertained, they all came in within a period of about nine or ten days,—a million a day.

They might have been turned out as fast as they came, provided they had all been turned down river together. But this was not their destination.

10. If the defendants were justified in *any* detention of plaintiffs' logs at all, they were justified in detaining them for so long a time as was requisite, with proper care and diligence, to effect the separation. No other sensible rule can be applied.

What is a reasonable time cannot be measured by days or hours. Who can fix, *arbitrarily*, and without regard to the object to be accomplished, any length of time, in days or weeks, which can be considered reasonable; and be-

yond which it would be unreasonable? The rule must be founded on some philosophical principle,—clear, precise, and of easy application.

If the thing to be done be legitimate and proper, time enough to do it must be granted; and not any arbitrary period, which may not be half sufficient for the purpose.

In cases like this, "good faith, sound discretion, and prudent management, so far as the rights of others are involved," are required; and, when these are observed, no liability should attach. *Foster* v. *Cushing*, 35 Maine, 61.

E. & F. Fox & Hammons, contra.

The admitted facts are amply sufficient to sustain a verdict for the plaintiffs.

(1,) The place was admitted to be a public highway, capable of being used for floating logs and timber to market.

(2,) That the defendants, *for their own convenience*, erected the boom complained of, and kept it across the river; and thereby detained plaintiffs' logs, hindering them from reaching their destination so soon as they otherwise would, and that thereby the plaintiffs were damaged.

What are the rights of the public in public rivers and highways?

WESTON, C. J., in *Berry* v. *Carle*, 3 Greenl., 273, says, "By the common law, rivers, as far as the tide ebbs and flows, are public and open for the use and accommodation of all subjects or citizens, and any obstructions erected or continued therein is a common nuisance, and may be abated as such. So rivers and streams, above where the tide ebbs and flows, although the land over which they pass belongs to the owners of the adjoining banks, yet, if they have been long used for the passage of boats, rafts or timber, although they have not the character of public rivers, within the meaning of the common law, yet they thus become public highways, and, like other highways, are to be kept open and free from obstruction."

Also, remarks of SHEPLEY *arguendo*, on p. 272,—"Even

booms cannot be erected without leave of the Legislature, and the grant of such leave shows that they would otherwise be nuisances."

In *Wadsworth* v. *Smith*, 2 Fairfield, 280, PARRIS, J., says,—"Those which are sufficiently large to bear boats or barges, or to be of public use, in the transportation of property, are highways by water, over which the public have a common right." "*Such rivers, therefore, cannot lawfully be so obstructed*, even by the owners of the banks and bed, as to interfere with this public right." If, therefore, Ten-mile brook, was naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose, unencumbered with dams, sluices or tolls, and no man can lawfully thus encumber it, without the public permission." The same doctrine is recognized in *Scott* v. *Wilson*, 3 N. H., 321.

In *Brown* v. *Chadbourne*, 31 Maine, 26, the Court say, "the right of way is in the waters, and the defendant had no authority to prevent its exercise. He could, by law, erect and continue his dam and mills, *but* was bound to provide a way of passage for the plaintiff's logs. He obstructed the river improperly by his dam and logs."

In *Knox* v. *Chaloner*, 42 Maine, pp. 155 and 156, the rights of parties as to use of navigable waters are very fully examined by APPLETON, J., and it is there decided, that "the right of passage of the public, in navigable waters with their mill logs, is paramount to the mill rights under the statute." That all hindrances or obstructions to navigation, without direct authority from the Legislature, are public nuisances, (and most certainly a boom without any legislative authority,) which impedes or obstructs the right of the public in floating logs in a stream, in which they can be floated in its natural state, must be held, *pro tanto*, a nuisance. See also Angell on Watercourses, §§ 554, 555.

Fifty years ago, in *Arundel* v. *McCulloch*, 10 Mass., 70, it was decided, that it was an unquestionable principle of the common law, that all navigable waters belong to the

public, and that no individual or corporation can appropriate them to their own use, or confine or obstruct them, so as to impair the passage over them, without authority from the Legislative power. When any public way is unlawfully obstructed, any individual who wants to use it in a lawful way may remove the obstruction, and the defendant in this case was justified in cutting down a bridge, over a navigable river, which had been erected over fifty years.

The boom being thus a public nuisance, and, as the case finds, erected by the defendants for their convenience, and proving detrimental to us, we had a right to cut it away, or may recover compensation for any damages we have sustained by reason of it. *Cole* v. *Sprowl*, 35 Maine, 169; *Sutherland* v. *Jackson*, 32 Maine, 80.

In *Brown* v. *Watson*, 47 Maine, 161. Where one returning home, with a loaded team, is stopped by obstructions placed in the highway, and compelled to take a more circuitous route, he is entitled to recover his damages from the person who placed the obstructions there. "For an injury to a private person by a common nuisance, however inconsiderable, he may maintain an action."

This principle has been applied to the obstruction of a public navigable creek, and a party thereby injured has recovered his damages, in *Rose* v. *Miles*, 4 M. & S., 103,

The defendants, being wrongdoers, having no right to obstruct the passage of logs, in the river, are responsible for all consequences of their illegal acts. The doctrine is well stated in Hilliard on Torts, 2d Ed., 112, "if an illegal act be done, the party doing or causing the same to be done is responsible for all consequences resulting from the act."

These, we think, are the legal principles which are applicable to the case, to determine the rights of the parties, and we believe nothing can be found in the rulings of the presiding Judge in conflict with them; and a verdict for the plaintiffs for some damages necessarily followed on the undisputed facts of the case. * * * * *

The case finds, that both parties contended that the rea-

sonableness or unreasonableness of the detention was for the jury, and the jury were instructed, that they might determine this question from the evidence in the case, *with the consent* of the counsel for both parties.

This being *by consent*, and the jury having passed upon it, the party has no cause of exception. "A party cannot except to any proceedings of a court, which takes place at his request or by his consent." *Mudgett* v. *Kent*, 18 Maine, 349.

Whether the jury came to a right conclusion, or not, upon this point, it is no ground for a new trial; it is the same as the finding of referees; the parties have selected their own tribunal to settle the fact, and should be bound by its findings.

The defendants' counsel starts with the assumption "that the injuries complained of were the necessary and inevitable result of the lawful use and occupation of the river." We think we have shown that he is in error, and that the defendants acted illegally in erecting their boom and detaining so large a quantity of logs therein as to endanger the property of others and create a public nuisance.

If we are right in these views, it follows, that all his suggestions as to ordinary care and proper diligence are inapplicable. These defendants are wrongdoers, responsible for all the consequences of their acts, notwithstanding they use ordinary care and prudence in their illegal proceedings. * *

If this defence is to prevail, the lower mill owners will be wholly in the power of those up river, and it would take half a dozen years for a drive of logs to get down; each boom owner asserting the right to detain the logs, because of the rise of water, and his own necessities, and the result would be, that most of the logs would be utterly spoilt before they reached their destination; the detention would also be constantly resorted to, to compel the sale of logs, rather than put the owners to the trouble and delay of waiting for them, and great damage and mischief would result from it. It is a strong argument against the defendants,

that no one ever before has asserted any such right, and the logs on all other rivers have been allowed to run with the freshet.

It is most manifest that proper diligence and care were not used by the defendants; they could have easily prevented such an accumulation of logs, and, by proper management, and a larger number of men, could have prevented such a jam, and turned our logs down with the benefit of the rise. We do not believe that "there was either good faith, or sound discretion, or proper management;" but all this was for the jury, and they have settled it in favor of the plaintiffs.

Evans, for defendants, in reply: —

The *general* proposition contended for by the plaintiffs, viz.: that obstructions to highways and navigable streams constitute nuisances, which may be abated, is not controverted. But, like all *general* propositions, it is subject to qualifications and limitations. The broad, unqualified proposition, that no person can at any time, or under any circumstances, or for any purpose, obstruct a highway or navigable stream, even though it be to the injury of another, without incurring legal responsibility, is *not true*.

Highways, whether on land or water, being for the common use, every person has an equal right with every other person, to their enjoyment.

The use of them by one, of necessity, to some extent, obstructs and impedes the use of them, at the same time, by another, and it may be to his great injury.

Has he thereby created a nuisance? Is he liable for the damages which the other has sustained? Has he done a wrong? Certainly not, if he has conducted with reasonable care and diligence.

In every case, therefore, the inquiry is, how is the obstruction complained of created? What is its nature? Permanent or temporary?

If permanent, as by dams or buildings or other similar

erections, they are indisputably nuisances, — no lawful authority being shown for their existence. If temporary, how and for what purpose occasioned? If occasioned by the actual use of the same highway by another, in the legitimate and proper pursuits of his own business, in a careful and prudent manner, certainly no nuisance is created which imposes any liability whatever. There may be an obstruction and an injury, but there is no ground of action.

The *general* proposition, that *every* obstruction in a public highway, occasioning individual injury, is a private nuisance for which an action will lie, is not therefore universally true. Whether it be so or not, in any given case, depends upon whether it is occasioned by the lawful or unlawful, proper or improper acts of one in the enjoyment of his own rights.

The authorities cited by the plaintiffs' counsel all go to support the *general* proposition, but no further. The learned counsel argues that, it being admitted that the acts of the defendants occasioned the detention of plaintiffs' logs, to their injury, the action is, upon the general principle, maintained, and the verdict should stand.

Still the question remains, were the acts, under the circumstances, *necessary* and justifiable?

The temporary hanging or closing of the boom, which is the obstruction complained of, was *indispensable* to the enjoyment of the defendants' rights in the common highway. If they could not do that, they could have no use of it. The boom was *indispensable*.

The obstruction, then, was an obstruction *inevitably* and *necessarily* occasioned by the use of the public highway, by those having an equal right to the use of it, with the plaintiffs, and the whole community. It was an inevitable incident to the use at all. It was utterly impossible for the defendants to enjoy their rights, without occasioning the obstruction. None of the cases, cited on behalf of the plaintiffs, hold the defendants responsible under circumstances like these.

The learned counsel for the plaintiffs makes no allowance

for these considerations. He argues in the broadest terms, *every obstruction*, however occasioned to a navigable stream, is *illegal*, and imposes liability. Here was an admitted obstruction, *ergo*, &c.: or thus — "The defendants being *wrongdoers*, having no right to obstruct the passage of logs in the river, are responsible for all consequences of their *illegal* acts." We admit responsibility for *illegal* acts, but we deny the *illegality*, we deny being wrongdoers. We claim the *clear*, *legal*, *undoubted right* ourselves, to use the river to *run our logs*. This is what we did, and all we did, and, if in doing it, we necessarily did impede and obstruct the plaintiffs temporarily, we did not thereby become wrongdoers, our acts were *not* illegal, and we created no nuisance for which an action can be maintained. The cases cited by us in opening are decided to this point. None are adduced to the contrary.

The counsel *assumes*, and reiterates that the acts we did were *illegal*, and hence deduces the liability he would attach to them, but he offers little argument and no authority to establish their illegality. His major proposition in the syllogism is, — "every obstruction, &c., is illegal."

This we deny, obstructions occasioned by the proper use of the river by another, having right, are *not* illegal. The premises failing, the conclusion necessarily fails also.

"The boom being thus a public nuisance," says the counsel, "may be abated or an action brought." This is leaping to a conclusion quite too summarily. Let it be first established that, under the particular circumstances of the case, the boom in question *was* a public nuisance. This we deny. A boom, it is admitted, *may be* for the time being an obstruction, and like any other obstruction *may* be — not *must* be, illegal or a nuisance, depending upon circumstances.

If it be a fit, suitable, customary and appropriate means, and especially if it be an *indispensable* means, of securing floating timber, then the owner of such timber, for such purposes, may lawfully resort to it, and if he conduct with caution and prudence and ordinary skill and diligence, he com-

mits no nuisance and incurs no liability. To hold otherwise is to deprive him of the useful enjoyment of his most unquestioned right.

In *Brown* v. *Watson*, 47 Maine, 161, cited by plaintiffs, the obstruction appears to have been wholly wilful; there was no pretence of necessity for it; it was not occasioned by the exercise of any lawful right on the part of defendant. It has no bearing on any question arising in the case at bar.

The same remark applies to the cases of *Cole* v. *Sproul*, 35 Maine, 169, and *Sutherland* v. *Jackson*, 32 Maine, 80, cited by plaintiffs' counsel. In both, the obstructions were occasioned by *permanent erections* in a public highway, without any pretence of right. The injury was not a necessary and inevitable one growing out of a proper exercise of the rights of defendants, as is the case here. The principle involved here, was not touched in either case.

Knox v. *Chaloner*, 42 Maine, 155–6, is referred to by the counsel for plaintiffs as illustrating the rights of parties to the use of running waters. There is no legal principle asserted in the case, to which we make the slightest objection. The spirit and scope of the decision there goes to uphold the right to the use of the stream for the purpose of floating logs to their destination. The object to be attained, by the use of the water, is securing the lumber in the place where it is wanted.

Now that is precisely what the defendants, in the case at bar, did, in the acts which are complained of. They were in the use of the stream to drive their logs to their destined place. We contend, as earnestly as the plaintiffs can, for the legal principle, that, in the pursuit of this lawful object, they cannot be hindered or obstructed. If they are entitled to the use and control of the waters, to attain this end, they are entitled to them in the only way in which it can be accomplished—the usual, customary efficient mode. If they cannot employ this mode, then they are the party who are hindered and obstructed in getting their logs to their place

of destination — their rights in the common highway are taken from them.

Brown v. *Chadbourn*, 31 Maine, 26, cited by plaintiffs, and others like it, of obstructions by means of dams and other permanent erections, leaving no sufficient passage way for logs, are not analogous to the present, and general remarks of the Court, in such cases, have but little application to the circumstances here presented.

"He obstructed the river *improperly*," is the language of *Brown* v. *Chadbourn*, and similar is that of all analogous cases. In that case, the dam could have been constructed so as to answer all the purposes of the owner, and still leave a passage way for logs. The rights and interests of both parties might have been preserved. The neglect to do this was the wrong complained of and the ground of liability. But, in the case at bar, this was impossible. The defendants could not enjoy the beneficial use of the river, for driving their logs, in any other mode than that they adopted. The injury thereby occasioned to plaintiffs was inevitable — one of absolute and dire necessity — wholly different from that in any of the decided cases referred to.

What the defendants contend for, is, the right to use the Androscoggin river for the purpose of floating logs to their mills for manufacture, in the usual manner of conducting such business, and in conformity with the usages of the country, free from liability, except for negligence or want of ordinary care and diligence on their part. They maintain this, as a *legal* proposition, and they complain that such was not the instruction to the jury, but the reverse.

If the defendants had the right claimed to the use of the river, how were they to enjoy that right in any other mode of proceeding than that which they adopted? What should they have done to stop their logs at their point of destination, which they did not do? Or omitted to do, which they did? What error or wrong did they commit, having, as must be conceded they had, the perfect right to drive their logs to the place of manufacture? Nothing has been pointed

out, or is pretended. No other feasible mode of accomplishing the object is suggested — none can be.

It is not pretended that the defendants' mills, at Berlin Falls, are located at an unsuitable or improper place, not adapted to such operations — on the other hand, the situation is eminently adapted to the purpose — a natural site and water power of great capacity, unequalled on that river. The plaintiffs, on the other hand, have no natural power or advantages. Their's is a steam mill. The long established policy of the State and the country, has been to foster and promote the occupation and development of its *natural advantages* and resources — and hence peculiar inducements are held out to the erection of water mills, not offered to those of a different description.

The restrictions sought to be imposed on defendants, in this case, are directly repugnant to this long cherished policy, and find no support in our statutes or adjudicated cases on analogous subjects.

There is a good deal in "the way of putting a case." The plaintiffs' counsel inquires, "what right had the defendants thus for their own private purposes and benefits to obstruct a highway and injure others who had an equal right with themselves to pass over it?" This is adroitly put. We claim no right to *obstruct* the highway, for private benefit.

We claim the right to *use* the highway, properly and legitimately, and if such use of it, of necessity occasions some temporary obstruction, it is not an unfrequent consequence. The books abound in cases where the rightful use of one's own injures another, but where no remedy can be had.

The ruling of the presiding Judge was, that the use of the water thus made by the defendants, was *unreasonable*, therefore *unlawful*. This was stated as matter of *law*, and being *unlawful*, the defendants were liable.

Why it was *unreasonable* is not stated. Was the object to be accomplished *unreasonable?* Certainly this will not

be pretended. Was there any other practicable mode of doing it? None is shown or suggested, and none can be imagined.

The ruling then, in effect, denies to the defendants the equal right which they have in the waters of the river for carrying on their mills.

2. The learned counsel supposes that we are precluded from complaining of the instructions to the jury upon this point, because, by the consent of parties, the question of reasonableness or unreasonableness was submitted to them, and their verdict is conclusive in the matter.

It is quite true, that both parties argued that question to the jury, and supposed that it properly belonged to them, under appropriate instructions, to decide. The instructions which were given were clearly decisive of the case. They were founded on no controverted facts. They assumed the case as made by defendants. They stated no alternative, in which a verdict should be found for defendants. In a word they cut up the defence, root and branch. Now, if these instructions were correct in law, our exceptions cannot be sustained, but if erroneous, they should not have been given, and our exceptions will be sustained, although it was left to the jury to pass upon the question of reasonableness or unreasonableness.

The opinion of the Court was drawn up by

DICKERSON, J. — Case, to recover damages sustained by the plaintiffs, in consequence of the stoppage and detention of their logs, by means of a boom erected by the defendants across the Androscoggin river, at Milan, in the State of New Hampshire.

It was admitted that the Androscoggin river, at the place in question, was a public highway, capable of, and being used for, floating logs and timber to market, and that the defendants, being owners of sawmills, at Berlin Falls, in New Hampshire, on said river, erected, for their own convenience and the operation of their mills, the boom com-

plained of, and that, at or about the time alleged, the defendants kept up said boom across said river, and thereby detained logs belonging to the plaintiffs, which were floating down said river, intermingled with logs belonging to the defendants, and thereby prevented said plaintiffs' logs from reaching their destination at Bethel steam mills, so soon as they otherwise would have done, and that thereby the plaintiffs suffered damage.

The case comes before us on exceptions and motion by the defendants. It is conceded that the Androscoggin river, at the place in question, is a public highway, capable of, and being used for floating logs and timber to market. While there is no controversy between the respective counsel with regard to the *general* proposition, that obstructions to highways, whether upon the land or water, constitute nuisances which may be abated, the learned counsel for the defendants denies that this proposition is universally true, and argues that, in the case at bar, it should be applied with limitations and qualifications which arise from the particular circumstances of the occasion.

It is to be observed, that general propositions are liable to be very much modified by circumstances; *in generalibus versatur error*. The difficulty oftentimes consists, not in understanding *the general* rule of law, but in applying it to the ever varying circumstances of particular cases. While, however, the general principles of the common law remain fixed, their adaptation to the vicissitudes of human affairs renders them sufficiently comprehensive to meet new institutions and states of society, and new systems of intercommunication between man and man, as they unfold themselves in the progress of civilization.

This peculiarity of the common law is, perhaps, nowhere more fully exemplified than in its application to public watercourses. As human society advanced from its primeval state, navigable rivers and public streams came to be the arteries of commerce, permeating parts otherwise inaccessible, developing occult mineral resources, and bearing upon

their bosom immense wealth to the more genial abodes of man. The history of our legislation, no less than the decisions of our courts, attest the solicitude of the community to make these great highways, both the means of developing the resources of the country, and of transporting their products to more remote regions. The various mill Acts, for the encouragement of milling, and the vigilance of courts to preserve a free transit for the various raw material and manufactures of lumber to a market, are so many proofs of this truth. "God," says Domat, "has given us the use of the seas and rivers, which opens the communication with all the world, to use, and makes us acquainted with our fellow men in distant countries."

The essential characteristic of highways is, that every person has an equal right with every other person to their enjoyment, and yet this enjoyment of them by one, of necessity, to a certain extent, interferes with its use by another. Water, air and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a *reasonable* use of each. A man cannot occupy a dwelling, or consume fuel for domestic purposes, at least in our large cities, without, in some degree, impairing the natural purity of the air; nor can he erect a building, or plant a tree near the house of another, without, also, in some respect, diminishing the quantity of light he enjoys. Ordinarily, these being the necessary incidents to the common enjoyment, furnish no ground of action. The use of water, from its greater specific gravity, and the countless variety of purposes for which it is appropriated, gives rise to a larger number of perplexing questions. The detention of water, by a dam for the benefit of a mill, oftentimes results in an injury to the owners of the privilege below. It does not, however, follow that for every such injury there is a remedy. If the detention is indispensable to the owner's reasonable enjoyment of his rights in the common highway, and is continued no longer than is necessary for that purpose, the proprietor below is without remedy for any injury

he may have suffered thereby; otherwise, the right of common use is nugatory, and the party requiring such use is himself obstructed in its exercise. *Webb* v. *Portland Manufacturing Co.*, 3 Sumn., 189; *Embrey* v. *Owen*, 4 English Law and Eq., 466.

The social duty, therefore, inculcated in the maxim, *sic utere tuo ut alienum non laedas*, must be understood, and applied with qualification. In *Inhabitants of Shrewsbury* v. *Smith & al.*, 12 Cush., 181, which was an action by a town against the owners of a dam, which had broken away and injured plaintiffs' bridge, the Court defined this maxim to mean, that each proprietor, in exercising his own rights on his own territory, should act with reasonable skill and care to avoid injury to others, and, as an approximate rule for measuring that degree, it should be that degree of ordinary skill, care and diligence, which men of common and ordinary prudence in relation to similar subjects would exercise in the conduct of their common affairs.

Where the legal effect of an act is the subject of judicial investigation, it is not unfrequently necessary to inquire into the subject matter, occasion, object, extent and necessity of the act, together with the manner and purpose of its performance. Was the subject matter appropriate, the object lawful, the occasion suitable, the extent reasonable, the necessity imminent, or the manner prudent? As these questions shall be answered by the facts and circumstances of the particular case, so will be the judicial determination of the legal consequences resulting from the act in question.

Reasonable use is the touchstone to which cases of this description must be subjected; and it becomes important, therefore, to examine the decisions of Courts upon this question.

1. *Of the use of water by riparian proprietors.*

In Pennsylvania the question arose with regard to the respective rights of the upper and lower riparian proprietors to the use of water for milling purposes. The presiding Judge instructed the jury as follows:—"The defend-

ant had a right to use the water as it passed through his land; if he detained it no longer than was necessary for his proper enjoyment of it, the plaintiff cannot recover; whether, if you believe, from the evidence in the case, that he did detain the water three days, at times, at other times, five days, at one time, thirteen days, in his own dam, to the injury of the plaintiff's mill, this was longer than was necessary for the defendant's proper enjoyment of the water, at his mill, as it passed through his land, is left for your determination. If you believe it was, you will find for the plaintiff; if you believe it was not, you will find for the defendant, unless you find that the defendant did maliciously or wantonly detain the water, or that there was some degree of malevolence in the time or quantity of water discharged to the injury of the plaintiff's mill; for, if you believe this, your verdict should be for the plaintiff." The verdict was for the defendant, and exceptions were taken to this ruling on the ground that the *time* the water was detained was so long and unreasonable that the plaintiff was entitled to recover; but the upper Court overruled the exceptions, and sustained the ruling, alleging as the ground of their determination, "the impossibility of making even a general rule for such cases, and that the matter was fairly submitted to the jury." *Hetrich* v. *Deachler*, 6 Barr., 32. *Thurber* v. *Martin*, 2 Gray, 394, also, was an action of tort for obstructing the natural flow of the water, and diverting it from the plaintiff's mill. In delivering the opinion of the Court, Chief Justice SHAW thus stated the law of the case:—"Every man has the right to the reasonable use and enjoyment of a current of running water, as it flows through or along his own land, for mill purposes, having a due regard to the like reasonable use of the stream by all the proprietors above and below him. In determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, its height and velocity, the state of improvement in the country in regard to mills and machinery, and the use of water as a propelling power,

the general usage of the country in similar cases, and all other circumstances bearing upon the question of fitness and propriety in the use of the water in the particular case."

The doctrine of *Thurber* v. *Martin* was expressly affirmed in *Chandler* v. *Howland*, 7 Gray, 350, where the Court say that the right of riparian proprietors to the natural flow of water over their lands is "*subject* to such *interruption as is necessary* and *unavoidable* by the reasonable and proper use of the mill privilege above."

In *Pitts & als.* v. *The Lancaster Mills*, 13 Met., 157, the defendants, owners of a mill and dam above an ancient mill-dam of the plaintiffs, rebuilt and raised that dam above its former height, whereby the water was wholly cut off from the plaintiff's mill for a period of six days, greatly to his detriment. The case was submitted to the Court upon an agreed statement of facts, and a nonsuit was ordered, the Court assigning as a reason therefor, that "this was not an unreasonable use of the watercourse by the defendants, and that any loss which the plaintiffs temporarily sustained by it, was *damnum absque injuria*." "What is a reasonable use," the Court say, "must depend upon circumstances, such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvements in manufactures and the mechanic arts."

2. *Of the use of highways upon land and water.*

In the several cases, *Veazie* v. *Dwinel*, and *Dwinel* v. *Veazie*, 50 Maine, 479, this Court held, 1st, that it was not lawful for a mill owner to obstruct, with the waste from his mill, a channel made by another mill owner, as a passage way for rafts, logs, and lumber, from the former's mill on the Penobscot river, to and through the sluice, in the latter's mill-dam, and 2d, that the latter had no right to *permanently* obstruct this channel by a boom across it, designed to guide his logs into a new channel made by the former, though he might lawfully use this new channel as a passage way for his logs, and erect *temporary* guide booms for that purpose. These cases were submitted to the Court, who gave this

construction to the rights of the respective parties, as a reasonable use of the Penobscot river as a public highway for running logs.

In *Gerrish & al.* v. *Brown & al.*, *ante* p. 256, it was held that, if a person obstruct a stream which is by law a public highway, by casting therein waste materials, filth or trash, or by depositing materials of any description, *except as connected with the reasonable use* of said stream or highway, or by direct authority of law, he does it at his peril, and is guilty of causing a public nuisance. In that case, the Court say, "the plaintiff, like any other citizen, may use the river as a highway for the purposes of navigation, and, as *incident* to the right of navigation, the *temporary* obstruction of portions of the river while preparing these materials for transportation, or *in securing them at the termination of their transit*, would not constitute a violation of law. In this respect, public streams are governed by the same general rule, as highways upon land."

A *temporary* occupation of a street, or highway, by persons engaged in building, or in receiving or delivering goods from stores, or warehouses, is lawful from the necessities of the case, while a persistent and continuous obstruction of a street beyond what is required for a reasonable use of it, even for such purposes, is unjustifiable. *People* v. *Cunningham*, 1 Denio, 526; *Commonwealth* v. *Passmore*, 1 Searg. & Rawle, 219.

In *Graves* v. *Shattuck & al.*, 35 N. H., 268, the plaintiff was obstructed by the defendants, while in the act of removing a building through one of the public streets of Nashua, and brought his action to recover damages occasioned by this act of the defendants. The right of the plaintiff, to encumber the street for such purpose, was put in issue, and the jury returned a verdict for the plaintiff, the presiding Judge according to the plaintiff that right, in his instructions to the jury. Exceptions were taken to this ruling, but the Court above sustained the instructions, and say, "the doctrine of all the cases on this subject that we

have examined seems to be in accordance with the instructions below, that the law justifies obstructions of a partial and temporary character from the necessity of the case, and for the convenience of workmen, when these obstructions occur in the customary, or contemplated use of the highway, and that the question of their necessity, and of the customary, or contemplated use, is one for the consideration and determination of the jury, under all the circumstances of each particular case."

3. *Of the test of reasonable use.*

A person is required so to conduct in the exercise of his own rights, and in the use of his own property, as not to do an injury by his misconduct, or by the want of ordinary care to the rights or property of another. What is reasonable care, or due care, depends, in every case, on the subject matter to which the care is to be applied, and the circumstance attending the subject matter at the time, when care is to be applied. Negligence consists in the omitting to do something that a reasonable man would do, or in doing something that a reasonable man would not do, causing, unintentionally, mischief to another. A party who takes reasonable care to guard against accidents, arising from ordinary causes, is not liable for accidents arising from extraordinary causes.

The test of exemption from liability for injuries arising from the use of one's own property is the legitimate use or appropriation of the property in a reasonable, usual and proper manner, without any negligence, unskilfulness or malice. *Noyes* v. *Shepherd*, 30 Maine, 178; *Sullivan* v. *Scripture*, 3 Allen, 566; 1 Hilliard on Torts, 131, § 38.

4. *Of the essential elements of a nuisance.*

If one, for his own benefit, violates the rights of another, it is a nuisance; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Neither express malice, nor a disposition, or desire to cause damage to another, as in case of malicious mischief, is necessary to the completion of the of-

fence. It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others and in plain violation of them; it is a wrong done. And, as every man must be presumed to intend all the necessary, natural and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice in the eye of the law, and no other malice need be proved to show the act to be a nuisance.

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 the eye of the law. They cannot be made the receptacles of waste materials, filth or trash, nor the depositories of valuable property so as unreasonably to obstruct their use as highways. *Commonwealth* v. *Temple*, 14 Gray, 69; *Dwinel* v. *Veazie* and *Veazie* v. *Dwinel*, 50 Maine, 479; *Knox* v. *Chaloner*, 42 Maine, 150.

The authorities relied upon by the learned counsel for the plaintiffs are not essentially in conflict with the general current of decisions to which we have adverted. *Wadsworth* v. *Smith*, 11 Maine, 278, was a case of a *private* stream, and the general statement of PARRIS, J., with regard to the rights of parties to the use of navigable rivers was not elicited by the question at issue, and, taken in its strictly literal sense, is not entirely accurate. In *Brown* v. *Chadbourn*, 31 Maine, 26, it was held that a riparian proprietor has no right *permanently* to obstruct a public stream by a dam, and that, if he builds such a dam, he is required to construct and maintain a passage way by it.

So in *Knox* v. *Chaloner*, 42 Maine, 150, a dam over such a stream was held to be a nuisance. *Cole* v. *Sproul*, 35 Maine, 169, and *Sutherland* v. *Jackson*, 32 Maine, 80, were cases of the obstruction of *private* ways by the erection of buildings. In *Brown* v. *Watson*, 47 Maine, 161, the defendant obstructed the public highway by wantonly felling trees across it. In these, and the other cases cited by the plaintiffs' counsel to this point, the obstructions con-

sisted of *permanent* erections, such as buildings or dams and the like, and were in no respect necessary to the use of the several highways, for the purposes of travel or transportation.

The general doctrine to be deduced from the authorities we have collated in reference to the use of navigable rivers, or public streams, as public highways, is, that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in doing so, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrongdoer, his acts are not illegal, and he creates no nuisance for which an action can be maintained.

Firemen, in extinguishing fires, builders, in erecting or removing buildings, teamsters, in hauling logs or masts to market, truckmen, in loading or delivering merchandize, shipmasters and boatmen, in receiving, transporting and delivering their cargoes, raftsmen, in managing their rafts, river drivers, in running logs, and mill owners, in securing

them, oftentimes, of necessity, require so much of a highway as temporarily to obstruct it; but, in such cases, they must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case; and, when they have done this, the law holds them harmless.

The defendants, as owners of the upper mills, had a right to the reasonable use of the river, not only to float their logs, but also to arrest and detain them at their mill. The current was deep, broad and rapid, and the quantity of logs borne along by it was very large. Their logs had been intermingled with the plaintiffs' by the mutual act of the parties and in accordance with the established usage of the country. The means to be employed by the defendants in the work of separation and detention; and the time, mode, necessity and extent of their use of the river for these purposes, were subjects properly addressed to the practical judgment of the jury, under all the evidence in the case; and it was the right of the defendants to have them so presented.

The case finds, that the whole question of the reasonable use of the river was agreed to be submitted to the jury, and the presiding Judge instructed them that they might determine this question.

This was a waiver by both parties of their right to except to the instructions of the Judge upon the subject of the reasonable use of the river. Whether, therefore, those instructions were correct or erroneous in this respect, is not necessary for us to determine, since the parties, by their own act, have precluded themselves from the right to question their correctness; nor were they material to the issue, as the reasonableness or unreasonableness of the detention of the plaintiffs' logs by the defendants was left to the jury to determine.

After a careful examination of the evidence we are unable

to discover sufficient ground for setting aside the verdict, as prayed for in the defendants' motion.

Exceptions and motion overruled, and Judgment on the verdict.

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

ISAAC P. FURLONG *versus* WILLIAM C. PEARCE.

The statute limits the bringing of an action to recover back usurious interest to one year from the time of payment.

Where a negotiable note, payable at a future day, is given for the excess of interest, the limitation is not from the date of the note, but from the time the note is actually paid.

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

This was an action under 3d sec. of chap. 45, of Revised Statutes, to recover back money alleged to have been paid as usurious interest by plaintiff to defendant.

The plaintiff offered evidence tending to show that he obtained on loan from defendant $500 for one year, and agreed to pay 12 per cent. interest therefor. That he gave defendant a note for that sum, dated Nov. 28, 1860, payable in one year with interest, secured by mortgage on his farm, and at same time gave him another note for thirty dollars, of same date, payable to defendant or order in one year without interest, for the extra six per cent. interest.

This $30 note was paid in money in Dec., 1862. The writ in this action is dated Jan. 6, 1863. Defendant moved a nonsuit on the ground that the limitation of one year named in the statute applied, and that the giving of the negotiable note without security was such payment that the time began to run from the time of giving the note. The Court refused to order a nonsuit, and ruled that the time for

limitation to commence was when the note was actually paid in money. To which ruling the defendant excepted.

Sanderson, in support of the exceptions.

Hammons, contra.

The opinion of the Court was drawn up by

DAVIS, J. — By the R. S., c. 45, § 3, it was provided that any person paying excessive interest might recover it back of the creditor receiving it, "in an action of the case, *commenced within a year after the payment.*" The amendment of 1862, c. 136, may possibly extend the remedy to some cases not reached by the Revised Statutes. And the amendment of 1863, c. 209, limits the action to one year from the time when it accrued.

The plaintiff hired $500 of the defendant Nov. 28, 1860, agreeing to pay twelve per cent. interest. He gave one note for the amount, payable in one year, with interest, and another note for $30, payable in one year, for the excessive interest. This note was not paid until Dec., 1862; and the suit to recover back the amount paid was commenced Jan. 6, 1863. But the defendant contends that giving a *negotiable note* for the excessive interest was a *payment* of it; and that the action, therefore, was not seasonably commenced.

A negotiable promissory note is, *prima facie*, a payment of a preëxisting debt for which it is given, if due upon a simple contract, so that no action can afterwards be maintained upon the contract. But this rule was intended for the protection of the debtor; and it does not abrogate the distinction between payment by a note, and an *actual* payment, in money, or other property. And the statute under consideration has always been understood as requiring an *actual reception* of the money or other property before any right of action would accrue to recover it back. There is no valid preëxisting debt or claim for the excessive interest. And if a promissory note is given for it, either by itself, or with the principal, the law regards it not as a *pay-*

ment, but as merely a *promise* to pay such interest, which, if the note has not been transferred, the maker may still refuse to pay, or the holder may decline to receive. *Stevens* v. *Lincoln*, 7 Met., 525; *Saunders* v. *Lancaster*, 7 Gray, 484.

The limitation of one year was stricken from the statute by the amendment of 1862, and was reënacted by the amendment of 1863. This suit was commenced before it was reënacted. If the Legislature could thus restrict a remedy given only by statute, in suits already commenced, which we do not question, still the action was seasonably commenced. *Exceptions overruled.*

APPLETON, C. J., CUTTING, WALTON, DICKERSON and BARROWS, JJ., concurred.

THOMAS H. BROWN, *Adm'r*, *versus* THOMAS COUSENS.

A promissory note, attested after it was signed by the maker, and without his knowledge, is barred by the statute of limitations after the lapse of six years from its maturity.

Since the statute of 1848, c. 73, which authorized any married woman to commence, prosecute and defend suits in law and equity, in her own name, and as if she were unmarried, the exception contained in the statute of limitations, c. 146, § 10, R. S. of 1841, and c. 81, § 100, R. S. of 1857, is to be regarded as inoperative so far as regards married women, they being no longer under any legal disability as to suing or defending actions.

But, upon the review of a suit brought by a married woman after the action was barred by the statute of limitations, the Court, while giving judgment against the original plaintiff for debt and costs and interest thereon, will not, under the statute of 1864, c. 268, enter judgment "for such further sum as the party prevailing in review would have been entitled to recover as costs in the original cause," unless it is *made to appear* that justice requires such judgment.

ON EXCEPTIONS to the ruling of APPLETON, C.

WRIT OF REVIEW. The facts are sufficiently set forth in the opinion of the Court.

Howard & Cleaves, in support of the exceptions.

1. An alteration by a stranger, whether fraudulent or otherwise, will not make an instrument void, if it sufficiently appears what the instrument was before the alteration. *Read* v. *Brookman*, 3 T. R., 151; *Matison* v. *Atkinson*, 3 T. R., 153, note c; *Master* v. *Miller*, 4 T. R., 338; *Henfree* v. *Bromley*, 6 East, 309; *Raper* v. *Birkbeck*, 15 East, 17; *Cutts* v. *U. S.*, 1 Gall., 69; *U. States* v. *Spaulding*, 2 Mason, 478; *Jackson* v. *Malin*, 15 Johnson, 297; *Rees* v. *Overbaugh*, 6 Cowen, 746; *Lewes* v. *Payn*, 8 Cowen, 71; *Warren* v. *Smith*, 2 Barb. Ch., 119; *Smith* v. *McGowan*, 3 Barb., 404; *Nichols* v. *Johnson*, 10 Conn., 197; 1 Greenl. Ev.; § 566, and note 1; 2 Parsons on Cont., 226, note; *Thornton* v. *Appleton*, 29 Maine, 298.

2. The plaintiff, being a married woman, is exempted from the operation of the statute of limitations. R. S., 1841, c. 146, § 10; 1857, c. 81, § 100. Although empowered to prosecute and defend suits at law and in equity for the preservation and protection of her property, yet the relation of husband and wife remains unimpaired, and the rights and duties of the parties remain the same as at common law, except so far as changed by the statute. The moral, social and marital rights of the husband may be so exerted, within all legal restraints, as to greatly impair, impede and even prevent the wife exercising her legal rights. This is regarded, in a legal sense, as a disability, and hence the provision by statute that the wife may bring her action within the time limited, after the disability is removed. *Park* v. *Ward*, 6 Harris, 506; *Mason* v. *Gormley*, 12 Harris, 80.

J. C. Woodman, contra.

The opinion of the Court was drawn up by

Barrows, J. — Julia B. Merriam, the plaintiff's intestate, recovered judgment against Cousens, the defendant, at the November term, 1860, upon default, without his knowledge or consent. Cousens paid the debt and cost, with officer's

fees on the execution, and subsequently procured a review of the suit, and the trial took place at the November term, 1863, before the decease of Mrs. Merriam, as upon the original suit. A verdict was returned in favor of Cousens, the defendant, and Mrs. Merriam's counsel took exceptions which are now to be considered. The original writ was dated July 10, 1858, and the declaration was in assumpsit upon two promissory notes dated Feb. 14, 1850, and payable to Henry Brown or order in six months and one year respectively. They purport to be witnessed by Francis Brown, and were indorsed by the payee, the day after they were made, "accountable for debt and costs without demand on me or the maker," to E. R. Holmes for a valuable consideration, and Holmes, for a valuable consideration, sold and transferred them to Mrs. Merriam before they became payable. Holmes and Mrs. Merriam were *bona fide* holders of the notes, and purchased them without any knowledge or intimation that they had been attested after they were signed. Mrs. Merriam was legally married in 1846, and her husband is still living, but, prior to these transactions, she had separated from him, and, for the last thirteen years previous to the trial, they had not lived together, though there was no divorce. The notes were purchased with her own money and in her own right.

The defendant relied upon the statute of limitations, and put in a brief statement also of a material and fraudulent alteration, and offered evidence tending to show that the attestation to the notes was made after they were signed and delivered to the payee. The jury found specially that the notes were not attested at the time they were signed, and that the attestations were fraudulently made, and they further stated that they found that they had been attested when they were passed to Holmes, but without the knowledge of Cousens, and that neither Holmes nor Mrs. Merriam was aware of anything irregular in the attestations.

The instructions complained of were *that*, if the notes were not attested when signed by the defendant, and in his

presence, the plaintiff could not recover; *that*, if the attestation was affixed after the notes had been signed and without the knowledge of the maker, it would constitute a material alteration, and would not authorize a recovery by the plaintiff, whether the alteration was made with a fraudulent intent or otherwise; and *that*, although the plaintiff was a married woman when the cause of action accrued, she was under no such disability as would relieve her from the operation of the statute of limitations.

It is manifest from the foregoing statement that, if the last mentioned instruction be correct, the points made by the plaintiff's counsel against those first recited become entirely immaterial to the decision of the case. There was no pretence that any subsequent attestation of the notes was made with the knowledge or consent of the promissor, and the verdict has settled that the attestation was not made when the notes were signed, or in the presence of the signer. The notes then were not promissory notes signed in the presence of an attesting witness, and the last one was barred by the statute of limitations in February, 1857, more than a year before the commencement of the action, unless the coverture of Mrs. Merriam relieves her from the operation of that statute. The case could not turn upon the questions whether the alteration was material or fraudulent, and instructions, right or wrong, upon those points, would in no manner affect the result. Even where there is error in the instructions, if it is certain that the excepting party, under correct instructions, can never prevail, the case will not be sent to a new trial.

We need not stop to inquire, then, whether, in a case that presented only a naked question as to the effect of the alteration of an instrument upon its validity, the instructions reported here upon that branch of the case would be sustained. They appear to have been so framed by the presiding Judge, for the purpose of presenting, unincumbered, the question as to the coverture. It does not matter wheth-

er the alteration was or was not material or fraudulent, if the notes were barred by the statute of limitations.

To avoid this bar, the plaintiff's counsel rely upon the R. S. of 1840, c. 146, § 10, and c. 81, § 100, of R. S. of 1857, which respectively provide, in substance, that, if any person entitled to bring any of the actions enumerated in the previous sections of the statute, relating to the limitation of personal actions, is a minor, *married woman*, insane, imprisoned, or without the limits of the United States, when the cause of action accrues, he may bring his action within the times limited in said chapter *after the disability is removed.*

As to married women, the disability was effectually removed, before these notes were in existence, by chapter 73 of the statutes of 1848, which *enabled* any married woman, who had property in her own right, to pursue all the appropriate remedies authorized by law in other cases, to enforce and protect her right thereto, — to commence, prosecute or defend any suit in law or equity, to final judgment and execution in her own name and in the same manner as if she were unmarried, — further enabling her to make and execute any bond or contract, or to do or perform any matter or thing which might be necessary to the prosecution or defence of any such suit.

But it is ingeniously urged, on the part of the plaintiff, that the moral, social and marital influence of the husband over the wife may be such as to greatly impede and even prevent the exercise of her legal rights, and that this should be regarded in a legal sense as a disability, and that it *is* so regarded by the Legislature, because the provision was incorporated anew into the R. S. of 1857, c. 81, § 100. But this view of the matter must be regarded as plausible rather than sound. The provision was designed to relieve cases of *disability*, not of *disinclination* or of *moral* or *social impediments.*

The exemption is made to depend upon the existence of a *disability*. What is a disability? Blackstone uses the

term to express *a want of legal qualifications*, or *incapacity*, and speaks of "pleas to the disability of the plaintiff, by reason whereof he is *incapable* to commence or continue the suit, as that he is an alien enemy, * * * infant, *feme covert*," &c. Webster further defines the word as "want of competent natural or bodily power or ability, — want of competent intellectual power or strength of mind, as the disability of a deranged person to reason or make contracts."

Representatives of these various classes of disability were exempted from the operation of the statute of limitations, during the lapse of a certain period after the removal of the disability, — minors and married women, by reason of legal disability or incapacity to sue, — the insane, by reason of mental disability or want of competent intellectual power, — the imprisoned and those without the limits of the United States, by reason of natural or physical disability. It is not for the Court to add a fourth class, and exempt those who, for moral, social or connubial considerations, refrain from exercising their legal rights. Standing as the statutes now do, the restraining influence of the nuptial relation might as well be pleaded in behalf of the husband as the wife. It constitutes no disability, and — no disability, no exemption — must be the rule.

When the exemption was created, and until a comparatively recent period, a married woman labored under an actual legal disability. By the common law, the personal estate of the wife passed to the husband, as an incident of the marriage; the right to collect her choses in action vested in him, and the right of the wife to enforce them was totally suspended during the coverture. Hence the exemption referred to.

But the Legislature have changed all that. The enumeration of married women in § 100, c. 81, R. S. of 1857, must be deemed a mere inadvertence, incidental to the radical change which had so recently taken place in a legal system which had been in existence for a time whereof the memory of man runneth not to the contrary. That slip of the pen

took away none of the newly given rights of married women. There is now no disability, and consequently nothing to lay a foundation for the exemption, or to which the exemption can be attached. Mrs. Merriam had labored under no such disability for more than six years previous to the commencement of her action, and the action was barred by the provisions of the statute of limitations. The instructions upon this point were correct, and the exceptions must be overruled.

Mrs. Merriam, the original plaintiff, has died since the trial of the case upon the review. As the judgment is wholly reversed, Cousens, the defendant, as plaintiff in review, is entitled to judgment for the full amount of the original judgment against him for debt and costs, with interest thereon, against her estate. Chapter 268 of the laws of 1864, provides that, in such case, judgment may be entered also "for such further sum as the party prevailing in review would have been entitled to recover, as costs, in the original cause, *if, in the opinion of the Court, justice requires it.* The Court cannot know that justice requires such a judgment, unless it is made to appear how it happened that justice was not done in the original suit. In this instance, as the case turns solely upon the statute of limitations, and we are not informed why the defence was not urged in the original process, the judgment is restricted to the amount of the original judgment and costs, with interest thereon, and costs of the review.

Exceptions overruled.

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

MASON H. MARSHALL *versus* GEORGE W. OAKES *& ux.*

The general rule of the common law is, that, for a tort committed by the wife alone, and without the presence or direction of her husband, she will be held liable; but in a civil suit therefor the husband must be joined with her.

If committed in his presence, and by his direction, he *alone* is liable.

If the husband was present, the *prima facie* presumption is that the wife acted under coercion; but this presumption may be overcome by evidence that she was the instigator and the more active party, or by other facts proved to the jury sufficient to rebut such presumption.

In an action against both, in the absence of any such evidence, the jury should be instructed to acquit the wife.

If exceptions are taken to the refusal of the presiding Judge to give an instruction which the party requested, and it does not appear from the case what instructions were actually given, unless the requested instruction presented the true rule of law applicable, and lacked no qualification whatever, the exceptions will be overruled.

Otherwise, if the refusal of the specified instructions necessarily implies that a contrary and incorrect rule was given; or that the jury were left without instructions on the point; or where they cover the whole principle, and it is clear that the case required that the law should thus be stated, although only the requests appear in the case.

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

REPLEVIN. The defendants claimed that the sheep replevied were the property of the female defendant. It was admitted that the defendants were husband and wife.

There was evidence tending to show that the wife was the active party in taking the sheep.

The defendants excepted to the refusal of the presiding Judge to give the jury the following requested instructions:

(1st.) That, if the title to the sheep in question is found by the jury to have been in the plaintiff at the time of the alleged taking and detention; and also find that the defendants were husband and wife at the time of the alleged taking and detention, and that the taking and detention were by them jointly or in company of each other, or by the wife in the presence of the husband, their verdict should be for the defendants.

(2d.) That if the title to the sheep in question is found

to have been in the plaintiff at the time of the alleged taking and detention, and that the defendants were husband and wife at the time of the alleged taking and detention, and that the taking and detention were by them jointly, or by the wife in the presence of the husband, or in his company, that the husband is alone guilty and liable.

Bolster & Richardson, in support of the exceptions.

Hammons, contra.

The opinion of the Court was drawn up by

KENT, J.—The instructions actually given are not stated in the exceptions. The exceptions are to the refusal of the Judge to give the specific rulings requested. We are only called upon to determine whether the Judge was bound to give the precise instructions requested. These requests were, in substance, that, if the plaintiff had proved property in himself, and a taking and detention by the defendants, yet, if the defendants were husband and wife, and the taking and detention were by them jointly, or by the wife in presence of her husband, that the verdict must be for the defendants, or, at least, that the husband alone could be held guilty.

The general rule of the common law is that the husband is liable for the torts of his wife. *Hawks* v. *Hamar*, 5 Binney, 43. But the question here is as to their joint liability. When the tort or crime is committed by the wife alone, and without the presence or direction of her husband, she may be held liable, civilly and criminally. In such cases, the civil action must be against both the husband and the wife. 2 Kent's Com., 149; *Head* v. *Briscoe*, 5 Car. & P., 484, (24 E. C. L., 419); *Keyworth* v. *Hill & ux.*, 3 B. & Ald., 685, (5 E. C. L., 422.) But, if committed in his presence and by his direction, he alone is liable. 2 Kent's Com., 149.

The *prima facie* presumption is, that the wife acted under coercion, if the husband was actually present. This presumption arises as well in civil suits for torts, as in crim-

inal cases. Hilliard on Torts, c. 42, § 57. If nothing appears but the fact that the wrong was done whilst they were both together, the jury should be instructed to acquit the wife. Such presumption, however, is but *prima facie*, and may be rebutted by the facts proved, showing that the wife was the instigator or more active party, or that the husband, although present, was incapable of coercion,—or that the wife was the stronger of the two. Wharton's Am. Cr. Law, Book 1, § 73; 1 Hale, 516. The coercion must be at the time of the act done, and then the law, out of tenderness, refers it, *prima facie*, to the coercion of the husband. Ib., § 74.

This presumption is one of the compensations, or offsets, which the old common law gave for the benefit and protection of the wife, for its stern and unyielding doctrines in relation to the superior marital rights of the husband, by which the rights,—the personal property, and legal existence of the wife are nearly all lost or merged in her baron or lord. As was forcibly said by Mr. Justice EMERY, in *State* v. *Burlingame*, 15 Maine, 106,—"the whole theory of the common law is a slavish one, compared even with the civil law. The merging of the wife's name in that of her husband is emblematic of the fate of all her legal rights. The torch of Hymen serves but to light the pile on which those rights are offered up."

It was a natural and logical result, as the founders of the common law clearly saw, that, if the husband was to be regarded as the head and sole representative of the union, the wife should have the benefit of her legal nonentity, when acting in presence of her husband, even if she apparently was not an unwilling actor. Her misdemeanors and trespasses were to be looked upon, not as arising from the promptings of her own mind or will, but as the result of the overpowering commands or coercion of him whom she had promised to obey. How carefully the fathers studied the first case in point, recorded in the history of man, (Genesis, chap. iii.,) or, some of the subsequently reported cases,

where, to common observation, the woman and wife appears as the prime mover in wrong and mischief, we cannot know and need not discuss.

But, to meet the actual facts of history and observation, the law has engrafted the qualification on the rule, before stated, viz., that the *prima facie* presumption may be overcome by the proof in the case, that, in fact, the wife was the originator, dictator, and principal offender. Hilliard on Torts, c. 42, § 1; *Com.* v. *Lewis*, 1 Met., 153. Where there are other facts established, besides the presence of the husband, as to the participation of the wife in originating and carrying on the common purpose, which tend to rebut the presumption, it is a question for the jury to determine whether or not the presumption is overcome.

In the case at bar, as before stated, we are called upon to determine only whether the Judge was bound to give the instructions requested or either of them. We are not to presume that no instructions on the point were given, or that those given were necessarily erroneous, because those requested were not given. But, if the requested and refused rulings cover the whole ground and contain the true rule which should govern and control the case, the party may sustain his exceptions. When the refusal of the specified instructions necessarily implies that a contrary and incorrect rule was given, or that the jury were left without instructions on the point; or when they cover the whole principle, and it is clear that the case required that the law should thus be stated, exceptions may be sustained, although only the requests are stated in the report.

Unless a party is quite certain that his requests cover the whole ground, it is always safer to state what the actual rulings were.

In this case, the requests were that the jury should be instructed as matter of law, absolute and conclusive, that if the husband and wife were both present and the taking was joint, or by the wife in the presence of the husband, the verdict must be for the defendants, or at least for the

wife. Or, in other words, that the presumption arising from the presence of the husband was conclusive in law, and that it could not be rebutted by other facts. The true rule, as we have seen, is that such presence raises a *prima facie* presumption, subject to be overcome by proof negativing clearly the presumed coercion or command. We have nothing in the case to show that the instructions given were not in the very words of the request, with the addition or qualification above stated, in reference to rebutting testimony. We do not think the Judge was bound to give the requested instructions, as a rule of law, without the qualification.

When the requested instructions would have been correct, with the addition of a single qualifying word, the omission of that word in the requests was held fatal to the exceptions. *Stowe* v. *Heywood*, 7 Allen, 118.

The requests, in this case, state but a part of the rule and are therefore imperfect.

On looking at the evidence, as reported, there seems to be enough for the consideration of the jury on the question whether the presumption was overcome or not. The wife claimed the property as her own, and seems to have been quite active in the taking, and apparently of her own will and motion. At all events, the Judge was not bound to say, as matter of law, that there was no evidence tending to show a state of facts which might rebut the presumption.

In an action of trespass against husband and wife, for a joint assault, where the evidence was that the wife was the real and principal offender, it was held that it was clearly a case to be submitted to a jury; the presumption being only *prima facie*, and, like other presumptions, liable to be overcome by testimony. Hilliard on Torts, c. 42, § 7.

It is unnecessary to consider the effect of the recent statutes in relation to married women.

Exceptions overruled.

Judgment on the verdict.

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

COUNTY OF ANDROSCOGGIN.

ISAAC C. WELLCOME *versus* INHABITANTS OF LEEDS.

The statute of 1853, c. 41, § 3, relating to the construction of railroads across highways, is not retroactive.

The provision in the charter of the Androscoggin railroad company, that "the railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," is a continuing obligation, requiring the company to keep the railroad so constructed at all times.

But a town is not thereby absolved from its obligations to see that the highways therein are not rendered unsafe by the crossing of a railroad.

If the highway at a railroad crossing is defective and the town has notice of it, it is no defence that the particular defect was one which the railroad company ought to have repaired.

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

This was an action to recover of the defendant town damages sustained by the plaintiff, occasioned by defects in a highway in said town at the crossing of the highway by the Androscoggin railroad.

The plaintiff offered to prove the existence of the highway, and that the inhabitants of Leeds were bound to keep the same in repair, &c., that there was existing in said highway at the crossing aforesaid, in said highway, and in the bed of said railroad, at the time of the injury a dangerous defect by reason of a want of planking in said highway and railroad bed at said crossing, and the snow upon said highway at the sides of said railroad, of which defect the inhabitants of Leeds had notice, and that he, while travelling in his pung drawn by one horse on the road aforesaid, with a load consisting of his trunk, on the way aforesaid, near the Dead River Crossing, in the use of ordinary care, was by

reason of said defect, and that alone, in consequence of his pung falling into said cavity and against the rail of said railroad, thrown violently upon the ground, permanently injuring him.

The plaintiff further offered to show that the railroad crossed the highway at a very oblique angle, almost parallel to the road, so that, it being in the winter time, the plow of the engine had thrown mounds of snow almost a foot high on each side of the railroad, and on the highway; that on the southerly side of the road a plank had been removed, leaving a cavity about twelve feet long and five inches deep; that when the plaintiff's pung, travelling from the north to the south, went over the northerly mound, it slewed on to said crossing so that the beak of the right runner struck the southerly rail of the railroad, at the same time the angle being so oblique the whole runner fell into the cavity, that he then rose to get out and relieve the runner, when the horse quietly and easily starting caused the sleigh to tip and throw out the plaintiff, with the trunk upon his back, thereby greatly injuring him.

Plaintiff also offered to prove that, in the records of the commissioners of Kennebec county, there was no record that the conditions and manner of crossing the highway by the railroad had ever been determined by the commissioners of Kennebec county, or of the county of Androscoggin.

The presiding Judge ruled the evidence insufficient to sustain the action. The plaintiff excepted.

Fessenden & Frye, for the plaintiff.

Record & Luce, for the defendants.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiff offered to prove that the town was bound to keep the highway in repair upon which he was travelling; that there was a dangerous defect in said highway, of which the town had notice, at the crossing of the Androscoggin railroad, "by reason of a want of plank-

ing in said highway and railroad bed at said crossing, and the snow upon said highway at the sides of said railroad;" that he was injured by reason of said defect; and that he was at the time in the exercise of ordinary care. The presiding Judge ruled that the evidence offered was insufficient to maintain the action.

The plaintiff then offered to prove, further, that neither the county commissioners of Kennebec county, in which the town was situated when the charter was granted to the railroad company, nor the commissioners of Androscoggin county, incorporated afterwards, had ever determined the conditions and manner of crossing the highway by said railroad. But the evidence was excluded.

The statute of 1853, c. 41, § 3, required that, before the "location" of any railroad across any highway, the conditions and manner of crossing should be determined by the county commissioners. In another clause the same determination was required before a railroad should "cross" any street of a city. As there could be no such determination before the *place* for crossing had been fixed by the location made by the survey, it is obvious that the words refer to the actual placing of the railroad across the highway by constructing it.

In cases to which the statute applies, the company have no right to *construct* their railroad across a highway, until the conditions and manner of crossing have been determined. If they attempt it, they may be enjoined, or indicted. *Commonwealth* v. *N. & Lowell Railroad Co.*, 2 Gray, 54; *Com.* v. *V. & Mass. Railroad Co.*; 4 Gray, 22. No such determination can be made without notice to the selectmen. And, if the company undertake to proceed without it, it is the duty of the selectmen to prevent or remove their work, as a public nuisance. If they neglect to do so, the town is liable to indictment, and is also liable for injuries to travellers caused by any defect in the highway.

But the statute of 1853 was not retroactive in its terms. It might have been wise, perhaps, to require the manner

and conditions of *maintaining the crossings already made* to be determined. The Legislature did not do it. The statute applied to those railroads, only, not constructed before its enactment. The Androscoggin Railroad Co. was chartered in 1848. The plaintiff offered no evidence that it was not constructed through the town of Leeds before the statute of 1853. If it was incumbent on him to prove that the railroad company ought to have had the conditions and manner of crossing determined, and that they neglected to do so, the evidence offered by him was insufficient for that purpose. If it was not necessary for him to prove such duty, and neglect, the evidence excluded was immaterial.

Was the other evidence offered by the plaintiff sufficient to maintain the action?

The charter of the company requires that "the railroad shall be so constructed as not to obstruct the safe and convenient use of the highway."

This is not limited to the original construction. It is a continuing obligation, requiring the company to keep the railroads so constructed, at all times.

It is the duty of towns to keep the highways in good repair. The language of the statute was changed by the revision of 1857; but the sense is the same. And, though the charter requires the railroad company to construct the crossing in such a manner that it shall not render the highway unsafe, it does not absolve towns from their obligation to see that they are so constructed. For any negligence in this respect they are liable, the same as if they alone were under obligation to keep the crossings in repair. *State* v. *Gorham*, 37 Maine, 451; *Currier* v. *Lowell*, 16 Pick., 170.

The risks of public travel in this State are greatly increased by railroad crossings, especially in the winter season. The bed of the railroad remains the same, while the highway on either side is elevated by the accumulating snow. The inhabitants of towns live in the vicinity of such crossings, and have notice of their condition. Public safety requires that the duty of keeping them in good repair should

be imposed primarily upon the towns. Notice to them is easily given, and proved; and the remedy of injured parties against them is simple, and certain. The reënactment of the provisions of the statute of 1841, after the judicial construction given thereto in the case of *State* v. *Gorham*, was a legislative adoption of that construction.

The additional burden, thus placed upon the towns, is a matter for the consideration, not of the Court, but of the Legislature. The general duty of opening and repairing highways is one of arbitrary statute regulation. Public necessity and safety require it; and they require this additional labor and care in regard to railroad crossings.

But the burden is not a serious one. If the railroad companies fail to do their duty, the towns may compel them to do it; or they may make the repairs, and recover back the money expended. If any company should persist in neglect, and subject the towns to continued trouble and vexation, it would do so at the risk of losing its charter. And, if any further remedies are necessary, it is for the Legislature to provide them.

If the highway at the railroad crossing in Leeds was defective, and the town had notice of it, it is no defence that the particular defect was one which the railroad company ought to have repaired. The facts offered to be proved were sufficient to maintain the action.

The exceptions are sustained.

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

SAMUEL BOOTHBY *versus* ANDROSCOGGIN & KEN. R. R. Co.

The charters of railroad companies or the general statutes of the State provide a remedy for the owners of lands over which the road is located for damages, where they are not remote and consequential; but where a company does only what it is authorized to do, and is without fault or negligence, it is not liable for consequential damages.

STATEMENT OF FACTS AGREED.

This is an action on the CASE. It was agreed that the defendants organized and built their railroad under and according to their charter.

In 1847, Nash and Jones owned a lot of land in Lewiston, over which the defendants located their railroad, and thereafter said Nash and Jones conveyed to them, by deed of warranty, the land included in their location, for the purpose of constructing their railroad upon it. The same year, the defendants made an excavation across said lot, on the land conveyed to them by the deed aforesaid, varying in depth from ten to sixteen feet, or thereabouts, as the land was more or less elevated in reference to the level of their railroad track. Said excavation was neither deeper nor wider than was necessary for the track and road bed of their railroad, and was made for that purpose. The banks on each side of the excavation were made of the usual slope in such cases, and wholly upon the land conveyed to them as aforesaid.

Afterwards, in 1853, the defendants, in order to protect their railroad at this point, and to prevent the earth from washing down upon it, constructed a permanent and substantial bank wall along their track, and distant therefrom from five to seven feet or thereabouts, and wholly upon their own land. Said wall along the land now owned by plaintiff is from five to six feet in height. Since the building of the said bank wall and making the excavation aforesaid, the defendants have dug no ditches, nor disturbed the

soil along the border of the plaintiff's land between said bank wall and his land.

The said Nash and Jones, after their deed to the defendants aforesaid, and after the said excavation was made, conveyed that portion of said lot east of the railroad to the Lewiston Water Power Company, and from them, through sundry mesne conveyances, the lots described in the declaration came to the plaintiff.

By the action of the elements and the frost, portions of the soil have from time to time caved in from the top of the slope, until, after a number of years, it reached the plaintiff's land; and, since he owned it, portions of his soil have broken off at the summit of said slope, and been washed down the side of said slope towards said bank wall.

Stephen Boothby, for the plaintiff.

J. H. Drummond, for the defendants.

The opinion of the Court was drawn up by

WALTON, J. — This is an action of trespass on the case, and the ground of complaint is that the Androscoggin & Kennebec Railroad Company, in constructing their road, made excavations so near the plaintiff's land, that, "by the action of the elements and the frost, portions of the soil have from time to time caved in from the top of the slope, until after a number of years it reached the plaintiff's land, and, since he owned it, portions of his soil have broken off at the summit of said slope, and slid and washed down the side of said slope towards the bank wall at the bottom." The plaintiff does not charge the defendants with negligence, but admits that the excavations were necessary for the purposes of the road, and that the road was built under and according to their charter. This charter, granted by the Legislature of the State, gave to the defendants express license to make all excavations necessary to the construction of their road; and for parties injured thereby a remedy was provided in the charter or in the general statutes of the

State; or, if the damage was so remote or consequential as not to be included in the remedies thus provided, then it was *damnum absque injuria*, and the parties were without any remedy.

In general, railroad companies are responsible in damages, in an action of tort, for doing what their charter does not authorize, or for improperly doing what it does authorize; but when they have done no more than is authorized by their charter, and that has been done in a skilful and careful manner, for such acts an action of tort cannot be maintained against them.

It is a principle of the common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil, and render it liable to break away and slide down of its own weight; but this principle does not apply to excavations made in pursuance of a license; and a license from the Legislature, if within its constitutional limits, affords as ample protection as a license from the injured party.

No ground is perceived on which this action can be maintained. *Mason* v. *K. & P. Railroad Co.*, 31 Maine, 215; *Rogers* v. *K. & P. Railroad Co.*, 35 Maine, 319; *Whittier* v. *K. & P. Railroad Co.*, 38 Maine, 26; Redfield on Railways, 155–158, and authorities there cited; 2 Hilliard on Torts, p. 363, c. 36, and authorities there cited; *Morris & Essex Railroad* v. *Newark*, 2 Stock., (N. J.,) 352.

Plaintiff nonsuit.

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

RODNEY G. LINCOLN *versus* LEE STRICKLAND.

The return of an attachment of real estate by an officer to the Registry of Deeds, in which the name of only one of several defendants is given, is sufficient to hold the real estate of the defendant named, but insufficient in respect to that of the others.

The return "S. J. C., August term, Kennebec county, 1856," sufficiently shows to what Court and term the writ is returnable.

When the amounts claimed in the several counts in the writ in all exceed the "*ad damnum*," the statement of the "*ad damnum*" as "the sum sued for" is a compliance with the law in an officer's return to the Registry of Deeds of an attachment of real estate.

ON REPORT. CASE against the defendant as sheriff, for the default of his deputy. The case is stated in the opinion.

T. A. D. Fessenden and *A. G. Stinchfield*, for plaintiff.

David Dunn, for defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiff, having a demand against John B. Jones and others, sued out a writ of attachment against them, and put it into the hands of Benjamin Dunn, a deputy of the defendant, with written orders to "attach real estate" thereon. Dunn made service of the writ, May 6, 1856. This suit is against the sheriff, charging Dunn with official neglect, in not making a valid attachment.

It appears in evidence, that Jones was at that time the owner of certain real estate, subject to a mortgage, which he afterwards sold, Oct. 23, 1856; that the plaintiff, relying upon his attachment, caused said Jones' right of redemption to be sold upon his execution; and that the officer returned the execution satisfied from the proceeds of said sale.

It also appears that the purchaser of said right of redemption, in fact, paid nothing; and the plaintiff now claims to recover the amount of the sheriff whose deputy served the writ, on the ground that the attachment was void, and that the sale was therefore void. Whether the plaintiff can now

claim, in contradiction to the officer's return, that his demand has not been paid, is a question upon which, from the view we take of the case, it is unnecessary for us to express any opinion.

The plaintiff contends that the attachment was void, because Dunn did not file with the register of deeds the certificate required by the statute in such cases.

The statute requires that the officer, in the certificate, shall state "the names of the parties." The parties to that suit were Rodney G. Lincoln, *plaintiff*, and John B. Jones and several other persons, *defendants*. In the certificate they were described as "R. G. Lincoln *vs.* John B. Jones *& als.*" This was sufficient to give notice of the attachment of the property of Jones, — though insufficient in regard to the property of the other defendants.

The statute requires the officer to state "the Court to which the writ is returnable." The certificate is not copied in the report; but it appears to have been in substance as follows: — "Court and term to which the writ is returnable. S. J. C., August term, Kennebec county, 1856." This, though abreviated, was a substantial compliance with the statute. The object is not to give the parties notice of the suit, but to give third persons notice of the attachment, and furnish them the means of ascertaining its continuance or termination. The certificate was sufficient for that purpose.

The only other defect alleged is, that the "sum sued for" was not correctly stated. The statute then in force required the officer to state the sum sued for; and a certificate of the "*ad damnum*" was held, in *Nash* v. *Whitney*, 39 Maine, 341, to be insufficient. But in many cases the *ad damnum* is the only sum sued for; and, in other cases, the two are the same in amount. The writ in the case under consideration contained two counts; and the sum sued for was *apparently more* than the two thousand dollars. But no more than that sum could have been recovered, because that was the extent of the *ad damnum*. The officer therefore stated, in legal effect, the sum sued for. And, if he had not stated

the sum correctly, we do not wish be understood as holding that the attachment would have been void for that cause.

Plaintiff nonsuit.

RICE, APPLETON, GOODENOW and WALTON, JJ., concurred.

MARY BRAGDON *versus* THE INHABITANTS OF POLAND.

On a contract for services to be paid for "out of the store" of a third person an action may be maintained without proof of a demand of payment at such store.

ON EXCEPTIONS to the rulings of APPLETON, J.

ASSUMPSIT for services, which it was admitted had been performed.

There was evidence tending to show that the plaintiff agreed "to take her pay out of the store of Lane & Stinchfield;" and that she demanded her pay of Lane, who was then one of the selectmen of the defendant town.

The counsel for defendants maintained that the action could not be maintained without proof of a demand at the store of Lane & Stinchfield.

And the presiding Judge instructed the jury that the plaintiff could not recover "without having first demanded her pay out of the store at Lane & Stinchfield's, and been refused her pay there."

The verdict being for the defendant, the plaintiff excepted.

H. C. Goodenow, for plaintiff.

W. B. Bennett, for defendants.

The opinion of the Court was drawn up by

DAVIS, J. — It is admitted that the plaintiff performed services for the town, for which she has not been paid. It

is contended, and the jury must have found, that she agreed "to take her pay out of the store of Lane & Stinchfield," traders, in Poland. The selectmen, or overseers of the poor, who were the same persons, had authority to make such a contract, and the plaintiff was bound by it. The only question, therefore, is, whether she had done all that was necessary on her part, to give her a right of action against the town.

The jury were instructed that she could not recover, "without having first demanded her pay out of the store at Lane & Stinchfield's, and been refused her pay there."

A note payable at a particular place, need not be demanded at that place, except for the purpose of charging an indorser. In a suit upon such a note, against the maker, no such demand need be proved. It is for him to show that he had the money there ready to pay it. *Payson* v. *Whitcomb*, 15 Pick., 212. And the same rule applies to a note payable in specific articles, unless a demand is required by its terms. *Wyman* v. *Winslow*, 11 Maine, 398.

In a suit upon a note payable in goods out of the maker's own store, it would probably be a good defence that the maker had his usual stock of goods there, without showing that any were specially set apart in payment; because, in that case, the payee having the right of selection, the maker could not select for him. *Aldrich* v. *Albee*, 1 Maine, 120. If payable at the store of another, perhaps an agreement with the owner of the goods to pay the holder of the note would be sufficient.

In the case at bar, the contract was not in writing. The report shows that the plaintiff, having performed the services, demanded her pay of Thomas Lane, one of the selectmen and overseers of the poor, and also one of the firm of Lane & Stinchfield. It may be inferred, though the report does not so state, that she called for *money*, and not for *goods*. It makes no difference. The town cannot defend on the ground that there was no demand. They must show that the goods were ready for her, at the place agreed upon.

The instructions, that *she* must prove *a demand*, on Lane & Stinchfield, were erroneous. Her contract was not with them; and she had no claim upon them.

And, besides, it appears in the report that the town did not have any goods ready for the plaintiff, at the store of Lane & Stinchfield. Lane, as one of the firm, did not offer her any goods. Nor did he, as one of the town officers, offer her any order for the goods. Nor had Lane & Stinchfield received any order or authority to deliver her any goods for the town. So that, though she had demanded her pay, and was entitled to it, the town had no goods at the place of payment, and neither made, nor offered to make, any arrangements for her payment at that place.

Exceptions sustained. — New trial granted.

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

JOEL H. BIGELOW *versus* HIRAM REED.

In an action to recover damages for an injury caused by the running of the defendant's horse against the plaintiff, on the highway: —

1. The plaintiff must prove that the injury complained of was caused *solely* by fault of the defendant, or his servants; —

2. If any other cause contributed to produce the injury, the plaintiff cannot recover; —

3. If the defendant used such care in keeping and managing his team, as men of ordinary prudence do, he was not in fault; —

4. But if, through want of ordinary care, the defendant's horse escaped from him, and did the injury, the defendant is liable, although the falling of icicles frightened the horse and caused him to run away; —

5. Where the cause of the injury is one distinct act, separate and by itself, the law does not go beyond this to ascertain what was the cause that led to or incited the act; —

6. It is no defence, that the plaintiff was in a use of the highway not justified by law, provided no negligence, or want of ordinary care on his part, contributed to produce the injury.

ON EXCEPTIONS to the ruling of WALTON, J., and on

motion to set aside the verdict as being against the evidence. No question of law arose on the motion.

This was an action of the CASE for injury alleged to have been received by the plaintiff by the defendant's horse and sleigh running against him on the highway, in consequence of the negligence of the defendant, or his servants.

The plaintiff's testimony tended to prove that he was sitting in his pung in the travelled part of the street in Augusta, waiting for two acquaintances to change horses; that the defendant sent his son with his horse and sleigh to a store near by, on an errand; that the son drove up to the store, left the horse without hitching, or proper care, and that the horse ran away, and against the plaintiff's pung, threw him out and injured him.

The defendant's testimony tended to prove that, when his son left the horse, he put him in care of a suitable person, who took proper care of the horse, which was frightened by the falling of icicles from a building near by, and broke away from the person in charge of him, without his fault.

The Court was requested by defendant's counsel to instruct the jury as follows:—

1. That the plaintiff must prove that the injury complained of by him was caused *solely* by fault of the defendant, before he can recover.

2. That, if any other cause contributed to produce said injury, the plaintiff cannot recover.

3. That, if they find that the defendant used such care in keeping and managing his team as men of ordinary prudence do, he was not in fault.

4. That, if they find that the horse started because of the falling of icicles from the roof of the building, it was an inevitable accident for which defendant is not responsible.

5. And, if the falling of the icicles contributed to produce the injury, the defendant's fault was not the *sole* cause, and the plaintiff cannot recover.

6. That, if they find that the plaintiff was sitting in his pung in the travelled part of the street, for the purpose of

seeing Thompson and Stevens trade horses, or waiting for Thompson to trade horses, that would not be a lawful use of the street; —

7. But was unlawfully obstructing the street.

8. And if plaintiff was injured while in the unlawful use of the street, he cannot recover for that injury, even if they find that the defendant was in fault also.

9. That, if plaintiff was injured because of his unlawful use of the street, he cannot recover, though they find that the defendant was in fault also.

10. That, in order that plaintiff may recover in this case, he must not only be in the exercise of his lawful rights, but must use ordinary care in such exercise.

11. That standing with his team transversely, as he is described to have done, when so large a portion of the street was occupied, and leaving so small a portion unoccupied, would not be the exercise of ordinary care.

12. At least it would be strong evidence of a want of ordinary care.

13. That, if the want of ordinary care on the part of the plaintiff contributed in the least degree towards the injury complained of, he cannot recover.

The first, second, third and thirteenth requests were given, the others were not.

But the Court, among other things, instructed the jury as follows: —

It is the duty of every one to exercise due diligence to guard against injury to others; and this rule is of universal application, applying to all men, at all times, in all places, and under all circumstances.

By due diligence is meant such diligence, as prudent men ordinarily exercise. The rule does not require the highest degree of care and prudence, but it does require that degree of diligence which prudent men ordinarily exercise.

If a person does not use this degree of diligence, he is guilty of negligence; and, when by such negligence a person is injured, the injured party may recover of the negli-

gent party the damage he has thereby sustained. And not only is a person responsible for his own negligence, but the law sometimes holds him responsible for the negligence of others. Thus, masters are responsible for the negligence of their servants, while the servant is employed about his master's business. And this responsibility extends to servants in the second degree, — that is, to under servants employed by servants, when such employment is in the regular performance of the master's business.

The plaintiff's action is grounded upon these principles; and to entitle him to recover he must prove that his injuries were the result of negligence on the part of the defendant, or on the part of those for whose negligence the defendant is responsible.

The son testifies that he was directed by his father to go and get a bill changed; that he drove for that purpose to the store of Lincoln on State street; that he there gave his horse into the keeping of Crommett while he stepped into the store; and that Crommett actually took hold of the reins before he let go of them. This evidence tends to show proper diligence on the part of the son, if Crommett was a suitable person to take charge of a horse, and I believe it is not denied that he was. But it would not be enough that the horse was thus put into the custody of Crommett; nor would it be enough for him to take hold of the reins. It would be the duty of Crommett to guard against the horse's getting away by holding on to the reins with due diligence; and if he was negligent in this particular, and the son was at the time in the employ of the father as his servant, and Crommett was employed by the son while in the regular discharge of his father's business, the father would be responsible for Crommett's negligence.

The verdict was for the plaintiff, and the defendant excepted.

J. Baker, for defendant.

1. The falling of the icicles was an inevitable accident, or

at least so unusual an occurrence, that the defendant was not responsible for it; and, if this cause contributed to the injury, the plaintiff cannot recover. 1 Hilliard on Torts, 124, 129; *Hixon* v. *Lowell*, 13 Gray, 59; 2 Cush., 300; 13 Met., 55.

2. The plaintiff was in the street for an unlawful purpose; for an unreasonable time; and obstructing the street.

In such cases, he cannot recover. 1 Hil. on Torts, 171.

3. The plaintiff was not in the use of ordinary care; and the eleventh and twelfth requested instructions should have been given.

4. The presiding Judge undertook to instruct the jury what state of facts would constitute ordinary care, on the part of the defendant's servant in holding the horse. But that was a question exclusively for the jury.

J. M. Meserve, for plaintiff.

The opinion of the Court was drawn up by

KENT, J.—The case, most strongly stated for the defendant, so far as the rulings and refusals of the Judge presiding in relation to the fourth and fifth requests, are in question, is this:—The defendant's son and servant was sent by him to a store in Augusta, to get a bill for ten dollars changed by the occupant. He went with a horse and sleigh, and, on arriving near the door of the store, he alighted from the sleigh, and requested one Crommett, who was standing near, to hold his horse whilst he got the bill changed; Crommett took hold of the rein by the bit, before the son left; and the son then went into the store; *that*, just after this, icicles fell from the eaves of the building on to the awning and sidewalk; *that* the horse instantly started, and broke away from Crommett, who was still holding him by the head, close up to the bit; *that* the horse then run furiously, without a driver, until he struck the plaintiff's sleigh and person, and caused the damage for which this suit is brought.

The fourth and fifth requested instructions were as follows: —

4. "That if they find that the horse started because of the falling of icicles from the roof of the building, it was an inevitable accident, for which the defendant is not responsible.

5. "And if the falling of the icicles contributed to produce the injury, the defendant's fault was not the *sole* cause, and the plaintiff cannot recover."

The only ground, on which the defendant can be held liable, is by proof that the injury was occasioned by the fault and negligence of the defendant or of his servants. It is not enough to show that the injury was caused by the defendant's horse, running in a furious manner in a public street against the plaintiff, he being in the exercise of ordinary care. It must be also shown that the defendant had been guilty of *negligence*, by which the horse came into that condition of unregulated and uncontrolled and dangerous rapidity. *Negligence* is the essential point to be determined.

The Judge presiding gave to the jury the three first requested instructions, which were in substance; that the plaintiff must prove that the injury complained of was caused *solely* by fault of the defendant; that, if any other cause contributed to produce the injury, the plaintiff cannot recover; that, if the defendant used such care in keeping and managing his team as men of ordinary prudence do, he was not in fault.

The defendant complains because the Judge did not, as a matter of law, instruct the jury that the falling of the icicles was an *inevitable accident*, for which the defendant was not responsible. This request is at best but an abstract proposition, and disconnected from any other would seem to be immaterial. But the Court was not called upon to determine, as a matter of law, that the falling of the icicles, at that time and place, was an *inevitable* accident. At most it was a question of fact, if material to the issue.

But the defendant relies more particularly upon the request contained in his fifth proposition.

What the exact ruling of the Judge, on this and other points in the case was, does not appear in the exceptions. A small part, apparently, of his charge is given, but it clearly appears, that there were many instructions given which are not set out in the bill. We are not to assume that *no* instructions on these points were given, but rather that those given were unexceptionable, if the excepting party had not a right to have the precise one requested given.

Before this point, made in the fifth request, could become at all material, the plaintiff must establish such carelessness and negligence on the part of the party holding the horse, as rendered the defendant primarily liable. The defendant says, assuming that to be so, I am excused, because the falling of the icicles alarmed the horse, and caused him to run, and thus contributed to the injury. In other words — that when a man leaves his horse, carelessly and without any proper attendant, in a public street, he is not responsible, if he can show that his horse was frightened by any other person or noise, common or uncommon, for which he was not responsible.

Undoubtedly, on the question of *care*, it may be very important to show the nature and extent of the cause which alarmed the horse, and whether it was unusual and not ordinarily to be expected, and all other matters, which go to show that, notwithstanding the injury, there was no want of ordinary prudence and caution. But assuming that, after all these facts are considered, the defendant is yet held as guilty of carelessness, can he fall back upon this "falling of the icicles," as a contributing cause of the injury?

It is a well established doctrine of the law, that, where two or more immediate causes concur in producing an injury, and the party sued is responsible for only one of those causes, and it cannot be determined which was the efficient or most efficient cause, or whether, without both, the injury

would have been done, the action cannot be maintained. But where the cause of the injury is one distinct act, separate and by itself, the law does not go beyond this, to ascertain what was the cause that led to or incited the act. The rule is—"*In jure, causa proxima non remota spectatur.*"

The law looks to the proximate—the immediate cause, and not to one even one degree removed. It is the cause, and *not the cause of the cause*, that is regarded. *Marble* v. *City of Worcester*, 4 Gray, 395.

The falling of the ice was in itself no cause of injury, directly and immediately, to the plaintiff. The proximate cause was the running of the horse against the plaintiff and his property. The alarm caused by the falling of the icicles was, perhaps, the cause of that running. But that was but a remote cause of the injury to the plaintiff, a cause of the cause. The defendant is not held responsible for the falling of the ice, but for his negligence in leaving his horse, in a condition where he might run away, if alarmed by such or any similar cause. There are many cases, where, if we do not stop at the direct or proximate cause, we may become involved "in a chain of causation, by successive links, endless." *Tisdale* v. *Norton*, 8 Met., 388.

The difficulty, in many cases, is in determining what are proximate and what are remote causes. But, in this case, it seems clear that no immediate cause operated to produce the injury but the running of the horse unguided. If a person fires a loaded gun in a street near a horse, that discharge does no injury directly to any one, but it alarms the horse and thus puts in motion a cause, which does injury. It is not the immediate, but a secondary or remote cause, which the law will not regard as a part of the proximate cause, but as one degree at least removed. If the concussion produced by the discharge of the gun had caused the icicles to fall, that discharge would have been a cause two degrees removed.

It seems to be well settled law in England that, if a man is guilty of carelessness "in leaving his team in a street, he

must take the risk of any mischief that may be done." This is the language of TINDAL, C. J., in *Illidge* v. *Goodwin*, 5 Car. & P., 190. In that case, it was testified to by two witnesses, that the horse and cart of the defendant, being left alone in the street, a person passing by struck the horse. The report states, what seems somewhat novel to us, that, during the cross-examination of the second of these witnesses, the jury interposed and said they did not believe the evidence of either, and thereupon C. J. TINDAL said, "supposing them to be speaking the truth, it does not amount to a defence," and he then added the words above quoted.

The same doctrine is recognized in *Lynch* v. *Nurdin*, 1 Ad. & E., N. R., 29.

The case of *Goodman* v. *Taylor*, 5 Car. & P., 410, is also in point. In that case, the defendant's horse was alarmed by a "Punch & Judy" show coming by, and ran and injured the plaintiff's horse. It appeared that the defendant's wife stood by the head of the horse, and he ran away and almost pulled his wife down. The Judge placed the case on the point, that this was due care, but no one suggested that "Punch & Judy" were coöperating and contributing causes. The verdict was for the plaintiff, notwithstanding the intimation of the Judge on the point of due care.

We do not think that the Judge was in error in refusing to give the requested instructions.

The next request, the sixth in the series, was—"that, if they find that the plaintiff was sitting in his pung, in the travelled part of the street, for the purpose of seeing Thompson and Stevens trade horses, or waiting for Thompson to trade horses, that would not be a lawful use of the street."

This proposition is urged as matter of law. It of course cannot be contended that it was unlawful, *per se*, for the plaintiff to be present at a horse trade. And it certainly would be a severe and, to most men, a new exposition of the law, to hold that the single fact that a man who stopped in the road for his own convenience or pleasure, although he had no

business of his own, "was in the unlawful use of the street." And this without reference to the length of time he was there, or to the width of the road, or to the fact whether he interfered in any way in the use of it by others. It is perfectly well settled, that travellers are not bound to keep in motion every instant they are on the road. It is their right to stop, temporarily, for business or pleasure, provided they do not unreasonably interfere with the rights of others, who wish to use the road. This right is recognized in our statutes, in the various provisions relating to the use of highways by travellers. The requested instruction does not contain any condition, which implies even that the plaintiff was thus interfering with the rights or wishes of others; and, as before stated, in the absence of the actual rulings of the Judge on this point, we can only pass upon the proposition as stated in the request. This we think the Judge could not properly give as matter of law. *Dickey* v. *Telegraph Co.*, 46 Maine, 483.

The subsequent requests, on this point, are based upon the correctness of this, and must fall with it.

If, however, we give a larger scope to the request, couched in general terms, we think that, upon the facts reported, (all of which are made the *basis* of the exceptions,) it is apparent that the plaintiff was not in the unlawful use of that small portion of the street, one hundred feet wide, which he occupied, and that there was no evidence on which the requested instructions could be based. He was clearly in the lawful use of the highway.

But if he was not, so far as the State and others who might wish to use the street are concerned, yet that fact would not authorize a trespass upon him, or any injury to his person or property, by another party, who did not represent the State or such aggrieved persons.

It has often been determined, that, although a person is on the wrong side of the road, yet he may recover for any injury wantonly or, under the circumstances, carelessly inflicted. So if cattle are prohibited from running at large,

yet if one is so found, no one has a right to maim or injure it.

A plaintiff is not precluded from recovering for an injury negligently done by the defendant, by the fact that he himself has been guilty of unlawful or negligent conduct, unless he might, by the exercise of ordinary care at the time, have avoided the injury. *Welch* v. *Wesson*, 6 Gray, 505; *Morton* v. *Gloster*, 46 Maine, 520.

A case illustrating this principle is *Davis* v. *Man*, 10 Mees. & Wels., 546, where the defendant negligently drove against and killed an ass in the highway, it was held that plaintiff was liable, although the ass was fettered and was *wrongfully* there.

We consider that the last requested instruction, which was given, covered all the ground that the defendant had a right to require, in relation to the use of ordinary care on the part of the plaintiff. It was, that if the want of ordinary care on his part contributed in the *least* degree towards the injury, he could not recover.

The 11th and 12th requests had relation entirely to matters of fact, and were properly refused.

The defendant further excepts to a portion of the charge to the jury as reported. It is unquestionably true that it is the province of the jury to determine the question of care, under the instructions of the Court. If this part of the charge can be fairly construed as an authoritative declaration by the Judge, that certain facts would or would not establish the exercise of ordinary care, it might be exceptionable. But, upon a careful examination, we think it is manifest that no such absolute ruling was given. In this part of the charge, the Judge was presenting the evidence on the strongest ground assumed by the defendant, and reciting the testimony tending to show that the son was guilty of carelessness in leaving the horse with Crommett, after he had actually taken the reins, it not being denied that Crommett was a suitable person to take charge of the horse. The question then arose, whether *Crommett* exercised due care

in holding the horse. The Judge did not rule, as matter of law, that it was necessary that he should take hold of the reins, or that it would be want of due care if he did not, under all possible circumstances. But assuming, as claimed by defendant, that the evidence established the fact, that he did thus take hold of the reins, the Judge extended the rule of due care to him in that position. He did not say that the person thus holding would be guilty of want of due care, if he let the horse go, or if he did not, at all events, keep him from breaking away. He did not undertake to define to the jury what degree of care, in thus holding, would be sufficient. But he did say, that it was incumbent on him to guard the horse from escaping "by holding on to the reins *with due diligence*." The fair interpretation of all which is, that the rule of ordinary care was applicable throughout the whole transaction, before and after the son put the horse in charge of Crommett, until he finally broke away. He left it to the jury to determine whether or not such care was used, without undertaking to declare that any one or more acts were or were not, in law, such neglect.

We discover no cause for setting aside the verdict on the motion, grounded on the allegation that it is against the weight of evidence.

Exceptions and motion overruled.

Judgment on the verdict.

APPLETON, C. J., WALTON and DICKERSON, JJ., concurred.

DAVIS, J., concurred in the result, and expressed his views upon some of the questions raised, in the following opinion: —

I concur in overruling the exceptions. And the importance of the question, with its frequent recurrence in practice, will justify me in stating my own views.

The jury were instructed, "that the plaintiff must prove that the injury complained of was caused *solely* by the fault

of the defendant; and that, if *any other cause contributed* to produce it, he could not recover." As this *general* statement necessarily embraced all the *particulars* of which it was composed, there was no reason for instructing the jury that, if *the falling of the ice* contributed to produce the injury, the plaintiff could not recover. And besides, as we shall see, a contributing cause, which is itself but one link in a *chain of causes*, does not necessarily vary the liability of the parties, or render the event the product of more than one cause, in contemplation of law.

An act that causes damage sometimes produces it *immediately*, without the intervention of any other force between it and the result. But generally it acts through other forces, one or more, which it sets in motion. And, in nearly every case of injury, the *primary cause* is removed, one degree or more, from the actual force which finally produces the damage. And it is to cases, all of which are embraced in this general statement, that the rule of law is to be applied, *that the act complained of must have been the "proximate" cause and the "sole" cause of the injury*. These terms were adopted in *Moore* v. *Abbott*, 32 Maine, 46. It is important that we have a clear idea of what is meant, in that case, and others like it, by the *sole* cause, and the *proximate* cause.

1. If the *primary* cause is a wrongful act, that is said to be the *sole* cause, though it operates through other causes which itself produces. It *alone* operates at the *inception* of that chain of forces which it sets in motion. It is not less the sole cause because it operates through other agencies produced by itself, which otherwise would have had no existence. The books abound in illustrative cases, only a few of which need be cited.

Thus, one who carelessly fires a gun in or near a public way, and thereby frightens a horse, is liable for the injury caused by such fright. *Cole* v. *Fisher*, 11 Mass., 137; *Moody* v. *Ward*, 13 Mass. 299. So one who carelessly kindles a fire upon his own land, and such fire destroys property of another upon adjacent land, is liable therefor.

Bachelder v. *Heagan*, 18 Maine, 32; *Barnard* v. *Poor*, 21 Pick., 388; *Clark* v. *Foot*, 8 Johns., 421. So, if one carelessly uses a steam engine that is defective, in consequence of which the boiler bursts; or a defective gas pipe, by reason of which the gas escapes; he is liable for the damage caused thereby. *Spencer* v. *Campbell*, 9 Watts & Serg., 32; *Emerson* v. *Lowell Gas L. Co.*, 3 Allen, 410.

So, also, when the *primary* cause of injury is an *inevitable accident*, operating through a chain of *dependent* causes, one who is connected with an *intermediate link* may be liable for the result. This occurs when it is his duty to *prevent the continued operation* of the cause, and he does not do it. In such a case his *negligence* is properly held to be the *sole cause* of the damage; for, with such care as he was bound to exercise, he might have prevented it. Thus, if goods in the possession of a bailee are destroyed by a flood, or a fire, with the origin of which he had no connection, if, by proper care, he could have saved them from destruction, his negligence is held to be the sole cause of the damage, and he is liable for it. *Powers* v. *Mitchell*, 3 Hill, 545; *Seymour* v. *Brown*, 19 Johns., 44; *Penobscot Boom Corp.* v. *Baker*, 16 Maine, 223; *Riddle* v. *Locks & Canals*, 7 Mass., 169.

The case at bar is clearly one of this class. A person has no right to leave his horse in a public street, unless he is securely fastened, or is in charge of some one competent to take care of him. He is bound to take care that he shall not do injury, in consequence of being frightened by anything that may occur. And, if the horse does become frightened, by an inevitable accident, and he does not prevent any damage being caused thereby, when he could have done it, by exercising ordinary care, his negligence is properly held to be the sole cause of the injury. It will be through it, and it *alone*, that the primary cause will be able to run on, and continue, to such a final result.

It will be noticed that, in both of these classes of cases, the causes, if several, are connected, and *dependent*. And it is *for this reason*, that any one who wrongfully sets the

train of causes in motion, — or, if not wrongfully set in motion, any one whose duty it is to stop it, he having the power to do it, but neglecting to exercise it, is responsible for the result.

There is another class of these cases, in which the *primary* cause is *wrongful*, but it would not have operated to produce the injury, except for the *negligence of some other party*. Whether in such a case either of the parties is liable to the person injured, or both, it is not necessary now to inquire.

But there is still another class of cases, in which *independent* causes combine to produce an injury. And whenever one of two efficient causes is not produced or set in motion *by the other*, but might have operated without it, then it can never be determined with certainty whether one would, or would not, have produced the effect without the other. *Murdock* v. *Warwick*, 4 Gray, 178; *Moore* v. *Abbott*, 32 Maine, 46; *Moulton* v. *Sanford*, *ante* p. 127. And therefore, whenever an *independent* cause, for the effect or continued operation of which a person is not responsible, combines with his wrongful act, or negligence, in producing an injury, he is not liable therefor. The injury cannot be apportioned; nor can it be proved that the other cause would not have produced it. *Rowell* v. *Lowell*, 7 Gray, 100; *Kidder* v. *Dunstable*, 7 Gray, 104; *Shepherd* v. *Chelsea*, 4 Allen, 113.

2. But, in a chain of *dependent* causes, the law looks only to those which are *proximate*, and not at those which are *remote*. It is often very difficult to fix the boundary between the two.

The word "proximate" seems to be used, not in the sense of *next*, but in the sense of *near*. It is the correlative of "remote." It is not confined, therefore, to the *last* motive power operating to produce an injury. It may be removed, one degree, or more, and still be a proximate cause, for the final effect of which the author is liable. Several cases of this kind have already been cited. The old distinction between *trespass* and *case* had its origin, not in the idea that

the *first* in a *chain* of causes may not be a proximate one, but in the principle that, although it was proximate, and the author of it was liable for the consequences, the *remedy* must be different. The cases do not intimate that the law will not look beyond the *last link* in the chain. In large numbers of them, it does trace back the line of cause and effect one step, or more.

Just where the liability should cease, must be determined in each case by itself. Generally, whatever is produced by a wrongful act, while it continues to operate, by itself, or through other agencies called into force by itself, it is the proximate cause of the result. But if the only effect of it is to *afford an opportunity* for some other *independent* force to operate, it is, as is sometimes said in cases of insurance, but the *occasion* of the result. Thus, if I carelessly frighten a horse, and the horse, by reason of the fright, runs away, and causes damage, I am liable therefor. But if, as a consequence of the delay caused thereby, the owner does not reach his place of business in season to perform some contract, whereby he suffers loss, I am not liable therefor. 1 Bouvier, "Cause." If a vessel is injured by perils of the sea, and in consequence of the *delay* caused thereby, is captured, it is a loss by *capture*, and the insurers are not liable if capture is excepted from the risks. *Livie* v. *Jansan*, 12 East, 648. So if a carrier wrongfully refuses to deliver goods, damages caused by a suspension of the consignee's works, though resulting from such refusal, are too remote to be recovered. *Waite* v. *Gilbert*, 10 Cush., 177. But if a vessel is disabled by a storm, and after the storm is over, in consequence of her condition, her boat is lost, the insurers are responsible for the loss of the boat, *as caused by the storm*, though they would not have been liable for it as a distinct loss. *Potter* v. *Ocean Ins. Co.*, 3 Sumner, 27.

And the same principle must be applied in determining whether the cause of an *injury* is remote, as in determining the remoteness of *damages*. "The damage to be recovered must always be *the natural and proximate consequence* of the

act complained of." 2 Greenl. Ev., § 256. But one's liability for damages, as we have seen, are never restricted to the *immediate* consequences of his wrongful act. Thus, the owners of a defective bridge, by whose negligence a horse is lost, are liable not only for the value of the horse, but for the consequent expense of medical treatment. *Watson* v. *Lisbon Bridge*, 14 Maine, 201.

In the case at bar, if the defendant had used due care, but some one had wrongfully frightened his horse, the act of such person would not have been too remote to render him liable. The negligence of the defendant is two degrees nearer the final effect upon the plaintiff; and therefore it certainly cannot be held to be *too remote* to be considered an efficient cause, for which he is liable to the party injured thereby.

THE CITY OF BATH *versus* GILBERT MILLER.

The statutes of 1860, chapters 450 and 475, authorizing the extension of the Androscoggin Railroad from Leeds to Topsham, recognize the "original road" and "the extension," as separate and distinct roads, for certain purposes.

Those statutes authorize the mortgage of "the original road" and "of the extension," treating them as distinct roads, and as having separate and distinct franchises; but do not authorize a mortgage of the *whole road* as a unit.

Property, purchased by the earnings of the whole road after its completion, is not included in either of the mortgages authorized by those statutes.

By section six of chapter 450, the city of Bath, on neglect of the company to pay the coupons on the scrip issued by the city, was authorized to take possession of all the property of the whole company, existing at the time whenever possession should be taken.

But such taking of possession does not vacate an attachment of property of the company previously made.

No suit can be maintained by virtue of this section, which was commenced before the city took possession of the property of the company.

Whatever rights were given to the city of Bath, by the eleventh section of the same statute, can be enforced only in the manner therein provided.

The City of Bath *v.* Miller.

Its provisions cannot be interposed to sustain an action of replevin by the city, for wood purchased by the company from the earnings of the whole road, and attached before possession of the road was taken by the city under section six; nor to prevent "judgment for return" in such action.

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

REPLEVIN for 1329 cords of wood, which the defendant had attached as the property of the Androscoggin Railroad Company.

The plaintiffs claimed title under two mortgages, which are sufficiently described in the opinion, and under chapters 450 and 475 of the special laws of 1860.

The plaintiffs offered evidence tending to show that coupons of the city of Bath, issued for the benefit of the railroad company, had, since the commencement of this action, been presented to the treasurer of the city of Bath for payment, and, though due, had not been paid, and which, by the conditions of the said mortgages, the said company was bound to pay. The other facts are stated in the opinion.

Tallman & Larrabee, for plaintiffs.

1. The mortgages were legally authorized and properly executed. They embrace after acquired property and all the property of the corporation.

2. Being mortgagees, the plaintiffs have the right to immediate possession.

3. The coupons having been dishonored, and notice thereof given, all the property of the company, by the statute, is transferred to the city, to hold against all other claims.

4. If this transfer, by operation of law, will not defeat this action, yet, as the wood is now the property of the plaintiffs, the Court will not give judgment for return.

J. C. Woodman, for defendant, submitted an elaborate argument.

1. Independently of statutes, the plaintiffs cannot hold this wood under the mortgages, because it was not in existence, or the property of the company at the time the mortgages were executed.

2. The mortgages do not profess to convey the property *of the company;* but only the "old road" and "the extension," and the separate property belonging with each of them. The statute treats the "old road" and "the extension" as separate; and the mortgages follow the statute.

3. Any forfeiture, under section six of chapter 450 of the laws of 1860, cannot affect this attachment made before there was any forfeiture. Nor can this suit be maintained upon a title acquired after it was commenced, even if such a title has been acquired.

4. Section eleven of the same statute does not aid the plaintiff. The lien given by that was upon property in existence when the bonds were issued. Besides, under that section, the plaintiff's only remedy is by Bill in Equity.

5. The defendant is entitled to a judgment for a return.

Other points were argued, but they did not become material in the view the Court took of the case.

Drummond, for defendant.

Even if taking possession under section 6 (ch. 450, laws of 1860,) dissolves a previous attachment, no such facts have been proved as justify taking possession under that section.

The proof is, that the coupon was presented to the Treasurer of Bath, and payment refused.

1. The plaintiffs cannot *by their own act* create a forfeiture *in their own favor.*

2. But the duty of paying the coupon is imposed by the statute, not on *Bath*, but on the *Railroad Company.* The plaintiff must show that the coupon was presented to the proper officer of the Railroad Company, or where it was payable, and payment refused, before *any* forfeiture can be claimed.

The plaintiffs, therefore, fail to show any reason under this section why there should not be judgment for a return.

Evans, for plaintiffs, in reply.

The opinion of the Court was drawn up by

APPLETON, C. J.—After the Androscoggin Railroad Company had built their road from Farmington to Leeds, it was authorized by the Act of 1860, c. 386, to extend their road to Topsham or Brunswick, there to connect with the Kennebec Railroad.

As it was deemed very improbable that the necessary funds for the completion of the railroad, as thus extended, would be raised by subscription, authority was given to the city of Bath to aid in the completion of the extension by the Acts of 1860, c. 450 and c. 475.

The statutes referred to recognize the "original road" from Farmington to Leeds, and "the extension" from Leeds to Topsham or Brunswick as, for certain purposes, separate and distinct roads. After the extension was completed, there was the Androscoggin Railroad from Farmington to Brunswick, which was to be regarded as a unit composed of the "original road" and "the extension."

After the completion of the extension, the Androscoggin Railroad, composed of the original road and the extension, with its own funds, purchased a large quantity of wood for its own use, which was attached by the defendant, a deputy sheriff, on various writs issued against it in favor of its creditors. While the extension was being built, both the original road and the extension had each its separate treasurer and treasury, and the funds of each were kept distinct, as of several corporations. This had ceased to be the case when the wood in controversy was purchased. The funds of the whole road, without any distinction as to their origin, were paid to the treasurer of the Androscoggin Railroad, and by him used in the purchase of the wood in question.

The plaintiffs claim title to this wood by virtue of rights acquired under the statutes before referred to.

When the Act authorizing the extension of the Androscoggin Railroad was passed, the railroad was subject to va-

rious mortgages, and to prevent their attaching to the extension, the Act of 1860, c. 475, was passed.

By c. 450 of the special Acts of 1860, "the city of Bath was authorized to aid in the construction of an extension of the Androscoggin railroad from the town of Leeds to Topsham or Brunswick."

By section 4, the corporation was authorized, on certain conditions, to execute and deliver to the treasurer of Bath "a mortgage of said extension of their railroad from Leeds to Topsham or Brunswick and *of all the property of said extension* which they then have or may subsequently acquire, and also the franchise of said extension, without prior incumbrance; also, the said mortgage shall be made so as to embrace not only the said extension, but also the *original road of said company from Leeds to Farmington*, and *of* all the property of *said* road, including the franchise *thereof*, subject, however, to prior uncancelled mortgages upon the same." The mortgages under which the city claim were given under the authority of this section, and, in their terms, are expressly limited by its provisions.

The section treats the "extension" and "the original road" as separate and distinct corporations. The wood in controversy was not purchased with the special funds of the extension—nor with those of the original road. It did not belong to the "extension," nor did it belong to the "original road." It was bought with the funds of the "whole of said railroad," and belonged to and was the "property of the whole of said railroad," and not of either of the component parts, by whose union it existed as an unit.

The plaintiffs fail to show a title by either of their mortgages.

By section 6, in case of the neglect of the Androscoggin Railroad Company to pay the principal and interest of the scrip, issued under the provisions of this Act, the city of Bath was authorized "to take actual possession in the manner hereinafter provided, of the whole of said railroad and of all the property, real and personal, of the company, and

of the franchise thereof, and" to "hold the same and apply the income thereof, to make and supply such deficiency and all further deficiencies that may occur, while the same are so held, until such deficiencies shall be fully made up and discharged." Whether the facts would ever exist authorizing the taking possession of "the whole of said railroad," was altogether uncertain. Whenever they should exist, this section, as between the plaintiffs and the Androscoggin Railroad, gives the plaintiffs a right to take possession of "the whole of said railroad, and of *all* the property of the company," as it should be when possession should be thus taken. It refers, not to "all the property, real and personal," when the mortgages, by section 4, were given, or when the lien, by section 11, was created, but to *all*, when the possession thereby authorized, should be taken. The scrip, for securing which this right was given, was payable at the expiration of thirty years. If the rights of the city were to be limited to the road and its property, real and personal, as existing when the scrip was issued, long before it would become payable, there would be nothing of value of the original property of which to take possession. The city of Bath was to "hold" the road and apply the "income" thereof to secure and enforce the payment of what might be its due. The city might take possession of *all* the property the railroad might own, upon the happening of the contingency contemplated in this section.

But, when the attachments in question were made, and when this suit was instituted, the plaintiffs had not taken possession under section 6. Before possession taken, the wood was liable to attachment and was attached. By this attachment a lien was acquired upon the property attached. The plaintiffs were not then in possession. When this suit was commenced, the city had acquired no rights under this section. Its subsequent action cannot be invoked in aid of the present suit, if not rightfully commenced.

By section 11, the city of Bath has a lien on "*the whole* of said railroad, its franchise, and all its appendages, and

all real and personal property of said railroad corporation." It is further provided by this section, that "this lien shall be enforced and all the rights and interests of the city shall be protected, when necessary, by suitable and proper judgments, injunctions, or decrees, of said Supreme Judicial Court, on a bill or bills in equity, which power is hereby specially conferred on said Court."

No bill in equity has been commenced. The lien, whether limited to the property of the corporation at the date of its origin, or embracing after acquired property, is given by this section. It is a peculiar right, not of common law origin, but deriving its vitality solely and exclusively from this statute. The remedy for its enforcement is provided by the section which creates this new right. When a right with its appropriate remedy exists at common law, if a statute gives a new remedy in affirmative words, this does not take away the common law remedy. But if a new right be conferred or created by the statute, the remedy prescribed by the statute, and none other, can be pursued. *Renwick* v. *Morris*, 7 Hill, 575. If a statute create a right, which *did not exist before*, and prescribe a remedy for the violation of it, that remedy must be pursued. *Stafford* v. *Ingersoll*, 3 Hill, 38; *St. Pancras* v. *Batterbury*, 89 Eng. Com. Law, 471. *Plaintiffs nonsuit and return ordered.*

DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

LYDIA K. BEALS, *in Equity*, *versus* OTIS C. COBB.

The mortgage of a married woman to secure her own promissory note is valid.

When the mortgagee has parted with all his interest in the mortgage, and the debt secured thereby, and is not accountable for rents and profits, he need not be made a party to a bill in equity to redeem.

But when he has merely given to another a quitclaim deed of the mortgaged premises, without assigning the mortgage debt, he must be made a party to such bill.

The Court will take notice of the want of necessary parties to a bill in equity, and ordinarily in such cases will allow an amendment on just terms.

But when a case in equity is submitted to the Court on an agreed statement, with the stipulation that "no facts, statements, or allegations are to be considered by the Court except those therein agreed upon," and the bill is defective for want of necessary parties, it will be dismissed, but without costs and without prejudice to either party.

BILL IN EQUITY. The case was submitted on an agreed statement of facts, which are sufficiently stated in the opinion.

Bennett, for the plaintiff.

Drummond, for the defendant.

The opinion of the Court was drawn up by

WALTON, J. — This is a bill in equity to redeem real estate mortgaged by a married woman to secure her own promissory notes, and the only question about which the parties seem to have disagreed, — or at least the only one argued by their counsel, — is whether such a mortgage can be upheld. This Court, upon a full and careful review of the law, have decided within the last year that such a mortgage is valid. *Brookings* v. *White*, 49 Maine, 479.

The objection, therefore, that this bill cannot be sustained because the mortgage was made by a married woman, is not a valid one. But there is another more formidable objection, and that is the want of a necessary party to the bill.

Otis C. Cobb is the only party defendant, and yet the notes to secure which the mortgage was given were not

payable to him, and it does not appear that they have ever been assigned to him, or that he is in equity entitled to the amount due upon them. The notes were made payable to Asa Matthews, and, for aught that appears, still remain his property.

True, Matthews gave a quitclaim deed of the land to Cobb, and perhaps this deed would operate as an assignment or transfer to him of the conditional fee created by the mortgage; but it would not necessarily operate as an assignment of the notes. It may be that Cobb claims (and perhaps rightfully) that he is equitably entitled to the amount due upon them. But the case does not show it; and in making it up the parties have expressly stipulated that no facts, statements, or allegations are to be considered by the Court except those therein agreed upon. Besides, such a claim presents a question in which Matthews is very clearly interested, and he should have an opportunity to be heard before it is decided. "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented." All persons materially interested in the subject matter of a suit in equity should be made parties to it. By this means the Court is enabled to make a complete decree between the parties, which will bind them all, and prevent future litigation, and make it perfectly certain that no injustice is done, either to the parties before it, or to others who are not before it. Story's Eq. Pleadings, § 72; *Bailey* v. *Myrick*, 36 Maine, 50.

When the legal estate created by a mortgage, and the debt to secure which the mortgage was executed, are held by different persons, the holder of the legal estate is only a trustee in respect to such estate, and holds it for the benefit of the person to whom the debt is due; and, in suits in equity respecting trust property, the rule is, that not only the

trustees, but the *cestuis que trust* (or beneficiaries) must be made parties. "The trustees have the legal interest, and therefore they are necessary parties. The *cestuis que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties." Story's Eq. Pleadings, § 207.

If the assignment by a mortgagee is such as to leave no interest in him to be affected by the decree; that is, if he has assigned his whole interest in the legal estate, and his whole interest in the debt secured by the mortgage, and the extent and validity of the assignments are not questioned, and there is no claim upon him for rents and profits, it is not necessary to make him a party defendant to a bill in equity to redeem the estate. But if the assignment is such as does leave an interest in the mortgagee which will be affected by the decree, whether it be an interest in the legal estate, or an interest in the debt, or an interest in the rents and profits to be accounted for, or if the extent or validity of the assignment is questioned, or if his interest in the subject matter of the suit is left in doubt even, he is a necessary party, and the Court will not proceed in his absence. Story's Eq. Pl., §§ 191, 192.

What the real transaction between Matthews and Cobb was, or for what purpose the quitclaim deed from the former to the latter was executed, or for what consideration, or if the quitclaim deed was intended as an assignment of Matthews' interest in the mortgage, why the notes secured by it were not also assigned or delivered to Cobb does not appear. The amount to be paid to redeem the estate may equitably belong to Matthews. The parties agree that he has never assigned the notes to Cobb, unless such was the effect of the quitclaim deed, and the case does not disclose enough to satisfy us that such was its effect. If the parties had intended that such should be its effect, and the case disclosed enough to satisfy us that such was their intention; or if it were necessary to give it such an effect in order to do justice between them, the Court might so hold. But, as

before remarked, these are questions in relation to which Matthews has a right to be heard, and the Court cannot properly proceed to determine them in his absence.

In equity suits, the Court will take notice of the want of proper and necessary parties. It is not necessary that the objection should be taken in the pleadings, as in suits at law. But in such cases, the Court will, on motion, ordinarily allow the defect to be supplied by an amendment of the original bill upon such terms as they shall think just. But in this case no motion to amend has been made. The case is presented on an agreed statement of facts, and the parties have expressly stipulated that, in determining it, "no facts, statements, or allegations are to be considered by the Court except those therein agreed upon;" and we do not think it would be right at this stage of the proceedings to disregard this agreement, and open the case to new allegations and new proofs. The case has been deliberately submitted to us for a final adjudication, and as we cannot properly make the decree prayed for, as the case is now presented, we think the bill must be dismissed.

The Court have already decided in *Brookings* v. *White*, before referred to, that a married woman's mortgage, although made to secure her own promissory note, is not void, overruling all former decisions and dicta to the contrary; and, when this is known to the parties, probably they will be able to agree upon their rights and liabilities without further litigation, for this seems to have been the principal point about which they disagreed.

Bill dismissed, without costs, and without prejudice to either party.

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

REUBEN INGALLS *versus* THE INHABITANTS OF AUBURN.

A highway surveyor cannot maintain an action against his town for money paid by him for labor in repairing the highways, unless he obtained written authority from the selectmen to employ the labor, although the amount of taxes assigned to his limits has not been expended, and the persons taxed neglect or refuse to pay such taxes, after due notice.

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

ASSUMPSIT to recover money paid by the plaintiff as highway surveyor for repairing the highway in his district.

It appeared that the plaintiff expended upon the highway, in his district, a sum less than the amount of the tax bills committed to him, but greater than the amount received by him on those bills, after due notice to the persons taxed. This action was to recover the difference between the amount he paid, and the amount he received. He did not obtain the written consent of the selectmen for any expenditure.

S. May, for plaintiff.

N. Morrill, for defendants.

The opinion of the Court was drawn up by

KENT, J. — A surveyor of highways is an officer or agent of the town, created by statute, whose powers, rights and liabilities are all defined and all rest upon this written law. All the surveyors are to be chosen by the town, but the selectmen are required to assign in writing to each surveyor his division and limits, to be observed by him. The duty of the surveyor is to superintend the expenditure on the highways, so assigned, of the amount he may receive in labor or money, from the list of tax payers and the assessments on them, committed to him by the selectmen. He is not a general agent, authorized and bound to keep all highways in his district in a safe and convenient condition, and to do this at his own discretion and at an unlimited cost. His duty is limited and specific. If he fails to expend the

money and labor in his rate bills, when available, when defects require the expenditure, or fails to give notice of a deficiency to the town officers, he may be liable to indictment, instead of the town. R. S., c. 18, § 65. But he is not bound to expend his own money, or to make himself liable to others for labor done at his personal request. He is simply to use, at his best discretion, what he can obtain in labor or money from the persons named in his list. If this proves insufficient, from any cause, and the duty and interest of the town require further expenditures, it is his duty to consult the selectmen, and they may authorize him, *in writing*, to employ *inhabitants* of the town "to labor for pay," to a certain amount, § 50. The cases of *Haskell* v. *Knox*, 3 Maine, 445; *Moor* v. *Cornville*, 12 Maine, 367; *Merrill* v. *Dixfield*, 30 Maine, 157; *Field* v. *Towle*, 34 Maine, 405, all sustain these views.

The counsel for the plaintiff does not directly controvert these propositions. But he maintains that the only case, where the surveyor is obliged to, or can properly ask for the written consent of the selectmen, is where the sum *appropriated* is *not* sufficient to repair the ways in the district; that where the expenditures are within the sum total of the list given to him, he may recover of the town for wages of labor employed by him. His view seems to be, that the surveyor has unlimited authority to expend on the ways *the sum named* in his list, and if, after notice to those named, he fails to obtain labor or money equal to the sum so named, he may employ others at his own pleasure to supply the deficiency, and himself recover for such labor in *assumpsit* against the town. He admits that when the *appropriation* proves insufficient, and the surveyor has no funds, he cannot expend anything without the written consent of the selectmen, however urgent the necessity. But he insists that the surveyor has the right to expend all the sum named, without consulting the selectmen, and, if he cannot obtain it on his bills, to employ others. The fallacy of this argument is to be found in the assumption that the surveyor has

a *quasi* vested right to expend a certain sum of money or labor, and that he may be held liable to the town or the public if he fails so to do.

But the surveyor has no such rights and is under no such liabilities, as before stated. He is bound to give notice to each person to furnish labor or materials at a time named, according to the vote of the town, and at prices fixed by the town. There is no law which compels a man thus notified to appear and work. He may decline or neglect so to do. If he does so neglect, the sum assessed on him, in labor, is to be put into his cash tax of the next year. The counsel puts the case of a refusal by every person named to work on the highways — and asks what is the surveyor to do? We answer, that he is not bound and has no right of his own motion to employ others to supply the place of the delinquents. He should apply to the selectmen, and, if they refuse to give any written consent for him to employ laborers, he has done his duty, and the town alone is responsible for the results from any neglect to repair defects. We do not see any reason why the selectmen might not properly regard this as a case where "the sum appropriated is not sufficient to repair the ways in the surveyor's district."

And the same rule might apply when the deficiency by neglect is partial. The object of the statute is to enable citizens to work out their highway taxes. Ordinarily this is found sufficient to keep the ways in a safe condition. If, from any cause, it proves insufficient, the law requires the surveyor to apply to the municipal officers and obtain their written consent, before proceeding to expend money. The statute has been amended since its first enactment, by the addition of the requirement that the consent should be *in writing*, thus plainly showing a purpose to restrain, instead of extending the authority of highway surveyors in this matter.

In this case, the plaintiff admits that he does not bring himself within the provisions of § 30. There is no other section which gives him authority to expend anything, which

he does not obtain as payment or performance on his bills, without the written assent of the selectmen.

The subsequent vote of the town, by which the plaintiff was "allowed to collect the unpaid taxes in his hands, for the amount expended by him on the highways more than he has collected," cannot be construed into a promise to pay that amount from the town treasury. It simply gives the assent of the town to his obtaining what he can from the lists in his hands. It does not even do, what perhaps equity might dictate, promise to allow and pay over what the town might receive from the cash tax of the next year, assessed on delinquents in his lists.

We can find no ground on which this action can be sustained. *Plaintiff nonsuit.*

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

ISAAC STRICKLAND *versus* ADONIRAM J. BARTLETT.

It is not necessary, under c. 61, § 1, of the Revised Statutes, that a husband and wife, in order to convey her real estate paid for by him, should join *in the same deed:* separate deeds from each, though executed at different times, will convey the title.

ON EXCEPTIONS, by defendant, to the rulings of BARROWS, J., and on MOTION to set aside the verdict.

S. C. Andrews, for the defendant.

M. T. Ludden, for the plaintiff.

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

BARROWS, J. — WRIT OF ENTRY. The land demanded formerly belonged to William Bray, who conveyed it, Aug. 26, 1854, by deed duly recorded, to Lydia A. Bartlett, wife of Frederic Bartlett, and mother of the tenant. Some six

years previous to this conveyance, the said Frederic and Lydia A. Bartlett separated, and though not divorced, have never since lived together. He testified that after the separation he never claimed or received any of his wife's earnings, nor set up any claim to any property that passed through her hands. It seems to be conceded that the property in controversy, so far as it was paid for at all, was paid for by the wife out of her earnings, subsequent to the separation.

Frederic Bartlett, the husband, during the pendency of a suit brought by one Essec Fuller against Lydia A. Bartlett, the wife, to recover pay for the buildings by him erected on the premises, under a contract with Lydia, by quitclaim deed, duly acknowledged April 29, and recorded May 1, 1856, conveyed all his interest in the premises to said Essec Fuller. Fuller failed in his suit, Lydia pleading her coverture in bar. *Fuller* v. *Bartlett*, 41 Maine, 241.

On July 2d, 1861, Lydia A. Bartlett, by quitclaim deed, duly acknowledged and recorded, in consideration of a piece of real estate deeded to her by this demandant, and $50 paid by him, and certain promises made to her by Essec Fuller, conveyed the demanded premises to said Essec, who, on the 6th day of the same month, conveyed the same by deed of warranty to the demandant. The demandant claims title under the above named deeds from Bray to Lydia A. Bartlett, from Frederic and Lydia A. Bartlett to Essec Fuller, and from Fuller to himself.

The tenant claims title under a levy, made May 30, 1861, upon an execution in his favor against Frederic Bartlett, and alleges that fraud was practised by Essec Fuller, with the knowledge of the demandant, in the procurement of the two deeds from Frederic and Lydia A. Bartlett, to said Essec. The jury have negatived the existence of any fraud, and there is nothing in the testimony to lead us to conclude that they erred in so doing. Certain matters appear which tend to discredit the good faith of the title under which the tenant claims. His suit against his father was based upon an

account consisting, with the exception of a single item, of charges for labor and expenses in carrying on the place for his mother, while she was living separate from her husband; services rendered and expenses incurred, not at the request of his father, but for the benefit of his mother, with whom he lived; and it further appears that the suit was at one time entered "Neither party," but at a subsequent term brought forward and defaulted by consent.

But his title, whether it accrued *bona fide* or otherwise, is not that of a prior creditor, for all the items of his account bear date subsequent to the purchase by Lydia A. Bartlett, subsequent of course to the time when, as the jury have found upon satisfactory evidence, Frederic Bartlett had made a gift to his wife of the proceeds of her earnings. Not being a prior creditor, he is not in a position to defeat that gift.

The fifth requested instruction raises the only point which it seems necessary particularly to examine.

The presiding Judge was requested to instruct the jury, that the husband and wife could not give a valid title to the premises thus standing in the name of the wife, without joining in the same deed, and this request was refused. If wrongfully refused, the tenant was plainly injured thereby, for whatever might be the infirmity of the tenant's title, the demandant must recover upon the strength of his own or fail in his suit. Husband and wife had both conveyed their interest in the premises to the same person, but by separate deeds. The demandant has the title of the grantee in their deeds. Was it essential to the validity of his title that they should join in one deed?

The tenant relies upon that clause in § 1, c. 61, R. S. of 1857, which, after providing that a married woman may manage, sell, convey, &c., without the joinder or assent of her husband, any real or personal estate which she may own in her own right, whether acquired by descent, gift, or purchase, adds, "but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or de-

vised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance." This provision is substantially a reënactment of c. 250 of laws of 1856.

The fallacy of the defendant's position consists in limiting the meaning of the word conveyance to the *instrument* by means of which the title passes. But it means also the act of transferring estates from one party to another. Looking at the intent of the statute and the connection in which the clause stands, the latter and broader signification seems the true one.

By force of its provisions, a married woman may convey property held in her own right without the joinder or assent of her husband, except such real estate as was directly or indirectly conveyed to her or paid for *by him*, or given or devised to her by *his* relatives, as to which it is requisite that his assent should be shown by his joinder in the conveyance. His assent to the conveyance evinced by his deed is the essential thing required, and that assent may as well appear in a separate instrument. If both convey the same premises by deed to the same party, though they do not join in the *deed*, they may be as truly said to join in the *conveyance* as though their names were subscribed and their seals affixed to the same paper.

Motion and exceptions overruled.

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

JOSHUA SMALL *versus* THE INHABITANTS OF DANVILLE.

Towns and other *public* corporations are not liable for the unauthorized or wrongful acts of their officers, though done in the course and within the scope of their employment.

Thus, a town is not liable for the tortious use by a highway surveyor of private property for the purpose of constructing a culvert across a highway.

The ownership of manufactured materials lying upon land taken for a highway is not affected by the location; and the officers of the town have no right to use such materials in constructing the highway.

ON EXCEPTIONS to the ruling of DANFORTH, J.

TRESPASS to recover the value of a quantity of split stones used by the surveyor of the defendant town in constructing a culvert across the highway. The stones were lying upon the land taken for the highway, when it was located. The surveyor, who was also one of the selectmen, claimed the right to use the stone as materials found on the land taken for the highway.

The presiding Judge ruled that the defendants were not liable for the acts of the surveyor, and ordered a nonsuit; to which order the plaintiff excepted.

David Dunn, for plaintiff, in support of the exceptions, relied on *Thayer* v. *The City of Boston*, 19 Pick., 511.

Record, for defendants.

The opinion of the Court was drawn up by

DICKERSON, J. — Trespass for the alleged taking and appropriation, by one of the highway surveyors of Danville, of certain stone and other materials, in the construction of a culvert across one of its public highways. The case comes before us on exceptions to the ruling of the presiding Judge, who ordered a nonsuit at the trial before him.

It is clear that the act of the surveyor in using plaintiff's split stone in building the culvert was a trespass. The stones were split before the road was located, and were lying upon

the ground at that time. The statute allowing the owners of land, taken for highways, a year after the proceedings are closed, to take off "lumber, wood, or any erection thereon," does not divest such owner of his right subsequently to remove manufactured materials which were on land where the highway was located. Such property does not properly enter into the estimate of damages, caused by the location. The question to be determined is whether the defendants are liable for the trespass of the surveyor?

The liability of corporations for the tortious acts of their officers has frequently been discussed by courts and jurists, and the results arrived at have been regarded as not in harmony with each other. This supposed conflict of authority, it is believed, is for the most part rather apparent than real, and arises from not making the proper distinction in regard to the various kinds of corporations, their nature and objects, and the relation they and their officers sustain toward the public, and each other. To hold corporations, established for *public* or political objects, to the same strictness of liability for the unauthorized acts of their officers, as corporations instituted for *private* or pecuniary purposes, and to make a decision in the one case an authority in the other, would be to confound the clearly defined and recognized distinction between these two classes of corporations. In the case of *private* corporations, the rule of law is, that they are liable for the wrongful acts and neglects of their officers, done in the course and within the scope of their employment. In this respect, there is no difference in principle or precedent between the officers of such corporation, and the servants or agents of private persons, unless expressly made by act of incorporation or by-laws.

But a less stringent rule applies in regard to the liability of *public* corporations, which have powers granted for public purposes, such as towns, where the corporators have no private estate or interest in the grant. These are sometimes called *quasi* corporations, having powers coëxtensive only with the duties and liabilities imposed upon them by public

statute, and usage, in contradistinction from corporations invested with full corporate powers. The several towns in this State sustain the twofold character of corporations and political divisions. So far as they may own and manage property, make contracts, sue and be sued, they are corporations; but, in matters pertaining to the preservation of the public health and peace, the making and repairing of highways and bridges, the support of the poor and the assessment and collection of taxes, they are political divisions, established and designed the better to enable the inhabitants to exercise and enjoy portions of the political power of the State. The power to locate, discontinue, make and repair highways is part and parcel of the political government of the State. For convenience, this power is confided in many cases to town officers. The duties of such officers are defined and imposed by *public* statutes, and not by their respective constituencies. The duty of the constituency in these political divisions is to elect their officers; that of the officers is to obey the public statutes. The officers thus chosen are *public* officers to all intents and purposes; as clearly so as higher officers of the State in their sphere. In legal contemplation they are not the servants, or agents of their respective towns, but public officers. Being public officers of a public corporation, acting in its capacity as a political division, the corporation is not liable for their unauthorized or wrongful acts, though done in the course and within the scope of their employment.

In accordance with these principles, this Court held, in *Mitchell* v. *The City of Rockland*, 41 Maine, 363, that the city was not liable for the loss of a vessel by fire, while in exclusive possession of its health officers, obtained by their unauthorized acts. So, in *Lorillard* v. *The Town of Monroe*, 1 Kern., 392, it was decided that an action does not lie against a town for the amount of a tax erroneously assessed and collected, but not paid to the town treasurer.

In further illustration of the twofold character of municipal corporations, — the one *public* as a political division,

the other *private* as an instrument of personal advantage or emolument, — it is to be observed, that officers of a municipal corporation in its *private* character, as owner and manager of lands and houses or other property, are regarded as the servants or agents of such corporation, and the corporation, therefore, is liable for their malfeasance while acting in the course and within the sphere of their employment. Whether such officer, in a given case, exercises public or private powers, is to be gathered from the nature of the object for which the powers were granted. If these be conferred, not for public purposes, but for personal or pecuniary interest, the officer exercises *private* powers; if, on the contrary, the powers conferred are for *public* objects, he exercises *public* powers. In *Bailey & al.* v. *The Mayor, &c., of the City of New York*, 3 Hill, 531, the New York Court of Appeals held that the city was liable for injuries sustained by reason of the negligent and unskilful construction of a dam across the Croton river, built under direction of the commissioners, appointed under a special Act of the Legislature for supplying the city with water, on the ground that the erection being for the private advantage of the city, the commissioners were the servants or agents of the corporation, and not public officers. The same principle has been applied, where the trustees of a village were made commissioners of highways by its charter. *Conrad* v. *The Trustees of the Village of Ithica*, 2 Smith, (N. Y.,) 158; *Furze* v. *The Mayor of New York*, 3 Hill, 612; *Thayer* v. *The City of Boston*, 19 Pick., 511.

It is argued that the case of *Thayer* v. *The City of Boston* is conclusive in favor of the plaintiff's right to maintain this action. That, however, was the case of a city having full corporate powers, the officers whose acts are complained of being corporate officers. There was no prior authority or subsequent ratification by the town of Danville, as required in *Thayer* v. *The City of Boston*. The mere consent of the selectmen, if proved, would not be sufficient. The action cannot be maintained. *Mitchell* v. *City of*

Rockland, 41 Maine, 363; *Davis* v. *Bangor*, 42 Maine, 522. *Exceptions overruled.*

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

STATE *versus* BILLINGS J. HOOD.

Offences of the same nature, though different in degree, may be charged in one indictment.

Exceptions do not lie to the refusal of the presiding Judge to compel the prosecuting officer to elect upon what counts in the indictment he will proceed.

When the collective value only, of the articles alleged to be stolen, is set out in an indictment for larceny, judgment will not be arrested, if the jury find the respondent guilty of stealing all the articles named.

Although an indictment contains several counts for offences of the same nature, but of different degrees, and the jury return a general verdict of guilty, judgment will not be arrested; but sentence will be given for the offence of the highest grade charged in the indictment.

ON EXCEPTIONS, to the rulings of BARROWS, J.

The case is stated in the opinion.

Record, for the respondent.

Ludden, County Attorney, for the State.

The opinion of the Court was prepared by

BARROWS, J.—The defendant is charged in the indictment with breaking and entering the store of Stephen R. Deane, at Leeds, and stealing therefrom quite a variety of dry goods and groceries, alleged in the first count to be of the gross value of $120.

In the second count, the bill of articles alleged to have been stolen is identical as to kinds and quantities, and a valuation is affixed to the individual articles, amounting in the whole to $120.

In the first count, the offence is alleged to have been committed on the 19th of September, in the night time; in the

second, on the 20th of September, without any allegation that it was in the night time.

A general verdict of guilty was returned and the counsel for the defendant complains that there was a misjoinder of counts; that, in the first count, only the gross value of the goods stolen is alleged, and that the prosecuting officer was not compelled by the Court to elect upon which count he would proceed, but a general verdict of guilty was returned and received. Neither of these objections is well founded, and the motion in arrest was properly overruled.

Offences of the same nature, whether the same or different in degree, may be charged in one indictment, in appropriate counts. This has been too often held by the Courts in our own and other States to admit of question or to require the citation of authorities. It is in such cases, where distinct offences are charged, that the Court may, in its discretion, if the counts are so numerous as to embarrass the defence, compel the prosecutor to elect on which charge he will proceed. But the refusal to compel such election, being a matter of discretion, would not be the subject of exceptions. And where, as is apparent in the present case, the same charge is made in different forms, in good faith, for the purpose of meeting the evidence or the conclusions which the jury might draw therefrom, such election will never be compelled. Whether the jury would come to the conclusion, from the testimony, that this offence was perpetrated in the night time of the 19th of September, or, after daylight, on the morning of the 20th, might be doubtful, and there was no impropriety in charging it both ways.

The allegation of value is sufficiently distinct in either count to meet all the requirements of justice. The sum total is all that it is necessary to ascertain in order to determine what penalty the criminal has incurred. The verdict is, that he was guilty of stealing all the articles to which a collective value was assigned in the first count. It is only in cases where the verdict negatives the stealing of a part of

the articles, that an allegation of the collective value will be held insufficient.

Nor is it any cause for arresting judgment that there was a general verdict of guilty. Where one and the same criminal transaction is charged in different counts, alleging the commission of different grades of the same offence, but one penalty will be awarded, and, upon a general verdict of guilty, it will be the punishment appropriate to the highest grade. The Judge, who tries the case, must necessarily know whether the counts and the evidence offered in support of them relate to one or more offences, and, where sentence has been passed, it is to be presumed that the proper punishment was awarded. *Crosby* v. *Commonwealth*, 11 Met., 575.

It is urged, that in this case two palpably distinct offences are charged. If that were so, and injustice were done to the defendant by the verdict, the remedy would be by motion to set the verdict aside as not being warranted by the evidence, and not by motion in arrest of judgment.

Upon a motion in arrest of judgment, it is not a valid objection to an indictment, that it charges in different counts two or more offences of the same nature, or the same offence in different grades, or with different circumstances; nor to a verdict, in such case, that it is a general verdict of guilty. *Exceptions overruled.*

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

ELEANOR MARTIN *versus* ROBERT MARTIN.

Courts of law recognize the territorial divisions of the State into counties and towns.

It is no ground for demurrer, that in a writ of entry it is not alleged that the land demanded is *in the county* in which the action is brought; it is sufficient if it is described as being in a town which is within the county.

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

Record & Luce, in support of the exceptions.

Fessenden & Frye, contra.

The opinion of the Court was drawn up by

APPLETON, C. J. — This is a writ of entry to which a special demurrer was filed. The land to recover which this action was brought is described in the declaration by metes and bounds, and as "situated in the town of Danville." After the demurrer was filed, the demandant asked for leave to amend by inserting after the word "Danville," the words "in the county of Androscoggin and State of Maine," which amendment was allowed.

A real action will abate unless brought in the county where the land lies. "If brought in a Court in any other county, the writ would be abated; but in our practice there is no occasion for a plea to the jurisdiction in such a case. The count, which is always inserted in the writ, describes the land with as much precision and certainty *as would be required in a deed for the conveyance of the same land;* it must therefore always appear on inspection whether the action is brought in the proper Court, and if not, the writ will be abated of course." Jackson on Real Actions, 57.

Courts of law are bound to recognize the territorial divisions of the State into counties and towns. In criminal cases it is sufficient to state an offence to have been committed in the town of S, without adding the county in which

the same is situate, to give the Court jurisdiction; the Courts take judicial cognizance of the towns created by law. *Vanderwerker* v. *The People*, 5 Wend., 530; *Goodwin* v. *Appleton*, 22 Maine, 453; *Ham* v. *Ham*, 39 Maine, 263; *State* v. *Jackson*, 39 Maine, 291.

The limits of Danville appear by its Act of incorporation. By the Act establishing the county of Androscoggin, Danville is within its territorial limits. If the town is within the county, so are all the different portions of land of which it is composed. The demurrer admits the land in controversy to be "situated in the town of Danville." Being in that town, it necessarily is within the county of Androscoggin.

It follows that the amendment was unnecessary, the declaration sufficiently disclosing the locality of the demanded premises. The rights of either party cannot be affected by an immaterial amendment.

Exceptions overruled.
Declaration adjudged good.

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

ABIGAIL V. LOTHROP *versus* TIMOTHY FOSTER.

The demand to have dower assigned may be made by parol and by one authorized by parol.

Although the wife has signed a deed of the premises with her husband, she is not thereby estopped to claim dower, when the deed contains no words indicating her intention to release her right of dower.

An agreement to release such right cannot be proved by parol.

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

This was an action of DOWER, claimed by the plaintiff as the widow of Sullivan Lothrop, who conveyed the premises to George K. Stinchfield in the year 1834. The plaintiff

signed the deed of her husband to Stinchfield; but there are no words therein indicating an intention of releasing her right of dower. The defendant claims as grantee of Stinchfield.

The plaintiff offered evidence of the death of said Sullivan Lothop; and, to prove that they were married, she offered certificate of their marriage, and also offered the testimony of a witness who was present at her marriage.

Job Prince, called by the plaintiff, testified:—I called on defendant, Oct. 9, 1861; asked him if he was in possession of the farm in question and if he was owner, and he said he was; I told him I came as agent and attorney of Abigail Lothrop, widow of Sullivan Lothrop, to demand her dower and that he might consider a demand made by me for her; he said he would admit the demand made by me but he did not consider she was entitled to her dower, as she had signed the deed. The plaintiff had given me verbal authority to act for her and I made the demand verbally.

The defendant offered the deposition of said Stinchfield, (subject to all legal objections.) The deponent states, that said Sullivan Lothrop and his wife signed and executed the deed to him at the same time; that he paid $625 as the consideration for the conveyance; that the plaintiff refused to sign the deed unless she was paid a sum in addition to that already named; she finally consented to sign the deed releasing her dower for five dollars, which deponent paid her for that purpose.

A default was entered, subject to the opinion of the full Court on report of the case.

The case was argued by

N. Morrill, for the plaintiff, and by

A. G. Stinchfield, for the defendant.

The opinion of the Court was drawn up by

Appleton, C. J.—The demand to have dower assigned may be made by parol and by one authorized by parol.

Baker v. *Baker*, 4 Greenl., 66; *Luce* v. *Stubbs*, 35 Maine, 92; *Curtis* v. *Hobart*, 41 Maine, 230. It seems a demand for dower need not be made by the widow personally, nor in the presence of witnesses. *Watson* v. *Watson*, 70 E. C. L., 5. In case last cited, the demand was made by the son of the demandant, without proof of any written authority, and its sufficiency was not questioned.

The husband having been seized of the premises in controversy during the coverture, the wife, upon demand, is entitled to dower, unless it be wild land. But there is no presumption that all land is wild, which the demandant must overcome, before she can have dower.

It is true, the wife, in the case before us, signed the deed with her husband, but there are no words releasing or indicating an intention to release dower. She is not, therefore, estopped to claim it. *Stevens* v. *Owen*, 25 Maine, 92.

The tenant cannot show an agreement to release dower by parol. The evidence of Stinchfield, offered for that purpose, was inadmissible.

The marriage of the demandant is neither denied by the specifications of defence nor by the pleadings. If it were, the certificate of the magistrate by whom the marriage ceremony was performed, and the testimony of witnesses who were present, seem sufficient to establish the fact.

The default to stand.

DAVIS, KENT, WALTON and DICKERSON, JJ., concurred.

JOSEPH PETTINGILL *versus* ANDROSCOGGIN R. R. CO. and J. R. ADAMS, *Trustee.*

Money in the hands of a station agent of a railroad company, received for tickets sold and freight collected, cannot be attached in his hands by trustee process, in a suit against the company by one of its creditors.

EXCEPTIONS from the ruling at *Nisi Prius* of DAVIS, J., charging the trustee, upon the following disclosure: —

Interrogatory 1*st*. Had you on the 10th of August, 1861, at the time the writ in said action was served on you, any goods, effects, moneys or credits in your hands or possession of the Androscoggin Railroad Company?

Answer. I had not unless I shall be held chargeable under the following circumstances: — As an individual I had nothing; but, as station agent at Wilton Station, I had in my possession, made up and charged on my books as paid to the treasurer, but not actually forwarded to him at the time of the service of plaintiff's writ on me, the sum of seventy-five dollars in money, which money I had taken as such station agent for tickets sold by me, and for freight delivered by me and paid for when so delivered, for which I had delivered freight bills receipted to the owners. I also had in my hands at the same time unpaid freight bills in the usual form, for freight not delivered, amounting to the sum of $204,42, and nothing more. At the time I received my appointment as station agent, I gave a bond to the then treasurer, with sureties, conditioned to pay over from time to time, as I received it, to the treasurer of the Androscoggin Railroad Company, all such moneys as should come to my hands as such station agent, which bond was then and is now in full force. I was not and am not liable to the Androscoggin Railroad Company for any funds in my hands, as I understand the contract, but I am bound and obliged to account for and pay over all such funds to the then treasurer of said company, and to no other person. The seventy-five dollars named above I afterwards, on the twelfth day of

August, forwarded to the treasurer of said company, and hold his receipt therefor. I was appointed station agent by the directors of said company.

C. Knapp, for the plaintiff.

Linscott & Pillsbury, for the trustee.

The opinion of the Court was drawn up by

DAVIS, J.—By the Massachusetts statute of 1794, c. 65, "any person having any goods, effects, or credits, *so* entrusted or deposited in the hands of *others* that the same *cannot be attached by the ordinary process*," may be sued by the process of foreign attachment, and the person having such possession be charged as trustee. That provision was incorporated into our statutes of 1821, c. 61; and, though there have been some verbal changes in the subsequent revisions, the form of the writ, (c. 63, § 6,) directing the alleged trustee to be summoned, for the reason that the debtor has not property "*in his own hands and possession*, which can be *come at to be attached*, but has entrusted such property to and deposited it in the hands of such trustee," has never been changed.

It is evident that the statute was not intended for any case in which the property could, without difficulty or risk, be attached in the ordinary method. In this respect the present statute does not differ from the former. *Allen* v. *Megguire*, 15 Mass., 490.

If the alleged trustee is *owing* the principal defendant, the suit operates as an assignment of the demand to the plaintiff, to be perfected by demand made by the officer having the execution. But, if he has "goods or effects" of the principal debtor deposited in his hands, liable to attachment, the service of the writ operates as an attachment of the *specific articles* in his possession. It is only in case he neglects to keep them, and deliver them to the officer having the execution, that he becomes *personally* liable. *Burlingame* v. *Bell*, 16 Mass., 318.

The property in the hands of the trustee must be such as *can be taken on the execution*. *Clark* v. *Brown*, 14 Mass., 271. Therefore, before the statute authorized *money* to be attached or so taken, one having (uncurrent) *bank notes deposited* with him, not in such a manner as to make him the *debtor* of the depositor, was held not to be chargeable as his trustee. *Perry* v. *Coates*, 9 Mass., 537.

In applying the statute, in practice, two general principles seem to be essential. Both of these have been recognized in the decisions; though there may be cases in which, through the inadvertence of Courts or counsel, they have been overlooked.

1. The property must be *in fact* in the hands of a person *other than the debtor*. Therefore, the *mere servant* of the debtor, having care of his goods under his direction, would not be liable upon this process, unless he should do something to prevent them from being attached. The original statute of 1758, Province Laws, c. 267, applied in terms to an "attorney, factor, agent, or trustee." The process is intended for a case in which, for some purpose, the goods are *out of the personal possession* of the debtor. It is for this reason that the cashier of a bank or a treasurer of any other corporation, is not chargeable as the trustee of such corporation, though some of the property in his custody would be attachable. The corporation can have no actual possession, except by him. He is the corporation, *quoad hoc*. Nor does his possession make him the *debtor* of the corporation, so that he can be chargeable upon that ground.

2. *Mere possession*, by a third person, of goods belonging to the debtor, will not render him liable to this process. *Skowhegan Bank* v. *Farrar*, 46 Maine, 293. If it were otherwise, the hirer of a horse, or the hotel or stable keeper in whose care he is placed by a traveller, may be held to answer to a suit against the owner. We agree with the Court in Massachusetts in the opinion, *Staniels* v. *Raymond*, 4 Cush., 314, that the Legislature could not have intended "that the mere possession of property by a party

having no claim to hold it against the owner, should render him liable therefor as trustee, and thereby he be subjected to trouble and expense in answering to a claim in which he has no interest. Such a construction of the statute would be prejudicial in very many cases, and cannot be admitted."

This principle, however, does not apply when the person having such possession does anything to prevent the goods from being attached as the property of the debtor, by concealing them, or refusing, on request, to expose them, or by asserting any claim to them himself, or in any other manner, he would then be liable to the trustee process. *Swett* v. *Brown*, 5 Pick., 178; *Hooper* v. *Day*, 19 Maine, 56; *Balkham* v. *Lowe*, 20 Maine, 369.

Nor has this doctrine ever been applied to a depositary of *money*. Though coin and bank notes are now attachable, and may be taken on execution, practically they can very seldom "be come at to be attached." They differ from all other property in this respect. And there are cases in which one holding a particular fund, merely on *deposit*, claiming no interest in it, may be chargeable as trustee. *Bell* v. *Gilbert*, 12 Met., 397; *Insurance Company* v. *Holbrook*, 4 Gray, 235. The owner of the fund can have no reason to complain; and any other rule would encourage fraud.

In the case at bar the alleged trustee was the station agent of the defendant company; and the money in his hands had been received for passage tickets sold, and freight bills collected. For this he is liable to be charged, unless his possession is the *actual* possession of the company, like that of its treasurer.

The corporation, as such, has no personality except in the persons of its agents. It can act only by agents. By them alone can it possess its property, and exercise its corporate functions. In doing this, *their* acts and possession are its own, not constructively, as in the case of agents of *persons*, but actually. In this respect corporations differ from persons. In one, the act or possession of the agent is

constructively that of his principal; in the other it is *actually* so.

There may be a limit to the application of this principle. A corporation may employ an agent who is not invested with its personality. A railroad company does employ a large number of such agents, in carrying on its business. Such agents, having the property of the corporation in their possession, may he held as its trustees. But some of the agents of a corporation must, in this respect, be considered as the corporation; and they cannot be charged as its trustees, for the reason they, *quoad hoc*, are the same. It may not be easy to draw the line between these two classes of agents. But we cannot doubt that those who are appointed to exercise the corporate functions, as its regular agents in doing the business for which the corporation was organized, must be considered as identical with the corporation in such business. A railroad corporation sells passage tickets, and receives and delivers freight, by station agents appointed for that purpose. It can do it in no other way. This is the very business for which such companies are incorporated. In doing this business, the acts of such agents, and their possession of the corporate property, must be considered as the *actual* acts and possession of the company; and they cannot be held as its trustees.

Exceptions sustained. — Trustee discharged.

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

COUNTY OF FRANKLIN.

CHARLES V. LOOK *versus* INHABITANTS OF INDUSTRY.

If one, under duress, pays a tax wrongfully assessed on him, and the money goes into the treasury of the town, he may recover the amount, in an action against the town, without first making a special demand therefor.

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

This was an action of ASSUMPSIT to recover the amount of a tax assessed on the plaintiff by the assessors of Industry for the year 1858.

It was admitted that the plaintiff paid the tax after arrest and commitment by the collector, and that the amount was paid into the town treasury; that the tax was legally assessed, if the plaintiff was an inhabitant of the town of Industry on the first day of April, 1858. There was no proof of any demand on the defendants.

The counsel for the defendants requested the Court to instruct the jury, if they should find that the plaintiff was not an inhabitant of Industry on the first day of April, 1858, this action could not be maintained; which instruction the Court declined to give, but instructed them, if they should find the plaintiff was not an inhabitant of Industry on the first day of April, 1858, their verdict should be for the plaintiff. The jury found specially that the plaintiff was not an inhabitant of Industry on the first day of April, 1858, and their verdict was for the plaintiff.

The defendants excepted.

Goodenow, in support of the exceptions, contended:—

1. That if the plaintiff was not an inhabitant of the town, the assessors were not authorized to tax him; that, for so doing, they personally were liable, and not the town.

2. That, without special demand before suit, the plaintiff could not maintain his action.

S. Belcher, contra.

The opinion of the Court was drawn up by

RICE, J.—The case finds that the plaintiff was not an inhabitant of Industry on the first day of April, 1858, and therefore was not liable to be assessed as such for that year. It also finds that the tax was paid under duress, and the money has gone into the treasury of the defendants. Under such circumstances, upon common principles, the corporation having received the money of the plaintiff, to which they have no right, and placed it in their treasury, are liable to refund it in this action. *Sumner* v. *First Parish in Dorchester*, 4 Pick., 461; *Thorndike* v. *Boston*, 1 Met., 242; *Briggs* v. *Lewiston*, 29 Maine, 472. We find no authority for requiring a special demand before commencing the action. *Exceptions overruled, and Judgment on the verdict.*

APPLETON, GOODENOW, DAVIS and WALTON, JJ., concurred.

EZEKIEL PORTER *versus* JEREMY W. PORTER.

A writing in these words, "value received of E. P., I promise to pay him or his order seven hundred dollars without interest to be allowed on settlement, no interest to be reckoned," will be legally construed a promissory note for that sum without interest; the last clause being regarded as surplusage.

No time of payment being named in the note, it is payable on demand.

There is no such ambiguity as to authorize oral testimony to explain its terms or qualify its construction.

Parol testimony is not admissible to show that the note was given for money received by way of advancement from the father to the son (the defendant) there being no ambiguity in the note itself that requires it.

Besides, the statute (R. S., c. 75, § 5) provides that gifts, &c., shall be deemed advancements when expressed in writing to be such.

Porter *v.* Porter.

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

This was an action of ASSUMPSIT on a note, or written contract, signed by the defendant, of which the following is a copy:— "November 9th, 1841.

"$733,33. For value received of Ezekiel Porter, I promise to pay him or his order seven hundred and thirty-three dollars and thirty-three cents without interest to be allowed on settlement, no interest to be reckoned.

"Strong, November ninth, one thousand eight hundred and forty one."

It was proved by the plaintiff, subject to objection, that the instrument declared on was actually made and signed by the defendant, on or about the 17th of February, 1857.

The defendant offered to testify, and prove by another witness, that the consideration of the note, or contract, was given by the plaintiff to the defendant, who is a son of the plaintiff, as an advancement, and was so intended by the parties at the time said note was given in 1857.

To the introduction of this testimony the plaintiff seasonably objected, but the presiding Judge overruled the objection and permitted this evidence to go to the jury.

The Court instructed the jury that they might judge, from all the evidence and circumstances in the case, whether the sums for which said note was given, were intended as a gift and an advancement, and intended by the parties, at the time the note was given, to be allowed as such in the settlement of the plaintiff's estate after his decease; and, if they should so find, that this action could not be maintained.

The verdict was for the defendant. The plaintiff excepted.

The case was argued by

H. L. Whitcomb, in support of the exceptions, and by

Linscott & Pillsbury, contra.

The opinion of the Court was drawn up by

RICE, J. — The case is assumpsit on the following instrument: — "November 9, 1841.

"$733,33. For value received of Ezekiel Porter, I promise to pay him or his order seven hundred and thirty-three dollars and thirty-three cents without interest to be allowed on settlement, no interest to be reckoned.

"Strong, November ninth, one thousand eight hundred and forty-one. "J. W. PORTER."

The controverted propositions are whether this instrument is a valid promissory note, or whether it is so ambiguous in its language, or was given under such circumstances as will authorize the introduction of oral testimony to explain its terms, or qualify its construction. If that part of the instrument which immediately follows the words "without interest," were omitted, the instrument would be thereby simplified. It would then be in form a promissory note, complete in its terms, and perfect in all respects except as to time of payment. The omission of a specific day of payment does not, however, deprive it of its character as a promissory note. Where a note does not specify any day or time of payment, it is by law deemed payable on demand, and therefore is construed as if it contained the words *payable on demand*, on its face. Story on Prom. Notes, § 29.

Do the words following "without interest," change, or in any way modify the legal construction of the instrument? We think not. It is manifestly an instance of redundancy of words often found in instruments drawn by the unskilful or in the writings of the illiterate, and designed strongly to express an idea then prominent in the mind. In this instance the idea expressed is, that on the settlement of the note no interest shall be computed. That idea was fully expressed by the words "without interest." Striking out the redundant words as surplusage, and the instrument is, in form and legal effect, a promissory note for the sum of seven hundred and thirty-three dollars and thirty-three

cents, payable on demand without interest. Such also is its legal construction as it stands.

Where a promissory note, on its face, is payable on demand, oral evidence of an agreement, entered into when it was made, that it should not be paid until a given event happened, is inadmissible. Story on Prom. Notes, § 24; Chit. on Bills, 162; *Farnham* v. *Ingraham*, 5 Vt., 114; *Woodbridge* v. *Spooner*, 3 B. & Ald., 233; *Mosely* v. *Hanford*, 10 B. & Cress., 729.

Parol evidence cannot be received to vary the meaning of a written contract, by adding to its terms, or by extending or limiting them, or by introducing an exception or qualification, or by proving a different contemporaneous agreement. *Boody* v. *McKenny*, 23 Maine, 517; Story on Cont., §§ 669, 671; 1 Greenl. Ev., § 275; *Hunt* v. *Adams*, 7 Mass., 518; *City Bank* v. *Adams & trustee*, 45 Maine, 455.

But it is contended that parol evidence is admissible to show want of consideration in a promissory note. Such is undoubtedly the law. In this case, however, it is conceded, or at least not denied, that the defendant actually had received from the plaintiff the amount of money specified in the note. The ground of defence is, that the money thus received, was by way of advancement from the father to the son, and the oral testimony was admitted to show that fact. The question now is, whether the instrument could legally be thus explained or qualified.

We have already seen that there is no ambiguity or uncertainty on the face of the instrument, and, therefore, it is not open to explanation by oral testimony on that ground.

In relation to advancements, it is provided in c. 75, § 5, R. S., 1857, that "gifts and grants of real and personal estate to a child or grandchild are deemed an advancement when so expressed therein, or charged as such by the intestate, or acknowledged in writing to be such."

In this case, there is nothing on the face of the note tending to show that the plaintiff intended the consideration

thereof as an advancement, or that the defendant intended to acknowledge it as such. The language used will not admit of such construction.

The transaction having been reduced to writing by the parties, and that writing being free from ambiguity and capable of a legal construction, on general principles parol testimony cannot be received to explain or qualify it.

But, aside from this general objection, the statute already cited manifestly contemplates that evidence of advancements shall be in writing, and therefore not open to explanation by oral testimony. Such has been the decision of the Court in Massachusetts on a statute, in all its substantial provisions, like our own, and from which ours was evidently copied. *Barton* v. *Rice*, 22 Pick., 508.

The plaintiff's exceptions to the introduction of oral testimony to explain and qualify the note in suit, are well taken and must prevail.

The defendant's objections to the introduction of evidence to show the true date of the transaction between the parties were not relied upon at the argument.

Exceptions sustained;—
Verdict set aside, and
New trial granted.

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

ISAAC DYER *versus* ABNER TOOTHAKER *& al.*

The mortgager, or person claiming under him, cannot maintain a *writ of entry* against the assignee of an undischarged mortgage, paid after breach of condition.

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

WRIT OF ENTRY. The facts are stated in the opinion.

J. H. Webster, for demandant.

A. W. Paine, for tenants.

The opinion of the Court was drawn up by

DAVIS, J.—The premises in controversy were mortgaged by David Webster and Daniel Burnham to James Rangeley, July 20, 1836. The *tenants* claim under a deed from Noah Burnham, and an assignment of the mortgage to him, made Feb. 18, 1843, which was subsequently foreclosed. The *demandant* claims under a seizure of the right of redemption, upon an execution in his favor against the mortgagers, Jan. 21, 1843, and a sale thereof to him March 21, following.

At the trial, the demandant offered to prove that Noah Burnham, at the time the mortgage was assigned to him, *paid* the notes secured thereby; and that the assignment was made to him for the purpose of defrauding the creditors of the mortgagers. The evidence offered having been excluded, the facts are to be taken as proved. And this presents the question whether the mortgager, or person claiming under him, can maintain a *writ of entry* against the assignee of a *paid mortgage*, which has not been released.

The general principles applicable to such a case are examined at length in *Stewart* v. *Crosby*, 50 Maine, 130. It is unnecessary to repeat them. It is sufficient to say, that, even if such an action could be maintained at common law, as was believed by Judge STORY, he conceded that, by the *statutes of this State*, the mortgager, *not in possession*, could have no remedy but in equity. *Gray* v. *Jenks*, 3 Mason, 520, 527.

According to the agreement of the parties, judgment must be rendered *for the tenants*.

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

ALMON CARSON *versus* JOHN WALTON.

In an action on a mortgage, where the notes thereby secured include usurious interest, the defendant *on default* is not entitled to costs, notwithstanding on such default, the amount of the conditional judgment is reduced by proof of such usury.

The Statute of 1862, c. 136, § 2, giving costs to a defendant upon proof of usurious interest under the general *issue* does not apply to real actions.

The R. S., c. 82, § 21, relating to offers to be defaulted applies to actions founded on judgments or contracts.

ON EXCEPTIONS to the rulings of RICE, J.

WRIT OF ENTRY as on a mortgage. The defendant claimed that usurious interest was included in the demandant's claim. The case is stated in the opinion.

E. Kempton, jr., for defendant, in support of exceptions.

G. C. Vose, for plaintiff, *contra*.

The opinion of the Court was drawn up by

APPLETON, C. J.—It appears in evidence that John Walton, being indebted to the Granite Bank, on 12th April, 1858, made a conveyance of the demanded premises to the bank to secure such indebtedness; that the demandant, on 25th Oct. 1859, advanced the amount due, taking the title from the bank, and giving to said Walton a bond of the same date, in which he agreed to convey to him (Walton) the same premises upon receiving, within a stipulated time, the amount advanced, and a further sum by way of usurious interest.

Inasmuch as the deed was from the bank to the demandant, and the bond was from the latter to Walton, it might well be doubted whether the demandant is to be deemed the mortgagee of Walton. *Treat* v. *Strickland*, 23 Maine, 234. But, as the parties have agreed that a conditional judgment as of mortgage may be rendered, we are relieved from the consideration of this question.

The defendant offered to be defaulted for the amount he

admitted due, which offer the demandant rejected. Subsequently a default was entered, with the agreement that judgment was to be rendered as on mortgage, and that the presiding Judge should determine the amount due the demandant as mortgagee, and any questions arising as to costs.

The amount found due was less than the plaintiff's original claim, inclusive of usurious interest. The presiding Judge gave costs to the demandant, and denied them to the tenant.

The tenant claims costs, and resists their allowance to the demandant.

The tenant is not entitled to costs within the Act approved March 19, 1862, c. 136, § 2, by which, when usurious interest has been taken, the "party may under the general issue prove such excessive interest, the defendant giving notice of such defence in his specifications of defence." No evidence was offered under the general issue. The Act in question does not embrace real actions. By its express terms, it applies only to suits on contracts.

Nor is there any valid objection to the allowance of costs to the demandant. This is a writ of entry and not an action founded on "*judgment or contract*" within R. S., 1858, c. 82, § 21. If it were, by voluntarily submitting to a default, the tenant, it would seem, has lost all the benefits to be derived from his offer. Nor is the case, as has been seen, within the Act of 1862, c. 136.

Exceptions overruled.

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

SUMNER RUSSELL *& als., Appellants from decision of* COUNTY COMMISSIONERS OF FRANKLIN COUNTY, *on petition of* SELECTMEN OF AVON.

An appeal from the decision of the county commissioners laying out a highway can only be taken after the proceedings are recorded at the second regular term after the laying out.

A return of the laying out of a highway was made at the December term, 1860; the case continued to the next term, (April, 1861,) and the proceedings then recorded. Subsequently an appeal was taken to the next term of the Supreme Judicial Court, held after April 1861: — *Held*, that the appeal was seasonably taken.

ON EXCEPTIONS, to the ruling of APPLETON, J.

This was an appeal from the decision of the county commissioners of Franklin county laying out a highway. The respondents moved to dismiss the appeal, because it was not seasonably taken; and the presiding Judge, *pro forma*, granted the motion, and the appellants excepted. The case is stated in the opinion.

Linscott & Pillsbury, in support of exceptions.

S. H. Lowell, contra.

The opinion of the Court was drawn up by

APPLETON, J. — The duties of the county commissioners upon a petition for the location, alteration or discontinuance of a highway, are pointed out by the provisions of R. S., 1857, c. 18, § 4. After giving due notice of the time and place of hearing, they are "to hear all parties interested. If they judge the way to be of common convenience and necessity, or that an existing way shall be altered or discontinued, they shall proceed to perform the duties required; make a correct *return* of their doings, signed by them, accompanied by an accurate plan of the way; and state in their return, when it is done, the names of the persons to whom damages are allowed, the amount allowed each, and when to be paid," &c.

By § 5, their *return*, made at their *next* regular term after hearing, *is to be placed on file* and to remain in the custody of the clerk, *for inspection, without record.* The case is then to be continued to their *next* regular term; when, or before then, all persons aggrieved by their estimate of damages shall present their petitions for redress. If no such petition is then presented or pending, the proceedings shall be closed, recorded and become effectual; and all claims for damages not allowed by them shall be forever barred; and all damages awarded under the first seventeen sections shall be paid out of the county treasury."

If no provision had been made for an appeal, the proceedings would now be closed.

But the right of appeal is given by § 34, which provides that "parties interested may appear jointly or severally at the time and place of hearing before the commissioners, on a petition for a laying out, altering and discontinuing any highway; and any such party may appeal from their decision thereon, at any time *after it has been entered of record*, and before the next term of the Supreme Judicial Court in said county, at which term such appeal may be entered and prosecuted by him or by any other party who so appeared. And all further proceedings before the commissioners are to be stayed until a decision is made in the appellate Court." In ascertaining the intention of the Legislature, it will be necessary to consider both the provisions of § 5 and of § 34.

By § 5, the return of the commissioners "is to be placed on file," for inspection, without record. It is to be recorded at the next regular term. When recorded, it is then "entered of record." Filing and entering of record are entirely different and are to be done at different terms. After the term at which the return is thus entered of record, "and *before* the *next* term of the Supreme Judicial Court," an appeal may be taken, which is to be entered at the next term before mentioned.

An appeal implies a decision from which such appeal is taken. The only decision of the county commissioners, was

when "the proceedings were closed, recorded and become effectual." Until that time they were merely on file, for inspection, and without record.

In this case, the county commissioners made their report, granting the prayer of the petitioners, at their term holden on the last Tuesday of December, 1860, being their next regular session after the hearing, which took place June 5, 1860. This report, or "return," was placed on file, &c., and the case continued to the *next* regular session, held on the last Tuesday of April, 1861, as required by R. S., c. 18, § 5, at which time, no petition for damages having been presented, the proceedings were closed and recorded.

The *next* term of this Court, after these proceedings were entered, was holden on the third Tuesday of October, 1861, at which term the appeal was entered, as by § 34 it should be. The appeal therefore was seasonably entered in this Court. *Exceptions sustained.*

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

REUBEN JONES, *in Review, versus* ELIAB EATON.

Where a review is granted, in cases in which the petitioner is not entitled to it as a matter of right, it may be done on such terms and conditions as the Court may deem reasonable.

If a review is granted, unless the defendant in review performs certain acts, performance of the conditions may be pleaded *in bar* of the action of review.

Whether a defective *jurat* to a plea in abatement may be amended, *quaere.*

ON EXCEPTIONS and REPORT.

WRIT OF REVIEW. The defendant pleaded in abatement, that the review was granted only in case defendant should fail to comply with certain terms, and alleged that he had complied with the terms.

The language of the *jurat* to this plea was, —"Subscribed

and sworn to, before me," &c. The plaintiff filed a motion to dismiss the plea for want of a sufficient *jurat*; which motion the Court denied, and allowed the magistrate to amend the *jurat* according to the facts, on defendant's motion. The plaintiff then moved to dismiss the plea for other reasons stated in the opinion, but the motion was denied.

To these several rulings the plaintiff excepted.

The plaintiff then filed a replication to the plea, on which an issue of fact was joined, the testimony taken, and the case reported to the Law Court.

Whitcomb, in support of exceptions.

J. S. Abbott, contra.

The opinion of the Court was drawn up by

APPLETON, C. J. — When the petition for this writ was heard, a review was granted, *unless* the defendant should within a definite time comply with certain terms deemed by the presiding Judge as just and reasonable. It is claimed that they have been complied with. Notwithstanding this, it is insisted that the writ properly issued. The ground taken, is, that the granting or denying a writ of review according as certain conditions are or are not complied with, is erroneous. In other words, it is urged that a review must be granted or refused absolutely, and that the Court have no discretion as to the imposition of terms.

By R. S., 1858, c. 82, § 4, "when judgment is rendered on default of an absent defendant," he is entitled, in cases within that section, to a review as "of right." That the review under that section "is a matter of right" is fully recognized by R. S., 1858, c. 89, §5. But the case before us is not within the purview of either of the sections, to which reference has been made.

When a review is not "of right," its allowance or refusal rests wholly upon judicial discretion. "When a case is presented on a motion or petition for a new trial, or for a review," remarks SHEPLEY, J., in *Tuttle* v. *Gates*, 24 Maine,

397, "for any cause not arising out of an illegal or erroneous act of the Court, a new trial may be granted or refused by the Court in the exercise of its legal discretion. It cannot be claimed as a matter of right. And, in such cases, it may be done upon such terms and conditions imposed, as the Court may consider reasonable." Such appears to have been the practice of this Court. *Howard* v. *Grover*, 28 Maine, 97; *Hobbs* v. *Bevens*, 33 Maine, 233; *Jewell* v. *Gage*, 42 Maine, 247; *Withers* v. *Larrabee*, 48 Maine, 570.

The plaintiff having sued out this writ, the defendant pleaded certain facts in abatement. But this plea may be regarded as defective for want of a sufficient *jurat*. *Fogg* v. *Fogg*, 31 Maine, 302.

But, if the whole record be examined, it will be seen that a review was not granted absolutely, but only on the happening of a certain contingency. The plaintiff has only a modified and conditional right to a review. The defendant negatives this by proof of performance of what, if done and performed by him, would prevent the issuing of the writ. The facts were set forth in the plea in abatement, but we think they constitute a bar to all further proceedings. According to the analogies of pleading, they should have been pleaded by way of answer to the plaintiff's writ, rather than in abatement thereof.

It is objected that the release filed contains no discharge of dower. This not having been required, the defendant was not bound to procure it. *Plaintiff nonsuit.*

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

AARON MCKEEN *versus* ALLISON PARKER.

Generally when a plea in abatement is adjudged bad on demurrer, the judgment is "*respondeas ouster.*"

But when a plea "*puis darrein continuance*" is adjudged bad on demurrer the judgment is final against the defendant.

ON EXCEPTIONS to the ruling of KENT, J.

Linscott & Pillsbury, for plaintiff.

C. F. Pillsbury, for defendant.

The case is fully stated in the opinion, which was drawn up by

DICKERSON, J.—FORCIBLE ENTRY AND DETAINER. This process was commenced before a justice of trials, and by him transferred to the Supreme Judicial Court, in accordance with the provisions of the Revised Statutes, chap. 94.

On the first day of the October term of the Court, A. D. 1862, the respondent filed a plea in abatement, in which he set forth, that, since the last continuance of said complaint, and before said first day of the term, the said McKeen had forcibly expelled the respondent from the premises demanded, and disseized him thereof, and that he still continued tenant and occupant thereof; for which cause the respondent claimed to have the process quashed, and his costs. To this plea the complainant filed a general demurrer which was joined. The presiding Judge, then intimating that the plea was bad and that the demurrer would be sustained, the respondent's counsel filed a motion to amend the *jurat* to the plea, according to the fact, by striking out the words "according to his best knowledge and belief." The Court denied the motion, adjudged the plea bad, sustained the demurrer, and ordered the respondent to answer over, the complainant's counsel claiming that the judgment should be peremptory against the respondent. To this ruling of the Judge the complainant excepted.

After the evidence was closed, the case was taken from the jury, and submitted to the Law Court, with jury powers to render such judgment on the merits as the law requires, with the further agreement that, "if, on the plea in abatement and matters in the exceptions, judgment should have been peremptory against the respondent, it is to be so ordered by the Court."

Neither the refusal of the presiding Judge to allow the respondent to amend the *jurat* to the plea in abatement, nor his ruling in sustaining the demurrer, is before us, since no exception was taken to his action upon these matters. The single question presented by the exceptions is whether the judgment should have been *respondeas ouster*, or peremptory and final against the respondent.

Generally, where a plea in abatement is adjudged bad on general demurrer, the judgment is *respondeas ouster*, as the cases cited by respondent's counsel clearly show. *Fogg* v. *Fogg & al.*, 31 Maine, 302; *Burnham* v. *Howard*, 31 Maine, 569.

This, however, is a plea in abatement, based upon what had transpired *puis darrein continuance*. When any matter which is a ground of defence arises subsequently to the last continuance, the defendant is allowed to plead it either in bar or abatement at the next term after it originated, and this is called a plea *puis darrein continuance*, an old French phrase signifying *since the last continuance*. The respondent's plea is of this description. 2 Bouv. Law Dictionary, 401.

What legal consequence followed to the respondent from sustaining the demurrer? Was it that he should answer over on the merits, or that he should submit to a peremptory and final judgment?

Questions of this character, it is believed, are not of frequent occurrence, and Courts, for the most part, are compelled to rely for authority, mainly, upon decisions made in the earlier stages of the common law. Although special pleading has been abolished in this State, yet pleas in abate-

ment are permitted to have place in the machinery of our jurisprudence, and, when they are resorted to, they must be pleaded with the same technical exactness and certainty, and be followed by the same legal consequences, that obtained before recent innovations were permitted to mar the symmetry of this monument of legal ingenuity, science and skill.

In 1 Chitty on Plead., 697, this doctrine is laid down,— "Pleas of this kind are either in abatement or in bar. If anything happen pending the suit, which would in effect abate it, this might have been pleaded *puis darrein continuance*, though there has been a plea in bar; because the latter plea only waives such matters in abatement as existed at the time of pleading, and not matter which arose afterwards; but, if matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, will be peremptory, as well on demurrer as on trial. A plea *puis darrein continuance* is not a departure from, but is a waiver of the first plea, and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon."

In 1 Black. Com., 252, it is said "to be dangerous to rely upon such a plea without due consideration; *for it confesses the matter which was before in dispute between the parties.*"

"On a *demurrer* to a plea in abatement," says Mr. Justice STORY, "*since the last continuance*, the judgment, if for the plaintiff, is final." Story's Plead., 31.

"Pleas *puis darrein continuance* may be in abatement or in bar; but judgment on the former is final, as well upon demurrer as upon verdict, if a plea in bar had before been filed; for in pleas *puis darrein continuance* there can be no judgment to answer over. These pleas are a waiver of all former pleas; and, if the matter pleaded, be found against the defendant, it is a confession of the whole declaration." Howe's Practice, 431.

The plea *puis darrein continuance* waives all previous pleas, and, on the record, the cause of action is admitted to the

same extent, as if no other defence had been urged than that contained in this plea. By operation of law, the previous pleas are stricken from the record, and every thing is confessed except the matter contested by the plea *puis*. *Kimball & al.* v. *Huntington*, 10 Wend., 675.

So, in *Renner & al.* v. *Marshall*, 1 Wheat., 215, it was held "that, if matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory, as well on demurrer as on trial."

The conclusion deduced from the authorities undoubtedly is, that a plea *puis darrein continuance* is a waiver of all former pleas, and if, on general demurrer, the decision be against the defendant, the judgment must be peremptory in favor of the plaintiff.

According to the agreement of the parties, the order must be— *Judgment peremptory against the respondent.*

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

DAVIS, J., announced his views as follows:—

Pleas *puis darrein continuance*, like pleas at any other stage of the action, must conform to the case. If the fact, had it originally existed, must have been pleaded in *abatement*, or, if it must have been pleaded in *bar*, it must be pleaded *in the same way*, at the next term, if it occurs while the suit is pending. If it could originally have been pleaded either in abatement, or in bar, it may be pleaded in either way *puis darrein continuance*.

The plea in this case is analogous to a *disclaimer*, or a plea of *non tenure*, in a real action. Until otherwise provided by statute, those pleas were either in abatement or in bar. *Otis* v. *Warren*, 14 Mass., 239. The statute prohibition does not apply to this case. If the plaintiff already had the possession, the defendant could have pleaded it in abatement; or by a brief statement, with the plea of "not guilty."

Whether the *facts*, if properly pleaded, would have been a good defence, is not the question before us. In an action

of *forcible entry and detainer*, the complainant is entitled to recover *rent*, from the time when the case is heard by the magistrate. That hearing, in this case, was May 16, 1861. Having obtained *possession*, could he prosecute the suit in order to recover the rent? See *Tufts* v. *Maines*. [Next case.]

The defendant pleaded the facts in *abatement*, and not in *bar*. His plea is fatally defective *in form*, if not in substance, for want of an *affidavit*. 31 Maine, 302.

The demurrer is general. But, as the plea is in *abatement*, if the defect is one of *form* only, it may be taken advantage of upon a *general* demurrer. *Clifford* v. *Cony*, 1 Mass., 495; *Lloyd* v. *Williams*, 2 Maule & Sel., 484; *Emerson* v. *Libby*, 2 Ld. Raym., 1015.

The ruling of the Court, *in sustaining the demurrer*, was therefore correct, whether the facts, if properly pleaded, would have been a good defence, or not. But the decision was final for the defendant; and he had no right to plead over. The only remaining question was one of *damages*, being the "reasonable rent for the premises." If the complainant afterwards took possession, his right to rent terminated from that time; and no writ of possession will be necessary.

JOSEPH TUFTS *versus* WILLIAM MAINES.

If, after the commencement of a real action, the tenant abandon the premises and the demandant take possession, the action cannot be further maintained for the purpose of recovering the demandant's costs.

But a mortgagee, under such circumstances, may maintain his action for the purpose of foreclosing his mortgage.

By prosecuting such a suit to final judgment and execution in his favor, the mortgagee waives foreclosure in any other mode, and the mortgager's right to redeem will be extended accordingly.

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

Linscott & Pillsbury, for demandant.

C. F. Pillsbury, for tenant.

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

DAVIS, J.—This is a *real action*, in which the demandant claims title under a *mortgage*. After it was commenced, the mortgager abandoned the premises, and the demandant entered into possession. Is he thereby precluded from further maintaining this suit?

That such was the old common law rule in actions of *ejectment*, there can be no doubt. Com. Dig. Abatement, H.; Jackson's Real Actions, 165; Stearns' Real Actions, 215. And it seems to have been incidentally recognized in some cases in this country. *Burnham* v. *Howard*, 31 Maine, 569; *Crosby* v. *Wentworth*, 7 Met., 10.

But in *ejectment*, at common law, no damages, or mesne profits, were recoverable. The *only* object of the suit was *possession of the land*. And, having obtained that, the plaintiff could not, as is suggested by counsel in this case, prosecute the suit *for his costs*. Costs for the prevailing party are but incidental to the judgment. And, if a plaintiff has lost his right to recover *damages*, he has no right to recover costs. As well might a plaintiff in *assumpsit*, after voluntarily accepting payment of the *debt*, claim to maintain his action for his costs.

It has been seriously questioned in this country, whether in a *real action*, especially if it is to settle the question of *title*, or if *mesne profits* on the one side, or the value of *improvements* on the other, are to be recovered, this rule should be applied. As *possession* is not the only object of the suit, it is contended that obtaining possession, without any adjustment of the other matters in controversy, ought not to bar the further prosecution of it. So it was held in Connecticut, in *Verner* v. *Underwood*, 1 Root, 73, in a *per curiam* opinion. The question was very carefully considered in New York, by PARKER, J., and such possession was held

not to be a bar to the maintenance of the action, in *Tyler* v. *Canaday*, 2 Barb. S. C., 160. And to the same effect substantially are *Price* v. *Sanderson*, 3 Harr. (N. J.,) 426; and *McChesney* v. *Wainright*, 5 Ham. (Ohio,) 452.

But however this may be in ordinary cases of disseizin, the rule cannot be applied to an action by a *mortgagee*. He has a right *by the statute* to maintain such an action, not merely to obtain possession, but as one mode of *foreclosing the mortgage*. R. S., c. 90, § 3. Therefore subsequently obtaining possession will not bar his action. *Walcutt* v. *Spencer*, 14 Mass., 409.

If it be said that he has not the right to pursue *two* modes of foreclosure at the same time; while this is not admitted, it is replied, that the mortgagee had the right to possession, without foreclosing; and the case does not show that he had any "certificate" of his entry *recorded*, so as to perfect his proceedings in that mode. And if it were otherwise he had the right to *waive* it. By prosecuting this suit to final judgment and execution in his favor, he does waive foreclosure in any other mode, and the mortgager's right to redeem will be extended accordingly. *Fay* v. *Valentine*, 5 Pick., 418.

According to the agreement of the parties, *judgment must be entered for the demandant.*

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

STATE *versus* ORISON F. QUIMBY.

A person competent to serve as *traverse* juror is competent to serve as *grand* juror.

Officers of the United States, although by our statutes they have the right to be excused from serving as jurors, are not disqualified to act as such.

ON EXCEPTIONS, to the ruling of WALTON, J.

Whitcomb, for respondent.

J. A. Peters, Attorney General, for the State.

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

WALTON, J.—Indictment for larceny. The defendant, on being brought into Court, and before his arraignment, submitted to the Court a written motion, in the nature of a plea in abatement, to quash the indictment, because one of the grand jurors, by whom the indictment was found, was a postmaster, and therefore, as the defendant contends, disqualified to act.

By the Revised Statutes, (c. 106, § 3,) certain persons are "exempted from serving as jurors," and the statute directs that "their names shall not be placed on the lists." Among those exempted are "all officers of the United States."

Statutes similar to ours are very common in this country and in England. But, so far as we have been able to discover, none of them have ever been construed to disqualify, but simply to excuse, the persons named. "If they be actually returned, and appear, they can neither be challenged by the party, nor excuse themselves from serving, if there be not a sufficient number without them." Bac. Abr., Juries, E, 6. "By force of the term exempted, we understand the party without the exemption would be liable to perform the duty. A person disqualified, and therefore incompetent and incapable, cannot be exempted from a duty or a service, when the law imposes no such duty or service upon him. Such an exemption is a personal privilege, with which the parties to the cause have no concern, and which furnishes them no cause of challenge, though the Court, upon the suggestion made from any quarter, that a person returned as a juror was exempted, would ordinarily decline to hold him to a duty to which he is not liable, and would, of course, excuse him." *State* v. *Forshner*, 43 N. H., 89.

In this State constables have always been exempt from serving on juries; yet, in *Fellows' case*, 5 Maine, 333, John L. Eastman, a constable of Fryeburg, was returned as a juror, and made return himself, that he had duly notified the juror. It was insisted that he was not a competent juror to sit in the cause. The Court held that he was a competent juror, though not compellable to serve.

A person competent to serve as a traverse juror is competent to serve as a grand juror. In respect to competency, the law makes no distinction between grand and traverse jurors. They are drawn indiscriminately from the same list. As our statutory exemption has been held to create no disqualification for service as a traverse juror, we see no reason for holding that it creates a disqualification for service as a grand juror. We think it does not.

It is said that the case is not properly before us, — that the motion to quash the indictment was addressed to the discretion of the presiding Judge, and that to his ruling exceptions do not lie. But we have preferred to pass over this objection, and consider the motion upon its merits.

Exceptions overruled.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT.

1863—5.

COUNTY OF WASHINGTON.

THOMAS SAWYER *versus* THOMAS M. MAYHEW *& al.*

If one, having no interest in a vessel and merely acting as agent for the owners, insures the vessel on his own account, the policy is void.

One undertaking to act as agent of the owner, in insuring a vessel, is bound to follow the instructions of his principal and to effect a valid insurance; though he may be excusable as to a doubtful point of law.

If, in such case, the agent does not obtain a valid policy which might be enforced at law, he is responsible to his principal for the actual damages sustained by him.

If the company was in good credit at the time the insurance was effected in such a case, and subsequently becomes insolvent, the damages will depend upon the ability of the company at the time the right of action accrues.

ON EXCEPTIONS, by the plaintiff, to the ruling of RICE, J.

The case is stated in the opinion.

B. Bradbury, in support of exceptions.

F. A. Pike, *contra.*

The opinion of the Court was drawn up by

APPLETON, C. J. — This is an action against the defend-

ants as insurance brokers, for not effecting a valid and available insurance upon the brig Idlewild, of which the plaintiff was the owner.

It appeared that the defendants procured a policy on the brig at the office of the Astor Mutual Insurance Company, and another at that of the Commercial Insurance Company, on their own account and payable to themselves. The defendants had no interest in the vessel, but were to hold the policies they might effect as collateral security for their advances. The policies were similar in their terms. Upon proof of loss, the amount insured at the office of the Commercial Company was duly paid.

The declaration in the plaintiff's writ contained three counts.

The second count alleges that the defendants, "well knowing that the Astor Mutual Insurance Company was then and there reputed to be, and in fact was, worthless and insolvent," yet, notwithstanding such knowledge, caused the insurance of the plaintiff's brig to be made at such insolvent office, in consequence of which the plaintiff failed to collect the amount insured after the brig was lost.

It was agreed that the Astor Mutual Insurance Company was solvent when the policy was effected, but that, meeting with heavy losses, it subsequently failed.

The third count alleges the insolvency of the company and a knowledge of that fact by defendants, and a request by the plaintiff to reïnsure, and a neglect by the defendants so to do, &c. But of this there was no proof.

It is apparent, therefore, that the plaintiff could not maintain his action upon the second and third counts. The only remaining inquiry relates to the first count and the instructions relating thereto.

In the first count, the ground of complaint is, "that the defendants did not in fact cause said brig Idlewild to be insured in said Astor Mutual Insurance Company by any good and effectual or valid policy of insurance," * * that the said Astor Mutual Insurance Company refused to pay the

amount of their policy upon said brig, " * and, because the policy upon the same was bad, invalid and ineffectual, the plaintiff could bring or cause to be brought no suit at law upon said policy against said insurance company," &c.

The plaintiff requested the presiding Judge "to instruct the jury, that the Astor policy, being made on account of the defendants and in their name, was void and ineffectual, because they had no ownership of, nor interest in, the brig Idlewild; or, that if not absolutely void, it could be valid only for the amount of the advances of the defendants to Sawyer and the premium notes they had given for him, which he declined to do, but did instruct them that said policy, so far as this trial was concerned, was to be treated as a good and valid policy."

The defendants, undertaking to act as agents, were bound to follow the instructions of their principal, and to effect an insurance which should be valid, though it seems they might be excusable as to a doubtful point of law. 2 Phillips on Insurace, § 1884, &c.

It is essential to any contract of insurance that the insured has an interest at risk. 1 Phil. on Ins., § 172. The interest to be insured must be truly described. *Simonds* v. *Hodgson*, 6 Bing., 114, (19 E. C. L., 23.) The insurance effected by the defendants was on account of and payable to *themselves*. They did not own the vessel and had no interest therein. They did not insure as agents, nor for and on account of the owners, or those interested, nor for whom it might concern. *Finney* v. *Bedford Com. Ins. Co.*, 8 Met., 348. The policy, by its very terms, excluded the idea of agency on the part of the defendants. The policy was therefore a wager policy. It was void by the laws of New York as by those of this State. "When the assured has no interest at the time the contract is made, the policy," remarks BRONSON, J., in *Howard* v. *Albany Ins. Co.*, 3 Denio, 301, "is a mere wager in which one party stakes the sum insured, and the other the premium paid, upon the happening or not happening of a particular event. Whether

such a contract would be good at the common law, we need not inquire; for it would be clearly within our statute against gaming. 1 R. S., 662, §§ 8, 9, 10; 3 Kent's Com., 277."

The instruction requested, therefore, should have been given, and the neglect to give it, is not obviated by what follows in the charge of the Judge—"that the policy, so far as this trial was concerned, was to be treated by them as a good policy." The plaintiff had a right to a good policy which he could enforce by suit, and such a policy he failed in obtaining. The jury, therefore, could not properly treat it "as a good policy."

It is true that there was evidence tending to show, and showing, that "the Astor Co. acknowledged the loss in Feb., 1857, and that it now forms a part of the indebtedness of the company. The officers of the company never made any objection to the form of the policy." If the plaintiff could not maintain an action upon the policy, he was at the mercy of the insurers. If the insurance company was insolvent, the loss arising from inability to enforce its collection would be greater or less in proportion as the company was more or less insolvent. As the plaintiff in the first count alleges no objections to the office at which the insurance was effected, and as it is admitted the company was then in good credit, he cannot complain of its subsequent insolvency. If the company acknowledged their liability, and after they failed were willing to pay the plaintiff, what he could have collected by process of law had the policy been valid, the damages would seem to be merely nominal. The plaintiff is entitled to be remunerated to the extent of the loss arising from his inability to maintain a suit upon the policy and no further. The damages may be trifling — but a void policy cannot be a good one. *Exceptions sustained.*

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

JOHN H. MCLARREN, *in Equity, versus* HENRIETTA B. BREWER, *Administratrix.*

A mere change of property from one form to another cannot, in itself, divest the owner, or those who have distinct and immediate rights in the thing in its original shape, of their property in it.

As a general rule, in such cases, the right attaches to the property in its new form, so long as it is capable of being identified and no rights of a *bona fide* purchaser, for a valuable consideration, and without notice, intervene.

Thus, if the mortgager of a vessel, without the assent of the mortgagee, sell it with warranty of title and receive, as a consideration for the sale, promissory notes, the mortgagee may elect to enforce his right to the vessel, or may follow in equity the proceeds in the form of the promissory notes in the hands of the mortgager, or his representative; but he cannot do both.

In such case, the law *imputes* a trust in the mortgager during his life; and that trust follows the notes in the hands of his representative.

In such case, as the Supreme Court of this State has jurisdiction in all cases of trust, whether arising by implication of law, or otherwise, the mortgagee may maintain a bill in equity against the representative of the mortgager to enforce his claim, the estate of the mortgager being insolvent.

The words in former statutes limiting equity jurisdiction to cases "where the parties have not a plain and adequate remedy at law," being omitted in the Revised Statutes, *it seems*, that the equity powers of the Court are to be determined under the general rules of equity in all cases in which the subject matter is, by statute, cognizable in equity.

BILL IN EQUITY, heard on demurrer.

B. Bradbury, for complainant.

A. Hayden, for defendants.

The case is stated in the opinion, which was drawn up by KENT, J.—The case, as stated in the bill, to which a general demurrer has been filed, is in substance this,—I. N. M. Brewer, the intestate, on the 25th of October, 1851, gave to the complainant a mortgage of a ship, then on the stocks, to secure all sums of money then due, and such further sums as the complainant might furnish and advance to said Brewer, for the purpose of finishing said ship and fitting

her for sea. The vessel was completed, and was registered in the name of said Brewer, as owner of seven-eighths, and of Nathaniel Y. French, of one-eighth; the said Brewer, on the back of said mortgage, acknowledged in writing, that the ship thus registered was the vessel named in the mortgage; the mortgage was duly recorded, on the day of registry, in the custom house—and, afterwards, in the town clerk's office; soon afterwards, the ship proceeded to sea, and has never since been in this State, except in June, 1858, and the complainant has not exercised control over her or received any possession under his mortgage. In February, 1858, the ship being in New Orleans, the said Brewer sold to said French the seven-eighths of the ship, which then stood in his name, for their full value, making no reservation of the rights of the complainant under his mortgage, but giving an absolute bill of sale, with warranty, of said seven-eighths. Upon the sale, Brewer received from French, as part of the consideration, his three negotiable notes, amounting in all to $12,240, in nearly equal sums, and payable at different dates, the latest being the first day of March, 1859—the said notes being secured by a mortgage of said vessel, given by French to Brewer. In March, 1858, a few weeks after the sale, Brewer died, and the respondent has been appointed as administratrix on his estate, and said notes and mortgage to Brewer have come into her hands, as such *administratrix*; one of the notes has been paid to her, and she still holds the other notes and mortgage. Brewer's estate is represented as insolvent, and commissioners have been appointed, and have reported that the claim of the complainant is $3654,85; and at the time of the decease of Brewer, a large part of the debt, intended to be secured by the mortgage to him, was due and unpaid, and has not since been paid.

The prayer of the bill is, that the proceeds of the sale of the ship, thus existing in the notes, should be applied by the administratrix to the payment of the complainant's debt,

secured by the mortgage, and for such relief as the nature of the case may require.

The principal question which arises is, whether a mortgagee of a vessel, which has been sold in another and a distant State, by the mortgager in possession, by an absolute bill of sale of the entire vessel or interest, and with warranty, without any prior authority from the mortgagee, can follow the proceeds of the sale, existing in the notes given for the purchase, and in the possession of the mortgager, or his representative?

It is a well settled doctrine, both in law and in equity, that a mere change of property from one form to another cannot, in itself, divest the owner, or those who have distinct and immediate rights in the thing in its original shape, of their property in it. As a general rule, that right attaches to the new form, so long as such new property is capable of being identified and distinguished from all other property, and no rights of any *bona fide* purchaser for a valuable consideration, without notice, intervene. It makes no difference, in law, into what other form the change may have been made, whether into promissory notes, received as the consideration of the transfer, or into other merchandise. The product is substituted for the original thing, and so remains, as long as it can be clearly shown to be such substitute. It ceases when the means of distinguishing and identifying fail. *Scott* v. *Surman*, Willes, 400; *Whitcomb* v. *Jacobs*, Salk., 160; *Taylor* v. *Plumer*, (a leading case,) 3 M. & S., 562; Story's Equity Juris., §§ 1258, 1259.

Money itself may be followed, if it can be thus identified. The difficulty in relation to money usually is, that, as it has "no ear mark," it cannot be thus distinguished. But this is simply a failure of proof, but does not alter or disprove the principle. *Taylor* v. *Plumer*, above cited.

This doctrine has been often applied to agents, factors, and trustees, where the sale has been rightfully made, and the proceeds are existing in notes or other property, and

the agent dies or becomes insolvent. *Thompson* v. *Perkins*, 3 Mason, 232; Story's Equity, before cited.

This class of cases is where the sale was made by a person entrusted with the property with a power to sell, or where the sale has been subsequently ratified and confirmed.

But the same principle applies to cases where the property of a party has been misapplied, or a trust fund has been wrongfully converted. "An abuse of trust can confer no rights upon the party abusing it, or on those who are in privity with him." Story's Equity, § 1258. The case of *Taylor* v. *Plumer*, before cited, was one of fraudulent transfer. Mr. Justice STORY, in *Conrad* v. *At. Ins. Co.*, 1 Peters, 448, says, — that this general principle, "has been extended to cases where there has been a fraudulent or tortious misapplication of property."

It may be admitted that the relation of mortgager and mortgagee does not of itself, and, unconnected with other facts, create the relation of principal and agent, or give any right to the mortgager to sell the whole property, by an absolute bill of sale, with warranty of a perfect title. The mortgager in possession may sell *his* interest, *i. e.* his right to redeem, but he is a wrongdoer if he sells and delivers the entire property to a purchaser, without the knowledge or assent of the mortgagee. Such sale, if the existence of the mortgage is not disclosed, is now made a criminal offence. Statute, 1860, c. 150. It may also be granted that, as to the mortgagee and his title and interest, such sale does not convey, nor impair his title, and that he may pursue and enforce his right to the thing, wherever he may find it.

But we think that, under the circumstances stated in this bill, he has an election to do so, or to follow the proceeds existing in the new form of negotiable notes in the hands of the mortgager or the representative of his estate. He may do this on the ground that he assents to and affirms the sale, and to the change of the property, mortgaged to him, from a vessel to the notes taken. A subsequent ratification is

equivalent to a prior authority. We have seen, that if he had had prior authority, he would have come under the rule so often applied to agents and factors.

He may do this, also, on the other ground, that it was a wrongful, if not a fraudulent conversion of his property, by the mortgager in possession, and he may so far waive the tort as to pursue the proceeds in the new form, whilst they can be identified. He must elect which course to pursue; he cannot have both remedies. *Murray* v. *Libbern*, 2 Johns. Ch., 441; *Murray* v. *Ballou*, 1 Johns. Ch., 566.

The bill sufficiently sets out an indebtedness covered by the mortgage. The complainant must, of course, establish such indebtedness, i. e. for money advanced for the purpose of finishing the ship, and fitting her for sea. No other debt or claim is covered by the mortgage.

But, as to this debt, under the circumstances of this case, the law *imputes* a trust in the mortgager, during his life, and that trust follows the notes in the hands of his personal representative. The proceeds of the sale of the ship, in her hands, stand in place of the thing sold, and should be applied, as we have a right to presume Mr. Brewer, if he had lived, would have applied them, so far as needed, to the discharge of the debt secured by the mortgage.

In this case there is not a plain and adequate remedy at law. The estate is insolvent, and, to say the least, it would require a peculiar action and judgment, *in law*, to take these proceeds out of the general mass of the estate, which by law should be distributed *pro rata* among all the creditors, and appropriate it specifically to the complainant's debt. Such appropriation is peculiarly the proper province of a court of equity.

According to the statement in the bill, the claim of the complainant is not equal to any one of the notes, and it would be difficult to find any principle of law by which an action of trover could be maintained for them. The estate is entitled to the notes and the proceeds, after the mortgage

debt is paid, and the claim set up is based on an imputed trust, and not on a legal title to the notes.

It is worthy of observation, that the words limiting the equity powers of this Court to cases, "where the parties have not a plain and adequate remedy at law," which are found in the R. S. of 1841, c. 96, are omitted in the present Revised Statutes. We are not called upon, in this case, to determine whether the omission of these words does in fact enlarge or alter the equity powers of this Court. It seems to leave them under the general rules of equity, in all cases where the subject matter is made by statute cognizable in equity.

It was declared by this Court, in *Tappan* v. *Deblois*, 45 Maine, 131, that "by the Revised Statutes of this State, (1857,) we have jurisdiction of all cases of trust, whether arising by implication of law or created by deed or will."

Demurrer overruled.

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

AUGUSTUS HEMENWAY *versus* ALVIN CUTLER.

Erections made by one occupying land under a bond for a deed are to be regarded as real estate, and are not removable by the occupant as personal property.

If a building is excluded from a levy, on the supposition that it is personal property, when in fact it is a part of the realty, the levy is void.

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

WRIT OF ENTRY, upon facts stated in the opinion.

B. Bradbury, for demandant.

Granger & Walker, for tenant.

The opinion of the Court was drawn up by

APPLETON, C. J.—The levy, under which the demandant claims, was made upon the demanded premises as the real estate of William Hicks, in whom the title appeared by the record to be. But Hicks had, many years before, conveyed his interest in the same to Thomas Murray, by an unrecorded deed, from whom the title passed, by various mesne conveyances, to one Jones, who gave a bond for a deed to the tenant.

The tenant, Cutler, having a bond for a deed, entered into the occupation of the premises in dispute and, while so in occupation, erected a barn thereon, which is specially excepted from the levy as personal property belonging to him. If the barn is to be deemed personal property, it was rightfully excepted. If it was real estate, or belonged to the realty, the levy was erroneous, for it is manifest that its value was excluded from the estimate of the appraisers. A creditor cannot, by making a levy, change the character of his debtor's estate and convert a part of it into personal property, by taking the land under the buildings and leaving the buildings as personal estate. *Grover* v. *Howard*, 31 Maine, 546; *Jewett* v. *Whitney*, 43 Maine, 243.

It is well settled that erections made by a mortgager, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property. *Corliss* v. *McLagin*, 29 Maine, 115; *Butler* v. *Page*, 7 Met., 40; *King* v. *Johnson*, 7 Gray, 239: *Winslow* v. *Merchants' Ins. Co.*, 4 Met., 306.

As between Cutler and Jones, the barn must be deemed as permanently a part of the realty.

Erections made voluntarily and without a contract, or without the consent of the owner, become part of the real estate and enure to the benefit of the owner of the fee. *Pierce* v. *Goddard*, 22 Pick., 559; *Sudbury* v. *Jones*, 8 Cush., 189.

As between Cutler and Hicks, if the latter was the owner

of the soil, the former could not claim the barn as personal property.

But it is argued that the tenant held adversely to Hicks and would therefore be entitled to betterments. This may be true, but, if so, it does not give the tenant the right of removal, or make the erections by him personal property. They are part of the realty, for which the owner of the fee must pay, if, in a suit for the recovery of his land, he makes an election so to do. If the demandant elects to abandon, they, as a part of the realty, belong to the tenant upon his payment of their estimated value. If, after an abandonment by the demandant, the tenant fails to pay the estimated value of the land, within the time and according to the provisions of the statute, then the improvements pass to and vest in the owner of the fee. In no event are they to be regarded as personal property, even when the tenant is evicted without suit. R. S., 1857, c. 104. In that case, the tenant may recover the value of his improvements, but they are a part of the realty and belong to the owner of the fee. The remedy of the tenant is by suit, and not by removing such of his improvements as may be removable.

In any aspect of the case, as presented, the barn erected by the tenant, on the land in controversy, cannot be regarded as his personal property. The levy therefore was erroneous, by excluding its value from the appraisement.

Plaintiff nonsuit.

CUTTING, DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

DARIUS PEARCE *versus* DANIEL SAVAGE *& als.*

Several releases by *joint* trustees will not bar a legal *joint* claim by the trustees against the person to whom such releases have been given.

Equity will not recognize a settlement of a trust estate made upon estimates without computation; but will require parties to produce their evidence and vouchers.

CASE IN EQUITY, heard on bill, answer and proofs.

The question between the parties was one *of fact*, and questions of law arose only incidentally.

The evidence is stated in the opinion.

A. Hayden, for complainant.

J. Granger, for respondents.

The opinion of the Court was drawn up by

CUTTING, J.—In the recent action at law, *Pearce* v. *Savage*, 45 Maine, 90, the documentary evidence then and now reported are identical.

The complainant claims title under a deed of mortgage from one *Winslow Bates* to *Benjamin D. Whitney* and *Joseph Richardson*, of March 3, 1834.

The tenants derive their title from a prior deed of mortgage from the same *Winslow Bates*, of March 26, 1831, to *Wooster Tuttle* and *Ezra Whitney*, executors under the will of *Elias Bates*, the father of the mortgager, to secure the faithful performance of his trust and agency, (to which he had been appointed by the mortgagees,) to collect and account for rents, to have the management of the real estate, &c. If the conditions of this mortgage have been fulfilled, the tenants have no equitable or legal title, otherwise they have both. This presents a question of fact, which, since the former decision, can be the only one in controversy between the parties.

The complainant, in order to show that the conditions of the prior mortgage have been performed, introduces the tes-

timony of *Winslow Bates*, who in substance swears that they were so performed, whose oath appears to be corroborated by the separate releases of the executors.

But the tenants deny the validity of the releases, and attempt to impeach the accuracy of the memory of *Bates*. The releases, which will be found reported in the former case, speak for themselves. They were not the joint production of the two executors, which, in legal contemplation, they should have been in order to bar a legal claim under the mortgage; for it will be perceived that the covenants in the mortgage are to them *jointly*, whereas the releases are from them *severally*. But, according to the testimony of Bates, elicited in cross-examination, the release from *Tuttle* was procured under peculiar circumstances. It was a settlement of *Bates'* agency during a period of eight years "*upon a jump*," and without the production of any account current. In the settlement of trust estates, equity will recognize no such practice, but will require the parties to produce their evidence and vouchers. It is contended by the tenants' counsel that the release was never legitimately executed or delivered, but years afterwards found by *Bates* among certain papers in the possession of the administrator of the estate of the late *Hon. Daniel T. Granger*, and for such purpose, as well as to contradict Bates, he introduces *Bates'* letter to *Granger*, dated September 4, 1843, some fourteen years after the date of the pretended release, in which Bates, among other things, says, — "As for Wooster Tuttle, previous to my departure from the East, (which was in October, 1839,) I was repeatedly urging him (Tuttle) to a settlement of our affairs, which he would not, or did not, consent to. I had been agent from 1831 to 1839, during all which time no settlement was ever had between us," &c. It is true, that the complainant's counsel attempts to reconcile the seeming disparity of *Bates*, as detailed by him in his deposition and letter, upon the hypothesis that the latter had reference to other matters. It may be so.

Again, it appears that *Tuttle* and *Whitney* assigned their

mortgage to one *Thomas G. Hathaway*, by deed, dated April 11, 1840, who subsequently foreclosed and entered into the actual possession of the disputed premises, under whom the tenants now claim. That, subsequent to this time and for a period of years afterwards, *Whitney* and *Richardson*, the second mortgagees, under whom the complainant now claims, were interested to ascertain the amount, if any, of the prior incumbrance. For that purpose, they employed Mr. *Granger* as their counsel, a person well acquainted with the parties, and of unimpeachable integrity. He lived in the immediate vicinity. Before the expiration of the foreclosure, he investigated the claims under the mortgage, satisfied himself, and so informed his clients, that their equity of redemption was of no value, in which opinion those clients acquiesced.

So the matter rested until 1855, when Mr. *Bates*, having returned from the west to his former residence in Eastport, and assumed the administration of his brother-in-law, *Thomas G. Hathaway's* estate, with no *selfish motives*, as he swears, procured a quitclaim deed from the second mortgagees to the complainant, for the consideration of two hundred dollars.

It has been urged with much force, by the tenant's counsel, that the conduct of *Bates* was unnatural and inconsistent with his official and social relations. That, if he really believed the first mortgage had been discharged, he would have purchased in the disputed title, either for himself or his widowed sister; instead of acting as the officious attorney of a stranger, without taking any interest himself in the speculation. Such conduct is the proper subject of comment, for it tends to impair the credibility of the complainant's principal witness.

Besides, the account settled in the Probate Court, in which *Bates* is charged nearly two thousand dollars, accruing under his agency, and mostly made out in his own handwriting; and his letter to his brother *Hamlet*, that when he left the State, in 1839, he had taken his share in his father's

estate with him, and had left his subsequent mortgagees to look out for themselves; and other circumstances disclosed in the evidence, almost too numerous to mention, go far to impair our confidence in the accuracy of Mr. *Bates'* recollection. In conclusion, when we take into consideration the lapse of time the tenants have been in possession since the foreclosure of the mortgage under which they claim—the long acquiescence of the party adversely interested—the circumstances under which the complainant procured his contested title—the decease of nearly all of the principal actors—the uncertainty, if not inconsistency, of most of the complainant's testimony, we are constrained to order this

Bill dismissed with costs for respondents.

APPLETON, C. J., DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

PROPRIETORS OF CENTRE STREET CHURCH IN MACHIAS *versus* MACHIAS HOTEL COMPANY.

The line of a parcel of land to run parallel with and at a specified distance from the south *side* of a building, should be measured from the corner board of that side, and not from the outer edge of the eaves.

ON STATEMENT OF FACTS.

WRIT OF ENTRY.

G. Walker, for the demandant.

A. Hayden, for the tenant.

The opinion of the Court was prepared by

APPLETON, C. J.—The line in controversy begins at Centre Street, and runs eastward, "parallel with and at the distance of eight feet four inches from the south *side* of the meetinghouse," &c. The question for decision is, whether the "eight feet four inches" shall be measured from the

corner board of the meetinghouse on the south side or from the outer edge of the eaves.

The parties have agreed upon a definite point from which and a course by which the line, eight feet four inches, is to be run. What is that point? The admeasurement is to be made upon the face of the earth. The side of a meetinghouse is something material and tangible, something defined and certain. The roof is no part of the side of a building. The eaves are the edges of the roof, projecting beyond the face of the walls. The side of a building is as defined as the doors or windows, and as certain a point of departure. The space from the extreme end of the eaves to the earth presents no material surface. Neither doors nor windows are to be found therein.

The question here is, not how much would pass by the conveyance of a house or other building; but where, in making an admeasurement, the place of beginning is to be found in describing a lot of land. That the parties may fix where they choose.

Judgment for the demandants — the eight feet four inches to be measured from the corner board of the meetinghouse on the south side.

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

CITY OF CALAIS *versus* JOSEPHUS BRADFORD.

The complaint authorized by c. 32 of R. S. of 1841, against certain kindred of a pauper, to compel them to contribute to his support, should be in the name of the city or town in which the pauper resides.

Where judgment has been rendered in favor of the overseers of the poor of such town, on their complaint, the judgment cannot be revived by *scire facias* in the name of the town, — although the town is beneficially interested in its enforcement, — even if this were the proper process by which to obtain a warrant of distress under the statute.

If a demurrer may be properly filed to a specification of defence, the defendant

may take advantage on argument on demurrer of any defect in the plaintiff's writ; and judgment will be against the party whose pleadings were first defective in substance.

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

SCIRE FACIAS against the defendant, to show cause why a warrant of distress should not issue against him, to collect the amount of a judgment rendered against him, in favor of William D. Lawrence and others, overseers of the poor of the city of Calais, on their complaint under the statute, to require him to contribute to the support of his father, who had become chargeable to the said city of Calais, as a pauper. The judgment was rendered at October term, 1857.

The defendant filed his specification of the ground and nature of his defence; which was in substance, that, at the time of the rendition of said judgment, and long before and ever since that time, he was and has been destitute of property and without the means to contribute to the support of said pauper, &c.

The plaintiffs demurred to the specification of defence, and issue was joined by the defendant.

The presiding Judge sustained the demurrer and ordered a warrant of distress to issue; to which ruling the defendant excepted.

C. Record, in support of the exceptions.

E. B. Harvey, contra.

The opinion of the Court was drawn up by

APPLETON, C. J.—By R. S., 1841, c. 32, § 6, certain specified kindred of paupers living within the State, and of sufficient ability, are made liable to support such paupers, in proportion to such ability, respectively.

By § 7, the proceedings for the purpose of apportioning the expenses for such support, among the kindred liable therefor, are to be "upon complaint made by any town," where any one of such kindred to be thus supported shall reside. The payment of the assessment upon each person liable under this section is to be enforced by warrant of distress.

Under § 7, the complaint should be in the name of the city or town, by their appropriate officers, and the judgment should be rendered in favor of the city or town thus complaining. *Bridgton* v. *Bennett*, 23 Maine, 420; *Nantucket* v. *Cotton*, 14 Mass., 243. The overseers of the poor, as such, would not seem to be the proper parties to proceedings under this section. They are the agents of the town or city complaining. They should not be parties. From the record of the original judgment described in the *scire facias*, the overseers of the poor of Calais were the complainants, and judgment was rendered in their favor.

Whether this judgment was rightfully rendered or not, it cannot be revived by *scire facias* in the name of another party plaintiff, though such party may be the one beneficially interested in its enforcement. Neither can a warrant of distress issue otherwise than in the name of the party complaining. As the overseers of the poor of Calais seem to have been the party complaining, and not the city of Calais, the latter has no right to the writ of *scire facias* in its favor, even if this were the proper process by which to obtain a warrant of distress under this section.

It is not denied that the specifications of defence are insufficient.

On argument on demurrer, the Court will, notwithstanding the defects of the pleadings demurred to, give judgment against the party whose pleadings were first defective in substance. On demurrer to a plea, the defendant may take advantage of a substantial defect in the declaration. So, if a demurrer may properly be filed to specifications of defence, — the defendant, on argument, may take advantage of the defects in the plaintiffs' writ.

The record as set forth in the plaintiffs' writ shows no adjudication in their favor. The city of Calais are not entitled, upon the record before us, to a warrant of distress.

Exceptions sustained. — Declaration bad.

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

JARED C. NASH *& al.*, *versus* ERI H. DRISCO.

The construction of a written contract, involving the meaning of words used therein, is not a question of fact, but one of law.

In a contract for the purchase of "timber," the purchaser acquires no title to trees not suitable for any purpose but for firewood.

EXCEPTIONS from the ruling at *Nisi Prius* of DAVIS, J. This was an action of TRESPASS.

J. A. Milliken, for the plaintiff.

B. Bradbury, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiffs purchased of the defendant, by a written contract or permit, "the right to cut and haul all the *timber* and bark" on certain premises, "down to as small as ten inches at the stump or but of the trees." Under this the plaintiffs operated, cutting and taking away timber for vessels, and for other purposes. And they also cut trees for firewood, and had it corded up, ready to be hauled away. While the wood was in this condition, the defendant, claiming that the plaintiffs had no right to cut it, took it himself, and appropriated it to his own use. For this, the present action of trespass has been brought.

The presiding Judge, in submitting the case to the jury, remarked, "that the word *timber*, in its etymological sense, might embrace nothing but materials for building or manufacturing purposes;" but that "the signification of the word was a question of fact for the jury to determine." The verdict was for the plaintiffs, and the defendant excepted to the instructions.

The signification given to the word "timber," by the Court, was correct. The words from which it was derived, and incorporated into the English language, all relate to the *erection* or *construction* of buildings or chattels. Webster defines it as "that sort of wood which is proper for build-

ings, or for tools, utensils, furniture, carriages, fences, ships, and the like."

Firewood, or what is sometimes called "cordwood," cannot properly be said to be constructed or manufactured. The materials of which it is composed are not called *timber*, though timber might be used for that purpose. In a contract for the purchase of "timber," the purchaser acquires no title to trees not suitable for any purpose but for firewood.

The construction of a written contract, involving the meaning of the words used therein, is not a question of fact, but one of law. The submission of it to the jury was therefore erroneous.

If there had been any evidence in the case of any local or special signification, which the parties might be presumed to have adopted, the question might properly have been submitted to the jury. But there was no such evidence.

Or if the jury had determined the question correctly, a new trial would not be granted in consequence of its having been submitted to them. But, in the case at bar, the jury must have given to the word an erroneous meaning. The exceptions are therefore sustained, and a new trial is granted.

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

GEORGE A. WHITNEY *& als. versus* BENJAMIN W. FARRAR.

A mortgagee of personal property may waive his lien under the mortgage and attach the same property in a suit at law.

It is provided by statute, that the attachment of certain kinds of personal property may be preserved, without actual possession by the officer, if his attachment be recorded in the office of the town clerk; and, where this was done by a deputy sheriff, who afterwards voluntarily gave up the property and secured himself by taking a receipt therefor, if he neglect to deliver the same, on demand of an officer having the execution, the sheriff will be answerable for such default of his deputy.

EXCEPTIONS from the ruling of MAY, J., and on motion to set aside the verdict as against law and the evidence.

This was an action on the CASE, against the late sheriff of the county of Washington, for the default of his deputy in not delivering, on demand, certain property attached on the original writ, that the same might be taken to satisfy the execution.

Granger & Dyer, for the plaintiffs.

B. Bradbury, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J. — The plaintiffs were mortgagees of a vessel on the stocks, during its construction. After the mortgage had been given, they sold to the builder, Seth G. Low, certain anchors, cables, and chains. The vessel was destroyed by fire while still unfinished; and the anchors, cables, and chains being saved, the plaintiffs caused them to be attached in a suit against Low. Whether they had been so attached to the vessel that the plaintiffs could have held them under their mortgage is not quite clear from the evidence. But that question is entirely immaterial; for a mortgagee may *waive* his lien under his mortgage, and attach the mortgaged property in a suit at law. *Libbey* v. *Cushman*, 29 Maine, 429.

The attachment was made by a deputy of the defendant. He at first caused his attachment to be recorded in the town clerk's office, as the statute provides for certain kinds of property; but he afterwards gave it up, taking an accountable receipt therefor. The plaintiffs recovered judgment in that suit; and the property was seasonably demanded of the attaching officer, upon the execution. For his default in not delivering it, this action is brought against the sheriff.

Upon the trial these facts were all admitted, or clearly proved; but the verdict was for the defendant.

Some instructions were given upon the degree of care which the attaching officer should have exercised in keeping

the property. As he voluntarily gave it up, and secured himself by taking a receipt, the instructions might have led the jury to believe that the question of *care* was before them, when it was not. But, as there is no pretence that any defence was shown to the suit, the verdict was clearly against the evidence; and it must be set aside for that reason. *Motion sustained. — New trial granted.*

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

JOHN S. DEWOLFE *& al. versus* NATHANIEL Y. FRENCH.

If parties intend to make a payment of money to depend upon the happening of a future event, the money cannot be recovered, where the contingency does not occur.

Otherwise, where the debt is to be absolute, and the happening of some contingent event is fixed on as the term of payment; — as when a vessel shall have arrived at a specified port, and the vessel is lost on the voyage; the law in such case will require payment to be made within a reasonable time after the loss of the vessel is ascertained.

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

This was an action of ASSUMPSIT on account annexed.

Bradbury & French, for the plaintiffs.

A. Hayden, for the defendant.

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

WALTON, J. — This is an action of assumpsit, in which the plaintiffs claim to recover for two items charged as commissions, for obtaining freight for the defendant's vessel. The defendant has offered to be defaulted for one of the items, and resists the other, upon the ground that the plaintiffs' right to recover for it was contingent; that it was expressly agreed that the plaintiffs should wait for their pay till the vessel for which the freight was obtained returned

with a cargo; and that the vessel was lost at sea and never returned.

If, in fixing upon the happening of a future contingent event as the time when money is to be paid, the parties intend to make the debt a contingent one, and the event never happens, the creditor's right to recover it will never accrue. But, if the debt is understood to be absolute, and the happening of the future event is fixed upon as a convenient time for payment merely, and, for some unforeseen or unthought of cause, the event never happens, the creditor's right to recover will not be defeated,—the law will require the payment to be made within a reasonable time after it is ascertained that the event will never happen. The debt will be contingent or otherwise, depending upon the intention of the parties.

If parties intend that a debt shall be contingent, as in *respondentia* or bottomry contracts, then it will be so held by the Court. If, on the contrary, they intend that the debt shall be absolute, and fix upon the future event as a convenient time for payment merely, as where a drover purchases cattle, promising to pay for them on his return from market, overlooking the contingency that he may never return, then the debt will not be contingent; and, if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time. The parties having neglected to provide for such a contingency, the law in this, as in many other cases, supplies the omission by implying such a promise as is necessary to do justice between the parties,—such as we may fairly presume would have been made in fact, if the contingency had been thought of. In each case, the intention of the parties to make the debt contingent or otherwise, must be gathered from the language used, the situation of the parties, and the subject matter of the contract, as presented by the evidence.

In this case, the evidence leaves us in doubt whether the plaintiffs in fact promised to wait for their pay till the vessel returned. The defendant testifies that they did, but the

plaintiffs testify that they did not. They say that at the defendant's request they agreed to let the charges stand over till he himself returned, but they emphatically deny that their claim was to be dependent upon the return of the vessel; and in this they are corroborated by a memorandum of the amount of commissions due them, written upon the margin of the charter-party. The memorandum states the amount of commissions due the plaintiffs in terms absolute, and contains nothing to indicate that the claim was to be a contingent one. If the claim was then understood by the parties to be contingent, why was it not so stated in this written memorandum?

As before stated, the evidence leaves it extremely doubtful whether the plaintiffs promised to wait for their pay till the vessel returned; but, be that as it may, we think it clear that the parties did not intend to make the claim a contingent one; and, if the expected return of the vessel was named as the time when payment should be made, that they overlooked, or did not think of the contingency that she might be lost and never return, and made no provision for it; and that the law, therefore, implies a promise on the part of the defendant to pay the amount agreed upon, within a reasonable time after it was ascertained that the vessel would never return. This he has neglected and refused to do. Our conclusion therefore is that the plaintiffs are entitled to judgment for the amount of both items sued for in their writ. *Judgment for plaintiffs for* $341,25, *and interest from date of the writ.*

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

ADNA BATES *versus* JOHN SARGENT *& als., Appellants.*

On an appeal from the decree of a Judge of Probate, made on a petition under c. 71, § 17 of R. S., to empower an administrator to execute a deed to carry into effect a legal contract made by the deceased, *it was held:* —

1. That an heir at law of the deceased was a party entitled to the right of appeal; —

2. The statute refers only to *legal* contracts, in force at the death of the obligor, the performance of which was by his death prevented; —

3. The statute was not intended to oust the Supreme Court of its equitable jurisdiction, or to restrict its exercise; —

4. If, after forfeiture of the bond, payments had been made, his rights arising therefrom can only be enforced by proceedings in equity; —

5. The provisions of the statute cannot apply to verbal contracts, void by the statute of frauds.

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

This was an APPEAL from a decree of the Judge of Probate for the county of Washington.

The petitioner, under the provisions of c. 71, § 17, of the Revised Statutes, made application to the Judge of Probate to grant authority to A. B. Getchell, the administrator of the estate of James Sargent, to convey to him a certain parcel of land, which said decedent had in his written obligation, dated May 25th, 1858, covenanted to convey to him, on the performance of certain conditions therein specified, on the part of the petitioner; that he has in part already performed the conditions specified, and is now ready to comply fully with the conditions on his part to be performed. The obligation was on condition that said Bates paid at maturity three promissory notes, of the same date of the bond, payable in one, two and three years with interest.

He further represents that said Sargent, now deceased, in the year 1863, sold him another lot, (described in his petition,) as he will be able to prove, and that he has performed the conditions on his part to entitle him to a deed thereof, but the said Sargent has been prevented by death from executing to him a deed of conveyance thereof.

The Judge of Probate decreed authority as prayed for, and the heirs at law of said deceased appealed therefrom.

On the hearing at *Nisi Prius*, the petitioner introduced the obligation of said deceased. He also introduced the administrator as a witness, who produced two notes, dated May 25, 1858, signed by the petitioner, on the back of one of which was an indorsement, dated Dec. 3d, 1862; and testified that he found said notes among the papers of his intestate, and that the indorsement on said note is in the handwriting of said intestate; that he does not find the other note described in the bond.

He testified further that the petitioner had deposited in his hands money to the amount due on said notes, to pay the same if license to convey should be granted.

Downes & Cooper, for the petitioner.

Granger, for the appellants.

The opinion of the Court was drawn up by

APPLETON, C. J.—This is a petition, under R. S., 1857, c. 71, § 17, to the Judge of Probate of Washington county, to authorize the administrator of James Sargent to carry into effect a bond given by said Sargent to the petitioner, to convey certain real estate therein described, upon the performance, on his part, of certain specified conditions. The petition likewise relates to certain other lands embraced in a contract between these parties not reduced to writing. Upon the hearing, the Judge of Probate *decreed* that the administrator be authorized and empowered to make and execute deeds of the several tracts according to the prayer of the petitioner.

From this decree the appellants, heirs at law of said Sargent, appealed, and the first question presented for consideration is whether the appeal is properly taken.

By R. S., 1857, c. 63, § 19, "any person aggrieved by any order, sentence, *decree* or denial of such Judges (of Probate) may appeal therefrom to the Supreme Court, to

be held within and for the same county," &c. The appellants, as heirs at law, are interested and may be aggrieved if license or authority to sell the estate of their ancestor should be improvidently granted. A person interested may appeal from a decree licensing the sale of real estate. *Smith* v. *Dutton*, 16 Maine, 309. So, from an appeal granting an allowance to the widow, though the amount to be allowed is within the discretion of the Judge of Probate. *Cooper, Appellant*, 19 Maine, 260. A decree of the Judge of Probate, granting leave to a creditor of an insolvent estate to institute a suit at common law, is subject to the right of appeal. *Leighton* v. *Chapman*, 30 Maine, 538. The appeal we think well taken.

In *Emery* v. *Sherman*, 2 Greenl., 93, the administrator was the party appealing. It is obvious that he could not be aggrieved, for he might, or might not, execute the deed prayed for by the petition, as he should be advised his duty as a faithful administrator would require.

By R. S., 1857, c. 71, § 17, "when it appears to the Judge of Probate having jurisdiction, that any deceased person in his life time made a *legal contract to convey real estate and was prevented by death from so doing*, and that the person contracted with, a petitioner, has performed, or is *ready to perform the conditions required of him by the terms thereof*, he may, on the petition of such person, his heirs, assigns, or his legal representatives, authorize the executor or administrator of the deceased to execute deeds to carry said contract into effect," &c.

This section relates only to *legal* contracts in force at the death of the obligor, the performance of which was by his death prevented. It enables the Judge of Probate, in such cases, to empower the administrator, upon legal performance of the conditions required of the person with whom the contract is made, to convey the real estate agreed to be conveyed. It was not intended to oust this Court of its equitable jurisdiction or to limit or restrict its exercise.

At the death of Sargent, the remedy of the petitioner, if

any, was by bill in equity. The conditions of the bond had not been complied with in the life time of the obligor. The performance of those conditions had not been prevented by the death of the obligee. He does not, therefore, bring himself within the statute upon which he relies, whatever may be his equitable rights arising from payment since the forfeiture of the bond.

The verbal contract between the parties, referred to in the petition, is void by the statute of frauds, and cannot be enforced.

As the petitioner is ready and willing to perform the contract on his part, costs are not allowed either party.

Decree reversed — without costs to either party.

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

COUNTY OF HANCOCK.

CHARLES FARNHAM, *in Equity*, *versus* CHARLES CLEMENTS.

Three persons verbally agreed, that if either should be the purchaser of a lot of land at an administrator's sale, they all should be equally interested in the purchase; that when the purchaser received the deed, he should convey one third to each of his associates. The purchaser having refused to convey, on tender of one third part of the purchase money by one of them, a bill in equity was brought to compel conveyance: — *it was held*, that equity would not afford relief, the agreement being within the statute of frauds; that the defendant did not hold the land as trustee; nor was there any resulting trust.

BILL IN EQUITY, — to which the defendant filed a general demurrer.

The bill alleges that plaintiff and defendant and one *Leach* associated themselves together for the purchase of land which was to be sold at public auction by an administrator: —

That either was to bid for himself and associates as it might be convenient;

That, if struck off to either, the one to whom it was so struck off, was to take a deed to himself and afterwards convey to each of his associates his third of the property;

That the sale took place, and the land was struck off to defendant under said agreement, and he took from the administrator a deed of it;

That, subsequently to said sale, defendant admitted said agreement, and that he was to hold said land for himself and associates, and, when he received a deed from the administrator, was to convey to each of them his third;

That, soon after the sale, plaintiff tendered to defendant the amount of his third of the purchase money and interest thereon, and a deed of quitclaim of an undivided third of said land, and requested a conveyance of the same, which defendant refused;

That defendant now holds said third of said land in trust for plaintiff;

That a fraud has been committed on plaintiff by defendant, for which relief is sought, viz.: — a conveyance of said third.

C. J. Abbott, for the plaintiff.

A. Wiswell, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — By the statute of frauds, R. S. 1857, c. 111, §, 1 "no action shall be maintained * * upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them * * unless the promise, contract or agreement, in which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized."

Under this statute, it has been held that a parol agreement to become co-partners in the business of purchasing

and selling lands and lumber is a parol contract respecting an interest in lands, and void by virtue of its provisions, so that it will not be enforced in equity. *Smith* v. *Burnham*, 3 Sumner, 435. So, in *Pinnock* v. *Clough*, 16 Verm., 500, where the defendant purchased a farm for the complainant in equity, but there was no written agreement between the parties and the purchase money was advanced by the defendant, the Court refused to enforce the agreement. If a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as, it is said, that would be directly in the teeth of the statute of frauds. 3 Sugden on Vendors, 180, (6th Am. Ed.); *Hunt* v. *Roberts*, 40 Maine, 187.

Neither did the defendant, after the purchase, hold the land as trustee.

All trusts concerning lands must be "created or declared by some writing signed by the party or his attorney," except those "arising or resulting by implication of law." R. S., c. 73, § 11.

It seems to be conceded that there is no trust "created or declared by writing."

Neither is there any resulting trust. When the person, who sets up a resulting trust, has in fact paid no part of the purchase money, he will not be allowed to show by parol that the purchase was made for his benefit. *Bottsford* v. *Burr*, 2 Johns. Ch., 404. No resulting trust can arise from the payment or advance of money after the purchase has been completed.

From the abstract of the bill, as well as from the argument of counsel, we understand the agreement sought to be enforced was a parol one. "If the agreement," observes Chancellor WALWORTH, in *Cozine* v. *Graham*, 2 Paige's Ch., 177, "as stated in the bill, appears to be a parol agreement only, and no sufficient grounds are alleged to take the

case out of the statute, the defendant may, by demurrer, object to any relief founded thereon. But, if it is stated generally, that an agreement or contract was made, the Court will presume it a legal contract till the contrary appears; and the defendant must either plead the fact, that it was not in writing, or insist upon the defence in his answer."

The parties to the alleged agreement are not all made parties to the bill. This is apparent from the bill. No reason is shown for the omission. "Whenever the want of proper parties appears on the face of the bill, it constitutes a good cause of demurrer." Story on Eq. Pleading, § 541.

Demurrer sustained.—Bill dismissed.

CUTTING, KENT, WALTON, BARROWS and DANFORTH, JJ., concurred.

ERASTUS REDMAN *versus* ALFRED P. ADAMS.

An order written thus:—"value received, pay to A. B. forty dollars and charge same against whatever amount may be due me, for my share of fish caught on board schooner Star," is an order for the payment of that sum absolutely, and is not limited to the proceeds of the drawer's share. An action can be maintained thereon in the name of an indorsee.

CASE STATED BY THE PARTIES.

ASSUMPSIT on an order of which the following is a copy:

"Castine, January 5, 1860.

"For value received, please pay to order of G. F. and C. W. Tilden forty dollars, and charge same against whatever amount may be due me for my share of fish caught on board schooner 'Morning Star,' for the fishing season of 1860.

"Yours, &c., "Frank R. Blake.

"To Messrs. Adams & Co.

"Accepted to pay.—Adams & Co."

If the plaintiff, as indorsee of the order, cannot maintain this action, he is to become nonsuit; otherwise the action is to stand for trial.

Wiswell, for plaintiff.

The bill, or order, upon which this action is brought, is in the usual form, negotiable and payable in money.

It is not payable out of any particular fund, or upon any contingency or condition. The drawer requests the drawees to pay a certain sum of money to a third person or his order, and charge the same against whatever amount may be due him for his share of fish caught on board sch. "Morning Star," for the fishing season of 1860. The order to pay is absolute, and not *provided* or *if* the drawees have any fish or the proceeds of any fish in their hands.

The drawer evidently in his order referred to his share of fish merely to show the consideration, and not for the purpose of rendering the payment contingent. Chitty on Bills, 139, note; *Sears* v. *Wright*, 24 Maine, 278.

"The statement of a particular fund in a bill of exchange will not vitiate it, if it be inserted *merely as a direction to the drawee how to reimburse himself.*" Chitty on Bills, 139.

In the case at bar, the amount would be payable, though the drawer, upon a settlement of the voyage, should have but a small share of fish, or indeed no share at all.

The acceptance of the order is absolute and unconditional. It is "accepted *to pay*," not on the happening of any event, or on any contingency. Adams & Co. promise to pay the order whether there were or should be any funds of the drawer in their hands or not. Chitty on Bills, 291–302.

The acceptance of the order is presumptive evidence that Adams & Co. had funds of the drawer in their hands. *Kendall* v. *Galvin*, 15 Maine, 131.

The acceptance of the order in this case is an unqualified admission of sufficient funds in the hands of the acceptors to pay the amount of the order.

E. Hale, for defendant.

The order is not negotiable; therefore the plaintiff, as indorsee, cannot maintain this action.

"The true test of the negotiability of a note," says C. J.

SHAW, "seems to be, whether the understanding of the promisor is to pay the amount at all events; not out of a particular fund, or on a contingency. If it were payable out of a particular fund, or on a contingency, it would not be negotiable." *Cotta* v. *Buck*, 7 Met., 588.

The instrument is considered as uncertain, contingent and void, as a bill or note, if the money is to be paid out of a specified fund which may never be realized, or be adequate to the purpose; "as out of rents, out of money had and received, out of my growing subsistence, out of the proceeds of goods when sold." Chitty on Bills and Notes, 5.

"A bill or note must not be made payable out of a particular fund." Byles on Bills, 165, and cases cited in note to the same effect; Bayley on Bills, 16.

The decisions in this State and Massachusetts are to the same effect, that a bill or note payable "out of" a particular fund, or in any way dependent on a contingency, is not negotiable. *Coolidge* v. *Ruggles*, 15 Mass., 387; *Bunker* v. *Atherton*, 35 Maine, 364; *Byram* v. *Hunter*, 36 Maine, 236.

The principle invoked applies to accepted bills or orders, as shown in *Jackman* v. *Bowker*, 4 Met., 236, although in that case the fund mentioned could be hardly called a *contingent* fund, in so strong a sense as in the case at bar, where it depended on the luck of a fishing cruise during the ensuing season.

To the same effect is a case cited in Bayley on Bills, 16, marginal note; *Dawkes* v. *Lord Deloraine*.

The language of the order in suit is, "pay to the order of, &c., and *charge same against whatever amount may be due me* for my share of fish caught on board schooner Morning Star, for the fishing season, 1860." This limits the fund, making it depend on the success of the fishing cruise. The words "charge same against whatever amount," &c., constitute a mercantile phrase more frequently used than the words "pay out of," but meaning the same, and, to the same extent, limiting the fund. This has been decided.

Where an order had these words, "pay to my order, five

thousand dollars, for value received, and *charge the same to my account* for transporting U. S. mail," it was held to be not negotiable so that the holder can sue in his own name. *Reeside* v. *Knox*, 2 Wheat., 253.

This case is cited in Byles on Bills, 165, and no distinction can be seen between it and the case at bar. It seems conclusive.

The only case where a fund is mentioned without destroying the negotiability, is where it is referred to as a fund fixed and certain, and only mentioned as a means by which the drawee may surely be indemnified. It cannot be claimed that these qualities apply to the fund referred to in the order in suit.

As the plaintiff can, then, only maintain his action by establishing the negotiability of the instrument in suit, the question becomes material,—"Did the acceptance change the nature of the order?" This point appears to be well settled.

The acceptance of an order not negotiable does not make it a bill of exchange, nor create a liability on the part of the acceptor. *Jackman* v. *Bowker*, 4 Met., 236.

If an instrument be not negotiable *ab initio*, no subsequent event can make it so. Bayley on Bills, 14, and cases cited in notes to same; *Jocelin* v. *Laserre*, Fost., 281; *Haydork* v. *Lynch*, Ld. Raym., 1563.

The language of the acceptance, "accepted to pay," means simply "accepted." There is no precise formula for such transactions; usually the name is written on the face of the bill under the word "accepted," but this may be varied. 1 Parsons on Contracts, 222; Byles on Bills, 254.

The declaration is, that, on the same day the order was made, and therefore, while the fund remained contingent, the order was accepted by defendant. The order, as it was written, was accepted. The acceptance could not vary it. The words "to pay," mean nothing; "accepted," alone, means as much. The others are surplusage.

The words "eventually accountable," after "accepted,"

were held to be surplusage, and in no manner restricting or qualifying the transfer, in *Donald* v. *Bailey*, 14 Maine, 101.

The words of the acceptance do not, therefore, entitle the plaintiff to his action on the order. Even if it should be claimed that the peculiar form of the acceptance makes a special contract, the plaintiff's declaration does not cover such contract. He declares only on a general and usual acceptance. He cannot, therefore, maintain his action. There is no privity between plaintiff and defendant, aside from the order, and therefore no other count covers any claim against the defendant. The action must be brought in the name of the payee, which would entitle the defendant to show the extent of the fund.

The opinion of the Court was drawn up by

BARROWS, J. — Is the instrument declared on negotiable, so that an action may be maintained upon it in the name of an indorsee against either of the prior parties? What constitutes a negotiable draft? It must be a written order from one party to another for the payment of a sum certain of money only, and that absolutely and without contingency to a third party or his order or bearer.

It has often been held that a bill or note payable out of a particular limited fund is not negotiable, but there is a difference between making the money payable out of a particular fund, and a mere reference to the fund in the draft to call the attention of the drawee to his means of reimbursement.

In this case, the order requires the drawees to pay to the order of G. F. & C. W. Tilden the sum of forty dollars, absolutely and without contingency. A means of reimbursement is indicated to the drawees in the words appended, "and charge the same against whatever amount may be due me for my share of fish," &c., but the payment of the order is not made to depend upon his having any share of fish, nor is the call limited to the proceeds thereof.

In *Reeside* v. *Knox*, 2 Wheaton, 253, cited by defend-

ant's counsel, the order was drawn on the Postmaster General of the United States, and in his official capacity. The Court expressly say, "no objection would lie to the form of the bill in the present instance, *were the drawee an individual.* It is matter of public notoriety that government accepts for no more, and is bound for no more, whatever be the form of the acceptance, than it has in its hands, and that it treats a bill drawn on it as no more than an assignment or order of transfer." In that case, the language of the draft was, "pay to my order five thousand dollars, for value received, and charge the same to my account, for transporting the U. S. Mail." No substantial difference in form between that order and the one under consideration is observed. Such an order, the Court in that case say, would be negotiable, but for the fact of its being drawn on a government officer.

According to the agreement of the parties,

The case is to stand for trial.

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

MARTIN STETSON *versus* MARY DAY.

Under our present statutes, for waste committed or suffered by the tenant, the reversioner may have an action of waste to recover the place wasted, and the damages; or he may have an action of the case in the nature of waste to recover his damages only; but he cannot have both.

If the tenant for life neglects to pay the taxes assessed upon the estate during the tenancy, and thereby subjects the estate to a sale, he is liable in either of those actions.

If the tenant deems such taxes illegal, notice of that should be given to the reversioner, and he be indemnified against loss, if payment of the tax is to be resisted.

In an action for waste, the tenant cannot deny the validity of any sale for taxes, because under our statute the *reversioner* cannot do so, until he has paid or tendered the full amount of the tax, charges and interest, for which the sale was made.

CASE in the nature of WASTE.

ON FACTS AGREED, as stated in the opinion.

Hinckley, for plaintiff.

1. The estate is liable to forfeiture. R. S., c. 95, §§ 1, 2.

2. Neglect by the tenant to pay the taxes is waste. Greenl. Cruise, Tit. 3, c. 1, §§ 27, 28, 41; 4 Kent's Com., 74; *McMillan* v. *Robbins*, 5 Ham., 28; *Varney* v. *Stevens*, 22 Maine, 331.

3. The collector's certificate and treasurer's returns are *prima facie* evidence of the correctness of the proceedings in the sale. R. S., c. 6, § 149.

E. Hale, for defendant.

1. The plaintiff cannot enforce a forfeiture of the tenant's term *in this form of action*. R. S., c. 95, § 2; 4 Kent's Com., 79; *Smith* v. *Follansbee*, 13 Maine, 273; 1 Washburn on Real Prop., 119.

2. The sale was illegal, and plaintiff has suffered no damage.

The opinion of the Court was drawn up by

CUTTING, J.—This is an action on the case in the nature of waste; wherein the plaintiff claims, not only damages, but a forfeiture of the life estate. In this form of action he may be entitled to the former, but not to the latter. This is not an action of waste, which is a real action; but case, wherein the plaintiff can only seek compensation in damages.

In former years jurists have disagreed as to whether the statute of Marlebridge, 52 Hen., 3, by which damages for the waste done could only be recovered, was the common law of this country; or the statute of Gloucester, 6 Edw., c. 5, by which, not only the place wasted was forfeited, but also treble damages. The Court, in *Sackett* v. *Sackett*, 8 Pick., 307, held the latter to be in force in Massachusetts in 1829. But our Court, in 1836, in *Smith* v. *Follansbee*, 13 Maine, 273, seems to have come to a different conclusion as to its adoption in this State, especially, as it respects ten-

ants in dower, and remark, "we do not at present perceive any objection to the maintenance of an action on the case, in the nature of waste, against a tenant in dower; but whether or not for permissive waste, may require investigation." In that case the action of waste was not sustained.

Such was the uncertainty of the law upon this subject until the revision of our statutes, in 1841, when, for the first time, by c. 129, § 1, it was enacted that—"If any tenant in dower, or by the courtesy, or tenant for life or years, shall commit or suffer any waste on the premises, the person having the next immediate estate of inheritance therein may have an action of waste against such tenant, wherein he shall recover the place wasted, and the amount of damages done to the premises."

Section 4. "Any person, entitled to such action of waste, may, instead of it, bring an action of the case in nature of waste; in which he shall recover the damages he has sustained by reason of the waste."

The subsequent revision, in 1857, was similar in its provisions, with the exception of an omission of the last clause in § 4, which, no doubt, was considered to be superfluous, since, in an action of the case, the damages sustained are always recoverable. Thus, it will be perceived, that our present code authorizes two forms of action, the one similar to that created by the statute of Gloucester, with some modifications, and the other, to that provided for in the statute of Marlebridge, giving to the reversioner his option to seek redress in either form, but he cannot have both.

The present plaintiff has brought an action of the case, and, if he is entitled to recover, it can only be for damages sustained by reason of waste suffered by the defendant, the tenant in dower. The plaintiff alleges that the tenant has suffered the estate to be sold for the non-payment of the tax of 1858, and compelled him to redeem or forfeit his reversionary interest.

In *Varney* v. *Stevens*, 22 Maine, 331, it was held to be "the duty of the tenant for life to cause all the taxes assess-

ed upon the estate during his tenancy, to be paid; and, by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioner." The same principle is enunciated in other authorities cited by the plaintiff's counsel.

This case is presented on facts agreed; the material parts of which are as follows: "One *John Closson* of Bluehill (where the premises are situated) has acted as the defendant's agent in the management of her said interest. The defendant has not been an inhabitant of said town since the conveyance of the reversionary interest to the plaintiff. The assessors of that town taxed the premises as non-resident in the year 1857. The treasurer advertised and offered the same at public auction, for sale, to pay the tax, but no bid was made therefor. Afterwards, and before the premises became forfeited to the town, the plaintiff paid the amount due to the treasurer, which sum was subsequently refunded to the plaintiff by the treasurer, the same having been paid him by said Closson as agent for the defendant. Said premises were again taxed to the defendant as non-resident by the assessors in 1858, and by reason of her neglect to pay said tax, they were sold by the treasurer to said Closson to pay the tax on Nov. 26th, 1859, and a deed was duly executed by the treasurer, dated on the 3d day of December following, subject to be retained by the treasurer until the right of redemption had by law expired. On July 9, 1860, said tax and costs amounting to two dollars and twelve cents, were paid by the plaintiff to the treasurer and the deed destroyed by him. Said Closson during the years said premises were so taxed, ever since and now is in the occupancy thereof, and taking the profits for the defendant."

From the foregoing facts, we may readily infer an intent by the defendant, or her agent, or both, to perpetrate a fraud on the plaintiff, whereby to obtain clandestinely the title to his reversion, otherwise why should not her agent have paid the tax of 1858 before any expenses had accrued,

instead of attending the sale, bidding for, and taking a deed of the premises in his own name?

At all events, as this Court have said in *Varney* v. *Stevens*, before cited, in thus "subjecting the estate to a sale, she committed a wrong against the reversioner," and, we may add, her agent a fraud in having the deed deposited in his own name with the treasurer, which might have become operative except for the plaintiff's vigilance, which fraud has not since been purged by an offer of reimbursement.

But it is contended by the defendant's counsel that the plaintiff has sustained no damage because the sale was illegal, there being no evidence offered of the qualification of the assessors, and the assessment of the tax, except what is disclosed in the treasurer's and collector's certificates, which, as also the specifications of defence, were made a part of the case.

It may be questionable whether under the agreed statement of facts it was necessary for the plaintiff to have offered any evidence; — the *tax*, the *sale*, and *the deed duly executed* appear to have been admitted. They were specifically alleged in the declaration, and not *specifically* denied in the specifications of defence; for a general denial is no specification. The relations between these parties are very similar to those between the mortgager and mortgagee, and upon this point we adopt the language of this Court in *Williams* v. *Hilton*, 35 Maine, 547. "It was the duty of the mortgager, and those holding under him to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted he should be indemnified against loss, because it would be unjust to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost."

Suppose the plaintiff in this case had assumed the hazard of contesting the validity of the tax of 1858, permitted the time of redemption to expire and the deed to be delivered to *Closson*, against whom he must have commenced his action. "But no person shall be entitled to commence, maintain, or defend any action or suit at law or equity, on any ground involving the validity of any such sale, until the amount of all taxes, charges and interest, as aforesaid, shall have been paid or tendered by the party contesting the validity of the sale, or by some person under whom he claims." R. S., 1857, c. 6, § 145. So that the plaintiff would have been precluded from contesting *Closson's* title until he had paid or tendered to him the taxes, charges and interest. Therefore it is readily perceived that the plaintiff was in no condition to test the validity of the tax only upon its payment to whoever might have seen fit, whether rightfully or wrongfully, to have taken the treasurer's deed. Such was the situation in which the plaintiff was placed by the agent of the defendant; if not by her procurement, it was by her permission. The Legislature have at last provided a remedy against such a growing evil in these days of woman's rights, and it is the province of the Court to enforce it.

Defendant defaulted.

Damages $2,12 *and full costs.*

APPLETON, C. J., DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

ALONZO P. STOVER *& ux., versus* THE INHABITANTS OF BLUEHILL.

In an action against a town to recover damages for an injury received in consequence of a defective highway, the plaintiff is a competent witness.

In such cases, the defendants are liable for the increased damages, (if any,) arising from the unskilful treatment of the plaintiff without any fault on his part, by a surgeon of ordinary professional skill and knowledge.

On Exceptions, to the rulings of Dickerson, J.

Case to recover damages for an injury to the female plaintiff, received in consequence of a defective highway.

The defendants excepted to the admission of the plaintiffs as witnesses, and to an instruction to the jury, which is stated in the opinion.

Rowe, for defendants, cited *Moore* v. *Abbott*, 32 Maine, 46; *Shepherd* v. *Chelsea*, 4 Allen, 113; *Kidder* v. *Dunstable*, 7 Gray, 104; *Rowell* v. *Lowell*, 7 Gray, 100; *Miller* v. *Mariners' Church*, 7 Maine, 51–55; 2 Parsons on Con., 454; *Keith* v. *Pinkham*, 43 Maine, 501; *Tuttle* v. *Holyoke*, 6 Gray, 447; *Eastman* v. *Sanborn*, 3 Allen, 594.

Wiswell, for plaintiffs.

There was also a motion to set aside the verdict, upon which no question of law arose.

The opinion of the Court was drawn up by

Dickerson, J. — This case comes before this Court on exceptions and motion.

The defendant's objection to the competency of the plaintiffs, as witnesses, is not insisted upon in the argument. They were, however, properly allowed to testify. *Palmer* v. *Bangor*, 46 Maine, 325.

The exceptions relied upon were taken to the instructions of the presiding Judge to the jury upon the subject of damages, as follows: — that it was the duty of the plaintiffs to employ a surgeon of ordinary professional knowledge and skill, and to follow his necessary directions, and that, if the jury should find they had done so, the plaintiffs would be entitled to recover compensation for the damages sustained, though such surgeon should have treated the limb unskilfully, and by such unskilful treatment prevented it from recovering so soon as it would have recovered under skilful treatment. The exceptions raise the question whether the defendants are liable for the increased damages, if any, arising from the unskilful treatment of the wife of plaintiff by

a surgeon of ordinary professional skill and knowledge, without any fault on her part. This question is clearly distinguishable from that class of cases, where a combination of causes, accidental, innocent, or blameworthy, have contributed to produce the original injury complained of. In this case, the cause of action is complete independently of the subject matter which gave rise to the exceptions. The case of *Moore* v. *Abbott*, 32 Maine, 46, and the cases in the 4th Allen and 7th Gray, cited by defendants' counsel, to the same point, have reference solely to the original cause of action, and not to the question of damages. The defendants are liable, not for all the possible, but only for the proximate consequences of their negligence; *causa proxima, non remota, spectatur*. The boundary between these two classes of consequences is so ill defined, that it is sometimes extremely difficult, not to say impossible, to trace it. Indeed, Professor Parsons, in his learned treatise on the Law of Contracts, vol. 2, p. 457, § 5, remarks, "that it is difficult, and perhaps, impossible, to lay down a definite rule which shall have, in all cases, practical value or efficacy, in determining for what consequences of an injury, a wrongdoer is to be held responsible." In *Harrison* v. *Berkley*, 1 Strobh., 548, the principle is laid down that "he shall not answer for those which the party grieved has contributed, by his own blameable negligence or wrong, to produce, or for any which such party, by proper diligence, might have prevented." And, in *Rigley* v. *Hewitt*, 5 Exch., 240, it was held "that he *is* responsible for all the mischievous consequences that may be reasonably expected to result under ordinary circumstances from such misconduct."

Very much, in this respect, must depend upon the facts and circumstances of each particular case. In the case at bar, the finding of the jury acquits the plaintiffs of all negligence or misconduct. They employed a competent surgeon. This was all they, unprofessional persons, could do. The necessity to do this was imposed upon them, not by their own fault, but by the fault of the defendants. If they

had neglected to procure the services of a competent surgeon, having the ability to do so, or employed an incompetent one, whereby the injury had been aggravated, it is clear that they could not recover damages for the injury thus increased; the law does not permit a party thus to take advantage of his own negligence or misconduct. Yet, upon the theory of the party excepting, the same legal consequences result to them from their diligence, as from their negligence, — from their discharge, as from their neglect of a duty imposed by law, if the surgeon employed, however competent, happens to increase the injury by unskilful treatment. It is difficult to discover the soundness of that principle which requires a party injured, without fault on his part, to insure, not only the surgeon's professional skill, but also his immunity from accident, mistake or error in judgment, and which precludes such party from recovering of the original wrongdoer damages arising from no fault on his part, and from causes beyond his power to control. On the contrary, there seems to be good reason for holding the party originally in fault responsible for the damages resulting to the innocent party under such circumstances. Indeed, the liability of a competent surgeon to mistake, accident, or error in judgment, as well as that of the party complaining to an increase of his injuries from other causes beyond his control, are among "the mischievous consequences," referred to in *Rigley* v. *Hewitt*, "that may reasonably be expected to result under ordinary circumstances from the defendants' misconduct," and for which they are responsible. The unskilful treatment of the surgeon, itself, if any there was, arose as a consequence of the original fault of the defendants. In the present imperfect state of medical science, and amidst the conflicting theories of medical men, as well as the uncertain reliance to be placed upon the different modes of treating injuries and diseases, it would not be difficult to make it doubtful, in a given case, if the professional treatment might not have been improved, or was unskilful, and thus a way of escape might be pre-

pared for wrongdoers from the legitimate and legal consequences of their negligence or misconduct. The principle, therefore, of holding the defendants responsible, is founded in sound reasons of public policy. It is also sustained by decided cases of courts of acknowledged authority.

In *Eastman* v. *Sanborn*, 3 Allen, 594, the hirer of a horse, who had made him sick, by improperly feeding and watering him, and returned him in this condition to the owner, was held liable for his full value, the owner having used reasonable care and employed a suitable veterinary surgeon, who treated him according to his best judgment, but was unable to cure him, although such treatment was in fact improper, and contributed to the horse's death. In that case, the Court say, "if the plaintiff did, on the return of the horse, employ suitable persons to take care of the horse, and they were faithful in performing the service in which they were employed, and the horse died, notwithstanding their efforts to save and restore him, the death must be attributed to the disease caused by the culpable neglect of the defendant, even though the remedies applied in the course of the treatment, instead of having their intended effect, aggravated the disease, and contributed in some degree to its fatal termination." In *Tuttle* v. *Holyoke*, 6 Gray, 447, the Court held, that if a horse, going off a highway, by reason of defect therein, falls upon a fence, and, in being removed therefrom with reasonable care and skill, suffers injury, the town is liable for such injury. So in *Dean* v. *Keate*, 3 Camp., 4, Lord ELLENBOROUGH held that the hirer is not responsible for any mistakes which a farrier, whom he calls in to attend a hired horse sick, at the commencement, or made so without his fault in the progress of the journey, may commit in the treatment. In such case the law requires that the party himself should be without fault. As the bill of exceptions does not present a case of *malpractice* of the attending surgeon, which would render him liable to the plaintiff, we express no opinion upon that question.

In support of the motion to set aside the verdict, it is argued that the case discloses gross carelessness on the part of the plaintiffs at the time of the accident, a want of diligence in employing a surgeon, and that the damages are excessive.

A review of the evidence, imperfectly reported, fails to satisfy us that the jury misapprehended it, or were influenced by prejudice, partiality, or other improper motive; and it is only in such contingency that the Court is authorized to set aside the verdict of a jury, as against evidence or the weight of evidence. Neither the existence of another road by which the plaintiffs might have returned to their home, nor previous notice of the condition of the road they took, nor the approaching darkness of evening, rendered it unlawful for the plaintiffs to pass over the road in question. They had a right to do so, exercising, at their peril, that ordinary care which the circumstances of the case should require.

The plaintiffs were driving at a walk, when the accident happened, and we are not prepared to say that ordinary care required them to get out of the sleigh, and feel their way over the drift which for thirty or forty rods nearly filled the road between the fences with snow of sufficient consistency to bear loaded ox teams. Nor do we perceive such negligence in procuring the attendance of a surgeon, as requires us to set the verdict aside on that account. The accident occurred in the evening, and a surgeon was sent for the next day, but he was absent from home, and did not attend until the day after he was called. It was not unnatural for the jury to infer that the plaintiffs had probable ground to believe that he would attend at the earliest practicable moment. Besides, if such had not been their reasonable expectation, there is no evidence that they could have obtained another competent surgeon at an earlier hour.

It was a case of permanent injury to the wrist of the wife plaintiff. In the matter of damages, so much depends upon her age and health, and her capacity for labor and useful-

ness, and especially as the Court can but imperfectly judge of the nature and extent of the injury, — it would be, at least, an exercise of questionable authority to disturb the verdict on the ground of excessive damages.

Exceptions and motion overruled, and judgment on the verdict.

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

CUTTING and WALTON, JJ., dissented.

COUNTY OF WALDO.

INHABITANTS OF FRANKFORT *versus* INHABITANTS OF WINTERPORT.

When part of a town is set off and incorporated into a new town, resident paupers, who had acquired a settlement in the old town, subsequently have their settlement in the town in which they resided when the Act of incorporation took place, unless the Act makes different provisions.

The Act incorporating the town of Winterport contains no provisions in conflict with this principle.

ON AGREED STATEMENT. ASSUMPSIT to recover $125,22, expended in support of Horatio Whitten and family; and the only question was in regard to the settlement of the paupers. It was agreed that they had their settlement in the old town of Frankfort, at the time of its division, and were not then chargeable as paupers; that, at the time they became chargeable, they had not resided five successive years within the limits of the present towns of Frankfort or Winterport; and that, when said Act took effect, they resided in the present town of Winterport.

W. G. Crosby, for plaintiffs.

N. H. Hubbard, for defendants.

The opinion of the Court was drawn up by

WALTON, J. — This is an action of assumpsit to recover the amount expended by the plaintiffs for the support of one Horatio Whitten and family. The relief commenced January 4, 1861. The plaintiffs allege that the settlement of Whitten and his family was at that time in Winterport. This the defendants deny. The case is before us upon an agreed statement of facts.

By an Act of the Legislature, approved March 12, 1860, part of the town of Frankfort was set off and incorporated into a new town by the name of Winterport. At this time, Whitten and his family had resided more than five years together in the town of Frankfort, and had thereby gained a settlement in the town; and, when the Act incorporating the new town took effect, dwelt and had their homes upon the territory included in it. Having their settlement in the old town, and actually dwelling and having their home upon the territory included in the new town, when the Act dividing the old town and incorporating the new town took effect, gave the paupers a settlement in the new town of Winterport. *Eddington* v. *Brewer*, 41 Maine, 462.

Such, we think, is the reasonable construction of such a division of a town, wholly independent of any express statute provisions in the Act of division relating to the settlement of paupers; and it is therefore unnecessary to consider whether or not the case of this pauper and his family falls within the provision of the third section of the Act dividing Frankfort.

Judgment for plaintiffs, for the amount sued for and interest from date of the writ.

APPLETON, C. J., CUTTING, KENT, DICKERSON and DANFORTH, JJ., concurred.

NOTE BY KENT, J. — There is an omission of a single word in R. S. of 1857, c. 24, § 1, clause 4, which renders the sentence obscure, if not self-contradictory.

INHABITANTS OF WINTERPORT *versus* INHABITANTS OF FRANKFORT.

When part of a town is set off and incorporated into a new town, and no provision is made in the act for the support of such paupers in the old town as have no settlement in the State, they must be supported by the town in which they are, when the support is given, and no action can be maintained by one of the towns against the other for reimbursement.

ON AGREED STATEMENT. ASSUMPSIT to recover money expended in support of one Doyle, who, it was agreed, had no legal settlement in the State, but before and at the time of the division of the old town of Frankfort was supported by it, at the town farm, which is in the plaintiff town.

N. H. Hubbard, for plaintiffs.

Before the division, Frankfort was under legal obligation to support this pauper, and no change was made in this respect by the Act of incorporation.

W. G. Crosby, for defendants.

The opinion of the Court was drawn up by

APPLETON, C. J. — The town of Winterport was incorporated out of part of the town of Frankfort.

The language is, "when a town composed *in* part of one or more existing towns is incorporated, persons *settled* in such existing town or towns, *who* had *begun to acquire a settlement therein*, and whose homes were in such new town at the time of its incorporation, have the same rights, incipient and absolute, respecting settlement, as they would have had in the town where their homes formerly were."

This is a transcript in substance from the R. S. of 1841, c. 32, § 1, clause 4, except that the word "or" is omitted. The Act of 1841 is, "when any new town shall be incorporated, composed *of* a part of one or more old incorporated towns, every person, legally settled in any town of which such new town is wholly or partly so composed, OR who has begun to acquire a settlement therein, and who shall actually dwell and have his home within the bounds of such new town, at the time of its incorporation, shall have the same rights in such new town in relation to the settlement, whether incipient or absolute, as he otherwise would have had in the old town where he dwelt." The manifest intention of the Legislature is clearly seen in the old statute, and the omission of the word "or," — which is necessary to make the sentence unambiguous, was manifestly unintentional, and should be supplied.

The liabilities of these towns for the support of paupers must be decided by the general pauper law of the State, or by the special Act creating the new town. They are not liable at common law.

The plaintiffs cannot recover under the general law relating to paupers, because it is conceded that the pauper Doyle had no settlement in the defendant town.

The plaintiffs cannot recover under the Act of 1860, c. 422, incorporating the town of Winterport, — because the obligation thereafter to support those now chargeable as paupers in Frankfort, and not having a settlement therein, is not specially imposed on the defendant town.

The Act, c. 422, § 3, so far as it relates to paupers, is in these words, — "the inhabitants of Winterport shall support all persons now chargeable as paupers in Frankfort, whose legal settlement is within the limits of Winterport; and all persons hereafter becoming chargeable shall belong to that town, in the territory of which they shall then have their legal settlement, whether direct or derivative."

It will be perceived, that, as between these towns, the obligation of providing for those situated similarly to the pauper in question is not thereby imposed upon either town. The plaintiff town has no better right to recover of the defendants than would any other town have, in which she might receive support. That is, the defendant town is not liable, because the pauper has no settlement therein. *Holden* v. *Brewer*, 38 Maine, 472. This must be regarded as a *casus omissus*, for which no provision has been made in the Act of incorporation, though it is otherwise in some of the Acts of incorporation cited by the counsel for the defendants. *Action to stand for trial.*

CUTTING, KENT, WALTON, BARROWS and DANFORTH, JJ., concurred.

JOSEPH WILLIAMSON, *Compl't, versus* BACHELDER CARLTON.

On trial upon a complaint for flowage under the statute, the complainant produced a quitclaim deed of the land flowed, without evidence of an entry or possession by him, actual or constructive: — *Held*, that a nonsuit was erroneously ordered, the complainant having made out a *prima facie* case of ownership.

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

This was a COMPLAINT FOR FLOWAGE under the statute. In support of the claim the complainant introduced, (1,) a deed of quitclaim of the premises described in his complaint, from Charles N. Cotting to him; (2,) deeds of the same from William Sohier to Cotting; also resolves of the State of Maine, referred to in the deeds, and the petition referred to in said resolves; (3,) the will of Benjamin Joy and proceedings under the same in Probate Court.

The parties agreed to substitute the following facts for the deeds: —

1st. That Charles N. Cotting of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, on the tenth day of December, 1858, by his deed of quitclaim of that date, duly made, executed, acknowledged and recorded, conveyed to said complainant, among other parcels of land, those described in said complaint, and that the *habendum* in said deed is as follows: — "To have and to hold said premises, together with all and every the rights, easements, privileges and appurtenances to said premises, and any and every part thereof belonging or used in connection therewith, unto the said Williamson, his heirs and assigns, to his and their use and behoof forever, but without any warranty on my part, express or implied. It being understood that, in respect to many of the parcels herein described, contracts or agreements for sales and for deeds, heretofore made by Benjamin Joy, his heirs, devisees and assigns, and by persons acting as trustees under his will, and under will of Hannah Joy, by Hannah Joy, Adm'x, by E. Jay, Adm'x,

and by within named grantor, are held by parties who have paid the whole or a part of the purchase money, which contracts or agreements, each and every of them, said grantee for himself, his heirs and assigns, hereby assumes as his own obligations and agreements, and agrees to perform as a part consideration of these presents."

2d. That William Sohier of Boston aforesaid, on the sixteenth day of August, 1854, by his deed of quitclaim of that date, duly made, executed, acknowledged, delivered and recorded, conveyed to said Cotting, among other parcels, the parcels of land described in said complaint, and that the premises and *habendum* in said deed are as follows:—"In the exercise of the power and authority to and upon me conferred by two resolves of the Legislature of Maine, one of which is the —— chapter of the resolves of said Legislature, 1847, and the other the —— chapter of said resolves, 1852, or either of them, and of *every other power or authority* me hereunto enabling, *grant*, release, quitclaim and appoint unto said Cotting the pieces or parcels of land hereinafter mentioned, and *all my right, title and interest therein.* It being understood that, to several of the lots heretofore referred to, no title is given, save a *title as mortgagee;* that, in respect of many of them, contracts for deeds are held by parties who have paid the whole or a portion of the purchase money. To have and to hold said premises, together with all and every the rights, easements, privileges and appurtenances to said premises, unto the said Cotting, his heirs and assigns, to his and their use and behoof forever, but without any warranty whatever on my part, express or implied."

3d. That said Sohier, on the fifteenth day of October, 1855, by his deed of quitclaim of that date, duly made, executed, acknowledged, delivered and recorded, conveyed to said Cotting, among other parcels of land, the several parcels described in said complaint; that the premises and *habendum* in said deed are the same as in the deed from said Sohier to said Cotting, dated August 16, 1854, herein-

before referred to, with the following addition:—"This deed being confirmatory of said deed to said Cotting, in which are incorrect bounds, and also to include lots unintentionally omitted."

It was admitted by respondent, in his specifications of defence, that he was the owner, at the time the complaint was filed, of the watermill and dam named in the complaint, and of the land on which they stood, and that said dam flowed the land described in the complaint.

On motion of respondent, the Court ordered a nonsuit; to which ruling the complainant excepted.

W. G. Crosby, argued in support of the exceptions, and *N. Abbott, contra.*

The opinion of the Court was drawn up by

Barrows, J.—This is a complaint for flowage under c. 92 of the Revised Statutes of 1857. The respondent pleads the general issue, but, by his brief statement, admits that he was, at the time of the filing of the complaint, and still is, the owner of the mill and dam described therein, and that the dam flowed the land described in the complaint, and he claims the right to maintain that dam and flow that land. The complainant, to entitle him to recover, must show that he was the owner of the land flowed.

A nonsuit should not be ordered if he makes out a *prima facie* case of ownership.

He presents a quitclaim deed, duly executed, acknowledged and recorded, from Charles N. Cotting to himself, covering the premises.

The respondent objects that a quitclaim deed, without evidence of an entry and possession, actual or constructive, by the grantee, is insufficient, and he cites cases where it has been rightly held that to maintain trespass *quare clausum* or assumpsit, for the proceeds of wood or other valuable products of land, of which the plaintiff being owner has been disseized, such evidence is necessary.

It may well be doubted whether these cases are applicable to the process before us. The most comprehensive terms are used in c. 92, R. S., in giving this remedy. Any person, "whose lands" are damaged, may obtain compensation. The respondent may plead in bar that the complainant has "*no* right, title or estate in the lands" alleged to be injured, but the possession requisite to support the action of trespass *quare clausum* is not indispensable to the maintenance of this process. There may be cases where the reversionary estate may suffer from the flowage. And there is nothing to indicate that the remedy is not open to an owner of land who has been disseized.

But, however these things may be, the utmost that could be required of the complainant, upon these pleadings, would be that he should make out such a title as would enable him to recover in a writ of entry. A quitclaim deed is not necessarily a mere naked release of the grantor's existing interest in the premises. It may be an actual grant of the land, differing from a warranty deed only in the covenants. A deed of conveyance duly executed, acknowledged and recorded, is equivalent to a feoffment with livery of seizin, and gives the grantee a *prima facie* title. *Blethen* v. *Dwinal*, 34 Maine, 135.

Such a deed, it would seem from the agreement of parties filed in the case, the one from Cotting to the complainant in fact was. Stopping here, then, the complainant, if nothing appeared to defeat or control his right to recover, would have been entitled to a verdict.

Has he made his case worse by the introduction of the deeds from Sohier to Cotting, and the other documentary evidence and the resolves of the Legislature? It is not shown that Cotting's title depended solely upon Sohier's deeds. His right to make a valid conveyance is not impeached by any testimony in the case, and his quitclaim deed would pass to the complainant all the estate he had in the premises, whether derived from Sohier or from other parties.

Neither does it appear that Sohier's right to convey depended solely upon the legislative resolves. He refers, in his conveyances, to other power and authority, and grants the land *and* all *his* right, title and interest in the premises. Are we to presume in the absence of all testimony that he had none? The respondent claims that we should do so, and then asks us to adjudge the resolves of the Legislature, under which alone he alleges Sohier claimed a right to convey, and upon which alone he says the title of Cotting depends, to be unconstitutional.

We think a *prima facie* case is made out, without examining the question whether or not Sohier was lawfully authorized to make the conveyances by virtue of the resolves.

But if it were conceded that Sohier had no estate in the premises, and no authority to convey except that which he derived from the resolves of the Legislature, and that Cotting's title rested solely upon those conveyances, how would the case stand?

The respondent calls upon us to exercise in his behalf the high prerogative of this Court, and to pronounce the legislative resolves unconstitutional, and the conveyances made by virtue thereof to be inoperative and void. Undoubtedly the Court has the power, in cases where the question properly arises, to pass upon the constitutionality of any legislative enactment.

The presumption always is, that the Legislature has kept within the legitimate scope of its authority, and except in cases where, upon the most careful and deliberate examination, it is *manifest* that the true limits of legislative power have been exceeded, the Act will not be pronounced void.

Where the rights of citizens have been invaded by any unwarrantable arbitrary exercise of the legislative power, it is the duty of this Court to afford the needed redress, and to declare the Act a nullity.

But at whose instance shall this be done? Plainly those whose rights were injuriously affected by the Act complained of, their representatives or assigns, and *they only* can call

upon the Court to do this. A stranger to those rights, merely interposing a cavil at the tenure by which a neighbor holds his property, cannot be permitted to do it.

If this respondent claimed under the devisees or trustees appointed under the wills of Benjamin and Hannah Joy, or under the remaindermen, referred to in the will of Benjamin, the question of the validity of the resolves might be fairly before us.

It no where appears, and it is not even suggested, that he does so claim. He claims a right to maintain his dam, and to flow that land. In order to give him an opportunity to test that right, it is necessary that the exceptions should be sustained. *Nonsuit set aside and new trial granted.*

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

SCHOOL DIST. NO. 9, IN SEARSPORT, *versus* MOSES DESHON.

In an action, under § 54, c. 11, of R. S., against a school agent of a district, for money in his hands unexpended, his objection to the maintenance of the suit, that it does not appear that he took the required oath as agent, will not be sustained.

Where the district agent received money, which by the statute was to be appropriated for certain definite and specific purposes, he cannot retain any balance remaining in his hands, on account of personal services rendered, as the statute provides that the money, "not so appropriated by him during his term of office," belongs to the district and may be recovered of him.

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

This was an action under sec. 54 of c. 11 of R. S., to recover of the defendant money received by him as school agent, which the plaintiffs allege has not been expended. The writ also contains a count for money had and received. The case was brought into this Court by appeal, by defendant, from the judgment of the Police Court of Belfast against him for $10,68, damages and costs of suit.

It was admitted that, in the year 1861, the defendant was acting school agent of the district, and received from the former agent $10,68, which belonged to the district; that he drew from the treasurer of the town the school money of the district, amounting to $136,38.

It was also admitted that the records of the district do not show that the defendant was sworn, but it was not denied that he was the acting agent during that year. The plaintiffs, before commencing suit, demanded the said sum of $10,68, which defendant refused to pay, claiming that he had an account for services and expenditures against the district.

The defendant testified that services charged in his account, which he produced, for repair of school house and of time and travelling expenses in obtaining teachers, &c., amounting to $21,35, were correct and necessary. The account was not seasonably filed in set-off in this action, and it was not permitted to go to the jury, although the defendant claims that the services rendered should go in set-off to the account of plaintiffs.

The instruction to the jury, to which the defendant excepted, will appear from the opinion.

W. H. McLellan, in support of the exceptions.

N. Abbott, contra.

The opinion of the Court was drawn up by

KENT, J.—This is an action under statute § 54 of c. 11 of R. S., to recover money received by defendant as school agent of the district. It was objected that the action cannot be sustained, because it does not appear that the agent was sworn. But the case finds that he was acting agent, under an election, and that, as such agent, he received and held the money in question. He was agent *de facto*, and we think he cannot object, in this suit, that all of the requirements of the statute were not complied with. Having received the money, claiming to be agent, he must account

for it. Indeed, if he cannot be regarded as agent, for any purpose, he may be liable in his individual capacity, under the count for money had and received, and be debarred from any defence arising from his acts as such agent.

The only exception taken to the ruling of the presiding Judge, upon the merits of the case, is, that he excluded the claim of the defendant "for *personal* services in going after the teachers." He directed the jury to allow what they deemed just for all other claims proved to their satisfaction.

By § 53 of c. 11, it is provided that the school agent shall employ teachers from the money placed at his disposal for that purpose, and, *from the same means*, provide fuel and utensils and make repairs, and pay insurance, if the district so direct. By § 54, it is provided that each agent, within the year for which he is chosen, *shall* expend the money apportioned to his district for the support of the schools therein, taught by instructers duly qualified. Any money received by the agent for the use of the district, and not appropriated by him *to such use* during his term of office, may be recovered from him in an action on the case, in the name of the town or district.

Assuming that the agent has or may have a legal claim for personal services against the town or district, the question is, can he legally claim to retain his compensation out of the money paid over to him for the support of schools in the district? No account in offset was filed in this case. The statute points out very minutely all the purposes to which he may apply the money; viz.: payment of teachers, for fuel, utensils, repairs and insurance. And *any* money "not so appropriated by him to *such use*, during his term of office," belongs to the district and may be recovered of him.

We think that the statute did not intend to allow the retention of any part of this money to pay for the personal services of the agent. It is the case where the law specifically appropriates *all* the money he may receive. He is bound so to use it, and, if he does not so use it all, he is bound to pay the part remaining in his hands to the district.

If he has any legal claim for personal services, he must look to the district or town for payment, by suit or otherwise. If he might have filed such a claim in offset, he has not done it. And it is well settled that a defendant cannot avail himself of any demand he may have against the plaintiff, if it has not been filed in offset pursuant to the statute; unless the demand arose from an actual payment of the plaintiff's demand, or, unless it was the understanding or agreement, expressed or implied, that one should be in payment or discharge of the other. *Sargent* v. *Southgate*, 5 Pick., 312; *Braynard* v. *Fisher*, 6 Pick., 355. We think that money placed in the hands of a public officer to be by him appropriated for definite and specific purposes pointed out in the statute, under the provisions of which he received it, cannot be regarded as within the exception to the general rule. *Exceptions overruled.*

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

COUNTY OF PENOBSCOT.

JONATHAN GILMAN *versus* THE CITY OF PORTLAND.

In an action by the master of a house of correction to recover the expenses incurred in support of a pauper therein, a declaration upon an account annexed to the writ is sufficient.

The certificate "Examined and allowed" by the county commissioners upon the account, is sufficient in such a case.

In such an action, the costs of commitment cannot be recovered.

Nor money paid to redeem clothes pawned by the pauper.

As such an action is "an action against a town for the support of paupers," full costs are recoverable, although the damages recovered are less than twenty dollars.

On Report from *Nisi Prius*, Kent, J., presiding.

The case is stated in the opinion.

F. E. Shaw, for plaintiff.

E. Fox, for defendants.

The opinion of the Court was drawn up by

Appleton, C. J.—The plaintiff, as master of the house of correction for the county of Penobscot, brings this action to recover of the defendants the costs in criminal proceedings, on the part of the State against Harriet Carr, and against Edward Hodgkins, and the expenses incurred in the support of the latter after his commitment to his custody. The individuals in question are admitted to have their settlement in the city of Portland.

Objections are interposed to the plaintiff's recovery, relating to the form of the action, the damages to be recovered, as well as to the amount of costs in the event judgment should be rendered for a sum less than twenty dollars. All these will be examined and considered in the order of their presentation.

(1.) This is assumpsit upon an account annexed. It is urged that there should be a special count under the statute. But this is not necessary. By R. S., 1841, c. 178, § 21, which authorizes this suit, it is provided that the master "may commence and prosecute his action at law for the same, declaring as upon an implied promise." This the plaintiff has done. It is manifestly the mode of declaring intended by the Legislature. It was adopted in *Weymouth* v. *Gorham*, 22 Maine, 385. It was recognized as correct in *Wade* v. *Salem*, 7 Pick., 333.

(2.) The certificate of allowance of the plaintiff's claim, by the county commissioners, is denied to be proper or sufficient. By R. S., 1841, c. 178, § 19, the master of every house of correction is required "to keep an exact account of all profits and earnings that shall arise from the labor of all such as shall be committed to his care and custody, and

of his disbursements for their support and maintenance," and to "present the same account, upon oath, unto the commissioners," &c. "The commissioners may make such further allowance as they think reasonable, in special cases, for the care, labor and services of the master, besides the allowance of one-third part of the earnings provided in the seventh section" of c. 178. By § 20, after the account of such master shall have been duly proved and certified to be correct, by the commissioners, he shall have a right to demand the same of the person committed, if of age, otherwise of his parent, master or guardian; and, if there be not sufficient estate of the parties liable as aforesaid, the same may be demanded of the overseers of the poor wherein such person shall have his legal settlement." By § 21, "fourteen days after demand made, in writing," but "within two years after the date of the certificate of allowance," the master "may commence and prosecute his action at law" for the "money so ascertained to be due."

It is not questioned but that the account was "duly proved." It is contended that the certificate of the county commissioners, that it was "examined and allowed," is not enough. It was duly proved, examined and allowed. The certificate we think sufficient. The county commissioners were to audit the claims of the master of the house of correction. They were not to adjudicate upon them finally. In case of notice to the adverse party, their certificate is, by § 21, only "presumptive evidence of the claim;" but, whether notified or not, the amount allowed "shall be liable to be disproved by evidence to be offered on the part of the respondent."

(3.) The plaintiff claims to recover the costs in the several criminal prosecutions in which the judgments were rendered and the warrants of commitment issued, under and by virtue of which he was authorized to detain the persons committed in the house of correction. But this claim cannot be allowed.

The statute contemplates that the persons committed shall

perform labor, and that two-thirds of their net earnings may suffice for their support in certain cases. But if any person committed, "shall, from sickness or any other cause, be unable to work, so as to support himself out of his share of earnings, the master shall then comfortably provide for and take care of him and be reimbursed as hereinafter provided." §§ 17 and 18.

The sum "due to any master of such house, from any person therein committed," is the balance over and above the share allowed for the prisoner's support from his earnings, expended in comfortably providing for and taking care of them, &c. The costs incurred in the proceedings against a prisoner are anterior to his commitment. The master has nothing to do with them. They are regulated by statute and they cannot, on any grounds, be properly included in the sum "due" the master. They were not so included in the amount for which the certificate of the county commissioners was given, even if they might have been. The plaintiff can only recover for "the sum so ascertained to be due."

(4.) The money paid to redeem the clothes of Hodgkins, which were in pawn, cannot be allowed. It does not appear that the payment was made by the authority of the defendants.

(5.) As the amount which the plaintiff will be entitled to recover is less than twenty dollars, it is insisted that his costs must be limited to one-quarter of the sum recovered. But such is not the statute. By R. S., 1857, c. 82, § 97, actions "by or against towns, for the support of paupers," are excepted from the restriction as to costs imposed when the judgment does not exceed twenty dollars. This is an action against a town "for the support" of a pauper. It may involve his settlement. That may be put in issue and the plaintiff would fail, unless he could prove it to be in the defendant town. This differs not from any suit between town and town for the support of a pauper, and is precisely provided for in the exception, to which we have referred.

The case of *Rawson* v. *New Sharon*, 43 Maine, 318, was correctly decided, but it is inapplicable. The plaintiff, a physician, there sued for services rendered the defendant town, at their instance and request. They were not rendered under the provisions of any statute, but in pursuance of a contract between the parties. As between them, it could not be distinguished from any other suit against a town, for any description of services. The settlement of the pauper was not in controversy. The only questions to be determined were the amount and value of the plaintiff's services; whether he had been employed and, if employed, whether he had been paid or not.

Defendants defaulted for $11,79, *and interest.—Full costs allowed.*

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

KENT, J., concurred in the result.

GEORGE M. WESTON, *Petitioner for Mandamus, versus* NATHAN DANE, *Treasurer of State of Maine.**

By the terms of the constitution, no money can be drawn from the treasury, but by warrant from the Governor and Council, and in consequence of appropriations made by law.

In the absence of an appropriation and warrant, the Court will not issue a *mandamus* to the treasurer to command the payment of money from the treasury, under any circumstances.

A resolve of the Legislature, authorizing the Governor and Council, to fix the compensation of an agent of the State for prosecuting claims, is no appropriation.

A copy of the vote of the Governor and Council fixing such compensation, attested by the secretary of state, is not the warrant contemplated by the constitution.

As no action can be maintained against the State, the Court will not permit a claim to be enforced circuitously by *mandamus* against the treasurer.

* This case was argued at Portland.

PETITION FOR MANDAMUS, notice of which was served upon the *State Treasurer* and *Attorney General*. The case was submitted to the Court upon the petition, answer, replication, and an agreed statement of facts, which are sufficiently stated in the opinion.

Joseph H. Williams, for petitioner.

If the amount was held by respondent for the use of the State, to be got out only as all other money in the treasury can legally be got out, by appropriation and warrant, still petitioner was entitled to it.

What is an appropriation?

"It is not setting apart a particular heap of dollars for a particular officer." Reverdy Johnson, *arguendo* in *Thomas* v. *Owens*, 4 Maryland, 214.

As the Court say, in that case, — "obviously the purpose of the constitutional provision for a legislative appropriation is to prevent the expenditure of the people's treasure *without their consent*." *Ibid*, 225.

Evidence of *their consent* in this case is to be found in the resolve of March 26, 1858, coupled with the order in council of October 13, 1860, which made the amount of appropriation definite.

The two acts together constitute "an appropriation by law."

"An act is as essentially accomplished by law when performed pursuant to a statute, as if consummated by the statute itself." *People* v. *Edwards*, 15 Barb., S. C., 529–534.

So the *Legislature* of 1860 must have regarded them; else what necessity for interference by the resolve of March 19?

What is a sufficient "warrant?"

Simply a direction in writing from the Governor and Council (who in this State are auditing officers) to pay a claim recognized by them, with a reference to the legislation authorizing its payment. This is the substance of all war-

rants issued by the Governor and Council, and the order in council of October, 1860, amounts to that.

Drummond, Attorney General, for respondent.

The opinion of the Court was drawn up by

APPLETON, J.—The State of Maine, having a claim against the United States for expenses in organizing a regiment for the Mexican war, on the 26th March, 1858, passed a resolve authorizing the Governor, with advice of Council, "to establish, by commission or otherwise, the compensation of the commissioner at Washington, appointed under resolve approved March 17, 1855; but no compensation shall be allowed the commissioner unless it be taken from allowances made by the general government on claims prosecuted by him," &c.

On the 13th Oct., 1860, an order in council was passed and approved by the Governor, "that the commission of George M. Weston, for his compensation in procuring an allowance from the United States for expenses in organizing a regiment for the Mexican war, known as the Mexican claim, be established at twenty per cent. of the amount *received by the State* on said claim, and said compensation to be taken from the amount so received."

The petitioner prosecuted the claim of the State so ably and successfully, that $10,308,28, was obtained from the United States and paid into the State treasury, on which sum his commissions would be $2061,66.

Of this amount the petitioner has received $1061,66, and a check of B. D. Peck, former treasurer of State, drawn upon its funds in bank. This check was passed to the credit of Peck in his individual capacity, he being at that time indebted to the petitioner in about that sum.

It is the payment of this sum of $1000, which the petitioner seeks to enforce by mandamus.

It is provided by the constitution of the State, art. 5, part 4, § 4, "that no money shall be drawn from the treasury,

but by warrant from the Governor and Council, and in consequence of *appropriations* made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published at the commencement of the annual session of the Legislature."

The resolve of the Legislature and the subsequent action of the Governor and Council can, if viewed most favorably for the petitioner, be regarded only as a contract between him and the State as to the amount of compensation to be paid him in case of his successful prosecution of the Mexican claim. If a contract, as the State is not suable at the instance of its citizens, the only remedy for the petitioner would be by resort to the Legislature, which, it is to be presumed, will pay a just regard to the equitable right of the petitioner. It was no appropriation. If it were so, then every contract made by the Governor and Council, or the Land Agent, or any other State officer, in pursuance of a statute authorizing the making of such contract, would be an appropriation. But it is not so. The Legislature, by their resolve, authorized the Governor and Council to establish the commission to be allowed the agent of the State, and they acted in pursuance thereof.

By the terms of the order, the whole amount was to be paid to, and in fact it was received by the State, and from the amount so received the compensation was to be taken. The money, when received, was in the State Treasury as much as any other money from any other source, and being there, it could not be drawn out except in pursuance of the provisions of the constitution.

If the money were to be regarded as the money of the plaintiff in the hands of the defendant as an individual, it is obvious the petitioner is not entitled to the writ prayed for. His common law remedies are ample for the enforcement of his rights.

But even if the resolve of March 26, 1858, were to be deemed an appropriation, it could not by its own force affect funds coming into the treasury two years after the official

existence of the Legislature, by which it was passed, had ceased.

The constitution further requires a warrant from the Governor and Council, to justify the treasurer in making any payment. This is indispensable. Without it the treasurer cannot legally make a payment. No warrant has been issued.

It is well settled law that no action can be maintained against the State. The Court cannot sanction an evasion of this principle. As was remarked by Mr. Justice WOODBURY, in *Reeside* v. *Walker*, 11 How., 290, "They could not, therefore, permit the claim to be enforced circuitously by *mandamus* against the Secretary of the Treasury, when it could not be directly against the United States; and when no judgment on and for it had been obtained against the United States." The same reasoning, with equal force, exempts the defendant from all liability in the present case.

The petition, stripped of the specious disguise thrown around it by the able argument of counsel in its support, asks us to command the treasurer to pay money in violation of the clear and distinct provisions of the constitution, by virtue of which he and we exercise the several trusts reposed alike in him and in us. The writ is denied.

Petition dismissed.

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

CHARLES E. DOLE *& al. versus* MERCHANTS' MUTUAL MARINE INSURANCE CO.

When a portion of the subjects of a civil government have rebelled, established another government, and resorted to arms to maintain it, and the rebellion is of such magnitude that the military and naval forces have been called out to suppress it, the fact that such rebels are robbers on the land, and pirates on the sea, does not preclude them from being regarded as belligerents.

Dole *v.* Merchants' Mutual Marine Insurance Co.

The seizure and destruction of a merchant vessel by such rebels, on the high seas, is within the terms of a warranty in the margin of a policy of insurance, by which the risk of "capture, seizure, or detention," is excepted from the perils insured against.

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

ASSUMPSIT on a policy of insurance on the plaintiffs' ship, *Golden Rocket*, — insuring thereon the sum of $5000.

Horace Gray, jr., *R. H. Dana, jr.*, and *John A. Peters*, for plaintiffs.

B. R. Curtis and *J. S. Rowe*, for defendants.

The facts in the case sufficiently appear in the opinion of the Court, which was drawn by

DAVIS, J. — This is a suit upon a policy of insurance, on the ship Golden Rocket, for one year, commencing November 19, 1860. On the trial, it was proved that the ship was taken July 3, 1861, by the steamer Sumter, Captain Semmes, who claimed her as a prize. He and his officers and crew stripped the ship of her sails and spars, took her provisions and stores, and then set her on fire, by which she was destroyed. The title of the plaintiffs, due notice of the loss, and demand of payment therefor, were admitted.

In defence, the company offered to prove that Semmes was duly commissioned as Captain in the Navy of the Confederate States, and was acting under the authority thereof; that said States had seceded from the United States, and had organized an independent government; and that they were, at the time of the loss, carrying on hostilities against the United States. This evidence was excluded.

The case was then submitted to the Court, and a default was entered, to be taken off if the action is not maintainable, or if the evidence excluded should have been admitted.

The insurance was against "perils of the seas, *enemies*, *pirates*, assailing thieves, restraints, and detainments of all kings, princes, or people," &c. Did this cover the loss?

Of this there can be no doubt. It was a loss by *enemies*,

or by *pirates*. The plaintiffs claim that it was a loss by pirates; the defendants contend that it was a loss by enemies. It is not denied that the latter risk is excepted from the policy by the marginal clause; therefore the action cannot be maintained, unless the act of Semmes was *piracy*.

I. Piracy, being committed only on the high seas, was not a crime of which the courts at common law had any jurisdiction. 2 Hale P. C., 18, 370. It was a capital offence by the civil law, of which the admiral took cognizance. By the statute 28 Hen. 8, c. 15, jurisdiction of this crime was conferred upon the common law judges. Since that time it has been spoken of as an offence at common law. And certain offences not piracy by the civil or the common law, have been made so by statute, both in this country and in England.

It is contended for the defendants, that the word "pirates," in a policy of insurance, must be understood as referring to those only who are guilty of piracy as defined "by the law of nations." But we can perceive no ground for such a restriction. The parties to the contract must be presumed to have understood the laws, at least of this country; and so far as any kind of *piracy*, whether by the statutes or by the law of nations, could affect marine risks, it must be considered as embraced in that term when used in contracts relating to such risks, unless there is some limitation or exception.

But, in the case at bar, it is unnecessary for us to determine whether the acts of Semmes and his crew were within the provisions of any statute. For the forcible taking of property from the owner, on the high seas, appropriating all that can be of any use, and destroying the rest, are clearly acts of piracy according to the law of nations, or the common law, if committed by the *parties*, and with the *intent*, necessary to constitute that crime.

The common law writers define piracy as consisting of "those acts of robbery or depredation upon the high seas, which, if committed upon the land, would have amounted to felony there." 1 Hawkins P. C., c. 37, § 4; 2 East P.

C., 796. It is, therefore, *robbery on the high seas*. This is the definition, in substance, given by the highest court in this country. *United States* v. *Palmer*, 3 Wheat., 610. It is believed to be the only correct definition of the *offence*.

There are cases in which courts, not in *defining piracy*, but in *describing pirates*, have used very different terms. But such descriptions, though generally correct in their application to the cases under consideration, cannot properly be taken as tests by which to determine any other case.

1. It is contended that the officers and crew of the Sumter were not pirates, because they did not "seize, without discrimination, every vessel which they chose to seize, regardless of national character."

Such are said to be the *acts* of pirates, in *Davison* v. *Seal Skins*, 2 Paine C. C., 324. Molloy declares a pirate to be "*hostis humani generis;*" and the same language may be found in the case of *United States* v. *Malek Adhel*, 2 How., 200. It is there said, that "he commits hostilities upon the subjects and property of *all nations*."

This may, generally, be true in fact. But it by no means follows that such indiscriminate hostility is necessary to constitute the crime of piracy. In the case first cited, THOMPSON, J., says, "the only difference between *robbery* and *piracy* is, that *the sea* is the theatre of action for the one, and *the land* for the other." No one has ever contended that a man could not be convicted of *robbery*, unless he had a general purpose to rob everybody. Such a rule is no more applicable to robbery on the seas, than on the land. If an act of piracy is proved, it surely would not be a good defence for the pirates, that their purpose was to seize vessels belonging to citizens of one nation only; or even that the piratical enterprise was designed for the taking of only a single ship.

Thus, if there is a mutiny of the crew, for the purpose of feloniously taking the ship, *and they succeed*, it is piracy. *Brown* v. *Smith*, 1 Dow. Parl. Cases, 349. The fact that pirates generally have a wider and more indiscriminate pur-

pose, has given rise to more general terms in describing what *they do*. But we are not aware that any court has ever held an act of robbery, committed on the high seas, not to be piracy; or that any other elements are necessary to constitute the offence.

2. But, it is said that, in the case at bar, the taking was not *animo furandi;* and that, without such *intent*, there can be neither robbery nor piracy.

Common law writers, from the time of Molloy, have applied this term to the crime of piracy. It has also been so applied by the courts in this country. *United States* v. *Smith*, 5 Wheat., 153. But, in the case of the *Brig Malek Adhel*, previously cited, Judge STORY is careful to explain, that it is not essential that the act be committed *for purposes of gain*. "If one wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression in the sense of the law of nations, and of the Act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*."

When, by statute, jurisdiction of this offence was conferred upon the common law courts, it was regarded as a felony. Some authors speak of it as a "marine felony." The taking was charged as "felonious" in the indictments, and the felonious intent was presumed, or proved, as in common law offences. When it said, therefore, that the taking must be *animo furandi*, nothing more is meant than that, as in robbery on the land, it must be with a *felonious* intent. In the case of *Davison* v. *Seal Skins*, before cited, it is said that, "the taking must be felonious." And, in *United States* v. *Jones*, 3 Wash. C. C., 209, 216, WASHINGTON, J., says: "The *felonious* taking of goods from the person of another, or in his presence, on the high seas, by violence, or putting him in fear, and against his will, is felony and piracy by the law of the United States."

3. But it is argued that the taking was not felonious in this case, for "what was done was for the purpose of prose-

cuting the *civil war*." Because the officers and crew of the Sumter acted under commissions issued by a *de facto* government, engaged in levying war against the United States, it is said that they were not *pirates*, but *enemies*.

That they were liable to be regarded as "enemies," is undoubtedly true. This implies the existence of "war." But every forcible contest between two governments, *de facto*, or *de jure*, is war. War is an existing *fact*, and not a legislative decree. Congress alone may have power to "declare" it *beforehand*, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its *previous* existence. In either case it is the *fact* that makes "*enemies*," and not any legislative Act.

But in a *civil* war, those who prosecute hostilities against the established government are also traitors. And their acts are robbery or murder on the land, or piracy on the sea. There may be good reasons, after the contest is closed, for absolving many of them from their liabilities to punishment, as has sometimes been done in cases of rebellion. But this can be done only by the legislative power; nor does it change the nature of the crimes they have committed. Their acts are not only acts of war, but also of robbery, murder, or piracy. As was said by Judge SPRAGUE, in the case of the *Amy Warwick*, Law Reporter, April, 1862, "they are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States sustain the double character of belligerent and sovereign, and have the rights of both. These rights coëxist, and may be exercised at pleasure. Thus, we may treat the crew of a rebel privateer as merely prisoners of war, or as pirates and traitors." These views were fully sustained by the Supreme Court of the United States. Prize Cases, 2 Black, 635.

An old writer has very clearly and concisely stated the

law on this subject: — "If subjects of the *same State* commit robbery upon each other, on the high seas, it is *piracy*. If they are subjects of *different States*, if in amity, it is piracy; if at enmity, it is not." Sir LEOLINE JENKINS, cited in 13 Petersdorf, 349, note.

The officers and crew of the Sumter were either subjects of the United States, or of some other government *in amity* with ours. In either case they were pirates. It is not claimed that they were not citizens of the United States. The fact that they were citizens of States that have revolted, and are engaged in civil war, did not change the nature of their acts, except to add to their enormity. The commission under which they acted was itself piratical, making all concerned in issuing it accessories before the fact to all the piracies committed under it. The pretended government that authorized such a commission, being designed to overthrow the only rightful government, made *treason* of all the robberies and murders committed by its authority, on land or sea. When committed on the high seas they were piracy. They were not the less piratical because they were belligerent. The lesser crime was not merged in the greater. *Commonwealth* v. *Squier*, 1 Met., 258. In being treason, such acts did not cease to be robbery and piracy, the same as if they had not been committed in execution of a conspiracy to subvert the government. The intent of *treason* made them not the less, but the more *felonious*. The case falls within that clause of the policy by which the plaintiffs are insured against a loss by "pirates," and they are entitled to recover, unless the loss is also within the *exception* made by the warranty, in the margin.

II. The warranty in this case is not extrinsic, or independent. It is merely an exception, in the margin, of certain risks that are specified in the body of the policy.

"Warranted free from *capture*, *seizure*, or *detention*, or the consequences of any attempt thereat, any stipulation to this policy to the contrary notwithstanding."

It is worthy of attention, that neither of the words "cap-

ture, seizure, or detention," is used in the body of the policy, in describing the perils insured against. The warranty, though intended to *except* some of the specified risks, does it in different words from those used to *describe* the risks. It is this, only, which makes the case one of difficulty or doubt.

The words used in the warranty are, indeed, also used in the body of the policy in the memorandum clauses, whose office is never to enlarge, but always to limit and circumscribe the risks assumed. *Potter* v. *Insurance Co.*, 2 Sumner, 197. But the use of the word in these clauses does not afford much assistance in determining their meaning in the warranty. For, if *certain kinds* of "seizures," as for a violation of the revenue laws, are excepted in the memorandum clauses, there may still be *other kinds* of seizure not therein excepted, which *are* excepted by the use of the same word, *without limitation* in the warranty.

The body of the policy insures against "enemies." A loss by them is a "capture." This, therefore, is excepted by the warranty.

The body of the policy insures against "restraints and detainments of princes and people." Such a loss, is by "seizure or detention." Therefore *that* is also excepted in the warranty.

The body of the policy also insures against "pirates." If a loss by *pirates* is either a "capture, seizure or detention," *that* is also excepted by the warranty. This is the exact question presented.

These words, though sometimes used synonymously, differ in the *extent* of their meaning — each embracing the one that *follows* it, but not the one that *precedes* it. Every capture is a seizure and a detention, and every seizure is a detention. But there may be a seizure, as for some violation of revenue laws, which is not a capture; and there may be a detention, as by an embargo, which is neither a capture nor a seizure.

This distinction has sometimes been overlooked, because

a seizure, or a detention without a seizure, may sometimes be *equivalent* to a capture, in giving the right to abandon for a total loss. It is difficult, therefore, in some cases, to determine the particular signification of each word. *Black* v. *Marine Insurance Co.*, 11 Johns., 287; *Wilson* v. *Union Insurance Co.*, 14 Johns., 227; *Magoun* v. *N. E. Marine Insurance Co.*, 1 Story, 157.

Though there may be a case of "detention" that is neither a capture nor a seizure; a loss by *piracy* is not one of that kind.

The question is therefore reduced to this:—Does the word "capture," or "seizure," as used in contracts of marine insurance, embrace *a taking by pirates?* If so, it is within the warranty, and the insurers are not liable.

That these words, as commonly used and understood, are broad enough to cover such a case, cannot be doubted. 1 Phil. Insurance, § 1110.

But it is argued that, as used in policies of insurance, they have acquired a particular meaning, which does not embrace such a case. If so, that meaning must be given to them in the policy under consideration. "If any terms in the policy have, by the known usage of trade, or by use and practice between the insurers and the assured, acquired an appropriate sense, they should be construed according to that sense and meaning." *Gibson* v. *Colt*, 7 Johns., 385.

The plaintiffs contend that "seizure," used in policies of insurance, embraces only the acts of some government, or of its officers; and that "capture" extends only to the acts of *enemies* in a *public war*. Is the meaning of these words thus restricted, when used in such contracts, so that both the parties must be presumed to have understood them in that sense? Is a *capture* always a *belligerent taking?*

The English cases throw but little light on this question. In *De Paiba* v. *Ludlow*, 1 Comyns, 360, the ship was taken by pirates, and was retaken nine days afterwards. The plaintiff recovered for a partial loss. This taking has been called a "capture," by some authors. Marshall on Insurance,

424. But no such point was decided; for the risk of pirates was expressly insured against, and there was no exception by a warranty or otherwise.

In *Goss* v. *Withers*, 2 Burr., 693, Lord MANSFIELD is reported to have said that, "as between insurer and insured, a capture by a *pirate* is upon just the same footing as a capture by an *enemy*."

The counsel for the plaintiffs speak of this as a *dictum;* and the counsel for the defendants seem to regard it as a decision that a piratical taking is a *capture*. It is thus spoken of by the Court of Queen's Bench, in *Kleinworth* v. *Shepard*, 1 El. & El., 447. But it is evidently a mistake. Lord MANSFIELD expressed no such opinion, unless we might infer it by his use of the word "capture," in speaking of pirates. The question before him was the right of the assured *to abandon*, in case of a capture by an enemy. Their right to abandon in case of a taking by a *pirate* was admitted. And he said that, *in regard to the right of abandonment*, the two cases were upon the same footing. The remark was strictly applicable to the point under consideration; and the correctness of it, as a rule of law, has never been denied. In either case, the insured may abandon at any time before a recovery or a restoration.

In *Naylor* v. *Palmer*, 8 Exch., 739, same case, 10 Exch., 322, the loss was by an insurrection of Coolie passengers. A similar loss seems to have been held a case of *seizure* in *Kleinworth* v. *Shepard*, before cited. In the latter case, the declaration alleged it to be a loss by "piracy," and this was admitted by demurrer. In the former case, there was no such admission. It is doubtful if the Court, in either case, would have held it to be a loss by *piracy*. The *general clause* in English policies is broader than in most American policies, covering "all other perils, losses, or misfortunes." And, though these words have been construed to mean other perils *of a like kind*, they sometimes embrace losses that otherwise would not have been covered by the policy. *Cullen* v. *Butler*, 5 M. & S. 461; *Butler* v. *Wild-*

man, 3 B. & A., 398. And the decision in *Naylor* v. *Palmer* was put, not on the ground that the acts charged were *actually* piratical, but that they were within the general clause in the policy. "They were either direct acts of piracy, or acts so entirely *ejusdem generis*, that if not reducible to the *specific* words of the policy, they are clearly included in the *general* words." The decision does not rest on the ground that it was either a *seizure* or a *capture*.

Only one American case has been cited. In *McCongo* v. *N. O. Insurance Co.*, 10 Rob. Lou. Rep. 202, 334, it seems to have been held that a loss by an insurrection of slaves, who took the vessel on which they were being transported, and escaped, was a loss by *capture*, or *seizure*. It is not easy to perceive how such a taking could be held to be piratical, even of the *vessel*, if it was taken only for a temporary purpose, in order to escape. The slaves might, however, be said to have *seized* the *vessel*. But we should hardly be willing to assent to the conclusion that they either captured or seized *themselves*, so as to render the insurers liable for their value.

Two, only, of the cases cited, appear to have any direct bearing on the question before us. In *Powell* v. *Hyde*, 34 Eng. Law & Eq., 44, a British vessel was fired upon, by mistake, by a Russian battery. The policy contained an exception of "capture, and seizure, and the consequences of any attempt thereat." It was held that the loss was within the exception, and that the insurers were not liable.

In *Kleinworth* v. *Shepard*, before named, the taking was admitted by the pleadings to have been piratical. The policy contained a warranty in the same terms as in the case before us; and the loss was held to be within the exception, so that the insured could not recover. No distinction can be perceived between that case and the one at bar.

The plaintiffs rely upon the definition given to the word "capture," by the elementary writers upon the law of insurance, as showing that it is not applied to a taking by pirates.

But in this respect such writers do not agree in their definitions, as may be readily seen by a comparison.

Of those who apply it only to a taking by an *enemy*, are the following: —

"*Capture*, as applied to the subject of marine insurance, may be said to be the taking of the ships or goods belonging to the subjects of one country, by those of another, when in a state of public war." Park, c. 4.

"*Capture*, properly so called, is a taking by the enemy as a prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken." 2 Arnould, § 303.

"*Capture* may be said to be, as applied to this subject, the taking of the ships or goods belonging to the subjects of one country by those of another, in time of war. * * An averment of a loss by *capture* cannot be sustained, unless the ship was taken *jure belli*." Hildyard, Law and Eq. Lib., 288, 302.

Jacob, in his Law Dictionary, has followed Park; and numerous cases might be cited in which courts have used the word in this sense.

Other authors have used the word in a wider sense, embracing *piracy*, and all other tortious takings.

"*Capture* is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, *or by a pirate*, with intent to deprive the owner of it." Marshall, 422.

Phillips, in his work on insurance, is somewhat indefinite; but he says that the "words capture and detention are broad enough to comprehend perils arising from pirates." Vol. 1., 2d ed., 651.

The same definition given by Marshall is repeated in 11 Petersdorf, 180; and in Bouvier's Law Dictionary. Tomlins defines the word as "the taking of a prey, an arrest, or seizure."

And piratical seizures have generally been called "captures," by eminent lawyers and Judges, from Lord MANSFIELD'S day to the present time. 1 Conk. Adm., 450;

Manro v. *Almeida*, 10 Wheat., 473. The same language is applied to pirates as to belligerents. They are called *enemies* — "*hostes humani generis*;" and are said to "*commit hostilities* upon the subjects of all nations." It is therefore natural and appropriate that their depredations should be called "captures."

There can be no doubt that the words "capture and seizure," in their general signification, are broad enough to embrace a taking by pirates. The plaintiffs rest their case upon the proposition that, in contracts of insurance, these words have acquired a restricted meaning, which does not embrace such a taking. The burden is upon them to establish the proposition; for words are presumed to have been used in their general and ordinary sense, unless the contrary appears. Therefore, unless it is reasonably certain that the parties used and understood the words in a restricted sense, we must construe them as they are generally used and understood. And we cannot come to the conclusion that these words have acquired any special, limited, or restricted meaning. Applied to contracts of marine insurance, they embrace all that, in their ordinary signification, they describe, so far as such risks may be affected thereby. The fact that elementary writers and courts have differed in their understanding or use of them, unless we conclude that those who have used them in a broad and general sense were in error, does not sustain the case for the plaintiffs. This we cannot do. There may be a difference, with no actual conflict. The word "capture" is properly applied to a *belligerent* taking, as stated by Park. We believe it to be just as properly applied to a *piratical* taking, as stated by Marshall; and that an insurance against "capture" would cover both risks, unless the parties specially excepted one or the other.

We might, perhaps, have based the decision on a different ground, as stated in considering the first question presented. Though the taking was piratical, it was also belligerent. War, *in fact*, existed at the time of the loss.

Hostile forces, each representing a *de facto* government, were arrayed against each other, in actual conflict. Its existence would not have been more palpable or *real*, if it had been recognized by any legislative action. And, though it was a civil war, the taking was not the less a *capture* for that reason.

But the other questions were legitimately raised by the facts in the case, and they have been argued by able and eminent counsel. We have endeavored to give the subject the attention it deserved, and have come to the conclusion that such a felonious and forcible taking on the high seas was both piratical and belligerent, and in either case was a capture and a seizure, within the terms of the warranty; and that the insurers are not liable. The default is therefore to be stricken off, and the case to stand for trial.

APPLETON, C. J., KENT, WALTON, DICKERSON and DANFORTH, JJ., concurred, holding that the taking, whether piratical or not, was the act of a belligerent, and to be regarded as a capture.

CUTTING and BARROWS, JJ., dissented, holding that the taking was piratical, but not a capture, seizure or detention, as understood in contracts of insurance.

ALBERT TREAT *& als.*, *Complain'ts*, *versus* JOHN P. BENT.
SAME *& als.*, *Complain'ts*, *versus* WALDO T. PIERCE.

A complaint for *forcible entry and detainer* must disclose enough upon its face to give the Court jurisdiction without a resort to parol testimony.

When the complaint shows that the complainant lives in the county in which the estate lies, it cannot be signed and sworn to by his agent or attorney, unless it also shows that the complainant is "out of the State, or sick, or, for other reasons, unable to attend personally before the Court."

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

The facts were the same in both cases, and are stated in the opinion, so far as they affect the questions of law decided.

Rowe & Varney, for complainants.

J. A. Peters, for each respondent.

The opinion of the Court was drawn up by

CUTTING, J. — Complaints under the statute for forcible entry and detainer, dated August 15, 1862, wherein "Albert Treat of Bangor, in the county of Penobscot, and *Robert Treat* of said Bangor, and Webster Treat, Franklin Treat, and Emeline M. Treat of Frankfort, in the county of Waldo, by their agent, the said Albert Treat, and Waldo P. Treat of said Frankfort, by his guardian, Albert Treat, complains," &c.

The process in each case was originally brought, and certain proceedings had, before the Police Court for the city of Bangor, where the respondent appeared and moved the Court to quash the complaint, because therein it appeared that one of the claimants, *to wit*, *Robert Treat*, was alleged to be a resident of Bangor, in the county of Penobscot, where the estate lies, and that, as it regards *him*, there could be no complaint signed and sworn to by an agent or attorney, which motion was overruled by the Court, and that ruling is presented for our consideration.

This process of forcible entry and detainer is one created and regulated by the statutes, and, in order to be maintained, must come clearly within their provisions. The statute relied upon by both parties, so far as the present inquiry is concerned, is that of 1862, c. 140, which provides that — "If the claimant lives out of the county where the estate lies, or is out of the State, or sick, or for other reasons unable to attend personally before said Court, the complaint may be made in his name, but be signed and sworn to by his agent or attorney, and, if out of the State, must be indorsed like writs."

The motion was to the jurisdiction of the Court, and should have been sustained, founded as it was upon the declaration as to the residence of *Robert Treat*. But it is said

there was evidence before the Court that he was at the time "out of the State." Before such evidence could be admissible, the complaint should have been amended, if amendable, so as to correspond with such fact, thereby enabling the respondent to put the same in issue, and also to call for an indorser, which could not have been legally furnished after the entry, and for that cause also the complaint might have been quashed. R. S., c. 81, § 9. In order to test the principle, we may consider *Robert Treat* to be the sole complainant. If he was out of the State, when process was commenced, it should have so appeared, and the process indorsed before entry, "like writs." It not so appearing, no indorser was required, but after entry, by such parol testimony it, so appearing, would render the process void on motion for want of an indorser.

But the record before us discloses no motion to amend, and evidence *dehors* the record, or a legal inference therefrom, is not admissible. The complaint itself should have disclosed enough upon its face to give the Court jurisdiction, without a resort to parol testimony, which can become no part of the record. *Complaints quashed.*

APPLETON, C. J., DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

HENRIETTA C. ADAMS *versus* COURTLAND PALMER.
SAME *versus* JOSEPH M. HODGKINS.
SAME *versus* MICHAEL SCHWARTZ.

Marriage is not a contract within the meaning of that clause of the constitution which prohibits the impairing the obligation of contracts.

A divorce granted by the Legislature is not invalid as impairing the obligation of contracts.

Such a divorce is valid in a case of which the Court, under existing laws, has no jurisdiction.

Especially, if it is granted by consent of the parties, and their consent may be inferred from their acts.

Prior to the Act of 1863 (c. 215) a release of dower, by a married woman under twenty-one years of age, was voidable.

The Act of 1863 (c. 215) cannot render valid a prior release of dower which was voidable when it was executed, and which, before the passage of the Act, had been avoided.

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

These were all actions of DOWER, depending on the same facts.

The defendants denied the marriage, and alleged a release of dower by the demandant. The facts bearing upon the question of marriage are stated in the opinion. The demandants claimed to avoid the release, because, at the time of its execution, she was under the age of twenty-one years.

A. Sanborn, for the plaintiff.

J. S. Rowe, for Palmer.

J. A. Peters, for Palmer and Hodgkins.

A. W. Paine, for Hodgkins and Schwartz.

The opinion of the Court was drawn up by

APPLETON, C. J.—On the 31st July, 1846, by an Act of the Legislature of this State, Franklin Adams was divorced from Mary Adams, then his wife. On the 18th Aug., 1846, he was married to the demandant. The validity of this marriage depends on the constitutional authority of the Legislature to grant a divorce.

(1.) The power of the British Parliament to grant divorces is unquestioned. The Legislature of this, and of most other States of the Union, have granted divorces in numerous instances,—and, unless there are found express constitutional prohibitions, the exercise of this power for a series of years would seem to be no insignificant argument in favor of the rightfulness of such exercise. But when, as in this State, it has the weight of long continued legislative

usage, sanctioned by the authority of our highest judicial tribunal, manifest and conclusive error must be shown in the conclusions to which this Court arrived, to induce us to reverse a deliberately formed opinion, upon the strength of which the Legislature have based their subsequent action, and upon the faith of which parties have entered anew into marital relations.

Notwithstanding a practice, continuing since the origin of the government, and its sanction by the opinion of this Court, in 16 Maine, 479, it is urged that the Legislature have no constitutional authority to grant divorces; that marriage is a contract like other contracts, that its obligation cannot be impaired without violating the clause in the constitution of the United States prohibiting the passage of any "law impairing the obligation of contracts;" that a divorce does impair their obligation; that the dissolution of the marriage contract is a judicial and not a legislative act; and that, consequently, the divorce of Franklin Adams from his then wife, by the act of the Legislature, before referred to, was void, and his subsequent marriage to the demandant null.

The argument of the learned counsel for the tenant assumes that marriage is a contract, like other contracts, and within the protection of the constitutional provision just referred to, as such, for if not, this branch of the argument has no foundation upon which to rest.

Upon examination, it will be found that there are grave and important differences between marriage and other contracts. All contracts, as such, depend upon the mutual and concurring assent of the parties thereto. They agree upon the terms. They define the respective rights, duties and obligations of each to the other. The contract may be for a longer or shorter period of time. Its terms may be changed, modified or dissolved, as the parties may determine. If the contract be violated by the one, damages may be recovered by the other for such violation. While the contract remains in its original vigor, the rights of the parties are

ever the same—their obligations ever the same. Their rights cannot be impaired by the Legislature. The contract is the law of the parties in reference to its subject matter—and remains unaffected by any change of domicil by the parties. Its origin, its continuance, and dissolution depend upon their will.

The contract *to marry* is like other contracts and subject to the same law. It is a contract to enter into a given relation—a peculiar *status*. But, when once the contract *to marry* has been performed, the original contract, antecedent to such marriage, is at an end. The parties, having complied with its terms, they cease to have rights under or by virtue of it. A new relation has been entered into, and the mere assent of the parties to enter into such relation does not thereby make such relation a contract.

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life; and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other.

The rights, duties and obligations arising under contracts are every where the same. Those of the marriage relation change with the change of domicil, and are dependent upon its laws. Foreigners do not bring with their families the laws relating to marriage of the place where they entered

into that relation. A marriage in France and a change of domicil to England, the law of husband and wife as established there governs the parties so long as their residence continues—to be modified anew by a further change of domicil. In other words, the legal obligations arising from the relation of marriage vary with that of the law of the State to whose jurisdiction the parties may be amenable. But at any given time, the law of marriage of any State, for all its inhabitants, is one and the same, but it may vary as the sovereign power of the State shall determine.

So, too, the law of divorce depends not upon that of the place, where the relation of marriage is entered into, but upon that of the place where the dissolution is sought to be obtained. The law of France would determine the causes of divorce, if sought for, while the parties were there domiciled. If they should change their domicil to America, the *lex loci*, where they should establish their residence, would prescribe the causes for and on account of which a dissolution of marital relations would be decreed. Nor is this all. The causes of divorce may be changed by the Legislature after marriage. They may be increased or diminished, and a divorce will be granted according to the law on that subject, when the libel is filed or the decree made, and not as it was when the ceremony of marriage was performed. New causes for divorce may be enacted, and the antecedent marriage will be dissolved for grounds subsequently deemed sufficient for its dissolution. Each State for itself is the exclusive judge of what shall be a valid cause for dissolving this relation, no matter when or where it was entered into.

Marriage, though in some of its aspects resembling a contract, is rather to be regarded as a social relation; a *status* with duties, rights and obligations established by the law of the State where the parties have their domicil, not by that of the State where the relation is formed; much less by that of their own will and pleasure. It is not then a contract within the meaning of the clause of the constitution, which prohibits the impairing the obligation of contracts. It is

rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds — but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.

"*Tunc genus humanum primum mollescere coepit.*"

That marriage is not to be regarded as a mere contract seems to be a view in accordance with the almost universal concurrence of authorities. "Marriage," observes ROBERTSON, C. J., in *Maguire* v. *Maguire*, 7 Dana, 181, "though in one sense a contract, — because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, is nevertheless *sui generis*, and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent of contracting parties, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good or justice to both or either of the parties will thereby be subserved. Such a remedial and conservative power is inherent in every independent nation. * * And, therefore, marriage, being much more than a contract, and depending essentially upon the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. "The obligation is created by the public law, subject to the public will, and not to that of the parties." "Marriage," observes Mr. Justice STORY, in his Conflict of Laws, § 108, "is not treated as a mere contract between the parties, subject, as to its continuance, dissolution and

effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society." The same views are enforced with great ability by AMES, C. J., in *Ditson* v. *Ditson*, 4 R. I., 87. "Now marriage," he observes, "in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the *domestic relations*. In strictness, though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrolled by any contract they can make. When formed this is no more a contract than "fatherhood" or "sonship" is a contract, * * as every nation and State has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory."

Not being a contract within the meaning of that term, as used in the constitution, legislative divorces are not invalid, as impairing the obligation of contracts. *Starr* v. *Pease*, 8 Conn., 541; 16 Maine, 480; Bishop on Marriage and Divorce, § 775; *White* v. *White*, 5 Barb., 474.

Neither is a divorce to be regarded as strictly a judicial and not a legislative act. "There would, therefore, upon principle, seem to be no reason why the granting of a divorce should not be either a legislative or a judicial act; legislative, when it is performed as a mere exercise of sound discretion, for the good of the parties and of the public, in which case vested rights could not be divested, but only their social relation or *status* for the future ascertained and established; judicial, when the divorce is demanded as a right under established laws, in consequence of some breach of duty committed by the offending party." Bishop on Mar. and Div., § 787. Thus, in England, although divorces may be granted by the courts, still the power of Parliament to grant them none the less exists.

But, if this were more questionable than we deem it to be, it

cannot be doubted that the *status* of parties may be changed by the Legislature, with their mutual consent; and such consent need not be express, but may be implied. In the case before us, the assent of the parties may be inferred from the act itself and their subsequent conduct. The husband was to pay a certain sum, within a limited time, to the previously appointed trustee of the wife, for her benefit. This he did, and the wife, or her trustee, received the payment. She ceased to claim a continuance of her marital rights. Nay, more, she entered into new marital relations, and hence, neither objected to, nor was in a condition to object to the new ties which her husband had formed with the demandant.

The result is, that the divorce of Franklin Adams from his former wife was legal, and his marriage with the demandant valid.

(2.) The demandant, while yet a minor, on 1st Dec., 1849, released her right of dower, by joining with her husband in a deed of the demanded premises of that date, to Amos M. Roberts, through whom the tenant derives his title.

The marriage between the demandant and Franklin Adams was, then, legal. During their intermarriage, he was seized in fee of the premises in which dower is demanded. He has deceased, and, since his death, his widow has demanded dower therein, which being refused, she has commenced this suit.

Upon these facts, she has a right to have dower assigned her by the common law. So, the statute then in force gave her dower "unless lawfully barred thereof." R. S., 1841, c. 95, § 1.

The mode by which dower could be "lawfully barred" is provided by § 9:—"A married woman may bar her right of dower, in any estate conveyed by her husband, by joining with him as a party in the deed of conveyance, and thereby releasing her claim of dower, or by a subsequent deed executed jointly with her husband, or legally authoriz-

ed guardian of her husband." As the demandant joined with her husband in his deed, she would be barred thereby, unless by reason of her infancy she can avoid her deed, which she attempts to do.

The statute in question manifestly refers only to the disability arising from the marriage relation. But at this time the wife was laboring under another and distinct disability — that arising from her infancy.

The disability from marriage arises from the presumed influence or possible coërcion of the husband. That of the minor, from the want of sufficient business capacity to act understandingly in the affairs of life. These are separate and distinct disabilities. They may exist separately or they may coëxist. When coëxisting, the removal of one is in no way the removal of the other. If the wife had been insane, she might have avoided her deed. So it is with infancy. 1 Washburn on Real Property, 199. *Priest* v. *Cummings*, 16 Wend., 617; S. C. 20 Wend., 338. *Sandford* v. *McLean*, 3 Paige, 117; *Webb* v. *Hall*, 35 Maine, 336. The case of *Sherman* v. *Garfield*, 1 Denio, 329, is directly in point. The Supreme Court of New York there held, that a prior wife surviving her husband could maintain ejectment for dower notwithstanding her conveyance while a minor, although she had done nothing to disaffirm it. That this is the right construction is established as well by the authorities cited, as by the Act of 1863, c. 215, by which the release of dower by a married woman *of any age*, &c., is made valid. The insertion of the words "of any age" clearly enlarge the meaning of the section and were so intended, else there would have been no necessity for their insertion.

(3.) The demandant not being bound by the then existent law might avoid her deed and recover dower. This she has undertaken to do. She has demanded dower, commenced her suit for its recovery; and is entitled to recover her rights, as existing when her suit was brought, unless they have been divested by the Act of 1863, c. 215, § 1,

which is in these words:—"The release of dower by a married woman of *any age*, *now* or hereafter made, by joining in the deed of her husband in the manner required by law, shall be valid."

This section is undoubtedly effective as to the future. The material question is whether, as to the past, it establishes a new rule by which courts are to be governed.

The release of the demandant was voidable. It has been avoided. Having been avoided, it is as if it had never been made. The demandant, therefore, is in the same position as any other demandant in dower. But the right of a widow to recover dower differs not from that of a demandant in ejectment, seeking to recover premises of which he has been disseized. Both are mere rights—both property. The right to recover an estate in dower and to recover one in fee, rest alike upon the same law. The same reasoning which would authorize the Legislature to transfer, by Act, the estate of the widow to the reversioner, would equally authorize the transfer of the fee to the demandant in dower. The demandant in dower and the demandant in ejectment, are both seeking to obtain possession. Their rights rest alike in action. That one is more valuable than the other in no way affects the question. The sanctity, the law throws around the one, is not greater than the protection, it affords the other.

If dower had been assigned, could the Legislature, by a change of law affecting the past, declaring that to be law which was not *then* law, take the estate in dower, thus legally assigned, and transfer it to another? If it could do this as to a doweress, what safety would the owner in fee have, that his estate might not be liable to a similar exercise of legislative power? The difference between the case supposed and the one at bar, consists only in this—that, in the former, dower has been assigned and the doweress is in possession, while, in the latter, she is seeking to recover that possession. In the one case it is the right *of* possession; in the other, the right to be *in* possession.

Before the passage of the Act of 1863, c. 215, the demandant, by the preëxisting law, was entitled to dower, because, not being barred by her release, by reason of her infancy, her rights were the same as if it had not been given. She stood precisely as every other widow with an unquestioned right of dower. Has the Act deprived her of that right? In other words—for it comes to that—can the right of a widow to recover dower be taken from her by an Act of the Legislature and given to the reversioner? If so, the tenure by which her rights—by which all rights are held, depend, not on the law as existing when they became vested, but upon the fluctuating will of a legislative assembly. No rights are or can be secure. The arbitrary will of the Legislature controls alike the past and the present, as well as establishes the law for the future.

It is provided by the constitution of this State, art. 1, § 6, that no one shall "be deprived of his life, liberty, PROPERTY, or privileges, but by the judgment of his peers or the laws of the land."

A widow to whom dower has been assigned is thereby seized of a freehold estate. Before its assignment, it is a vested right to recover a freehold; differing from a vested right to recover an estate in fee, of which one has been disseized, mainly in the lesser interest at stake. One is as much property as the other. Both are alike entitled to the protection which the constitution guaranties to the PROPERTY of the citizen.

"The law of the land," remarks TENNEY, J., in *Saco* v. *Wentworth*, 37 Maine, 171, "does not mean an Act of the Legislature; if such was the true construction, this branch of the government could at any time take away life, liberty, *property* and privilege, without a trial by jury." "The words 'by the law of the land,' as here used," remarks BRONSON, J., in *Taylor* v. *Porter*, 4 Hill, 140, referring to the constitution of New York, "do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory,

and turn this part of the constituton into absolute nonsense. The people would he made to say to the two houses, you shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights and privileges of a citizen, unless you pass a statute for that purpose; in other words, you shall do no wrong unless you choose to do it." "An Act of the assembly whereby a man's property is swept away from him without a hearing, trial or judgment, or the opportunity of making known his rights or producing his evidence, is not a *law of the land* within the meaning of the 9th section of the declaration of rights, as set forth in the constitution of Pennsylvania. By the law of the land, as set forth in the constitution of Pennsylvania, is meant the law of an individual case as established in a fair and open trial, or an opportunity given for such a trial in open Court, and by due course and process of law." *Brown* v. *Hummell*, 6 Barr., 86. In other words, no one shall be deprived of his property, unless by one having a superior right or title thereto judicially established. It cannot be done by mere legislation. It is for the Legislature to prescribe laws for the future. It is for the Courts to apply the law as then existent to the facts as ascertained by proof.

Acts similar to the one under examination have not unfrequently received the consideration of Courts and with an almost uniform result. An Act of the assembly legitimating the children of a bastard cannot divest an estate which had previously passed, by the death of the mother of the bastard, to her heirs at law. *Norman* v. *Heist*, 5 W. & S., 171. "The right of property," observes GIBSON, C. J., in delivering the opinion of the Court in the case just cited, "has no foundation or security but the law; and when the Legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more. The estate was lawfully *vested* in the plaintiffs, who were the next heirs to their intestate sister, at her death; it was guaranteed to them by the constitution and the laws; and to

have despoiled them of it, in favor of the supposed natural right of the grandchildren, would have been as much an act of despotic power, as it would be had the grandchildren been strangers to the intestate's blood." So the Legislature of Pennsylvania passed an Act directing "that every last will and testament *heretofore* made, or *hereafter* to be made, &c., to which the testator has made his mark or cross, shall be valid. This was held unconstitutional as to a will dated and proved *before* its passage. *Greenough* v. *Greenough*, 1 Jones, 489. "It is destitute of retroactive force, not only because it was an Act of judicial power," observes GIBSON, C. J., "but because it contravenes the declaration in the 9th section of the 9th article of the constitution, that no person shall be deprived of life, liberty and *property*, except by the judgment of his peers and the law of the land. Taking the proof of the execution, at this stage of the argument, to be defective, under the Act of 1833, it would follow that the plaintiff had become the owner of a third of the property in contest, by the only assurance any man can have in his property—the law. Yet the Legislature attempt to divest him of it, by a general law, it is true, but one infringing on particular rights." In *Killam* v. *Killam*, 1 Am. Law Register, 18, the same Court held that an estate already descended could not be divested from the legal heirs and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the Legislature may cure the taint of a bastard blood for the purposes of future inheritance. In *White* v. *White*, 5 Barb., 474, it was held that the statute of New York, for the more effectual protection of the property of married women, so far as it purported to deprive the husband of his *then* existing right over the property of his wife, was unconstitutional and void. It was valid in its prospective operation, but could not deprive the husband of his vested rights of property.

In *Westerveldt* v. *Gregg*, 2 Kernan, 203, it was held that the husband had a vested interest in a legacy, which was bequeathed to his wife, before the passage of the Act

for the more effectual protection of the property of married women, though the legacy *had not been reduced to* possession when the Act took effect; and that the Legislature had not the power to deprive the husband of his rights to such property and make it the sole and only property of the wife; and that, so far as the Act purports to do so, it violates the provision of the constitution which declares that no person shall be deprived of "property without due process of law." "A right to reduce a chose in action to possession, is one thing," observes EDWARDS, J., "and a right to the property which is the result of the process by which the chose in action has been reduced to possession, is another and different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defence, and the other is a vested right to the thing, after it has been obtained. * * The husband was then entitled to receive the legacy as his own, by taking the necessary legal proceedings, and he will now be entitled to receive it, unless the right which he then had has been taken away, and, if that right has been taken away, he has lost a vested right of the value of the legacy in question." But this, the Court held, was not the case, and that the Act, so far as it purported to interfere with the right of the plaintiff anterior to its passage, was void. The same views were affirmed in *Norris* v. *Boryea*, 3 Kernan, 288. So, in *Strong* v. *Cline*, 12 Indiana, 37, it was held, that, though a statute cannot take away the vested rights of dower or courtesy, it can those which are merely inchoate. These general principles, denying the power of the Legislature to take away vested rights from one and transfer them to another, have likewise received the deliberate and repeated approval of this Court, as well as of the Supreme Court of the United States. *Kennebec Purchase* v. *Laboree*, 2 Maine, 275; *Austin* v. *Stevens*, 24 Maine, 250; *Webster* v. *Cooper*, 14 How., 488.

The cases cited by the counsel for the tenant will mainly

be found to be those in which a perfect legal right would have been created, but for an accidental omission of some formality required by the statute. Thus, in *Pratt* v. *Jones*, 25 Vt., 303, a statute of Vermont, making levies valid, notwithstanding certain informalities, was held constitutional, though applicable to levies made before its passage. Referring to the Act in question, REDFIELD, C. J., says:—"It pertained purely to the remedy, and was, in effect, enlarging the remedy, instead of restricting it, and advancing the right on one side, without denying it on the other. If this levy was of the nature of a contract between the parties, or a statute bar, it might be more questionable how far the Legislature could divest it. But, as it was, it seems to us not in any sense to impair or vary the obligation of the contract, but only to *qualify the effect of certain evidence*, created by the plaintiff altogether under a misapprehension of its effect; and thus to advance the remedy, and disturb no rights, which the law can recognize as valuable, or justly entitled to be regarded as inviolable." But, when the sheriff's sale is absolutely void, a confirmatory Act will be of no avail. *Dale* v. *Medcalf*, 9 Barr., 110.

In *Watson* v. *Mercer*, 8 How., U. S., 88, an Act of the State of Pennsylvania, providing that no deed, &c., should be "deemed, held and adjudged invalid, or defective, or insufficient in law, or avoided, or prejudiced, by reason of any informality or omission in setting forth the particulars of the acknowledgement, &c., in the certificate thereof," was held constitutional. "The Act," observes STORY, J., in delivering the opinion of the Court, "supposes the titles of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance, made by them, shall not be void, because there is a defective acknowledgement of the deeds by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to *confirm* and not to impair the contract of the *feme covert*." In *Satterlee* v. *Matthewson*, 2 Pet., 380, the decree of the Court is best sustained by the opinion of Mr. Justice JOHNSON,

who concurred in the result to which the rest of the Court arrived, but who resisted the "portentous doctrines," as he termed them, announced by Mr. Justice WASHINGTON. In *Wilkinson* v. *Leland*, 2 Pet., 627, a statute, confirming the sale of the property of infant heirs, to pay the debts of the decedent, was held valid. But, at that time, the State of Rhode Island had no constitution, but was acting under its original charter derived from the king. But, in delivering the opinion of the Court, STORY, J., remarks, "we know of no case in which a legislative Act, to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to the Legislature the power to *divest* the *vested* rights of property and transfer them, without the assent of the parties."

So, too, where a legal right to property exists in persons incapable, by reason of some disability, as insanity, infancy, &c., of exercising the ordinary functions of ownership, statutes have been enacted authorizing the sale or pledge of their property to raise money for their necessities — and their validity has been sustained, when the application of the money thus produced would not alter the rights of the parties. But this is merely the removal of a temporary bar to the complete enjoyment of property — the mere modification of previous legislation.

But the cases to which we have been referred differ entirely from the one at bar. The Act in question is not a confirmatory Act. The release of the demandant was voidable and was avoided before its passage. It was as though it had never been. There was no release to confirm, because it had previously been avoided. An insane person may execute a deed, and when sane, may avoid it. So may a minor avoid his conveyances when he arrives at full age.

But, after the sane man has avoided his contracts made when insane, and the man of full age, those of his infancy, can the Legislature breathe life into the acts thus avoided, and make valid the avoided deed of the insane man, or render the rescinded contract of the infant binding? It would be to decree that parties should be bound by cancelled deeds or rescinded contracts.

The avoidance of a deed is as much an act as its execution. The rescission of a contract is as much an act as the making of one. Now the statute in question, if valid, does not so much confirm a deed, by retrospectively removing the then existing disability of infancy, as it imposes a disability upon the demandant by annulling her act of avoidance done when by the law she was perfectly competent to act. The confirming a voidable deed *before* its avoidance is one thing; to confirm it after it has been avoided is another and different thing, and that is precisely what the statute does, if effectual. Whether the statute under consideration be regarded as an attempt to render valid a voidable deed after its avoidance, or as annulling a valid act after its execution, or as an union of both, is immaterial. Both are alike beyond the legitimate functions of legislation.

The result is, that the Act of 1863, c. 215, so far as it is prospective in its operation, is valid and binding, but it cannot divest the demandant of rights vested in her before its passage under and by virtue of preëxistent law.

The cases to stand for trial.

CUTTING, DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

THADDEUS ADAMS *versus* EBEN G. MORSE.

A reservation, in the conveyance of a saw-mill, of "all the slabs made at said mill," is not valid, as against subsequent grantees.

Evidence that "there has always been a custom at a certain saw-mill and other mills in the neighborhood to leave the slabs as belonging to the mill, the owners of the logs never claiming them," does not establish a legal right in the mill as real estate to the slabs sawed.

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

A. W. Paine, for plaintiff.

J. A. Peters, for defendant.

The opinion of the Court was drawn up by

KENT, J. — The plaintiff went on to a mill lot in possession of defendant, with his team and took a load of slabs, and was proceeding home with them, when the defendant forcibly took the slabs away, while the team was on the mill lot. The plaintiff claimed no right to the slabs or to the logs from which they were cut, or to the premises covered by the mill lot, except by virtue of what he claims to be a reservation in his deed of the lot and mill, executed thirty years ago, to one Rich, of five-eighths undivided. The descriptive part of that deed contained this clause, — "I, the said Adams, do hereby make a reservation for drawing water from the saw-mill dam for the use of my blacksmith shop at all times I may want, but not to the injury of the grist-mill; also, all the slabs made at said saw-mill, except what said Rich may want for his own particular use, together with a privilege of burning said slabs into coal on land belonging to said saw-mill on the easterly side of the stream; and I, said Adams, do agree to clear away all the slabs once in every year from the saw-mill."

After the record of this deed, Rich conveyed the premises granted to him, and, by several mesne conveyances, the title to the whole lot, including the other three-eighths, came to

Ellison, who leased the mill to the defendant, who, by the agreement or lease, was to have the slabs made by him. The particular slabs in controversy were sawed from logs of one Merrill, at this mill by defendant, and Merrill was to have one half of the slabs by agreement.

The plaintiff claims that this clause, in the deed given by him, secures to him an absolute property in all the slabs cut at that mill for all time, and whoever may be the owner of the mill, or of the logs from which they are cut. He claims this property by virtue of what he regards as a valid reservation in his deed, by which this right became attached to the real estate to run with the land forever.

In the discussions to be found in the books on this subject, nearly all fall back, for the definition of reservations and exceptions, to the language of Shepard, in his "Touchstone," p. 80. He there defines a reservation to be "a clause of a deed whereby the feofee doth reserve some *new thing* to himself *out of that which he granted before.* This doth differ from an *exception* which is ever a part of the thing granted, and of a thing *in esse* at the time, but this (reservation) is of a thing newly created or reserved *out of a thing demised*, that was not *in esse* before."

In these definitions, it will be perceived that both a reservation and an exception must be a part or arise out of that which is granted in the deed. The difference is only that an exception is something taken back out of the estate, then existing and clearly granted, whilst a reservation is of something issuing out of what is granted. A man grants a tract of land, described by metes and bounds, except one acre, also particularly described. This is an exception, for the acre never passes. Another man grants without any exception of any part, but reserves rent or some right to be exercised in relation to the estate, as to cut timber, or to have an easement therein. This is a reservation. Shepard further defines a reservation, — "that it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of

another thing. If one grants land yielding for *rent*, money, corn, a horse, spurs, a rose, or any such like thing—this is a good reservation, but, if the reservation (not exception) be of the grass, or of the vesture of the land, or of a common or other profit to be taken out of the land, these reservations are void." The reason is given in Brooke's Abridgement, title Reservation, pl., 46, that "it is a reservation of a parcel of the thing granted, and is not like where a man leases his manor, except white acre, for there the acre is not leased, but here the land is leased, therefore the reservation of the herbage, vesture or profits of the land or the like is void." Lord COKE, Co. Lit., 47, a, says—"a man on his feoffment or conveyance cannot reserve to himself parcel of the annual profits themselves for that would be repugnant to the grant." *Borst* v. *Emple*, 1 Seld., 33.

In the case at bar, it is clear that the whole title of the grantor was conveyed without *any exception*. The question is—was the reservation of the slabs valid? The first objection to such a construction is—that the slabs, or the right to have all the slabs that might thereafter be sawed at that mill, did not pass as part of the grant, unless it was a legal right attached to the mill and going with it, without any special words of grant in the deed.

The grantor, the plaintiff, had no legal title to all the slabs which might afterwards be sawed at that mill, when he conveyed—unless a custom, hereafter to be alluded to, gave such right.

It was not reserved as *rent*. No words are used denoting any such intent, and we do not understand, from the able argument of the plaintiff's counsel, that he contends that it can be so regarded. It is not a technical rent, because it is not an annual sum of money or its equivalent. It is not payable yearly, or at fixed times. It is not certain, either in quantity or time, and there is no condition of forfeiture, or right of entry upon non-payment.

It rather resembles profits, income from use of the pro-

perty, and such reservation, as we have seen, is void, as repugnant to the grant.

The question has passed from the original parties to the grant, and we are not called upon to pass upon the question whether, as between such parties, and whilst the property remained in the grantee, and he was the owner of the logs, it would amount to a contract by which the plaintiff might claim the slabs. The question now is, whether it was such a reservation as attached to the real estate and run with the land, and transferred the title of personal property belonging to a stranger.

Is this a "reservation of the thing out of that which he granted before?" The production of slabs, by one mode of sawing logs, is not a thing issuing or coming out of the thing granted, within the meaning of the law. The grant was of land and water and a mill. It does not limit or prescribe the use by the grantee. He may use it to saw logs or clapboards, or shingles, or any kind of lumber, or he may never saw logs at all; or he may change the use of the water, to carry a grist-mill, or may use other machinery which makes no slabs.

It is true, that, in this case, the operations of the mill did result in the producing some slabs. But surely every thing that may be manufactured at a mill does not arise, come out of the thing granted, so as to become a part of the realty, or so as to be the subject of a grant or reservation in the conveyance of the estate.

Whatever does come out, may be—as rent, or timber on the land granted. A grist-mill, which derives its pay and its profits from toll in kind, as most of such mills do, may be granted, and a reservation of a portion of the toll, after it is separated, might be good, if not void as being a part of the profits. Why? Because it is a thing issuing out of the mill granted, and separated as the mill's portion. But a reservation of one half of all the corn or wheat brought to that mill to be ground, by strangers, would not be. If a man should give a deed of a cotton factory and land there-

with, it would hardly be contended that he might reserve every tenth yard of cotton cloth manufactured at that mill forever. So, of a fulling-mill or a tannery. If slabs may be reserved in a deed of a saw-mill, then every tenth board may be reserved, whoever may be the occupier. No man can thus attach another man's personal property to his realty, and either pass it or reserve it, simply on the ground that he, or his mill, have changed the form of it by manufacturing it.

In the case of *Wickham* v. *Hawkers*, 7 Mee. & Welsby, 63, cited and relied upon by the plaintiff, the decision was that a *reservation*, in terms, to come upon the land, and there hawk, hunt, fish and fowl, was *not* in law a reservation, but a new grant of a license or liberty so to do.

So, the reservation of the best beast of the tenant in possession for the time being, rests upon the old feudal law in relation to heriots. By this law, by heriot service, or custom, the best beast on the land becomes the property of the lord of the manor. "A heriot goes with the reversion as well as rent, and the grantee of the reversion shall have it." Jacob's Law Dict., "Heriot." The beast thus becomes attached to the freehold. We have no such service or custom, and therefore, those cases in the English books, which recognize the reservation in a deed of a beast, are not applicable here.

This is not a *condition* upon which the estate is held, and for breach of which the grantor might enter and reinvest himself in the estate. The words used do not import a condition. There is no covenant running with the land. *Parish* v. *Whitney*, 3 Gray, 516.

The plaintiff offered to prove (if admissible) that there had always been a custom at this mill and also at other mills in the neighborhood, to leave the slabs as belonging to the mill, the owners of the logs never claiming the slabs, and that no such claim was ever before made at this mill. The only legitimate purpose to which such evidence could be applied in this case, would be to establish a legal right in the

mill as real estate, to the slabs thus sawed. But such right could not be established by a custom such as it is proposed to prove.

The question is not discussed in the arguments, and it is clear that it cannot avail the plaintiff. *Waters* v. *Lilley*, 4 Pick., 145; *Perley* v. *Langley*, 7 N. H., 233; *Freary* v. *Cook*, 14 Mass., 488. If the owners of logs at the mills or some of them in the vicinity have not heretofore claimed the slabs, it may have been because until recently they have been of no value and rather an incumbrance. The only custom alleged is that the slabs have been left as belonging to the mills. This may have arisen from various causes, and does not necessarily show that the *right* has been admitted — even if such tacit admission by custom could avail to establish the right. The custom, as stated, is not general. It is only of this mill and other mills (not all) in the *neighborhood.*

It is unnecessary to consider other points made in the defence, involving the questions — whether an owner of an undivided portion can make a reservation like this, — whether the neglect to clear away the slabs according to his agreement did not avoid the reservation, — whether this reservation was at all events to extend beyond the time that Rich, the grantee, held the premises, as it contemplated a right in him to select and hold all the slabs he might want for his own use, — whether the provision as to burning the slabs on the land does not imply that they are only reserved for the purpose of making coal for the blacksmith shop referred to in the first reservation of water, — and perhaps some other questions which might arise between the plaintiff and his immediate grantee. *Plaintiff nonsuit.*

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

ISRAEL B. NORCROSS *versus* BENJAMIN W. THOMS.

From evidence that a person uses his own property in such manner as to injure another in his property, comfort, or convenience, the jury would be authorized to infer that he was guilty of nuisance.

ON EXCEPTIONS, to the ruling of CUTTING, J.

CASE to recover damages by reason of an alleged nuisance maintained by the defendant.

It was proved that the defendant moved a blacksmith's shop within twelve feet of the plaintiff's hotel, and that, by reason of the black cinders, dust and ashes arising from the shop, the plaintiff was injured in his property and subjected to inconvenience and loss.

Defendant contended that a blacksmith shop is not in itself a nuisance; and that the injury alleged and proved by plaintiff did not bring said shop within the legal definition of nuisance, and that unless defendant exercied his vocation in said shop in a manner unusual, extraordinary, or out of the usual course, to the damage of the plaintiff, he could not recover.

The presiding Judge instructed the jury that, if defendant erected, continued, or used said shop for the exercise of his trade, and by reason thereof plaintiff was injured in his property, comfort, or convenience, the jury would be authorized to infer that defendant was guilty of nuisance and liable in damages.

The verdict was for plaintiff, and the defendant excepted.

F. A. Wilson, for defendant.

The instruction was too broad. An injury to one's *convenience* is not made a nuisance by our statute. It embraces only injuries to comfort, property, or enjoyment of one's estate. The common law is the same.

Briggs, for plaintiff.

The opinion of the Court was drawn up by

DICKERSON, J.—This is an action on the case for an in-

jury sustained on account of an alleged nuisance. This form of action, as its name imports, is the appropriate remedy for injuries arising in particular cases which do not fall within the ancient and technical formulas, and which would otherwise be without remedy.

It is not practicable to give a precise, technical definition of what constitutes a nuisance at common law. Blackstone in his Commentaries, vol. 3, p. 215, defines a nuisance to signify "anything that worketh hurt, *inconvenience*, or damage." "All the acts," says Bishop, 3 Crim. Law, § 848, "put forth by man, which tend directly to create evil consequences to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of courts." The only accurate method of ascertaining the meaning of the term nuisance at common law, is to examine decided cases, adjudged to be, or not to be, nuisances.

A nuisance is distinguishable from trespass, since it consists in a use of one's own property in such a manner as to cause injury to the property, or other right, or interest of another. It is the injury, annoyance, inconvenience, or discomfort, thus occasioned, that the law regards, and not the particular business, trade or occupation from which these result. A lawful as well as unlawful business may be carried on so as to prove a nuisance. The law, in this respect, looks with an impartial eye upon all useful trades, avocations, and professions. However ancient, useful, or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy. Though the nuisance be public, rendering the guilty party liable to indictment, the sufferer may recover compensation in a civil suit, proving special and peculiar damage to himself. *Cole* v. *Sproul*, 35 Maine, 161.

A reference to decided cases will aid in showing the nature, kind and extent of the injury necessary to render a party liable for maintaining a nuisance, and what trades and

occupations have been held to be so conducted as to constitute nuisances.

Being delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey, as many times in a day as if the obstruction had not existed, has been held a sufficient injury to maintain an action against the obstructer. *Greasely* v. *Codding*, 2 Bing., 263.

An injury to lands or houses which renders them useless, or even uncomfortable for habitation, is a nuisance. *Howard* v. *Lee*, 3 Sand., 281.

Using a smith's forge, *Bradly* v. *Gill*, Lutw., 69, operating a tobacco mill, *Jones* v. *Powell*, Hutt., 136, carrying on a tannery, *Pappineau's case*, 2 Str., 686, keeping a livery stable, *Coker* v. *Birge*, 10 Geo., 336, and manufacturing soap, *Brady* v. *Weeks*, 3 Barb., 157, under certain circumstances, have been respectively held to constitute a nuisance.

Our statute does not define a nuisance, but simply provides a remedy for *certain* injuries arising from a nuisance at common law. It does not deprive a party of his remedy for *other* injuries arising from the same source, but leaves the common law doctrine of nuisance in full force and effect. R. S., c. 17, § 8.

The business of a blacksmith, though honorable, necessary and useful, should be carried on so as not to injure others. The close proximity — twelve feet distant — of defendant's blacksmith shop to the plaintiff's hotel could scarcely be occupied as such without causing serious annoyance, and inconvenience to the plaintiff's guests, and consequent loss to himself. The instructions of the presiding Judge authorized the jury so to find, and, after a somewhat careful examination of the authorities, and the principles upon which they rest, we have not been able to discover any error in his instructions. *Exceptions overruled.*

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

YORK COUNTY M. F. INS. CO. *versus* A. O. BROOKS *& als.*

It affords a surety in a bond no defence, that it was signed by him, on the promise of the principal that he would procure the signature of a certain other person, if the obligee at the time the bond was delivered to him had no knowledge of the promise.

So, if one is induced to sign, supposing a forged name thereon to be genuine, the obligee being ignorant of the circumstances.

If the forged name be obliterated before the delivery of the bond, the rights of the obligors therein will not be altered or their liabilities affected thereby.

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

This was an action of DEBT on a bond to secure to the plaintiffs the faithful performance, on the part of A. O. Brooks, of his trust as agent of the plaintiffs, in collecting outstanding assessments. The bond sued on is signed by W. O. Brooks, John W. Perkins, and John Perkins, jr. Brooks did not appear to answer to the action.

It was admitted that John W. Perkins signed the bond on the promise of Brooks to procure the signature of Robert G. Perkins; and there was evidence that the name of said Robert was at one time upon the bond, but was afterwards completely erased.

John Perkins testified that he signed the bond supposing the signature of R. G. Perkins to be genuine, and that he was a man of property.

It appeared, from the testimony of R. G. Perkins, that he did not sign the bond, never authorized any one to put his name upon it—and was never requested to sign it. The bond came into the hands of the plaintiffs as it now appears.

McCrillis, for plaintiffs.

Briggs, for defendants.

The opinion of the Court was drawn up by

APPLETON, C. J.—The defendant, A. O. Brooks, having been employed by the plaintiffs as their agent to collect their

outstanding assessments, gave them the bond in suit as security for the faithful performance of his trust. The plaintiffs received it, ignorant of any agreement between him and the other defendants, or of any relations between them other than those arising from their respective signatures. Brooks having failed to pay over the moneys collected, the plaintiffs seek to enforce the bond in suit for the purpose of obtaining indemnity for the loss sustained.

John W. Perkins, the first surety on the bond, claims to be discharged because he "signed it on the promise of A. O. Brooks, that he would procure the signature of Robert G. Perkins," which he failed to do. The existence of this promise was unknown to the plaintiffs, and it is no fault of theirs that it was broken. This defendant neither signed the deed on condition nor delivered it as an escrow. He relied upon the promises of his principal, and he is not the first surety and, probably, will not be the last, who has found a reliance on such promises like leaning upon a broken staff. He undoubtedly expected the promise given to be performed, but the disappointment of his expectations constitutes no answer to the plaintiffs' claim. When a bond is signed and delivered, without any condition or reservation annexed, although under an expectation that it would be signed by others, it is the deed of the person signing, though it should not be signed by those whom he expected would sign it. *Haskins* v. *Lombard*, 16 Maine, 140. So, too, where a note payable to a bank was signed by the principal and one surety, an agreement, on the part of the principal with such surety, that he will procure another surety, which is not done, before he procures the note to be discounted, constitutes no defence, the officers of the bank not being conusant of such agreement. *Passumpsic Bank* v. *Goss*, 31 Vt., 315; *Dixon* v. *Dixon*, 31 Vt., 450.

It is admitted that the name of Robert G. Perkins, affixed to the bond, was a forgery, and was erased therefrom before its delivery to the plaintiffs, and so erased that there

was no appearance of his name ever having been on the bond, when delivered, or that it had ever been.

The other defendant, John Perkins, alleges that he "signed the bond on the faith of the name of Robert G. Perkins, whom he knew to be a man of property," but, as that was a forgery, he denies his liability. But it was his neglect that he was ignorant of the genuineness of the signatures which preceded his own. He imposed no conditions limiting the legal effect of his signature. A surety on a bond cannot interpose, as a defence against paying for the defaults of his principal, that the name of another surety, upon the same bond, was obtained by fraud, unless the signature of the latter was a *condition* by which to obtain that of the former. *Franklin Bank* v. *Stevens*, 39 Maine, 533. Perkins made no conditional signature. Nor was there a conditional delivery. A subsequent surety is not to be discharged because the name of a prior one has been forged. His own signature is an implied assertion of the genuineness of those which preceded it, for it is not to be presumed that a man would affix his name to a bond when the prior names were forged. It was held in *Selser* v. *Brock*, 3 Ohio, 302, that one, who signed a note apparently as principal, but who was in fact a surety, within the knowledge of the holder, and affixed his signature after the names of others as signers had been forged upon the note, and while it was in the hands of him for whose benefit it was drawn, so far sanctioned and affirmed the genuineness of the signatures, that he could not take advantage of the fraud in his defence against the holder, unless he showed the holder was privy to the same. 1 Parsons on Notes and Bills, 235.

The name of Robert G. Perkins was erased before the bond was delivered the plaintiffs. They never knew it had been fraudulently affixed, nor of its subsequent erasure. Such alterations only as are material will defeat a bond. The forgery imposed no liability on the person whose name was forged. Its erasure neither released nor discharged him from any. The surrender of a fictitious and forged bond

for the benefit of the surety, to whom the same was of no possible use, except as a matter *in terrorem*, affords no ground upon which a court of equity will decree the exoneration of a surety. *Loomis* v. *Fay*, 24 Vermont, 240. The defendants would have been liable had the erasure not been made. Its erasure has in no respect altered their rights or affected their liabilities. Their liability, therefore, still continues. *Defendants defaulted.*

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

SAMUEL VEAZIE *versus* THE CITY OF BANGOR.

A plaintiff cannot recover upon a count in his declaration setting out a special contract, unless he alleges and proves performance of the contract.

Where services are performed under a special contract, the party claiming payment therefor must, as a general rule, prove substantial performance or a waiver.

Acceptance or voluntary use of the subject matter of the contract is evidence of a performance, or a waiver, though not conclusive.

But, if such acceptance or use is in ignorance of deficiency of performance, it is not a waiver.

When there has been no intentional departure from the contract, or failure to perform it, but the party has acted in good faith, endeavoring to fulfill it according to its terms, he may recover, in case of failure, what his services are worth, less the damage caused by such failure.

But, in such cases, proof of an intention *bona fide* to perform the contract fully is indispensable to a recovery.

When, by the terms of a contract, some person is agreed upon to examine and determine the character, quality or quantity of the work done, no action can be maintained *upon the contract*, unless such examination and decision are alleged and proved.

Nor can a party recover, *under a general count*, for labor performed under such a contract, unless he proves that he attempted in good faith, and did all he reasonably could, to perform it in all respects; including the examination and decision, or some sufficient reason for the want of them.

ON EXCEPTIONS, by defendants, to the ruling of APPLETON, C. J.

ASSUMPSIT to recover for labor, &c., expended upon the highways in Bangor. The case is stated in the opinion:

A. G. Wakefield, for defendants.

McCrillis & Sanborn, for plaintiff.

The opinion of the Court was drawn up by

DAVIS, J.—The plaintiff contracted to keep certain roads in the city of Bangor in good condition and repair, for a term of three years, for the sum of $1700 a year, to be paid to him *annually*. The case is very nearly like that of *Allard* v. *Belfast*, 40 Maine, 369, in which the plaintiff made a similar contract, upon which he was to be paid *quarterly*.

It is evident that the Court, in that case, overlooked the fact that such a contract is clearly divisible, and therefore no payment is required before performance. *Keeping* the roads in repair, from one quarter to another, or from year to year, is a full performance, *pro tempore*, entitling the party to payment therefor. And, therefore, *such performance* is a condition precedent to any right of payment.

No definite rules can be given, though sometimes it is attempted, by which it can always be determined whether it is the intention of the parties that the conditions in a contract shall be dependent, or independent. As was said by TINDALL, C. J., in the case of *Stavers* v. *Curling*, 3 Bing., 355, there is no better guide than "common sense." *Leonard* v. *Dyer*, 26 Conn., 172; *Kettle* v. *Harvey*, 21 Vt., 301. But, if this case is within either of the rules given by Sergeant WILLIAMS, in 1 Saund., 320, it is the *second*, instead of the *first;* "when the day appointed for the payment of the money is to happen *after* the thing is to be performed which is the consideration therefor, no action can be maintained for the money before performance." Such was held to be the law applicable to it when it was previously before us; and it was sent back to a new trial for that reason.

The plaintiff cannot recover upon the first count in his

writ, because, in that the special contract is set out, and no performance is alleged. The second count is a general one, for labor done in repairing certain roads, for which a *quantum meruit* is claimed. Upon this he was entitled to recover, by proving the services generally, unless the defendants could defeat the action by proof that they were performed under the special contract. *Jewett* v. *Weston*, 11 Maine, 346; *Wolfe* v. *Howes*, 6 Smith, (N. Y.,) 197.

Such a contract having been proved, under which the services were rendered, the question arose at the trial whether the plaintiff could recover any compensation without proving a literal and full performance of the conditions. And, upon this point, the jury were instructed that, though the plaintiff had failed in some particulars to perform the contract according to its terms, "if he had performed labor beneficial to defendants, he might recover what his services were reasonably worth, less the damage sustained by reason of his failure to fulfill it."

There are two general conditions to be performed by the plaintiff, in the special contract, (1,) "to keep the roads in good condition and repair," and (2,) "to the acceptance and approval of the mayor and the committee on streets and highways," according to whose "directions" he was to be paid annually.

If the plaintiff failed to any extent, or for any part of the year, to perform the *first* condition, and the *second* condition had not been in the contract, could he recover a *quantum meruit* for any beneficial services rendered during the year?

The general principle undoubtedly is, in all cases where services are performed under a special contract, that the party claiming payment therefor must prove substantial performance, or a waiver. *Stark* v. *Parker*, 2 Pick., 267. An acceptance, or a voluntary use of the subject matter of the contract, will be evidence of performance, or of a waiver, though not conclusive. *Hayden* v. *Madison*, 7 Greenl., 79; *Abbott* v. *Hermon*, 7 Greenl., 118; *Pullman* v. *Corn-*

ing, 5 Selden, 93; *Bristol* v. *Tracy*, 21 Barb., 236; *White* v. *Hewitt*, 1 Smith, (N. Y.,) 395; *Smith* v. *Coe*, 2 Hilton, (N. Y.,) 365; *Taylor* v. *Williams*, 6 Wisc., 363. But, if such acceptance, or use, is in ignorance of any deficiency of performance, it will not be held to be a waiver. *Andrews* v. *Portland*, 35 Maine, 475; *Morrison* v. *Cummings*, 26 Vermont, 486.

There are cases in which it is held that, for services performed under a special contract, there can be no right of payment, in whole or in part, without a strict and literal performance of all the conditions, or a waiver thereof. That of *Andrews* v. *Portland*, previously cited, would seem to imply such a doctrine. But the plaintiff, in that case, did not bring himself within an *exception* to the rule, which is sustained by numerous cases, having the weight of authority decidedly in its favor.

When there has been no *intentional* departure from the contract, or failure to perform it, but the party has acted in good faith, endeavoring to fulfill it according to its terms, in case of failure, he may recover what his services are worth, less the damage caused by such failure. *Norris* v. *School District*, 12 Maine, 293; *Knowlton* v. *Plantation No.* 4, 14 Maine, 20; *Wadleigh* v. *Sutton*, 6 N. H., 15; *Hayward* v. *Leonard*, 7 Pick., 181; *Snow* v. *Ware*, 13 Met., 42. In all these cases where the question has been raised, and in numerous others that might be cited, proof of an *intention*, *bona fide*, to perform the contract fully, has been held indispensable to a recovery. *Wade* v. *Haycock*, 25 Penn. State, 382; *Smith* v. *Gugerty*, 4 Barb., 614.

And there is good reason for holding such intention essential. If one might knowingly depart from the terms of a contract, or, with no good excuse, leave it half performed, and still have the right to exact payment for his services, it would not only leave the other party without any right or power to carry out his own plans in his own affairs; but, it would open a wide door for fraud, and be a fruitful source of litigation. No person has any right to *any com-*

pensation for services rendered under a special contract, unless he has at least *attempted*, in good faith, to perform all its conditions. It was in consequence of overlooking this principle, that the Court in New Hampshire, in opposition to the general current of authorities elsewhere, held that one who voluntarily, and without excuse, left the service of his employer before the expiration of the time agreed upon, could recover for the time he had worked. *Britton* v. *Turner*, 6 N. H., 481; *Miller* v. *Goddard*, 34 Maine, 102.

Whether the plaintiff, in the case at bar, acted in good faith, with the actual intention to keep the roads in as good repair as when he took charge of them, does not appear to have been a question particularly presented at the time of the trial. Whether the presiding Judge should not have stated to the jury that he could not recover without proof of the fact, we need not now determine; for the question raised upon the *second* condition to be performed by the plaintiff may be conclusive of the case, without another trial.

This condition is, that the roads should be kept in repair, &c., "to the acceptance and approval of the mayor and the committee on streets and highways." And it is admitted that they had not been accepted or approved by the mayor and the committee; and that the plaintiff had not *requested* them to examine or approve of them, nor attempted to procure their acceptance.

This was a substantial part of the contract into which the plaintiff entered, and he was not at liberty to disregard it. The mayor and committee were not parties to the contract, but were persons upon whose judgment the parties relied, and whose approval the plaintiff agreed to procure. If he had applied to them, and they had refused to *examine* the roads; or if, upon an examination, they had capriciously, arbitrarily, or unreasonably refused to accept and approve them, he might not have been without a remedy. *Hill* v. *School District*, 17 Maine, 316; *Chapman* v. *Lowell*, 4

Cush., 378. But, voluntarily and intentionally to disregard his contract in this respect, and *avoid* the examination and judgment of the men mutually agreed upon, was an act of bad faith, by which he is precluded from any right of recovery, even if his services were, to some extent, beneficial. The authorities are numerous on this point.

Thus, in *Milner* v. *Field*, 1 Eng. Law & Eq., 531, under an agreement to build houses, to be paid for by instalments, as the work progressed, upon delivery of a certificate, signed by the surveyor for the time being, "that the work had been in all respects well and substantially performed," such certificate was held to be a condition precedent to any right of payment. In *Butler* v. *Tucker*, 24 Wend., 447, the work was to be done "to the entire satisfaction" of the other party, and of the building committee; and it was held that the plaintiff could not recover without alleging and proving that the work was done to the satisfaction of the *committee*, though he need not allege or prove that it was done to the satisfaction of the *defendant*. But in *McCarren* v. *McNulty*, 7 Gray, 139, it was held, in such a case, that it was necessary to prove that the work was satisfactory to, or accepted by, the *defendants*. And in all cases where some person is agreed upon by the parties, in the contract, to examine and determine the *character*, *quality*, or quantity of the work done, such examination and decision are conditions precedent to any right of payment, and must be alleged and proved in order to maintain an action upon the contract. *United States* v. *Robeson*, 9 Peters, 319; *Morgan* v. *Birnie*, 23 Eng. Com. Law, 415; *Lebanon R. R. Co.* v. *McGraun*, 33 Penn., 530; *Faunce* v. *Burke*, 16 Penn., 469; *Adams* v. *City of New York*, 4 Duer, 295; *McMahon* v. *N. Y. & E. R. R. Co.*, 6 Smith, (N. Y.,) 463, and cases there cited.

The case at bar does not differ from these, except that the second count is not upon the *contract*, but is a general one, for labor. But, under this count, the labor having been performed *under the contract*, the plaintiff must *prove* that

he *attempted*, in good faith, and did all he reasonably could, to perform it, not only in repairing the roads, but also in procuring the acceptance and approval of the mayor and committee on highways. Their acceptance and approval, *or some sufficient reason for the want of it*, was indispensable in order to maintain the action. But nothing of the kind is alleged; and, if such an allegation had been made, or is not necessary, in the general count, it is not only *not* proved, but is *disproved*, by the evidence.

A motion for a nonsuit was seasonably made by the counsel for the defendants; and the parties agreed that, if it should have been granted, the verdict, if for the plaintiff, should be set aside. Accordingly the verdict is set aside; and, if it is desired, *a new trial will be granted.*

APPLETON, C. J., CUTTING, KENT, DICKERSON and BARROWS, JJ., concurred.

HIRAM SMITH *versus* JOHN S. CHADWICK.

An action cannot be maintained against an officer for attaching property exempt from attachment, but confused with property not exempt, unless the debtor sets apart or claims to set apart the property not liable to be attached.

A debtor may waive his privilege, and consent that exempted property may be attached.

The waiver may be made by acts or neglect to act. And when the debtor fails to set apart or claim to set apart exempted property, parcel of a larger quantity, before or at the time of the attachment, he waives his privilege.

ON EXCEPTIONS, by plaintiff, to the ruling of CUTTING, J.

The case is stated in the opinion.

Hilliard & Blanchard, for plaintiff.

Brown & Simpson, for defendant.

The opinion of the Court was drawn up by

CUTTING, J.—Trespass for the malfeasance of the de-

fendant's deputy, for the taking of alleged property of the plaintiff. To sustain the action, plaintiff introduced a bill of sale from one *George H. Bishop* and wife to himself, dated July 4, 1861, embracing various articles of furniture, amounting to the sum of two hundred ninety-four dollars and nineteen cents, all of which was subsequently attached by the deputy, excepting about one hundred dollars' worth, on a writ in favor of one *Thomas H. Shaw* and another, prior creditors, against Bishop.

At the trial, the principal question presented to the jury was whether there was any delivery of the articles to the plaintiff, enumerated in the bill of sale, prior to the attachment. The jury were instructed as to what constituted an effectual delivery, so as to transfer the property from the vendor to the vendee, as against the attachment of prior creditors, to which instruction no exception was taken, which appears to be relied upon by the plaintiff's counsel.

But, during the progress of the trial,—"the plaintiff offered to prove that a portion of the property was exempt from attachment by the creditors of Bishop," which the Judge ruled to be inadmissible. As to this ruling, the plaintiff's counsel does complain, and in his argument contends that in respect to such property no delivery was necessary as preliminary to a valid transfer. That is the question now presented.

It may be very questionable whether the offer was sufficiently specific. It was not contended that all the articles were exempted, but only a portion. What portion or what particular articles were not named in the offer, and the defendant might well object to so general a proposition.

But, waving that consideration, we will proceed one step further, and consider the evidence then already introduced by the defendant, before his offer to introduce more. That evidence was the bill of sale of articles valued at about three hundred dollars, two hundred of which only had been attached by the officer, leaving one hundred dollars' worth of

exempted property or its equivalent, and, of the property attached, only a portion claimed as exempt.

That a debtor has the right to dispose of his exempted property, when not intermingled with his other property not so exempt, is a proposition not necessarily involved in this case. Here was a pretended sale of a large quantity of furniture, all embraced in one bill of sale; if any portion was exempt, it was confused with the much larger portion not exempt—a most perfect confusion of goods, which would justify the officer in attaching the whole, for the law certainly would not, under such circumstances, require him, at his peril, to discriminate between the attachable and unattachable property. It was attached as the debtor's property and the jury have found that it was then his property; that the title had not passed out of him as between him and his prior creditors, yet this debtor, neither at the time of the attachment, nor since, up to the time of the trial, ever made any claim or gave any notice to the officer that he had wrongfully attached a part in contra-distinction to the whole.

In *Clap* v. *Thomas*, 5 Allen, 158, the Court remark, that—"a debtor may always waive his privilege, and consent that his exempted property may be applied to the payment of his debts; and it is not necessary that such waiver should be expressed in words. It may be made by acts or neglect to act. If the debtor, who has a larger quantity of any kinds of provisions than the law exempts from attachment, sets apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it, when the officer is about to attach the whole, he cannot maintain an action against the officer, who takes the whole."

We recognize that decision as sound law, and are unable to perceive any valid distinction in principle between a large quantity of any kinds of provisions and a large quantity of any kinds of household furniture. *Exceptions overruled.*

DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

APPLETON, C. J., delivered a separate opinion:—

The jury found that the goods in controversy had not been delivered the plaintiff prior to their attachment as the property of his vendor. In such case, though the sale may be good between vendor and vendee, it seems well settled that it cannot defeat attachments made without the knowledge of such sale and before the vendee has acquired a title by delivery or taking possession of the goods sold. *Lanfear* v. *Sumner*, 17 Mass., 100; *Sherman* v. *Rutter*, 7 Pick., 56; *Packard* v. *Wood*, 4 Gray, 307; *Ludwig* v. *Fuller*, 17 Maine, 162.

It does not appear that Bishop, the plaintiff's vendor, ever set apart any specific portion of the furniture as exempt from attachment. Neither does it appear that the plaintiff claimed he had so done, or notified the officer that he claimed any as exempt from attachment, or made any demand for any specific articles whatsoever. *Tufts* v. *McClintock*, 28 Maine, 625.

EUNICE KNEELAND *versus* TIMOTHY FULLER.

If a husband pay money belonging to his wife, with her consent, in part fulfilment of a contract for the purchase of real estate, under an existing written contract, she cannot maintain an action to recover back the money so paid; nor, although by such payment the contract is fulfilled on the part of the husband, and the other party refuses to convey.

If a parol contract for the purchase of real estate is made and fulfilled on the part of the purchaser, and the seller is ready to perform the agreement on his part, no action can be maintained to recover back the purchase money.

But, if the vendor refuses to perform the contract on his part, the party performing, not being in default, can recover back all payments which have been made.

If the parties to a contract deliver and receive goods as money, the Court will treat them in the same manner.

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

B. H. Mace, for plaintiff.

J. A. Peters, for defendant.

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

APPLETON, C. J.—The plaintiff is a married woman. Prior to her intermarriage with her present husband, he had bargained with one Jones for the purchase of a lot of land upon which he was then living. The contract was in writing, but, not having been produced, we are left in ignorance of its terms. The title to the land to which the contract relates passed from Jones to one Miller, and from him to the defendant,—but it is left uncertain whether the defendant owns the whole estate or only an undivided portion of the same. It seems that the validity of this contract has been recognized by the successive owners of the land in question, and that it still remains in full force. The plaintiff's husband, with her consent, has appropriated her funds towards the payment of the land thus contracted to be sold.

If the payments thus made by the husband with the funds of the plaintiff, and with her consent, were in part fulfilment of his contract, and the amount therein stipulated to be paid has *not* been paid, the plaintiff cannot maintain this action. Where there is a contract for the conveyance of land on the payment of a certain sum, and a part only of this sum is paid, the party making such payment cannot recover it back, the contract upon which it was paid remaining in full force. *Rounds* v. *Baxter*, 4 Maine, 454; *Weymouth* v. *McLellan*, 14 Maine, 214. The plaintiff's husband, if he had paid his own money under such circumstances, could not have recovered it back. The wife is in no better situation, the appropriation of her funds having been made with her consent.

If the contract has been performed on the part of the husband, though the payments thereon were made with the funds of the wife, if made with her consent, and received in

payment of his contract, she can maintain no suit therefor, if the contract was a valid one. The remedy is to be sought for in a suit upon the contract and for its violation, or by proceedings in equity, in which the rights of the wife will receive due protection.

But the plaintiff rests her claim upon other grounds. She testifies that the payments made were with her funds; that the last payment was made upon the statement of the defendant that it was to be received as money, and in full payment of all that was due, and with his promise that upon receiving such payment he would make and execute a deed to her of the land thus paid for with her funds; —that after she had paid the amount thus agreed upon, she demanded her deed, which he declined giving, and claimed, in violation of his promise, to appropriate her funds so received to the liquidation of the prior outstanding debts of her husband. But this he had no right to do.

A verbal agreement for the sale and conveyance of land is void by the statute of frauds. If a parol contract is made and fulfilled on the part of the purchaser, and the seller is ready and willing to perform this agreement on his part, no action can be maintained to recover back payments thus made. *Richards* v. *Allen*, 17 Maine, 296; *Conglin* v. *Knowles*, 7 Met., 57; *King* v. *Welcome*, 5 Gray, 41. But, if the vendor refuses to perform the contract on his part, the party performing, not being in default, can recover back all payments which may have been made. *Richards* v. *Allen*, above cited; *Thompson* v. *Gould*, 20 Pick., 134; *King* v. *Brown*, 2 Hill, 485. If, then, the defendant has agreed to convey to the plaintiff, upon payment by her therefor, certain lands, and he has refused upon and after such payment to convey, he is legally liable.

The payments made by the plaintiff were in part by a pair of steers and one cow, which were delivered and received as and for the sum of one hundred dollars. The declaration contains the usual money counts, as well as an account annexed in which the oxen are charged the defend-

ant. The parties treating the oxen as money, the Court will so recognize them and their agreed price may be recovered on the money counts. *Ainslie* v. *Wilson*, 7 Cowan, 662; *Hall* v. *Huckins*, 41 Maine, 574. So, when goods are received under a special contract, which the party receiving refuses to perform, the party so delivering the goods may, it would seem, elect to consider the contract as rescinded, and recover in an action for goods sold and delivered. *Gary* v. *Hill*, 11 Johns., 441; *Burlingame* v. *Burlingame*, 7 Cowan, 92.

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

CUTTING, KENT, WALTON, BARROWS and DANFORTH, JJ., concurred.

THE CITY OF BANGOR *versus* ASA P. LANSIL.

The owner of land has a legal right to fill it up so as to interrupt the flow of *surface water* over it, whether flowing from a highway, or any adjoining land.

Nor does the fact, that the land filled up was a swale, make any difference in the owner's rights, provided no natural watercourse is obstructed.

If, in filling up his lot, the owner construct a drain for the flow of surface water from the highway, which had been accustomed to flow across his lot, and afterwards allow the drain to become obstructed, and it is repaired by the town, the latter can maintain no action to recover the expense of such repairs.

Such a drain is not a "private drain," within the meaning of § 12 of c. 16 of the Revised Statutes.

ON EXCEPTIONS to the ruling of CUTTING, J.

CASE, under § 12, c. 16, of R. S., to recover the amount expended by the plaintiffs in the repair of a drain.

The evidence, affecting the questions of law raised, tended to show that the drain in question was from Lincoln street, through the defendant's lot, and another lot, to a drain made by the city; that the defendant's lot was formerly a swale, and the surface water flowed across it, but there was no natural watercourse on it; that Lincoln street was

constructed in 1834, and, after that, the surface water flowed in gutters down the street, till it came to the defendant's lot, and then passed off across his lot, in greater quantities than before the construction of the street; that, in 1852, the defendant filled up his lot so as to prevent the water from flowing from the street over it; and, thereupon, the street commissioner, without authority from the city, dug the drain and the defendant finished it, and the water from the street had passed off through it, until recently; that, the defendant failing to repair the drain after proper notice, the plaintiffs had repaired and enlarged it; and this action was brought to recover $43, the expenses incurred.

The presiding Judge instructed the jury, that it appeared by the testimony that there was a low swale on the lot of defendant, over which the water from the land in the vicinity naturally flowed; that, if defendant bought the lot under these circumstances, he had no legal right to fill up the lot and obstruct the natural flow of the water, and thus cause it to flow back into the street, and upon adjoining owners; that, if defendant filled up his lot, he was bound to make a suitable drain to carry away the water, so as not to injure the highway and adjoining proprietors; that, if defendant made the drain under these circumstances, it was a private drain, which he was bound to keep in repair, and, if he neglected to do so, and in consequence of such neglect, the highway was injured, the plaintiffs, after due notice, could themselves repair such drain and recover the expense of the defendant in this action.

The defendant (*inter alia*) requested the presiding Judge to instruct the jury, that, if the plaintiffs duly laid out and constructed Lincoln street, and the water flowed down the drains of such street to the defendant's lot which abutted upon said street, and a drain across the defendant's lot was needed to drain the water from the street, the defendant was under no legal obligation to construct such drain, but the law provided another remedy to secure the construction of the drain, and, if defendant, without permit from the proper

authorities, and through a misapprehension of his legal rights and obligations, constructed such drain, such construction would not of itself constitute it a private drain.

The presiding Judge refused to give the requested instructions, but did instruct the jury that, if more water was brought by the drains on Lincoln street down to the defendant's lot than naturally flowed there, the jury would deduct from the expenses of repair in like proportion.

The jury returned a verdict for plaintiffs of twenty-seven dollars, and stated, in answer to an inquiry from the Court, that they reduced the damages, because more water was brought to the defendant's lot by the construction of the street than formerly flowed there. The defendant excepted.

W. H. McCrillis, for defendant.

A. G. Wakefield, for plaintiffs.

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

DAVIS, J.—By our statute of 1821, c. 121, copied from the Massachusetts Act of 1797, a person needing a drain "for his cellar," or for other purposes, could construct it, upon his own premises, *to the street;* and then, "by the consent and under the direction of the selectmen," he, either alone, or with others, might extend it across or along the street, to some suitable place of discharge. If there were several owners, it was a "common sewer." But, whether owned by one or more, it was a *private* drain.

Such drains were entirely different and distinct from gutters, made as part of streets, to drain off the surface water. Such gutters had always been made, under the general power and duty to open the streets and keep them in repair.

Unless by some city charters or by-laws, no *public* sewers, for the accommodation of the inhabitants, were authorized by law, until 1844. All such sewers, though constructed under and along the streets, were *private* property. And no change has ever been made in the law, making *such* drains

other than private property. Many such may be found in all our cities and large towns.

By c. 94 of the laws of 1844, the municipal authorities were, for the first time, empowered to locate and construct *public* drains, for the common use of such adjacent proprietors as, for a stipulated price, desired to connect private drains therewith. These *public* sewers were to be *located*, either under the streets, or, if necessary, through the lands of any person, who was to be compensated therefor. The proceedings of the *location* are, in many respects, like the proceedings in locating streets.

As cities and towns were only *authorized*, and not *required*, to construct *public* drains, the sewerage of our cities has been, and still is, to a large extent, by *private* drains. These have, many of them, been made across or along the streets. As they were liable to get out of repair, there had always been a provision by which any *owner* could repair a "common" sewer, at the expense of *all*.

But it was found that, in some cases, none of the *owners would* repair such drains; and that, by their want of repair, the *streets* across or along which they were constructed, were thereby made unsafe for the public travel. And therefore, by c. 77, § 9, of the laws of 1854, the street commissioner of the city of Portland was authorized, in any such case, to repair the defective "private drain;" and the owners were made liable to the city for the expense of such repairs. This *special* statute was made *general*, by R. S., c. 16, § 12.

The action before us was brought under this provision of the statute.

Was the drain repaired by the city in this case *such* a drain as is contemplated by the statute?

It is quite obvious that it was not a *public* drain, or sewer, within the meaning of the statute. It was neither *located*, nor constructed, as such. None of the provisions relating to sewerage by public drains, to be made and owned by the city, for the use of the abuttors on the streets, are applicable to it.

In discussing the question whether it was a "*private* drain," it is contended, in behalf of the city, that the defendant, in 1852, had no right to fill up his house lot, which was at the lowest point of a swale crossed by Lincoln street, so as to prevent the water flowing down the gutters either way, during a storm, from passing off over his lot, as before it was filled up.

His right to fill up his lot, depended on the question whether there had been a natural *watercourse* across the lot before Lincoln street was made. That street was made in 1834. No right to flow water across it had therefore been acquired, by prescription or otherwise, in 1852, unless there had been a *watercourse* there before 1834. If there had not been a watercourse there, though it was low, swampy land, and, with the adjacent lots, had been overflowed at certain seasons of the year, he had the right to fill it up.

A natural watercourse "consists of bed, banks, and water; yet the water need not flow continuously; and there are many watercourses that are sometimes dry. There is, however, a distinction to be taken in law, between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which in times of freshet, or melting of ice and snow, descend from the hills, and inundate the country." Angell on Watercourses, 5th ed., § 1.

In accordance with this definition, it has been held, that, "when there is no watercourse, or stream of water, one cannot claim a right of drainage, or flow of water, from off his land, upon and through the land of another, merely because his land is higher than that of the other, and slopes towards it, so that the water which falls in rain upon it would naturally run over the surface in that direction." *Luther* v. *Winnissimet Co.*, 9 Cush., 171.

Whether there had been a watercourse was a question for the jury. If there had not been, then the defendant had the right to fill up his lot; and he was under no obligation to make any drain, or permit the city to make one.

But, if there had been a watercourse, though the defendant had no right to fill it up, still this action could not be maintained. The statute applies only to a "private drain," made strictly for private use, which the owners may keep open, or fill up, at their option, leaving the street in good repair. But a *watercourse* is private property only in a restricted sense. The owner of the land through which it flows has no right to fill it up, to divert the water from the land below, nor to turn it back upon the land above. For so doing, he is liable to indictment, or to an action on the case at *common law*, for the *damage* caused by the detention or flowage of the water. *Calais* v. *Dyer*, 7 Maine, 155.

But the action given by the statute, for the *expense of repairing*, cannot be applied to a *watercourse*, even if it is used for a drain. The language is clearly applicable only to drains and sewers which are strictly *private property*. The city can have no right *to use* such drains. The owners cannot be under obligation to keep such drains open *for the benefit of the city*. If the street gutters were opened into them, they would no longer be *private*, but *public*.

It is clear that the drain in this case is not such as the statute refers to, as a "private drain." If it was a watercourse, and the defendant was bound to keep it open, the remedy must be sought in a different action, not for the expense of repairing, but for the damage caused by obstructing it. *The verdict must be set aside, and a new trial granted.*

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

CUTTING, DICKERSON and DANFORTH, JJ., dissented.

CUTTING, J. — There are only two kinds of drains known to the law — one a public and the other a private drain. Public drains are those constructed by the municipal officers of a town under R. S., c. 16, § 2. All other drains are private drains, and embrace two classes. The first such as connect with a public drain by permission of the munici-

pal officers, and the second without such connection; of which latter class the defendant's drain was one.

It appears that Lincoln street was established and built in 1834, running through a low swale, extending from abov and below the sides of the road down and across the lo subsequently purchased and filled up by the defendant; tha+ a culvert was built across the street above the lot, belo.w which culvert a drain extended down and through the defendant's lot to a public drain below. As to the construction of this drain, thus passing through the defendant's land, by whom and for what purposes built, there was controversy, but none whatever as to its actual existence. It was not a public drain, for it was not constructed by the municipal officers, and, if the street commissioner assisted in its construction, it was without authority and consequently a gratuitous act. It is true the defendant swears "that it is not a private drain nor any use to his lot, nor of any private advantage to him." The existence of the drain being admitted, it became a question of law as to its character. He may perhaps, now, in a certain sense truly say, after having filled up his lot, dammed up the road, and caused an overflow of water, that the drain is of no use to him so long as he is high and dry, and suffered so to remain in consequence of this drain. But the more important question now is, whether that drain is of any use to the public. When a road is legally laid out, and constructed, no owner of adjoining lands has lawful right by embankments to create an overflow of water; otherwise highways instead of being a public benefit would be a public nuisance, and such would be the situation of Lincoln street, if the defendant should prevail in this suit. Against such an act even the common law would afford a remedy, which is also found in § 12 of the Act before cited.

The instructions were in harmony with this construction of the law, except they were too favorable for the defendant, by which the damages were reduced as found by the jury.

DICKERSON and DANFORTH, JJ., concurred.

OREN CLARK *versus* WILLIAM BOSWORTH.

Prior to the Revised Statutes of 1841, the visible possession of an improved estate by the grantee under his deed, by himself or his tenant, was constructive notice of the sale to subsequent purchasers, although his deed was not recorded.

This rule is still in force as to deeds made prior to the Revised Statutes of 1841, even against conveyances made since those statutes went into effect.

ON EXCEPTIONS, by plaintiff, to the ruling of CUTTING, J. REAL ACTION. The case is stated in the opinion.

J. H. Hilliard, for the plaintiff.

Sewall, for defendant.

The opinion of the Court was drawn up by

BARROWS, J.—Both parties claim title to the premises in controversy under Edward Smith, and the main question for decision is, which has the better title? Let us look at the history of their respective titles. The demandant claims by virtue of an attachment made May 30, 1837, on a writ in favor of Thomas A. Hill, against Edward and Samuel Smith, and a levy in pursuance of said attachment made on the premises as the property of Edward Smith, March 17, 1842, and a quitclaim deed from Hill, the levying creditor, to himself, in consideration of $100, dated March 23d, 1857, and recorded August 28, 1861. No continuing possession of any part of the premises followed either this levy or the quitclaim deed, but the respondent seems to have been in the visible possession of a considerable portion of them during all this time, and for two years, at least, prior to the attachment under which the demandant claims; and it appears, that, as early as 1835, the respondent erected a shop thereon, which, with the additions made in 1843 or 1844, is some 50 or 60 feet long; that, in 1844, he built a house thereon, and has occupied both buildings ever since they were erected, the latter as his own home; and that he

has used the land as his own since 1835, without let or hindrance, except the nominal interruption created by the levy in 1842. Such portions of the demanded premises as the respondent did not occupy were occupied by other persons who do not appear to have had any connection with the demandant or the title under which he claimed. The respondent claims to derive title to himself (by mesne conveyances, which it is unnecessary to recite,) through two deeds conveying the whole of the premises claimed by the demandant, which have never been recorded and are now said to be lost, but which are referred to in a deed of the same premises from one Benjamin Dyer to William H. Cheever, which was recorded August 15, 1833.

Was there competent and sufficient evidence of the existence of the deeds from Edward Smith to J. G. Bakeman, dated April 6, 1833, and from said Bakeman to B. Dyer, dated April 20, 1833, and, if proved, what was the legitimate effect of the respondent's possession under these unrecorded deeds upon the demandant's subsequently acquired title?

Upon referring to the testimony of Bakeman and Dyer we cannot doubt the loss or destruction of these deeds, and the objection to the *competency* of the secondary evidence is but faintly supported by the demandant's counsel in his ingenious and elaborate argument, and the authorities which he cites upon this point, unexceptionable in themselves, do not apply to the facts developed by the testimony here.

The testimony was *competent*—was it *sufficient* to prove the existence and execution of the deeds? We do not see how clearer proof could be expected after the lapse of nearly thirty years. True, Dyer does not profess to remember the details about the witnessing and acknowlegement of the deed from Bakeman to himself, but he testifies explicitly, that he had such a deed, and few who undertake to do business are ignorant of the ordinary requisites of a simple conveyance of real estate.

Both these deeds are referred to and their dates given in

the conveyance from Dyer to Cheever, made and recorded a few months later, and acknowledged before Samuel Cony, who, as Bakeman testifies, drew, witnessed and took the acknowledgement of the deed from E. Smith to him.

Upon the facts thus developed, the presiding Judge instructed the jury that, if the defendant at the time of Hill's attachment was in possession and occupancy of the premises as tenant under Cheever, it would authorize them to infer such constructive notice of Smith's deed to Bakeman as would defeat the attachment of Hill, and plaintiff could not recover in this suit.

The jury did find such constructive notice and returned a verdict for defendant. Were the rights of the demandant prejudiced by the instructions? Prior to the passage of the Revised Statutes in 1841, it had been well settled, by a series of decisions, that the visible possession of an improved estate by the grantee under his deed was implied notice of the sale to subsequent purchasers, although his deed had not been recorded.

In 1841, the rule was changed and thereafterwards actual notice was required, and the doctrine of constructive notice, as to all subsequent transactions of that description, was done away.

But, in *Hanley* v. *Morse*, 32 Maine, 287, while these doctrines were reaffirmed, it was decided that, previous to 1841, as against a subsequent grantee, such constructive notice was equivalent to a registry of the deed, and that the rule of constructive notice was still in force as to deeds made prior to the Revised Statutes of 1841, even against conveyances made since those statutes were passed.

While we fully recognize the learning and ability of the Judge who dissented from that conclusion, neither the force of his reasoning, nor the argument of the demandant's counsel here, satisfies us that that decision should now be overturned. Each year that has passed since it was promulgated, while it has diminished the number of cases to which it can apply, has increased the improbability that any

really innocent purchaser would ever find himself a sufferer by paying his money for a title apparently good upon the records, but defeated by an open visible possession commencing previous to 1841, under an unrecorded deed, and continuing thenceforward.

If we adopt the doctrine of the majority of the Court in *Hanley* v. *Morse*, then, in conformity with the reasoning of TENNEY, J., dissenting in that case and citing *Hewes* v. *Wiswell*, it does follow that the title of Clark, the demandant, must stand or fall with that of Hill, his grantor. His counsel complains that "the charge of the Judge mingled the fortunes of Hill and the plaintiff here together, and the verdict of the jury consigned them to a common fate." And why not? If the doctrine that an open visible possession of improved real estate should operate as notice to a subsequent purchaser of title in the possessor, and if such a possession, continued for two years, affected Hill with a notice of the respondent's rights in the premises, it is difficult to perceive why such possession, continued for twenty years more, before the plaintiff here purchased Hill's interest, and fortified by the erection and occupancy of a dwellinghouse upon the premises, for some thirteen years, should not suggest to the demandant in this case that it would be a fraud upon his neighbor's rights to purchase and set up a paper title that had been suffered so long to lie dormant. If the possession of the respondent was notice to Hill and would preclude his recovery, *a fortiori*, it was so to the demandant, and would prevent him from recovering on the same grounds.

The case of *Hewes* v. *Wiswell*, 8 Maine, 94, was a totally different one. There the Court rightly sustained the title of an innocent purchaser, for value, from a fraudulent grantee who had long been in possession as against a claimant under an unrecorded deed, the grantee in which had only been in possession for a short time, many years before.

The tenant there could not be supposed to have had any knowledge of the brief possession of the premises by the

grantee in the unrecorded deed, which possession had terminated even before the fraudulent grantee acquired his title, leaving the estate wholly unprotected. See the concluding portion of the opinion of the Court in that case, on page 100.

On the whole, we do not perceive that the plaintiff here has been deprived by the rulings of any rights which he can lawfully maintain, and accordingly the

Exceptions are overruled.

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

ISAAC M. BRAGG *versus* THE CITY OF BANGOR.

Towns may be indicted and fined for allowing their highways to become unsafe and inconvenient, although they may have no notice of the defect.

But a traveller cannot recover for injuries received in consequence of a defective highway, unless he proves that the town has *actual* "reasonable notice of the defect," although the jury may infer *actual* notice, in any case, from the circumstances proved.

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

CASE against defendants for neglect in keeping Water street in repair.

The facts affecting the question of law decided were the following:—

The drain from the Dwinel House to the Kenduskeag stream having become out of repair, the proprietor of the house, an inhabitant of Bangor, undertook to open them; that, while opening it, the workmen excavated under the adjacent part of the road; that, after finding and opening the drain, the street was filled up with the gravel and dirt taken out, and it was trodden and pounded down, taking the ordinary course in such case. The workmen intended

to leave the road safe, and supposed they did. They left it so that there was no apparent defect, on the surface of the street, but in fact the road was so left as to be defective by the excavation, made as before stated, not being fully filled up. The only notice to defendants was to the laborers upon the drain, and was the notice derived from what they did in the premises, unless notice may be inferred from the fact that, while the place was dug up in the street, it was seen by the street commissioner before it was filled up.

J. A. Peters, for plaintiff.

A. G. Wakefield, for defendants.

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

KENT, J. — A town or city is liable to pay damages to any person injured through any defect of a highway, which the town is bound to keep in repair, on certain conditions. The liability is not absolute — is not recognized by the common law, but rests entirely on the provisions of the statute. It is not enough to show a legally laid out highway, and that the town was by statute bound to keep it in repair; that it was defective, and, that the plaintiff, using due care, received an injury solely by reason of that defect. If it had been the intention of the Legislature to hold a town responsible in all cases and at all times, for injuries received through a defective highway, — no other provision would have been required, than a simple declaration of such liability, without any condition or qualification. Such a declaration is made in § 37 of c. 18. The language of that section is — "Highways, town ways and streets, legally established, are to be opened and kept in repair so that they *are* safe and convenient for travellers with horses, teams and carriages. In default thereof, those liable may be indicted, convicted, and a reasonable fine imposed therefor."

The liability to *indictment* exists, whenever, for any cause, the way is unsafe or inconvenient. No notice or knowledge

of the defect need be proved. But § 61, under which this suit is brought, does not give a right of action on the same proof as in case of indictment. It adds a distinct and positive requirement or proviso, to be established by proof, before the plaintiff can make out a *prima facie* case. That condition is,—"if such town or persons," (obliged by law to repair the road,) "had *reasonable notice* of the defect or want of repair." Notice to the town thus becomes an essential and indispensable element in determining the liability. If the fact of due notice is not established, it is as fatal an objection as want of proof of an existing defect.

It is notice "of *the defect*" that is required. The question then is, what is notice of an existing fact? Must not the fact be known by somebody, before any person can have notice of its existence?

If we seek for the reasons on which the condition as to notice is based, it is apparent that the Legislature did not intend to hold a town liable, unless there was some fault or neglect or failure in duty by the town or its officers. This fault would be chargeable, if there was neglect. The neglect would be established, if, after "reasonable notice," the town failed to remedy the defect. Reasonable notice is such notice as gives information to the town officers, or some of the inhabitants, of the actual condition of the road. It is not necessary that those, who thus have notice of the actual condition of the way, should recognize it as a defect or themselves believe it to be such. Whether the road was unsafe and defective, in fact, is a question to be determined on trial. It is enough if the town has such notice or knowledge of the exact condition of the road. What is reasonable notice, and how long time, after such notice, a town should be allowed to repair, are questions which may arise on trial, to be determined by the Court and jury. It is true that the cases in our reports have gone a great length on the point of notice, and have, in some of them, allowed very slight evidence of notice, and that confined to a very few inhabitants, to be sufficient. In other cases, it has been left

to the jury to infer notice, from evidence of the existence of the defect, for such a length of time that it must have been observed by some of the citizens of the town. But this is not an inference of law, but a species of proof of a fact to a jury. In all these cases, necessity of notice was recognized as essential, and proof sufficient to establish the fact was required. No case has gone to the length of dispensing with the requirement of the statute as to notice.

The position taken in the opinion, drawn by Mr. Justice DAVIS, in this case, is in substance this, — that if there has been a want of due care on the part of a town in making or in keeping a road safe, it is no excuse that the inhabitants did not in fact know it was unsafe, i. e. did not know its actual condition. Does not this rule dispense with proof of notice in all cases, and place the liability entirely on the fact that a defect existed at the time and place of injury? It may be said that this should be the law. But the difficulty is, that the statute does not hold the town answerable, unless it has had notice. These words mean something more than that a town might have had notice, by diligence and care, or ought to have taken notice. The question still returns, did the town, in fact, have such notice? Grant that very slight evidence of notice may be sufficient, — that it may be established by proof that but one or two of the inhabitants, and they not among the principal inhabitants or tax payers, saw or knew of the defect, and that a jury may be satisfied of the fact, by evidence of a long continued existence of an obvious and patent defect, in a road daily or often used by the inhabitants and others; yet the proof of the fact has never been dispensed with. It cannot be, so long as the present statute is in force.

In the case before us, it is clear that there was a defect existing, — hidden from view on the surface, and that no person had any knowledge that a defect existed, or of the actual condition beneath the surface which rendered the way unsafe for travellers. It would seem to be a plain proposition that a town could not have reasonable notice of a de-

fect of the existence of which no living person had any knowledge. The street commissioner knew that the drain had been opened—and probably he saw that it had been filled up in the usual manner. The workmen, who are not described as citizens of Bangor, knew only the same facts. They did not know or see or believe that any excavation under the adjacent part of the road existed and remained unfilled. They "had trodden and pounded down the earth, which had been taken out and replaced, and they intended to leave the road safe, and supposed they did so leave it." If the case turned upon the question of the use of ordinary care on the part of the town, or the party excavating, it might be a grave question whether there had been any want of such care. But we are not considering that point. Assuming all that can be claimed as to the existence of the defect, and that it was the sole cause of the injury, and that the town was obliged to keep the way safe, so far as the state was concerned, yet there is one fatal objection to the maintenance of the action by a private person. The city had no notice of the existence of any defect.

The illustration given in the argument of the defendants' counsel is correct and to the point. A bridge falls, or a culvert gives out, and they are repaired by using, apparently, sound and proper timber. But it is shown, afterwards, that a stick of that timber had a latent defect, not visible, and a person is injured by the falling of the bridge or culvert, occasioned by such concealed defects. Could the town be said to have had reasonable notice of such defect? A similar case is that of a small culvert across the road, the surface being of earth and smooth to all appearance, but, the small timbers or planks having given way, the water had gradually and imperceptibly washed away the earth, so that a mere crust remained beneath the surface. No person had ever looked into the culvert, and no one knew of its dangerous condition. A horse breaks through this smooth and apparently safe highway. Here we have all the elements necessary to charge the town, except notice,—a legal way

—clearly unsafe—an injury caused thereby, without fault on the part of the driver, and a neglect to repair. But would any one contend that the town had the notice required by the statute?

The fallacy of the argument for the plaintiff is in assuming that a neglect of the town, in not keeping its roads safe, or in not exercising sufficient care in ascertaining, or remedying any latent defects, are sufficient to charge the town in case of an injury. These may be grave faults, and, if the Legislature had seen fit to hold towns liable for these causes alone, we, of course, should not question its right so to do, nor the binding force of such enactment. But it has not seen fit so to declare. It has not imposed on towns the liability of insurers, or that of common carriers of passengers for hire, who may be held liable for even latent and concealed defects, if the utmost care and most searching examination might have detected them. It has added the clearly expressed condition that the town has had reasonable notice of the defect. The Court cannot ignore or nullify this provision. Notice of a fact implies knowledge of the existence of the fact, brought home to the party to be charged, either by his own observation, or by declarations made to him by those who have seen or known it. Mere neglect of duty in other particulars cannot supply the place of such notice or knowledge. Like any other distinct and substantive fact, required to charge a party, it must be affirmatively proved, by evidence which the law deems sufficient.

Plaintiff nonsuit.

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

DAVIS, DICKERSON and BARROWS, JJ., dissented.

DAVIS, J.—Cities and towns are required by the statute to keep the streets and ways in repair, "so that they are safe and convenient for travellers with horses, teams and carriages." R. S. c. 18, § 37. For want of reasonable diligence and care in the performance of this duty, they are

liable to be indicted, and fined. *State* v. *Fryeburg*, 15 Maine, 405. And if, through any defect or want of repair, "of which they have had reasonable notice," any person is injured, they are liable for the damages occasioned thereby. R. S. c. 18, § 61.

As to what is a "reasonable notice," there has been much discussion. It is sometimes a difficult question; but as it is a mixed question of law and fact, each case must be determined upon its own facts. It is important to bear in mind, however, that *time* is not the only, nor the principal element in such a notice. In fact, towns are sometimes liable for defects of which the inhabitants have no *actual* notice. And, in such cases, the element of *time* applies only to the *existence of the defect*. Has it existed so long, or under such circumstances, that the town, with reasonable care and diligence, *might have known it*. If so, the town being responsible for the safe condition of the road, has *constructive* notice of the defect, and cannot escape its liability on the ground that there was no *actual* notice. *Drury* v. *Worcester*, 21 Pick., 44.

Reasonable care and diligence are required on the part of towns, as well to *prevent* defects, as to repair them when they occur. For this purpose, they are required annually to raise money, and to appoint *surveyors*, or commissioners, whose special duty it is to *examine* and repair the town and highways, and keep them constantly in a good and passable condition, in summer and in winter. As it is their duty to look after and keep themselves informed in regard to the condition of the roads, they cannot plead ignorance in excuse for any defect which proper care and diligence would have brought to their knowledge. "Because," says SHAW, C. J., in *Reed* v. *Northfield*, 13 Pick., 94, "this degree of care and diligence they are bound to exercise; and therefore, if, in point of fact, they do not know of such defect, when by ordinary and due vigilance and care they would have known it, they must be responsible, as if they had actual notice."

And the same principle applies to the manner in which a defective way is repaired, or a new one constructed. Reasonable care and diligence must be used to make it safe. And, if there is negligence in this respect, it is no sufficient excuse that the inhabitants did not in fact know that it was unsafe. Because, in every case where such care and diligence would have made the way safe, and the defect is the result of negligence, reasonable notice must be presumed. If workmen employed by the town to construct or repair a watercourse, by their negligence and want of proper care, leave it unsafe, though they do not in fact know it to be unsafe, it would be in violation of the whole spirit of the statute to hold that the town had no notice of the defect. *Horton* v. *Ipswich*, 12 Cush., 488.

In the case at bar, the drain from the Dwinel House being defective, the proprietor dug up a portion of the adjacent street in order to repair it. By the city ordinances, as well as by a general statute, he had no right to do this "without the consent of the municipal officers." R. S., c. 16, § 1. While the work was in progress it was seen by the street commissioners, and they do not appear to have interfered with it. What an inhabitant of the city was thus permitted to do, and known to have done, in a public street, the city must be held responsible for, so far as it affected the safety and convenience of the way. The city was as much bound to have the street kept and left safe for travellers, as if all that was done had been done by its own agents. The municipal officers permitted the drain to be opened under the street; and having knowledge of the fact, and not preventing it, they were bound to use due care to have it so restored as to be safe.

That the street was left defective when the excavation was filled up is not denied. There can be no doubt that reasonable care and diligence would have rendered it safe. It would be absurd to suppose, when it was so filled up as not to be safe at the time, that it was not the result of negligence. And having had notice of the original defect, if any

notice of their own negligence in repairing it was necessary, it ought to be presumed. But I do not think any new notice was necessary.

DICKERSON and BARROWS, JJ., concurred.

INHABITANTS OF CORINTH *versus* INHABITANTS OF BRADLEY.

Persons, *non compos mentis* may acquire a settlement in their own right by a five years' residence.

A person *non compos mentis*, not residing with his father, nor supported by him, does not follow a new settlement acquired by his father, after the son is twenty-one years old.

The residence of a person in a town is not changed by an absence for a temporary purpose only, if he has sufficient intelligence to form and retain the intention of leaving for a temporary purpose and of returning, and does return, in accordance with such intention.

ON EXCEPTIONS to the ruling of APPLETON, C. J.

ASSUMPSIT for supplies furnished one Alexander Rowell.

The evidence tended to show that Bradley was incorporated in 1834, and that Rowell's father then resided there; that the pauper was then over thirty years old, and *non compos mentis;* that he did not then reside in either Corinth or Bradley; that he was not supported by his father; that he went to Corinth twenty or thirty years ago, where he labored for various individuals for his board and clothes; that he frequently left the town and labored in other towns, on the same terms, for a month, months, or a year, but always returning to Corinth.

The pauper was a witness with reference to these facts, and as to his intentions when he left Corinth at the different times specified.

The presiding Judge instructed the jury, that Rowell could gain a settlement in the plaintiff town by having his home and residing for five successive years therein, not re-

ceiving supplies directly nor indirectly during that time; that, to constitute five years' residence it was not necessary that he should be there bodily all that time; that, if he left for a temporary purpose only, and with the intention of returning and had sufficient intelligence to form and retain the intention of leaving for such temporary purpose and of returning, and did so return, such temporary absence would not prevent his gaining a settlement.

The verdict was for the defendants, and the plaintiffs excepted.

Hilliard & Flagg and *McCrillis*, for the plaintiffs, submitted an elaborate argument in support of the following propositions:—

I. That a person *non compos mentis* is, in all cases, incapable of gaining a settlement for himself; but has the settlement of his father, whether he lives in his father's family or not, or whether he is supported by his father or not.

II. That he cannot gain a settlement by *residence*, because, in order to have a residence, he must have an *intention* of residing, and proof that a person is *non compos mentis* disproves any such intention.

III. That, if he can, in any case, gain a settlement by five years' continuous residence, he must be bodily present in the town for the whole of that time, because, when he goes away, he can have no *intention of returning*.

J. A. Peters, for defendants.

The opinion of the Court was drawn up by

Barrows, J.—It has been repeatedly decided, in this State, that persons absolutely *non compos mentis* may acquire a settlement in their own right by a five years' residence, that is to say, according to rule VI, § 1, c. 24, R. S., 1857, and corresponding provisions in previous enactments. *Augusta* v. *Turner*, 24 Maine, 112; *New Vineyard* v. *Harpswell*, 33 Maine, 193; *Gardiner* v. *Farmingdale*, 45 Maine, 537; *Auburn* v. *Hebron*, 48 Maine, 332.

No sufficient reason is perceived for departing from these decisions, or for so refining upon them as to make them difficult and uncertain in their application by common minds, or so as to open the way for much manœuvering and innumerable conflicts of testimony as to petty details in these questions of settlement. The decisions are intelligible as they stand, and afford a convenient rule for determining the questions that may arise. It may, not unfrequently, be easy to ascertain what town has been the home of any given individual for the space of five years continuously, when it would be difficult, if not impossible, satisfactorily to determine whether the person had been bodily present in such town every day or hour of the period.

Another class of cases, like *Wiscasset* v. *Waldoborough*, 3 Maine, 388, and *Tremont* v. *Mt. Desert*, 36 Maine, 390, decide that a person *non compos mentis*, who continues to reside with, and be dependent upon his father, after he arrives at the age of 21 years, is not thereby emancipated; and it may be well enough, on the principle of humanity, so strenuously contended for by the plaintiffs' counsel here, to hold that where mutual care and dependence indicate that the ties of nature are warmly regarded, parties thus nearly related shall not be subjected to separate settlements. But the widest range in the realms of sentiment or imagination would fail to detect, in the circumstances of this case, any reason to suppose that the condition of this pauper or his friends would be in the least ameliorated by fixing his settlement in the same town with a father from whose control and care he had been so long emancipated and turned adrift.

When the father of the pauper acquired a settlement in the defendant town, in 1834, the pauper was more than thirty years of age, a resident of another town, not supported directly or indirectly by his father, and whether *non compos* or not, had long been free from parental control, and his settlement could in no way depend upon that of his father then gained.

The instructions in this case, so far as the plaintiffs' rights were affected by them, were carefully guarded, and they certainly furnish *the plaintiffs* with no rightful cause of exception.

The pauper was a witness in the case. The jury could judge of his capacity, and, to a certain extent, the instructions required them to do so, and they appear to have found, under those instructions, that he has had his home and residence in the plaintiff town for twenty-five or thirty years last past, laboring there for such compensation as he could get, and, when temporarily absent, always retaining the intention, subsequently uniformly executed, to return there as his permanent home and abiding place.

It is perhaps seldom that the unfortunate subjects of this class of suits are possessed of intellectual abilities of the highest order, but the mental power of Socrates could hardly have enabled him to gain a settlement under our pauper laws more effectually. *Exceptions overruled.*

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

KENT, J.—I concur in the opinion. The presiding Judge did not rule, as the plaintiffs' counsel in his ingenious argument seems to assume that he did,—that an insane or *non compos* person, who was incapable of forming an intention by reason of mental alienation or imbecility, could retain a home, when absent by reason of an intention to return. But he did say, in substance, that if the pauper had sufficient intelligence to form and retain the intention of leaving and returning, and did so return, such temporary absence would not prevent his gaining a settlement.

There are degrees in insanity and in mental imbecility. In this case, the jury could not answer the question whether the pauper was or not, *non compos*. But they did find, under the instructions, that he had sufficient intelligence to form an intention, and that he did form such an intention. The instruction, thus guarded, was correct, and does not involve the broad proposition stated by the counsel.

NATHAN DANE, *State Treasurer, versus* CHARLES D. GILMORE *& als.*

A judgment against the sheriff for his default is a pre-requisite for maintaining a suit upon his official bond.

If such judgment is obtained by fraud or collusion, it is not conclusive against the sureties on the bond.

A sheriff, *as such*, cannot legally serve an execution on his deputy, even though directed to him.

The fact that he had served the writ on his deputy and made an attachment of personal property, before the deputy was appointed, does not authorize him to serve the execution after such appointment.

In a suit against a sheriff for not serving an execution against his deputy, which he had taken for service, he is not estopped from showing that he could not legally serve the precept.

The statute, directing that the appointment of a deputy sheriff shall be lodged in the clerk's office, does not require it to remain there. After it has been recorded, the deputy may take it away.

After such appointment is recorded, it is notice to all of the fact of the appointment.

The sureties on a sheriff's bond are not liable for his acts or omissions in the service of a precept, which, by law, he was not authorized to serve.

If, in a suit on the official bond of the sheriff, *it is admitted* that the sheriff had no authority by law to serve the precept, his failure to serve which was the neglect complained of, judgment will be given for the defendants, although the plaintiff had recovered a judgment against the sheriff for the same alleged default.

ON FACTS AGREED. ACTION OF DEBT on bond of Gilmore, sheriff of Penobscot county, in the name of the State Treasurer, for the benefit of Nathaniel F. Tenney & als., who are alleged to have been injured by his, the said Gilmore's, misfeazance in his said office. On the 7th July, 1859, said Tenney & als. sued out a writ against one Joshua Dennis, on which the said Gilmore was directed to attach the stock of goods of said Dennis to the amount of fourteen hundred dollars. Said Gilmore, on the 8th day of July aforesaid, did make the attachment of said Dennis' goods, as directed, and made his return thereof on said writ, in due form.

Judgment was recovered in said action, on the 16th day of January, 1860, and execution issued and placed in the hands of said Gilmore on the 15th day of February, 1860. Said execution was directed to the sheriffs of our several counties, and not to a coroner, nor was said Gilmore a coroner.

On the back of said execution, said Gilmore was directed to satisfy the same out of the goods attached on the original writ. Gilmore took the execution, but neglected to satisfy said execution and to return the same.

On the 18th September, 1860, the said Tenney & als., sued him, the said Gilmore, as sheriff, for his alleged neglect aforesaid, and, on the 27th August, 1861, recovered judgment by default. Execution issued thereon September 11, 1861, and demand was made on Gilmore the same day for payment thereof, which was refused.

This action is brought to recover the amount of said judgment against the defendants, who are principal and sureties on his, said Gilmore's, official bond as sheriff. Said bond is dated January 1st, 1859, and was duly approved.

In a book labelled "record of appointments of deputy sheriffs, vol. 5," in the clerk's office in said county, is a copy of the appointment of said Dennis, by said Gilmore, as his deputy, dated August 17, 1859, and of the certificate of the qualification of said Dennis; and it is the only and all the record contained in said office in reference to said Dennis as a deputy under said Gilmore, and bears no seal or certificate of the clerk of the courts of said county.

Plaintiffs in interest had no knowledge that said Dennis was, or assumed to be, a deputy under said Gilmore at the time of the delivery of said execution to said Gilmore for satisfaction.

Gilmore was sheriff from the time of the original attachment, till after the execution against said Dennis was delivered to him.

Said Dennis acted as a deputy of said Gilmore from the date of his appointment till January 1, 1861. Neither the plaintiffs in interest nor their attorneys knew that fact on

the said 15th day of February, 1860, nor for a long time thereafter.

The certificate of appointment of said Dennis, as deputy, was lodged in the clerk's office and recorded, and a certificate made thereon by the clerk, and was then taken away by said Dennis. It has been the practice in this county for deputies to take away their written appointments, after they have been recorded.

Upon the foregoing, a default or nonsuit was to be entered with the following proviso:—The defendants claim to be able to show that, while the suit was pending against said Gilmore, for said alleged default, the plaintiff's attorneys had him under arrest upon a writ and an execution in favor of the plaintiffs upon the same cause of action, on which judgment was recovered against said Dennis, and requested him, while under arrest, to agree to a default in the aforesaid suit, then pending; that said Gilmore at first refused, and gave as a reason, that he did not think his bondsmen should be made liable for this claim, but afterwards, in consideration of a release from arrest on said writ and execution, signed a paper to be defaulted, and the action was defaulted accordingly.

It was agreed that if, in any view of the case, this evidence would be admissible and material, the case should stand for trial.

Blake & Garnsey, for the plaintiff.

I. Gilmore having attached the goods, and having them in possession when he received the execution, and undertaking to serve it, with a full knowledge of the facts, of which the plaintiffs were ignorant, acted *colore officii*, and, for such acts, he is officially holden. *Harris* v. *Hanson*, 11 Maine, 244; *Bond* v. *Warren*, 7 Mass., 130; *Knowlton* v. *Bartlett*, 1 Pick., 274; *People* v. *Schuyler*, 4 Comstock, (N. Y.,) 174.

It is no defence, that it was an illegal act for Gilmore to serve an execution on his deputy. The bond is for the very

purpose of protection against the *illegal* acts of the sheriff; not against his *legal* acts.

II. As Gilmore had the goods, no one else could serve the execution, especially as it was directed to the sheriff, and Dennis is not described in it as a deputy.

III. Dennis was not legally appointed deputy. 1. The statute provides that the appointment of deputy shall not be valid until recorded, and the record does not show when it was recorded. R. S., c. 80, § 8. 2. The appointment must be *lodged* in the clerk's office; that is, it must be deposited and retained there. No custom can control the law in this particular.

IV. The judgment against Gilmore, being conclusive against him, till reversed or annulled, is also conclusive against all the defendants.

J. A. Peters, for defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—Nathaniel F. Tenney and others, having recovered judgment against the sheriff for official neglect, bring this suit against him and his sureties on his official bond. The signatures to the bond being admitted, and the judgment being produced, if the case rested here, the plaintiff's right to recover could neither be doubted nor denied. *Cony* v. *Barrows*, 46 Maine, 497. But the parties, having agreed to certain other facts, have submitted their rights to our determination upon those facts, waiving, by their agreement, the questions of their admissibility and their competency, which otherwise would have been both open to them.

That the evidence offered would make out a *prima facie* case is conceded. It is not necessary to consider how far a judgment against the principal is conclusive upon the sureties without notice. It is well settled, if it be obtained by fraud or collusion, they may contest its conclusiveness as against them. *Lowell* v. *Parker*, 10 Met., 314.

The main question presented is, whether the sheriff can legally serve process on his deputies, for, if he cannot, he can hardly be held responsible for omitting to do what could not legally be done by him. And if he has been guilty of no official neglect there can be no liability on the part of his sureties.

By R. S., 1857, c. 80, § 42, "every coroner *shall* serve and execute, within his county, *all* writs and precepts in which the sheriff thereof or his deputy is a party, unless served by a constable," &c.

The authorities are numerous that a sheriff cannot legally serve on his deputy. "When a levy is made by a deputy sheriff, under an execution in which he is a party, a sale under it will vest no title in the purchaser. And, when another deputy of the same sheriff is a party, he cannot levy under it; and the Court will set the levy aside on motion." *Singletary* v. *Carter*, 1 Bailey, 467. "Officers," remarks SEWALL, C. J., in *Gage* v. *Graffam*, 11 Mass., 181, "are not to serve writs on themselves. The sheriff and his deputies, in the office of sheriff entrusted to serve writs, constitute in legal analogies one office and one officer." The case of *Johnson* v. *McLaughlin*, 9 Ala., 551, is strongly in point. "Was the execution," inquires COLLIER, C. J., in this case, "in respect to which the sheriff is charged with default properly directed to him, and was he bound or even authorized to obey its mandate? * * If the sheriff be a party, the law requiring the writ to be addressed to a coroner is not merely directory, but, if disregarded, it has been held the Court will set the process aside. Although an execution is said to issue from the Court, yet the issuing of it by the clerk is a ministerial act, and only derives judicial sanction from its conformity to the judgment. Its direction to any class of executive officers does not proceed from anything found in the judgment itself, but from the suggestion of the clerk, whose duty it is to give it the proper form. Hence, it is clearly competent for the defendant in execution to object to it for non-conformity with the

judgment, or by showing it was directed to an officer, who was incompetent to serve it. * * What has been said is quite enough to show that the direction of the execution did not impose upon the sheriff the obligation to serve it."

Neither does the fact that the sheriff had served the original writ on Dennis *before* his appointment as a deputy, by attaching his goods, affect in any way or enlarge his right to make service of the execution, which was placed in his hands after his appointment. "It is claimed," observes BENNETT, J., in *Bank of Rutland* v. *Parsons*, 21 Vermont, 199, which resembles the case at bar in most essential particulars, "that as the defendant served the writ of attachment without objection, took a receiptor, and pursued him to judgment, he is to go on and execute the final process, which was put in his hands by the bank. But we think this cannot alter the case, nor clothe the defendant *with official power;* and, without official power to perform an act, he cannot be guilty of official neglect for not doing it."

Nor was the sheriff in any way estopped in the suit against him, from setting up the defence that he had *no* power legally to serve the execution against his deputy, which the plaintiffs placed in his hands. In discussing this question in the case last cited, BENNETT, J., says, "we know of no doctrines of *estoppels* that can apply to such a case as this. We think it more reasonable to hold the statute, which prohibits the defendant from executing the writ of execution, to be an *estoppel on the sheriff*, though he disregarded its injunctions in serving the original writ." In *Case* v. *Humphrey*, 6 Conn., 130, where one, not authorized to serve a writ, made service in fact by leaving a copy; it was held, in an action against him for a false return, that he was not thereby precluded from denying that the writ was legally directed to him. "It has been said," remarks HOSMER, C. J., in delivering the opinion of the Court, "the defendant is estopped to deny that the writ was legally directed to him, inasmuch as he acted under it and thus vir-

tually declared that the direction was legal. The objection is too unfounded to require discussion."

But it is insisted that the facts, as admitted, fail to show that Dennis was a deputy of the sheriff. But we think otherwise. The case finds that "said Gilmore gave said Dennis, the defendant in the original writ, a commission, upon which he was sworn, which was lodged in the clerk's office and recorded, and a certificate made thereon by the clerk, and was then taken away by said Dennis. It was the original of which the aforesaid record is a copy. It has been the practice in this county for deputies to take away their written appointments after they have been recorded."

The statute requiring the appointment to be *lodged* in the clerk's office does not intend that it shall forever remain there. It is to be lodged there for the purpose of being recorded. When recorded, the deputy may take it away. A copy of the appointment and of the oath administered to the deputy is found in a book in the clerk's office labelled, "records of appointments of deputy sheriffs, vol. 5." The commission to the deputy sheriff shows that it has been lodged and recorded in the clerk's office. It is admitted that the official attestation of the clerk shows these facts. Neither the sheriff nor his deputy could contest the appointment of the latter. The facts as agreed upon bring this case directly within R. S., 1857, c. 80, § 8. If Dennis be not a deputy on the above facts, it will be impossible to hold the sheriff for the negligence or misconduct of any officer, for the same proof would be found to apply to all his deputies.

The result is that Dennis was a deputy sheriff of Gilmore, for whose official acts he would be responsible. The plaintiff knew, or by examining the records might have known, who were the deputies of the sheriff, — and should not have placed the execution in the hands of one not competent to serve it.

The sheriff, then, by taking an execution against his deputy, which he could not legally serve, was, as to his sureties,

acting individually and not officially. Not being authorized to make service, they cannot be liable for his unauthorized and illegal acts or omissions to act. In the suit against him, for official neglect, he might have invoked in bar thereof the facts here admitted, and the defence would have been sustained. All these facts were known to him, and it was his duty to his sureties to have resisted the suit.

The liability of the sureties will depend upon the law as applied to the facts as agreed upon in this case. According to the agreement of the parties, Dennis was a deputy sheriff, and the sureties of the sheriff cannot be held for his acts or omissions to act, when such action was not and could not have been official.

The sureties had no notice of, and were not parties to the judgment against the sheriff, and, it would seem, are not, therefore, to be absolutely concluded thereby; certainly not, if it was collusively obtained. "It is clear," observes PARRIS, J., in *Hayes* v. *Seaver*, 7 Maine, 242, "when the executors neglected to make a defence which would have availed them, that the executors suffered a judgment to be rendered, which they might have successfully resisted; and, inasmuch as the defendant, their surety, was not a party, he ought not to be barred by that judgment, thus *negligently* or *collusively* suffered by his principals, were it *de bonis propriis*, but may now be permitted to avail himself of the same matter in his defence, which they might have urged against the original suit on the *scire facias*."

It follows that, in truth, the sheriff, notwithstanding the judgment against him, has been guilty of no *official* neglect, however he may have personally misconducted himself in the matter. The facts agreed upon, without objection as to their competency or admissibility, fully establish this. By the agreement of parties, there was no *official* neglect, and, there being none, there is no liability on the part of the sureties for the unofficial misconduct of one holding the office of sheriff. *Plaintiff nonsuit.*

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

KENT, J., held that the case should stand for trial.

I doubt whether, on this report, we can find enough to authorize us to overcome the conclusiveness of the judgment against the sheriff, without a new trial. *If* it is admitted, as a general principle, that a judgment against the sheriff for a default is conclusive, or *prima facie* conclusive, upon his sureties, on a suit on the official bond, — it seems to me that all the facts stated in this report cannot avail in defence of this suit as it now stands. This doctrine is admitted in the opinion, and seems to be the rule of the Court, in *Cony* v. *Barrows*, 46 Maine, 497. The only question then is whether the facts, admitting them to be true as stated in the report, estop or conclude the party to the extent of overcoming the conclusiveness of the judgment.

Undoubtedly we are to assume and consider all these matters to be true, in fact. But if we do — does it follow that these facts are sufficient to overcome the judgment? Here are a series of facts — that Gilmore was sheriff; that he attached and made a return; that judgment was recovered; execution issued, and Gilmore neglected to keep and sell the goods; a suit against Gilmore for default; a judgment thereon in due form, and other facts as to Dennis, the debtor, being his deputy, &c.

Now is not the fact that a judgment was duly rendered against Gilmore, a fixed and admitted fact? Can we regard the other fact, as to Dennis being his deputy, otherwise than as a single fact — the bearing and effect of which is to be determined in connection with all the other facts?

If this had been debt on the judgment against Gilmore alone, and the parties had agreed to the same facts as herein set forth, should we say that, by the admission of the plaintiff that the debtor was his deputy, contained in a statement of facts, that Gilmore could go behind the judgment and defend successfully and overcome it, by the admission of the existence of a fact which he might have shown in defence in the first suit against him?

Or take any case of debt on judgment. Can a judgment be impeached, and its validity and sacredness and conclusiveness be overcome, where the parties agree to a statement of facts which contains admission of matters which would have been a good defence in the original suit; as fraud, deceit, want of consideration, or even payment. These might be good grounds for review, — but not as a defence against a suit on the judgment.

It strikes me that all we have a right to do, in a case like this, is to hold both parties to the truth of the facts as stated. But if one of those facts (as a judgment) is of a nature not to be overcome or affected by other facts agreed, we cannot properly say that it shall be. The fact that there was a judgment is to be considered, with all its incidents and conclusiveness, as the first fact of the case. Are there any other facts which legally overcome it?

But, I admit that another question may be raised on this case, as stated. How far is the judgment against the sheriff conclusive on the sureties on the bond? Is it to be regarded as if the sureties were parties to that judgment, and are we to hold them exactly to the same extent that it binds the sheriff, who was a party?

This action is on the bond, which is conditioned "for the faithful performance of his duties as sheriff." The statute c. 80, § 12, provides for a suit on the bond by any one injured by the sheriff's neglect. But he must first ascertain the amount of his damages by judgment in a suit against the sheriff for such neglect. *Dane* v. *Gilmore*, 49 Maine, 173. This judgment must be produced, and is undoubtedly *prima facie*, and, in absence of all other facts, sufficient to maintain the suit on the bond. But it is by force of the statute. The sureties were not parties, nor had they any notice of the pendency of that suit for negligence. They had no day in Court; no hearing; no opportunity to prove any matters in defence.

If it is granted that the judgment is effective, yet it must be a *judgment fairly obtained* on the merits, and not one

the result of *collusion*, or by consent obtained by taking undue advantage of the situation of the party.

Sureties, who are bound for the honest and faithful execution by another of official duties, will be in great danger of being held, not only to answer for the actual defaults, but for all judgments which can be obtained by the consent of the sheriff, extorted from him, or assented to by him to obtain favor, or to secure benefits in relation to other distinct matters.

Suppose an action is brought against a sheriff for neglect in not arresting a debtor, or for not attaching or holding goods, in a certain suit named, or any other malfeasance or misfeasance, and the case is entered in Court and the sheriff, in writing, consents to be defaulted for $10,000, a judgment for that sum is rendered, and afterwards a suit is instituted, like this, on the bond, — is that judgment so absolute and conclusive that the sureties cannot show that it was not a fair judgment rendered upon merits, or that, in fact, there was never any such suit as the one named, — or that no such writ was ever put into sheriff's hands, — or that no property was attached, — but that the consent to a default was obtained by promises of favor, or by money actually paid to the sheriff to induce him to consent, or by releasing him from arrest on a suit? Must the sureties pay $10,000, because the sheriff had yielded to bribes? If the sureties had been parties to the first suit, they could have looked after the case, and it would have been their duty to see that no such judgment was rendered. The law assumed as probable that any sheriff would defend with all his powers, — and, if possible, save himself and his bondsmen harmless.

It must be remembered that the question here is not whether the sheriff alone, on a suit on the judgment, could interpose this objection. It may be granted that he could not. It is not an attempt to impeach or nullify that judgment; *that*, as between the parties, stands good, it may be, until reversed. But, when it is attempted to use that judgment to sustain an entirely different suit, not on the judg-

ment, but on a bond, I think the defendants may show, if they can, that the judgment was not obtained in the due course of justice, but by collusion, or the deliberate abandonment of a defence by the sheriff, he being aware of the existence of what he supposed a good defence, and being induced to yield to the request of the plaintiffs because he was under arrest by them, and, in consideration of a release from arrest, he signed a paper consenting to a default.

If these facts are established by proof, I do not see why they do not make a case of a judgment by collusion; not merely by *negligence* on the part of the sheriff. The authorities fully sustain this view.

Sureties are not bound by a judgment *negligently* or collusively suffered. *Hayes* v. *Seaver*, 7 Maine, 240.

The general rule is well stated in *Lowell* v. *Parker*, 10 Met., 315. Such judgments against sureties are *prima facie* evidence, to stand until impeached or *controlled* by evidence of fraud or collusion.

Dawes v. *Shed*, 15 Mass., 9, is a still stronger case, in which it was held that sureties are not estopped by a judgment obtained or suffered collusively or negligently.

My view on the whole case is that the evidence offered should have been admitted, and that a new trial should be ordered. I do not think that there is enough evidence of collusion or fraud, if we throw out of the case the offered evidence; but there is, if that can be proved by competent testimony. And I do not think that the sureties can avoid the effect of the judgment, by simply showing, or having admitted, facts as existing, which the sheriff might have shown in defence, and, in justice to his sureties, ought to have shown. *Mere neglect*, without collusion or fraud, or any act on either side, except a simple default entered by consent, is not sufficient ground to avoid the judgment and render it inoperative against sureties.

It is to be remembered that, by statute c. 80, § 12, a plaintiff can only obtain judgment in a suit on the bond, by first showing a judgment obtained against the sheriff. When

we say that the judgment offered is invalid or inoperative, it seems to preclude the necessity of any proof of actual neglect in defending on the part of the sheriff, and the plaintiff is without any remedy on the bond. I state this simply to show that, if we adopt a rule that *mere* neglect of a sheriff to defend is sufficient to destroy the effect of the judgment against sureties, we may open the door a little too wide. I think the case should go back for trial.

JORDAN F. STINSON *versus* JOHN ROSS.

A sale of real or personal property on execution is not vacated by a reversal of the judgment on which it issued.

When the officer's return of a sale of an equity of redemption on execution shows that the proper notices have been given, it is not necessary that the deed should also show it.

The owner of the equity of redemption of real estate may maintain a real action for its possession against any one, except the mortgagee and those claiming under him.

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

WRIT OF ENTRY. The demandant claimed under a sale of the equity of redemption on an execution issued on a judgment afterwards reversed on error; and also under an assignment of the mortgage.

Libbey, for demandant, cited 6 Peters, 8, and 8 Wend., 9.

Stewart, for tenant, cited *Cummings* v. *Noyes*, 10 Mass., 433.

The opinion of the Court was drawn up by

WALTON, J.—This is a writ of entry. The demandant claims title as assignee of a mortgage and purchaser of the equity of redemption at a sheriff's sale.

One question is whether a sale on execution is vacated by a reversal of the judgment on which it issued. We think

a reversal of the judgment will not have that effect. Upon the reversal of a judgment in a real action, the plaintiff in error will be restored to the land which he lost by it. *Cummings* v. *Noyes*, 10 Mass., 433. If judgment in a personal action has been satisfied by a levy on real estate, and the judgment is afterwards reversed, the levy is thereby avoided, and the plaintiff in error may recover the lands, even after they have passed into the hands of a *bona fide* purchaser for value. *Bryant* v. *Fairfield*, ante p. 149. But when property, real or personal, has been *sold* on execution, the sale will not be vacated by a reversal of the judgment; and the writ of restitution, after the reversal, issues only for the amount for which the property sold on the execution. *Gay* v. *Smith*, 38 N. H., 171. Such is the law independently of the Act of 1860, c. 138, § 2, which, being passed after the sale in this case, can have no bearing upon it.

It is objected that the sheriff's deed in this case does not show that the statute requirements in regard to notice were complied with. It is not necessary that it should. The officer's return on the execution shows that the proper notices were given, and that is sufficient. *Welsh* v. *Joy*, 13 Pick., 477.

In *Pratt* v. *Skofield*, 45 Maine, 386, the deed being the only evidence relied upon to prove the sale, (the officer having died without making any return on the execution,) and the recitals being too defective to show that the statute requirements in regard to notice had been complied with, the Court held that the deed was inoperative. But this decision is not applicable to a case where, as in this case, there is a good and sufficient return on the execution.

We think the demandant's title under the sale on the execution is valid; and this renders it unnecessary to decide whether the assignment of the mortgage from Catherine Ross to the demandant was valid or not; for being the owner of the equity of redemption, and not being resisted by the mortgagee, or any one claiming under her, the de-

mandant is entitled to possession of the land, as against the tenant, independently of the assignment.

Judgment for demandant.

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

WILLIAM N. SOPER *versus* SAMUEL PRATT.

If, in a writ of entry, there was a claim for mesne profits, and the tenant claimed and was allowed for betterments, an action may afterwards be maintained, to recover for rents and profits, from the date of the writ in the former suit to the time the demandant was put in possession of the premises.

ON STATEMENT OF FACTS.

This was an action to recover for mesne profits between May 11th, 1857, and September 10th, 1861.

From the case, it appears that the plaintiff, on the said 11th day of May, 1857, instituted a suit to recover the premises, and claimed damages for rents and profits to the date of his writ. The tenant claimed betterments. The jury found for the demandant in that case, and estimated the increased value of the premises, by reason of improvements made by the tenant, at $970. They further found the value of the land, if no improvements had been made, would have been $1500. In that action, judgment was rendered on the 4th day of September, 1860. The demandants elected to pay the estimated value of the betterments, which amount was paid on the 20th day of August, 1861; and on the same day a writ of possession was issued, by virtue of which the demandants were put into possession of the premises on the 10th day of September following.

J. H. Hilliard, for plaintiff.

Sewall, for defendant.

The opinion of the Court was drawn up by

KENT, J.—It is a well settled doctrine of the common law that, after a recovery in ejectment, the plaintiff may maintain a new suit of trespass and recover thereby the *mesne profits*. By our Revised Statutes, he can now recover such profits in the original suit for the land, up to the date of his writ, if he makes the claim in his writ. But, for those rents and profits accruing after the date of the writ, he must resort to a new action of trespass. *Larrabee* v. *Lumbert*, 36 Maine, 447.

The plaintiffs institute this suit to recover such mesne profits, from the date of their writ to the time of the final execution of the writ of possession, issued on a judgment obtained by them against the defendant, for the land. They show such judgment and execution, or the parties agree to these facts. Ordinarily these facts would entitle the plaintiffs to judgment in this case. But the defendant says that in the original suit he interposed a claim of betterments, and that his claim was sustained by the verdict; and that, at the request of the plaintiffs, the value of the land, without the improvements was found by the jury;—and that the plaintiffs elected to pay and did pay him the estimated value of his improvements, as provided by statute. He contends that, in such a state of facts, no claim for rents and profits of the land can now be sustained.

The case of *Jones* v. *Carter*, 12 Mass., 314, cited by defendant, is similar to the case at bar, and it was there held that an action for *mesne* profits would not lie, where the demandant had elected to pay the betterments. Although the reasons given in that case are not entirely satisfactory, and, although the Court in New Hampshire, in the case of *Withington* v. *Corey*, (2 N. H., 115,) denies its soundness and maintains a contrary doctrine, we might feel bound to recognize that case as established law, having been decided before the separation of the State from that Commonwealth, if there had been no change in or addition to the statute then in force. That decision was based on the original statute

of 1808. Since that time several new provisions in relation to mesne profits have been introduced into our statutes.

1. They may be declared for in the original action.

2. Defining what are to be allowed as rents and profits. c. 104, § 12.

3. That, "in estimating the rents and profits, the value of the use by the tenant of improvements made by himself, or those under whom he claims, shall not be allowed to the demandant." § 13.

4. That "the tenant shall not be liable for the rents and profits for more than six years, *unless the rents and profits are allowed in set-off to his claim for improvements.*" § 14. This section distinctly recognizes, by clear implication, a right thus to set off. It refers to a claim of *betterments*, for it provides for a set-off of rents and profits against a claim for improvements of *more than six years standing*, and *such* improvements are those recognized as coming within the legal right of betterments. The whole scope of these new provisions seems to include a right in the demandant to have an equitable and just allowance for the use of his property, whilst in the wrongful possession of the tenant. And it is difficult to perceive any good reason why he should not have such a right and remedy. He finds an usurper in possession of the land, having occupied and improved it as his own for years. He brings his action for possession. He is met, not with a denial of his right and title to the premises, but by a claim for the improvements the disseizor has made. This is interposed by no action or wish of the legal owner, but *in invitum*. He is compelled to answer it, and, to save his rights, to ask for an estimation of the value of his land without the improvements. He is then obliged to pay the estimated value of the improvements, or to permit the tenant to keep the lands at their estimated value. Why should he not be allowed to offset a fair rent for his land and what he owned on it, against the claim for improvements? Why, if he pays—as in this case, for all that the other party has done to improve the estate, should

he not have pay for the use of his real estate, by which use the tenant has been enabled to obtain rent for his improvements?

Where all the improvements were made by the tenant, the equitable view is that the owner of the land should have rent for his land, but not for the improvements which are the result of the labor and expenditures of the tenant, or of those under whom he claims. It would be unjust, on one hand, to allow the owner of the land to exact the value of rents which come from such improvements, made without his aid, and equally unjust, on the other hand, to exonerate the man, who has wrongfully dispossessed him, from any liability for the use of the land on which his improvements were made. The rule laid down in § 13, before referred to, seems the equitable and just one.

In all real actions brought to recover land, the demandant may now insert a claim for mesne profits. He is not bound to anticipate a claim of betterments—and he cannot be deprived of his rights by the interposition of such a request or claim. The statute, as before shown, contemplates that there may and should be a fair adjustment of rents and profits and improvements between the parties; that the demandant should have a just allowance for land rent, and the tenant should have a proper estimation of the value of his improvements; and that the land rent should be offset or deducted from the sum found as the value of the improvements. This can be done by the jury, as well on the first trial, as it could be in a separate action, and thus justice can be done to both parties.

The construction which denies to the land owner any right to rent in case of betterments may often operate so as to do extreme injustice. The betterments may not be of the value of twenty dollars, and the party may have been in possession of valuable real estate for ten years, the fair ground rent of which would be a thousand dollars for that time. If a party, by simply asserting and proving some trifling addition or improvement, could thus save to himself

large rents, he would secure an unjust advantage by this rule of law. If the value of the use of the real estate is small, then the allowance for betterments would be reduced very little. Taking all the provisions of our present statutes, we are of opinion that when the demandant inserts in his writ a claim for mesne profits, and the defendant interposes a claim for betterments, and both are to some extent sustained, that the rents and profits of the land and of all the real estate in the premises, which is not included in the improvements made by the tenant or by those under whom he claims, or owned by him, may be offset or deducted from the estimated value of such improvements. A separate action for mesne profits cannot now be sustained for any rents *before* the date of the writ in the *original* action — and they cannot be recovered in *that* action for any time after *such date*, although declared for in that suit. *Larrabee* v. *Lumbert*, 36 Maine, 440.

The decision leaves the rents and profits after the date of the original writ to be recovered in an action of trespass for mesne profits.

It would seem to follow *that*, as the demandant could not recover for rents beyond the date of his original writ, if he has declared for them, no offset could be made of rents and profits, for which he had no legal claim in that action. His only remedy is by a subsequent action for mesne profits, for the rents and for use and occupation after the date of such writ — as it clearly was in a case where no claim for betterments had been made.

The question before us arises in a case where the demandant elected to pay and did pay the estimated value of the improvements, and had judgment and execution by force of which he was put into possession. If he had abandoned to the tenant, who had paid for the land at its appraised value, he might find a difficulty in maintaining such an action as this for mesne profits, after the date of his writ in the first case, because he would be unable to show any judgment in

his favor, which is the foundation of a writ of trespass for mesne profits.

The plaintiff, according to the foregoing views upon the case as stated, can claim only for rents and *profits of the land*, independently of improvements—under the rule as stated in § 13 of c. 104. They claim only since the date of the original writ.

It is well settled that, in an action for *mesne* profits, the record of a recovery in a real action is conclusive evidence of title in the plaintiffs in such suit, which cannot be impeached. *Larrabee* v. *Lumbert*, 36 Maine, before cited; *Dewey* v. *Osborn*, 4 Cowan, 329; *Benson* v. *Matsdorf*, 2 Johns., 369; *Emerson* v. *Thompson*, 2 Pick., 487. According to the agreement of the parties, the *case is to stand for trial.*

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

LUMBERMAN'S BANK *versus* SAMUEL PRATT.

One partner cannot bind his co-partners by indorsing, in the firm name, a note given *after* the dissolution of the partnership, to renew a note given *before* the dissolution.

If one partner indorse a note with his own name, given after dissolution of the partnership, but running to the firm, he is liable thereon in an action by the indorsee.

ON EXCEPTIONS to the ruling of CUTTING, J.

ASSUMPSIT against the defendant as indorser of a promissory note running to Samuel Pratt & Co. The facts are fully stated in the opinion.

G. P. Sewall, for defendant.

J. H. Hilliard, for plaintiff.

The opinion of the Court was drawn up by

KENT, J.—This action is against the defendant, as indorser of a note, which, on its face, is payable to Samuel Pratt & Co., and which was indorsed to plaintiffs by Samuel Pratt in his individual name. The facts proved, upon which the ruling of the Judge was based, were *that*, at the date of the note, no such firm existed, it having been dissolved some time previous; *that* Butters, the payee in this note, had given a prior note to the firm, which had been discounted by the plaintiffs, and which fell due on the day of the date of this note, and after the dissolution of the co-partnership; *that* the first note was indorsed in the partnership name, before the dissolution, and, at the time it fell due, Hoskins, the partner of Pratt, was absent in the army, and gave no assent to any waiver of notice. Pratt, however, did waive notice, by requesting the cashier not to protest it on the day it fell due. As this was done after the dissolution, Pratt alone became responsible to the bank, as indorser of that note. The note in suit was brought to Pratt by the payee, (Butters,) on the same day, and Pratt indorsed it in his own name, and it was then discounted by the bank. It also appeared that Pratt had notified the cashier, some days before this note was made, that the co-partnership had been dissolved. Due demand and notice were proved.

The Judge ruled that, on this state of facts, the action could be maintained against the defendant as indorser.

It is evident that Pratt had no authority to indorse this new note in the name of the firm, so as to bind his former partner. *Sanford* v. *Mickles*, 4 Johns., 224.

At the time this note was made, there was no such firm in existence as is therein named.

It was therefore made payable to a co-partnership which had been dissolved, and not in payment of a debt for which the firm was then liable; Pratt alone being responsible to the bank, by reason of his waiver.

An essential fact, in determining the liability of a party

as indorser, is whether the parties intended that the transaction should be an indorsement, with all the rights and liabilities of an indorser. In this case there can be little doubt that the defendant so intended. He knew that the co-partnership had been dissolved. He had given the other party notice of that fact. He had no right to indorse it in the name of the firm.

The name of the firm had been inserted by mistake or inadvertently. It was decided by the Supreme Court of the United States, in *Pease* v. *Dwight*, 6 Howard, 190, that, where a note had been made on its face payable to the order of several persons, and the name of one was inserted inadvertently or by mistake, and the note was indorsed and delivered by the real payees, without the indorsement of the person whose name was inadvertently used, an action against the actual indorsers might be maintained.

In this case, the note was payable to the defendant by name, although the addition of the "Co." was made. He evidently regarded this as a mistake or inadvertence, for he disregarded the addition, and indorsed it in his own name. Both parties must have so regarded it, for they both knew that there was no such firm in existence. Having thus indorsed it, and passed it, we think he cannot now avoid the liability which he deliberately assumed. Another view will lead to the same result. The note was made payable to a non-existent party; known to be such by both parties. It is like a note payable to a fictitious person, or one in which the name of the payee is left blank. It has been often held that, in such cases, the title might pass without any indorsement, in the name of such fictitious person, especially if both parties knew all the facts. *Elliot* v. *Abbott*, 12 N. H., 549; *Foster* v. *Shattuck*, 2 N. H., 446.

Exceptions overruled.

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

NATHANIEL WILSON *versus* CHARLES WIDENHAM.

Where a grantor of real estate is in possession when the deed is delivered, there can be no breach of the covenant of seizin.

If, in the declaration in an action of covenant, the covenants are set out in full, but a breach of only one is alleged, an amendment, by adding a new count alleging the breach of another covenant, is allowable.

The covenant of warranty in a deed, given by one in possession of the estate, runs with the land, although the grantor has no title.

And one to whom the grantee has released all his title may maintain an action on such covenants, independently of chapter 82, section 16 of the Revised Statutes.

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

COVENANT. The facts are stated in the opinion.

Peters and *Wilson*, for plaintiff.

B. H. Mace, for defendant.

The opinion of the Court was drawn up by

KENT, J.—The defendant gave a deed of certain premises to Jeremiah Colburn, which contained the usual covenants of warranty. Colburn conveyed the same premises by a naked release to the plaintiff. At the time of the conveyance to Colburn, the defendant had no legal title by deed, having before that time conveyed the premises to another person. But he was in possession of the land at the time he conveyed to Colburn. The plaintiff was evicted by the superior title, by judgment of the Court, after vouching in the defendant. The plaintiff now brings his action, based on the covenants in the deed from defendant to Colburn, as assignee of Colburn.

The first count in plaintiff's writ sets out the facts in detail, but the breach alleged is on the covenant of seizin. When the case was opened, the plaintiff moved for leave to add new counts, and the Judge presiding granted leave to

the plaintiff, subject to objection, to make such amendments as the Court *could* allow, against objection, subject to the opinion of the full Court to allow or reject the same. The new count filed under this leave is on the covenant of title and warranty against the claims of all other persons.

The question before us seems to be whether this amendment is one which the Judge could lawfully allow, in his discretion. The action is on the covenants in the deed, and the cause of action is found in one and the same deed. The original count sets forth facts which would authorize a recovery on the covenant of warranty, if such a breach had been therein alleged. We think it was within the legal power of the presiding Judge to allow the amendment, with or without terms. *Heath* v. *Whidden*, 24 Maine, 383; *Clark* v. *Swift*, 3 Met., 390.

Under this count the plaintiff may recover as on a covenant running with the land, and independently of the statute, (c. 82, § 16,) which now gives to an assignee a right to recover on the covenants of seizin or freedom from incumbrance, upon filing a release to his grantor. Formerly an assignee could not recover on such covenants, because they do not run with the land. But the covenant of general warranty has always been held to be thus attached to the land. *Slater* v. *Rawson*, 6 Met., 439; *Thayer* v. *Clemence*, 22 Pick., 494.

The action on this covenant may be maintained by an assignee, although the deed to him is simply a release. *Beddoe* v. *Wadsworth*, 21 Wend., 120. Or by a sheriff's deed of an equity of redemption. *White* v. *Whitney*, 3 Met., 81.

The covenant of seizin was not broken, for the case finds that the defendant was in possession when he gave his deed to Colburn, and had been for some time before. He also manifestly claimed a title by giving the deed. Possession and seizin, so far as a right to convey is in question, are now regarded as nearly synonymous. *Slater* v. *Ransom*, 6 Met., 439. The plaintiff and his grantor took possession under their deeds. It is not necessary that the grantor in posses-

sion should have had a legal title. *Beddoe* v. *Wadsworth*, 21 Wend., 124.

The plaintiff shows an eviction by a better title, before the commencement of his suit.

It is not necessary to consider the questions raised by the neglect of the plaintiff to file a release to his immediate grantor. This provision of the statute, as before stated, applies only to actions on "covenants of seizin or freedom from incumbrance," and not to those which run with the land. The object of this statute is to give an assignee a right of action on the personal covenants, which before he did not have. It leaves the common law in force as to covenants real, which run with the land.

According to the agreement of the parties, the *pro forma* nonsuit is to be taken off. *Case to stand for trial.*

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

GEORGE FORBES *& al. versus* MARY M. HALL.

An attachment of real estate upon a writ containing the money counts, without any specifications of the claims under those counts, is invalid against subsequent attachments or conveyances.

A levy, in the description of which the place of beginning, with the first line from it, and the last line running to it, is given with sufficient certainty, but the other description is a line commencing at the second monument and running "thence southwesterly forty-nine feet and five inches to a point; thence easterly twenty-one feet and nine inches to a point;" is invalid for uncertainty, there being no other description by which the estate levied on can be identified.

But when some particulars are erroneously stated, and yet, from the whole description, the premises levied on can be ascertained, the levy is valid.

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

REAL ACTION. The case is stated in the opinion.

Hilliard & Flagg, for plaintiffs.

Blake & Garnsey, for defendant.

The opinion of the Court was drawn up by

DAVIS, J.—The premises in controversy were conveyed by the tenant, and her husband, April 28, 1858, to one George Wooderson, and the deed was recorded on the same day. Wooderson, on the same day, gave a deed of the premises back to the tenant alone; but his deed was not recorded until April 28th, 1859. In the meantime, two attachments were put upon the premises, as the property of Wooderson, by the demandants; and one attachment, of an earlier date, by Sturgis, Wade & Dawson. Judgments were duly recovered in all three of the suits; and levies were made Dec. 19 and 20, 1860.

The proceedings in the levy in favor of Sturgis, Wade & Dawson appear to have been correct; but, as the writ in that case contained the common counts, without any specification of their claim, their attachment was invalid. Their title under their levy is therefore subject to any rights of third persons originating before the *seizure upon their execution*. Before that time Wooderson's deed to the tenant had been recorded; and the premises had been attached and levied upon by the present demandants. The validity of their attachments is not questioned. So far as their levies were valid, they are entitled to recover.

One of their judgments was for $380,00 debt, and $26,03 costs of suit. The appraisers, in describing the property set out for the levy of the execution upon this judgment, designate with sufficient clearness the place of beginning, with the first line from it, and the last line, running to it. But between those two points, commencing at the second monument, the line is said to run "thence southwesterly forty-nine feet and five inches to a point; thence easterly twenty-one feet and nine inches to a point." There is nothing in this or any other part of the description by which the line intended can be ascertained. There is no definite course and no monument. This levy cannot be sustained.

The other judgment was for $530,04 debt, and $26,03

costs of suit, upon which execution was duly issued. The appraisers, in describing the part of the premises set out, improperly use the terms "southwesterly," and "northwesterly;" but the other part of their description is not only sufficient without these terms, but it is sufficient to correct the erroneous use of them, and enable one, by the whole description, to ascertain the premises levied upon. Such an error will not render either a deed, or a levy, invalid. *Bosworth* v. *Sturtevant*, 2 Cush., 392; *Wing* v. *Burgis*, 13 Maine, 111.

The demandants are entitled to a judgment for the premises described in the first count in their writ, and for no more.

APPLETON, C. J., CUTTING, KENT, DICKERSON and BARROWS, JJ., concurred.

INHABITANTS OF ORRINGTON *versus* COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

Under Revised Statutes of 1857, c. 218, § 18, the selectmen may lay out a town or private way for *inhabitants* of the town, from whatever place in the town it leads.

And if the town refuses to accept such a way laid out by the selectmen, the petitioners may appeal to the County Commissioners.

But the selectmen can lay out such a way for persons *not inhabitants*, only when the petitioners are the owners of cultivated land in the town, and the way leads *from such land* to a town or highway.

On appeal to the County Commissioners, they may lay out a town or private way *that substantially corresponds* with the way prayed for in the petition.

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

PETITION FOR CERTIORARI. The grounds of the petition sufficiently appear in the opinion.

J. A. Peters, for the petitioners.

J. E. Godfrey, for the respondents.

The opinion of the Court was drawn up by

DAVIS, J. — The town of Orrington refused to accept a way located by the selectmen, and thereupon the persons aggrieved thereby petitioned the County Commissioners to locate it. In their petition they do not state *what kind* of a way had been located by the selectmen; but the validity of that location, it not having been accepted, is not in question. The petition sufficiently shows that it was either a town way, or a private way. In either case, upon the refusal of the town to accept it, they had the right to apply to the County Commissioners. The Commissioners have heard the parties, upon due notice, and have determined that it was laid out as a town way, and have located it as such. Their proceedings are called in question in two particulars.

1. It does not appear that the way laid out leads from land in the possession or under the improvement of any of the petitioners, to a town or highway.

But it does appear, as it did not in the case of *Scarborough* v. *County Commissioners*, 41 Maine, 604, as reported, that the petitioners are "inhabitants" of the town. And whatever construction we might give to the R. S., 1841, c. 25, § 27, there can be no doubt that, by the R. S., 1857, c. 18, § 18, the selectmen have authority to lay out town or private ways for the "inhabitants" of the town, *or* for the "owners of *cultivated* land therein."

If it is laid out for any of the "*inhabitants*," on petition therefor, and the town refuses to accept it, or if the selectmen refuse to lay it out for them, no matter from what place, or to what place, in the town, it leads, they, if aggrieved thereby, may petition the County Commissioners to locate it for them. R. S., 1857, c. 18, §§ 22 and 23.

If refused to be laid out, or if laid out by the selectmen and refused to be accepted by the town, "for the owners of cultivated land therein," who are *not inhabitants*, it must appear that the way leads *from such land* to a town or high-

way. Cultivated land is land under improvement. If it was necessary under the former statutes for the owner to be *personally* "in possession" of it, it certainly is not by our present statutes. If the land is *under improvement*, and he is the *owner*, he may petition the selectmen, and, in case of their refusal, he may petition the County Commissioners to locate a way from such land to a town or highway.

But the case at bar comes within the first clause of the statute. The petitioners were "inhabitants" of the town; and whether they owned any cultivated land therein, or whether the road was laid out from any such land to a town or highway, are immaterial questions. *Lisbon* v. *Merrill*, 12 Maine, 210.

2. But it is contended that the County Commissioners materially varied the location from that which was made by the selectmen.

Under the statute of 1821, c. 118, § 11, the way as located by the selectmen might be changed, and any way located which would be a substantial compliance with the original petition. *Goodwin* v. *Hallowell*, 12 Maine, 271. By the R. S., 1841, c. 25, § 34, the County Commissioners had no power except to "approve and allow the way *as laid out by the selectmen.*" But by the R. S., 1857, c. 18, § 23, they may proceed and act upon the petition as is provided respecting highways. If the selectmen refuse to locate the way prayed for, the Commissioners may locate the way upon any route that substantially corresponds with the petition. That it may vary to some extent, either in the *termini*, or at intermediate points, and still be within the petition, there can be no doubt. *Winslow* v. *County Commissioners*, 37 Maine, 561. And, as a refusal to accept the way laid out by the selectmen renders their proceedings upon the petition void, we think the Legislature, by changing the statute, must have intended that the Commissioners should have power to make any location which, as in the case of highways, they could have made under the original petition.

It is not claimed that the variation is so great that the

location would not have been valid under the petition. And therefore, *the writ must be denied.*

APPLETON, C. J., CUTTING, KENT, DICKERSON and BARROWS, JJ., concurred.

KENT, J., delivered the following opinion:—

I concur in the result as stated in the opinion, and I do not see any good reason to depart from the positions and constructions therein stated. But I think there is a distinction not alluded to, which settles the first question raised beyond a doubt. I refer to the distinction between *town* and *private* ways. The question is, who has a right to petition the County Commissioners, after a refusal to lay out or to accept a *town* way, by the selectmen or by the town. It is contended that no one can thus appeal, unless he is an owner of land under improvement, from which land the proposed road leads to a town way or highway. But this limitation, as to the *termini* of the way, applies only to the private ways, described in § 18, c. 18, R. S. of 1857, as "laid out for one or more of its inhabitants, or for owners of cultivated land therein."

From the earliest times there have been two kinds of ways, which selectmen might lay out, and which towns might accept. The first are town ways. They are described in the statute of 1821, c. 118, § 9, as ways for the use of such town only. The second class are private ways for one or more individuals thereof or proprietors therein. The same distinction is kept up in the R. S. of 1841, c. 25, § 27, and renewed in the present statute, in a more condensed form.

The authority in c. 18, § 18, of R. S. of 1857, is to "lay out town ways, and private ways for one or more of its inhabitants, or for owners of cultivated land therein."

Town ways are not, and never were, regarded as laid out for one or more of its inhabitants as individuals, or for owners of cultivated land, but for the whole town, in its corporate capacity, and for the general convenience of all travellers.

Any one or more of the inhabitants may petition for a town road, whether they have any personal or direct interest therein or not. But a private way can only be laid out on petition by some owner of land under improvement, for a way from his land to some town or county road, already existing. By §§ 22 and 23, the right to petition the County Commissioners is given, in case of a town way, to any inhabitant who is a petitioner therefor, but, in case of a private way, it is only given to the petitioner who, as owner of land under improvement, has asked for such private way for his private convenience. The sections must be construed, not as applying the limitation as to ownership of land to town roads, but only to private ways. This is the plain and grammatical construction.

The present statutes have avoided the obscurity in language which led to the decision in 41 Maine, 604.

I concur with the opinion on the second point. The law now, does not, as formerly, provide for an *appeal* strictly so called, but gives jurisdiction to the County Commissioners in all cases of refusal by the town or its officers; and authorizes them to proceed to act on the petition "as is provided respecting highways." They may lay out the road prayed for between the *termini* named, as they might lay it out if it was a county road, on such petition. The refusal of the town has given them this jurisdiction, and they are not limited to the simple power of affirming or reversing the action of the town, as in case of a strict appeal.

APPLETON, C. J., and CUTTING, J., concurred.

SAMUEL ABBOTT *versus* MOSES ABBOTT.

The defendant's deed described his land as the west half of a certain lot "as surveyed by I. J. & I. B. by order of the Court of Sessions;" but no survey of it had ever been made, except by one H. by whom a divisional line had been run, and according to which the parties had occupied, ignorant of the fact that the line did not equally divide the lot; in such a case, the language of the deed would seem to indicate an intention to convey a particular part of the lot, as already divided, and not an undivided part, yet to be divided.

If possible, the intention of the parties, as apparent in the deed, should govern its construction; and if the line intended by the parties can be ascertained, that must be conclusive.

It is well settled, that *what* the boundaries of land conveyed by deed are, is a question of law; *where* the boundaries are, is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground, with one referred to in the deed, is always a question for the jury.

If the monument found upon the ground, corresponds with that in the deed in some particulars, and differs from it, in others, the whole description in the deed is not to be rejected; and parol evidence is admissible to show whether such monument was the one intended.

Where the eastern boundary of the land conveyed, was a line "as surveyed by I. J. & I. B." if they had never made *any* survey, there was a latent ambiguity in the deed. If a dividing line had been made by another person, whether the parties referred to *his* survey, was a question of fact to be submitted to the jury.

Where the defendant alleges that he and those under whom he claims are in possession of land, claiming title, whether he has made improvements, is, in an action of *trespass*, an immaterial question.

Although the owner of land, while disseized, cannot maintain an action of trespass against the disseizor, he may, after re-entry, for trespasses subsequently committed.

If both parties are, in some sense, in possession, such mixed possession enures to the benefit of him who has the legal title.

The fact that the defendant has been in possession for six years, claiming title, and has cultivated the land and made improvements thereon, does not affect the plaintiff's right to maintain such action.

The owner of the land may, at any time within twenty years from the time of his disseizin, re-enter, so as to maintain an action for trespasses committed after his re-entry.

The time when he discovers that he has been disseized is immaterial, if it be not within twenty years, so that he may re-enter and purge the disseizin.

Exclusive occupation under *a mutual agreement* upon a boundary line, though it be erroneous, is such possession as is requisite to constitute disseizin.

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

This was an action of TRESPASS *quare clausum*. The land in controversy is the eastern half of lot No. 284, 12th range of lots in Etna. The lot was formerly owned by Samuel Abbott, who devised one half thereof to the plaintiff, and the other half to his wife and two sons, William and Leonard. Some time previous to date of his will, he employed one Harvey to run a line through the lot. The said devisor died in September, 1831, a few days after the execution of his will.

The plaintiff, in 1836, sold, by warranty deed, the west half of the lot to one Stevens, who, in 1837, conveyed the same to the defendant. The description in the deed is,— "west half of lot No. 284, and one half of gore north of said lot, both containing fifty-five acres, being the same, more or less, as surveyed by Israel Johnson and Isaac Boynton, by order of Court of Sessions."

The plaintiff purchased the eastern half in 1851, and soon after discovered that it was not equally divided by the Harvey line.

From the bill of exceptions, it appears the plaintiff, as a witness in his own behalf, testified that, by direction of his father, and a short time prior to his death, which was in September, 1831, a line was run by one Harvey through, or partly through lot No. 284, in Etna, dividing it into the east and west parts. *That*, immediately after his father's death, by a mutual understanding between the devisees of the said lot, he entered and occupied and claimed the west part up to the Harvey line, supposing that his father had devised him the west half in severalty, and that the Harvey line was in the centre. And the other devisees of the lot, so supposing, enclosed, occupied and claimed the east part up to the Harvey line, and they all supposed the lot to be divided in severalty, and the line as run divided the lot in equal parts. *That*, in 1851, he purchased the east part, and, in 1853, he discovered the Harvey line was not run

through the centre of the lot. That his brother, the defendant, cut grass within the last six years, on the east part of said lot, according to the new line run since the commencement of this action, by the surveyor appointed by the Court, but on the west part according to the Harvey line. *That* the Harvey line was intended to be in the centre of the lot; that his brother, during the said six years, had cut the grass when he did not cut it, that sometimes he cut it.

The lot No. 284 was a wood lot, and there was no dividing fence between the east and west half until within about eleven years ago, when a clearing was first made. That no survey or line was ever made by Israel Johnson and Isaac Boynton, or any other person, by order of the Court of Sessions.

The defendant introduced testimony tending to show that the Harvey line had always been recognized by the owners of the two parcels, since his father's death. *That* there was no other survey of the lot, or line run, except by Harvey, who run a line through the lot, dividing it into the west and east half, a short time before the death of said Samuel Abbott, in September, 1831.

The defendant contended, that the land was intended to be conveyed according to the Harvey line, but, by mistake, was described as the survey made by Johnson and Boynton.

The presiding Judge ruled that, if Johnson and Boynton never made any survey or run any line, as stated in the deed, — and it was admitted they did not, — the words "as surveyed by Israel Johnson and Isaac Boynton, by order of the Court of Sessions," must be rejected, whatever the mistake or intention might be. That the words "by Israel Johnson and Isaac Boynton, by order of the Court of Sessions," could not be rejected and the word "surveyed" retained and applied to the Harvey line, even if no other survey was made, or line run, except by him. That the other descriptive words in the deed must be resorted to, alone, to ascertain what land was conveyed to the defendant, and the words "west half" would confine the defendant's land to the west half of the lot.

The defendant's counsel requested the Court to instruct the jury, that if, through an agreement, and occupation under an agreement, between the devisees and those claiming under them, for more than twenty years, according to the Harvey line, *that* was the dividing line between the east and west part of the lot, and would be binding on plaintiff. The presiding Judge did not instruct as thereby requested, but instructed as hereafter follows.

The defendant also contended, and offered evidence tending to show that he had been in open, notorious and exclusive possession of the west parcel of the lot, according to the Harvey line, for more than twenty years, and up to the date of the writ, and had, more than eleven years ago, cleared and cultivated a portion of the lot up to the Harvey line, clearing it and sowing it to grain, and laying it down to grass, and built some fence. And the presiding Judge instructed the jury that if the defendant had been in such possession for twenty years or more, it was a defence to the action, and the line would bind the parties. He further instructed the jury that, if the defendant had been in such possession more than six years before this suit was brought, and had so improved and cultivated the land, this action could not be maintained, unless before the alleged trespass the plaintiff had entered upon the land; and he observed the plaintiff testified that the *defendant* had cut the grass when *he* had not, though forbidden; and that sometimes *he* cut it. And if, after discovering that the line was not in the centre of the lot, the plaintiff, within six years from such discovery, entered upon the land, he might maintain an action for cutting the grass after *such* entry; and, if both were in possession, the law would adjudge the possession in the plaintiff, who had the legal title.

The case was elaborately argued by

McCrillis, in support of the exceptions, and by

L. Barker and *C. P. Stetson*, *contra*.

The opinion of the Court was drawn up by

DAVIS, J. — The land in controversy was in possession of the *plaintiff* from 1831 to 1836. It was supposed to be one half of the lot, which had previously been divided by his father, during his lifetime, one Harvey acting as surveyor, in running the dividing line. In 1836 the plaintiff sold it to John Stevens; and he conveyed it to the *defendant* in 1837. The plaintiff purchased the other half of the lot in 1851; and, in 1853, he discovered that the lot was not equally divided by his father. He thereupon claimed to set aside the Harvey line, as having been erroneously run; and, from that time until 1860, when this suit was commenced, there seems to have been a mixed possession of the strip in dispute, the grass having been cut upon it sometimes by the defendant, and sometimes by the plaintiff.

It is contended that the *defendant* and those under whom he claims were in the exclusive possession from 1831 to 1853, claiming title; and that the defendant made certain improvements by cultivation, and the erection of fences.

Some question seems to have been raised, whether, if the title is found not to have been in the defendant, he can recover compensation for the improvements made by him. But, as this is an action of *trespass*, the question is immaterial.

The defendant claimed title by *disseizin*. If he can establish such a claim, it must be on the ground that he was in possession from 1831, including the possession of those under whom he claims, to 1853. For, after that time, his possession was not *exclusive*.

While the owner of land is disseized, he cannot maintain an action of *trespass* against the disseizor. *Allen* v. *Thayer*, 17 Mass., 299; *Bigelow* v. *Jones*, 10 Pick., 161. But after reëntry, he can maintain such an action for *subsequent* trespasses. *Putney* v. *Dresser*, 2 Met., 583. And if *both* parties, as in the case at bar, can be considered in any sense in possession, such mixed possession enures to the benefit of the one having the *legal title*. *Leach* v. *Woods*, 14 Pick.,

461; *Slater* v. *Rawson*, 6 Met., 439. Therefore the right of the plaintiff to maintain this suit, depends upon the question, whether he had any right of entry in 1853.

The plaintiff claims by deeds from Leonard and Sarah Abbott, in which the land is bounded on the west "by land owned by Moses Abbott," the defendant. These deeds are therefore of no service in determining the locality of the dividing line.

In order to do this, by ascertaining what land was *owned* by Moses Abbott, the plaintiff, at the trial, resorted to his own deed to Stevens, and Stevens' deed to the defendant, given in 1836, and 1837. In these deeds Moses Abbott's land is described as "the west half of lot number two hundred eighty-four, as surveyed by Israel Johnson and Isaac Boynton, by order of the Court of Sessions."

The *plaintiff* then proved that Johnson and Boynton never made any survey of the dividing line; and that the Harvey line, which had been the divisional line of occupation, was erroneous, not being in the centre. And he claimed that, as there was never any such survey by the persons named in the deed, the *whole clause* should be rejected, and the line be established by a new survey, giving him *one half of the lot.*

The *defendant* introduced evidence showing that there was never *any* survey of the dividing line, except by Harvey. And he contended that the words "as surveyed" should not be rejected from the deed; and that the parties intended to convey the west half of the lot *as surveyed by Harvey*, but made a mistake in the description.

The Court ruled that the words "as surveyed" could not be retained, and the other words rejected; but that the whole clause must be rejected," whatever the intention or mistake might be;" and that "the other descriptive words in the deed must be resorted to alone, to ascertain what land was conveyed to the defendant."

When the plaintiff conveyed to Stevens, and Stevens to the defendant, they were in possession to the dividing line

as surveyed by Harvey. And the language employed, if applied to the dividing line, and not to the former survey of the whole lot, would seem to indicate an intention to convey a particular part, as *already divided*, and not an undetermined part, yet *to be divided*. And the *intention* of the parties, as apparent in the deed, should govern its construction, if possible. The deed clearly refers to a dividing line, previously surveyed. If the line thus intended by the parties *can be ascertained*, that must be conclusive.

What are the boundaries of land conveyed by a deed, is a question of *law*. *Where* the boundaries are, is a question of *fact*. An *existing line* of an adjoining tract may as well be a *monument* as any other object. And the *identity* of a monument found upon the ground with one referred to in the deed, is always a question *for the jury*. These propositions have been so often applied in real actions, that no citation of authorities is necessary to sustain them.

And, upon this question of *identity*, parol evidence is always admissible. *Waterman* v. *Johnson*, 13 Pick., 261; *Wing* v. *Burgis*, 13 Maine, 111. The acts and declarations of the grantor are important in determining it. *Patten* v. *Goldsborough*, 9 S. & R., 47. Subsequent occupation by the parties is generally decisive. *Stone* v. *Clark*, 1 Met., 378.

It sometimes happens that the monument found upon the ground corresponds with the description of the monument in the deed in some particulars, and differs from it in others. In such case, *the whole* description in the deed is not to be rejected; and parol evidence is admissible to show whether the monument partially but erroneously described was the one intended. *Parker* v. *Smith*, 17 Mass., 413; *Clark* v. *Munyan*, 22 Pick., 410; *Slater* v. *Rawson*, 1 Met., 450. "It is well settled," says DEWEY, J., in *Crafts* v. *Hibbard*, 4 Met., 438, "that parol evidence cannot be introduced to contradict or control the language of a deed; but it is equally well settled that latent ambiguities may be explained by such evidence. Facts existing at the time of the

deed, and prior thereto, may be proved by parol evidence, with the view of establishing a particular line as the one contemplated by the parties, when such line is left, by the terms of the deed, ambiguous and uncertain."

Thus, if the premises are bounded by land of A on the *north*, and A's land is on the *south*, it may be proved that it was intended as the *southern* boundary. *White* v. *Eagan*, 2 Bay, (S. C.,) 247. So, if bounded on "Broad river," it may be proved that "Catawba river" was intended. *Middleton* v. *Perry*, 2 Bay, 539. Both these cases are cited with approbation in *Linscott* v. *Fernald*, 5 Greenl., 496. And the cases previously cited from Massachusetts are to the same effect.

The line, "as surveyed by Israel Johnson and Isaac Boynton," was the eastern boundary of the land conveyed. If Johnson and Boynton never made *any* survey, there was a latent ambiguity in the deed. If it should appear that they surveyed the whole lot, on some former occasion, then the words "as surveyed" would be applied to the whole, and would not affect the dividing line, but would leave it to be determined by subsequent occupation. But, if they never made *any* survey, then the words "as surveyed" might appropriately be applied to the dividing line; and, if that line was never surveyed by any one except Harvey, whether the parties to the deed must have referred to *his* survey was not a question of *law*. Because the existing line, as a monument, was, in part, erroneously described, it was not for *the Court* to say that no monument existed to which the description was intended to apply. The question was one of *fact*, which should have been submitted to the jury.

Upon the question of disseizin for twenty years or more, claimed by the defendant, from 1831 to 1853, the evidence is not fully reported. The jury were correctly instructed that such a disseizin would be a defence to the action.

The jury were instructed that, if the defendant had been in possession six years, "and had improved and cultivated the land, this action could not be maintained, unless, before

the alleged trespass, the plaintiff had entered upon the land;" but, if the plaintiff, "within six years from the discovery that the line was not in the centre of the lot, entered upon the land, he might maintain an action for cutting the grass after such entry."

If the plaintiff was the owner of the land, and had been disseized less than twenty years, he might, after reëntry, maintain an action for *subsequent* trespasses. In such case, it is not easy to perceive how the defendant's rights in this action could be enlarged by his having "improved and cultivated the land," before such reëntry. And the plaintiff's *right* of reëntry could not extend "six years from his *discovery* that the line was not in the centre of the lot," if before such reëntry he had been disseized for twenty years. Nor could he acquire any rights by reëntry after the twenty years had expired. *School District* v. *Benson*, 31 Maine, 381. If he was disseized, the time when he *discovered* it was immaterial; as it was immaterial whether he had discovered it at all, if not in season to reënter and purge the disseizin. *Poignard* v. *Smith*, 6 Pick., 172.

The defendant requested the Court to instruct the jury, "that if, through an *agreement*, and *occupation under an agreement*, between the devisees, and those claiming under them, for more than twenty years, according to the Harvey line, *that* was the dividing line between the east and west part of the lot, it would be binding on the *plaintiff*."

If such *agreement* and *occupation* made the line binding, either by *disseizin*, or by way of *estoppel*, the requested instruction should have been given.

The question is not, whether it would have been binding upon *both* of the adjoining owners. If one who is in open, visible occupation, to a known and agreed boundary, sells to a stranger, and afterwards himself purchases the adjoining lot, *he* may be estopped, as against such stranger, from denying the correctness of such boundary, though his *grantor* of the adjoining lot would not have been. See *Merriwether* v. *Larmon*, 3 Sneed, (Tenn.,) 345.

But if such occupation was a *disseizin*, it was binding on *all* the parties, after continuing twenty years or more.

Mere occupation, by inadvertence, or mistake, without any *intention to claim title*, may not be a disseizin; as where a fence is erroneously erected not on the dividing line. *Lincoln* v. *Edgecomb*, 31 Maine, 345; *Brown* v. *Gay*, 3 Greenl., 126. But if, in such case, there is an *intention to claim title* to the land occupied, though the line is fixed by mistake, it is a disseizin. *Otis* v. *Moulton*, 20 Maine, 205. In the case of *French* v. *Pearce*, 8 Conn., 439, in an elaborate opinion by HOSMER, C. J., it was held, that actual occupation, under claim of ownership, though resulting from a misapprehension of the place of the dividing line, was a disseizin, sufficient, if continued, to establish a title in the possessor. That case was sustained, and quoted with approval, in *Spaulding* v. *Warren*, 25 Vt., 316. The authorities upon this question are collected in 1 Greenl. Cruise, 53, note.

The *intention* which is necessary to constitute a disseizin is an *intention to claim title*. Such intention is not presumed on the part of a tenant, against his landlord. It *is* presumed, even beyond the extent of occupation, if it is under a recorded deed. An intention to commit a *wrong*, against the lawful owner, implying a *knowledge* that the disseizor has no *right*, is never necessary. In nearly all the reported cases of disseizin, the disseizor appears to have occupied, if without legal right, by mistake, either of law, or fact. And if the mistake is of the boundary line, it does not vary the result. *Melvin* v. *Prop. of Locks, &c.*, 5 Met., 15.

But if this were otherwise, there can be no doubt that exclusive occupation, under a *mutual agreement* upon a boundary line, though it be erroneous, is such possession as is requisite to constitute a disseizin.

In some of the states, such an agreement is held to be binding and conclusive *at once*, on the ground of estoppel. *Carlton* v. *Redington*, 1 Foster, 291; *Kip* v. *Norton*, 12 Wend., 127; *Lindsay* v. *Springer*, 4 Har. (Del.) 547;

Orr v. *Foote*, 10 B. Monroe, 387; *Dudley* v. *Elkins*, 39 N. H., 78.

This doctrine is questioned in other States. But it seems to be everywhere conceded that exclusive possession, under such an agreement, twenty years, or *long enough to bar an entry*, will establish a title in the possessor, by disseizin, if not by estoppel. *Boyd* v. *Graves*, 4 Wheat., 513; *Smith* v. *McAllister*, 14 Barb., 434; *Wilson* v. *Gibbs*, 28 Penn., 149; *Clark* v. *Tabor*, 28 Vt., 222; *Holton* v. *Whitney*, 30 Vt., 405. Such was declared to be the law by Judge STORY, in *Wakefield* v. *Ross*, 5 Mason, 16. And the same doctrine was sustained, upon full consideration, in an opinion by WILDE, J., in *B. & W. Railroad Co.*, v. *Sparhawk*, 5 Met., 469.

Whether the devisees, of whom the plaintiff was one, made such an agreement, and occupied according to it for twenty years or more, was for the jury to determine, upon the evidence in the case. The question should have been submitted to them, with the instruction requested by the defendant. *Exceptions sustained.—New trial granted.*

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

DICKERSON, J., concurred in the result.

SO. BOSTON IRON CO. *versus* BOSTON LOCOMOTIVE WORKS, & BANGOR, OLDTOWN & MILFORD R. R. CO., *Trustees.*

FRANCIS ALGER *versus* SAME & SAME, *Trustees.*

(*Bean versus Same & Same, Trustees.*)

Where a party residing in this State has been summoned as trustee of a party residing in the State of Massachusetts, in a suit brought by a corporation established in that State, the attachment of the funds is not dissolved, if the principal defendant shall, after the attachment, assign his estate under the insolvent laws of that State.

So, too, if the *plaintiff* is a citizen of this State.

EXCEPTIONS from the ruling of APPLETON, J.

The principal defendant corporation was defaulted in both actions, and the only question is whether the trustees are chargeable. The plaintiffs and principal defendants in the first action are corporations, incorporated by the Legislature of Massachusetts, having their place of business in Boston in that State. The trustees are a corporation under the laws of Maine, doing business in said county of Penobscot.

The trustees disclose an indebtedness due from them to the principal defendants, on account, which accrued on and before August 11, 1859. They also disclosed notice of the assignment, hereafter mentioned, to Gardner P. Drury and William Page.

Said assignees thereupon, by leave of Court, appear to defend their right to the funds disclosed, and offer, in proof of their claim, certified copies of proceedings under the insolvent laws of Massachusetts, upon petition of said principal defendants, dated October 14, 1859. The appointment of said Drury and Page, as assignees, October 27, 1859, proof of claim against said corporation previously contracted to the extent of $22552,50, and assignment to said Drury and Page, October 27, 1859, of all the estate, real and personal, including all deeds, books and papers, &c., which the corporation had or was interested in, on October 15, 1859.

Time of service of writs on trustee, October 1, 1859, in first of above actions; and August 31, 1859, in second.

The cases are alike in all the facts, except date of service of writ, and the fact that one of the plaintiffs is a corporation, while the other is an individual, resident of Boston aforesaid.

Blake & Garnsey and *C. P. Stetson*, for the several plaintiffs.

A. W. Paine, for the assignees.

The opinion of the Court was drawn up by

TENNEY, C. J.—By the statute of the Commonwealth of

Massachusetts, of 1851, c. 327, entitled an "Act to secure the equal distribution of the property of insolvent corporations amongst their creditors," it is provided that assignments may be made to persons, chosen or appointed as assignees, as therein set forth, of all the estate real and personal, of the corporation, excepting such as may be by law exempt from attachment, with all its deeds, books and papers, relating thereto, which assignment shall vest in the assignees all the property of the corporation, both real and personal, which it could, by any way or means, have lawfully sold, assigned or conveyed, or which might have been taken on execution, on any judgment against the corporation, although the same may be attached on mesne process, as the property of the said corporation; and such assignment shall be effectual to pass the said estate, and dissolve any such attachment, made after this Act shall take effect, and the said assignment shall also vest in the said assignees all debts due to the corporation, and to any person for its use, &c. And the corporation is required to draw all such checks and orders for moneys deposited in banks, &c., as the assignees shall reasonably require, to enable them to demand, recover and receive all the estate and effects, assigned, "especially such part thereof, if any, as may be without the Commonwealth."

By the authority of this statute, the corporation, which is the principal defendant in the above named actions, created by the Legislature of Massachusetts, and having its place of business in the city of Boston, made the assignment, according to the provisions of the Act, to Gardiner P. Drury and William Page, who appear and claim the fund in question.

The South Boston Iron Company is an incorporated body, under the Act of the Legislature of Massachusetts, and its place of business is in the city of Boston. The plaintiff in the other suit named is a resident of the same city. The railroad company, summoned as trustee in these suits, was incorporated by the Legislature of the State of Maine, and

has its place of business in the county of Penobscot in this State.

The principal defendant has been defaulted in both actions.

The service of the writ in each of the actions was made upon the trustee corporation anterior to any proceedings under which the assignees appear to claim the fund, and to resist the judgment, to charge the trustee. The railroad company made disclosure, that it was indebted to the principal defendant in a specific sum stated, and that it was notified of the assignment to the persons who appear as the assignees. According to the exceptions, the only question, intended by the parties for adjudication in these cases, is whether the trustee corporation is chargeable, all the proceedings, necessary to present that question, being conformable to law.

The exceptions do not find at what place the respective claims of the plaintiffs in these actions originated, or at what place they were to be discharged, but, from the fact that the parties plaintiffs, and the party, which is principal defendant, had their places of business, or were resident in Massachusetts, it is inferrible that the contracts originated there, and were there to be performed. *Coolidge* v. *Poor & al.*, 15 Mass., 427; *Consequa* v. *Fanning*, 3 Johns. Ch., 610.

It is not contended by the assignees that the statute laws of one State can govern the Courts in another. But that the principle of indispensible comity may so far extend that the judgments, under certain statutory provisions of one State, may be treated in others, as having the like effect in relation to certain matters. Bankrupt laws and insolvent laws are examples. *Very* v. *McHenry*, 29 Maine, 206; *Long* v. *Hammond*, 40 Maine, 204; *Burlock* v. *Taylor*, 16 Pick., 335.

Discharges under insolvent laws of one of the United States have been treated as good in another, with certain limitations, against those who are citizens of the State

where the discharge was given, and not so against citizens of other States. *Ogden* v. *Saunders*, 12 Wheaton, 213; *Blanchard* v. *Russell*, 13 Mass., 1; *Betts* v. *Bayley*, 12 Pick., 572.

It is proper to remark, that discharges under insolvent laws of other States, are pertinent to the question, now before us, only so far as they show the rules by which this comity is extended by the Courts of one State to those discharged under insolvent laws of another. No question of discharge is now presented, as no judgment of any kind appears to have been finally rendered, and the statute invoked by the assignees does not provide for a discharge of insolvent corporations. The inquiry here is, whether the assignment, under the statute of Massachusetts, can vacate an attachment, made in this State under its laws, of the funds, which belong to the corporation, which seeks the aid of the statute referred to, the attachment having been made before any of the proceedings were instituted by the corporation, which resulted in the assignment.

By the authority of the cases cited by the assignees, the assignment resting alone upon the statute of Massachusetts would be effectual, to invest the entire right to the debt, due from the trustee to the principal defendant, in the assignees, so that it could not be defeated, or qualified by the service of the trustee process, *subsequently made*. The laws of this State, if unaffected by the statute of Massachusetts, would have authorized such attachment, and it would be valid. But by the rule of comity, referred to, the assignment would be upheld here, and an attachment made after the assignment, and notice thereof to the creditor would be invalid.

When a contract is made in a certain country or State, the party contracting is presumed to be conusant of the laws of the place where he is, and he must know that his contract is to be judged of, and carried into effect, according to those laws which are supposed to be an element in the contract itself; and hence the discharge of a debtor un-

der the bankrupt law of the country where the contract was made, is good every where. *Very* v. *McHenry* and *Blanchard* v. *Russell*, before cited.

But remedies are regulated and governed by the laws of the place where the remedy is sought. The process which the creditor may have to obtain satisfaction of his claim against his debtor, either by the attachment of property, the arrest of the party indebted, or a simple summons to appear before a tribunal, that a valid judgment may be obtained, are all determined by the *lex fori*. By what rule of law, then, can the assignees, appointed under an insolvent law of another State, after an attachment of property, come in here and defeat that attachment, by a claim thereof, by virtue of that insolvent law? If the creditor, who caused the attachment to be made, is a citizen of this State, he is excepted from the rule of comity, because the extension of this rule to this State would be injurious to a citizen thereof. *Very* v. *McHenry*, before cited.

In *May* v. *Breed*, 7 Cushing, 15, SHAW, C. J., in giving the opinion of the Court, on page 41, says,—"though the point has been long doubted, we consider it as now settled, by a preponderance of authority, that when a debt, due by an American merchant to an English bankrupt, is attached by an American creditor of the English bankrupt, by a trustee process, or process of foreign attachment, the assignees of the English bankrupt cannot come in and interpose such assignment, to defeat such attachment, and claim the assets as by a prior title."—"Considering, therefore, what the weight of authority now is," to which Chancellor KENT, contrary to his opinion in *Holmes* v. *Rensen*, now assents, (2 Kent's Com., 405,) "that the assignee of a foreign bankrupt will not have a right to defeat the attachment of a domestic creditor, made in conformity with the laws of his own State, it is founded on the principle that the foreign assignee can claim to sue here, not by positive law, but by comity only, and that this comity will not be yielded, when it would tend to injure the citizens of the State where the

remedy is sought, and that every State has both the right and the power to control and regulate personal property found within its limits, and having given such right to its own citizens, they shall not be taken away by the application of the principle of comity. This principle is entirely distinct from that which gives effect to the certificate of discharge of a bankrupt against a debt contracted in the country of the bankrupt, and to be executed there."

In the foregoing quotation, the attachment of the creditor is held valid against the claim of the assignee in bankruptcy, because made in conformity to the law of the country where the creditor is a citizen. Will this principle apply to the case, where the creditor is a citizen of the State, where the insolvent law is in force, and he seeks his remedy by the ordinary process of attachment, &c., in another? We think it must apply to those who are entitled to the process of the State, by authority of which process he can make a direct attachment of the property of his debtor, or by virtue of which he can indirectly secure a fund by foreign attachment; and can obtain his judgment. Citizens of other States are entitled to bring suits in our Courts. Const. U. S., art. 4, sec. 2. Being so entitled, they have all the rights of our own citizens in securing their claims by attachment or by arrest of the party indebted; and the estate of the debtor party, living out of the State, may be secured by the process of foreign attachment or that which is direct. R. S., c. 86, § 7; Ibid, c. 81, § 18. These provisions are the positive law of this State, and Courts have no power to dispense with them, by the rules of comity.

Previous to the commencement of any proceedings, which resulted in the assignment of the property of the principal defendant, the plaintiffs severally, in their actions, obtained the processes, by which an attachment was made of a debt due from the trustee to the principal defendant. No one can doubt that the attachment, at the time it was made, was perfectly valid. The action was entered in Court. The default of the principal defendant gave jurisdiction over the

fund secured. The trustee submitted to the jurisdiction and was bound. The assignees come in, claiming the fund, but, so far as appears, do not deny the right of the plaintiffs to the judgments, to which they would have been entitled, if they had been citizens of this State.

Exceptions sustained.—Trustee charged.

In the case of *Rufus D. Bean* v. *the same defendants*, (*principal and trustee*,) the Court, at *Nisi Prius*, adjudged that the trustee be charged, to which exceptions were filed.

TENNEY, C. J.—This case differs in no essential particular from the preceding, excepting that the plaintiff is a citizen of this State. *Exceptions overruled.*

Trustee charged.

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

APPLETON, J.—The plaintiffs and defendants are corporations, existing by force of the statutes of Massachusetts, and having their place of business there.

The defendants went into insolvency, under the laws of Massachusetts, on 14th Oct., 1859. The trustee process was served 1st Oct., 1859.

The plaintiffs are entitled to judgment. The proceedings in insolvency constitute no bar to the suit.

By the statute of Massachusetts, an assignment under their insolvent laws dissolves all preceding and existing attachments in that Commonwealth. It is insisted, *therefore*, that the trustee in this case should be discharged.

The principle of comity has no application to the remedial process of a country. Suppose the attachment had been of a cargo of iron, before the assignment. The attachment, when made, was valid. So was the trustee process. It sequestrated, for the time being, the funds of the defendants in the hands of the trustee. Now, there is no mode recognized by our law by which this Court can act in the premises, except by charging or discharging a trustee. But the trustee, having funds, cannot be discharged. There is no

statute here, by its own force, dissolving an existing attachment or providing for its dissolution by an order of the Court. The arrest of an individual or the attachment of property is a part of the remedial process belonging to the *forum* in which the cause is tried. It has nothing to do with the contract, and is in no way to be governed or controlled by the law of the place, where the contract was made No principle of comity requires us to dissolve an attachment, any more than to release a debtor from arrest, because the parties to the suit *here* may be domiciled in a country where arrest and attachment are unknown.

The contract between these parties may be enforced here, and, such being the case, the plaintiffs are entitled to all the remedies which the law gives other creditors. There is but *one* process, and that applies to all who are amenable thereto. No provision exists for its alteration.

One ground upon which a foreign assignment is upheld so as to defeat a trustee process is, that the assignment is effectual to pass property wherever situated, and consequently the supposed trustee has ceased to owe the debtor and owes his assignee. *Burlock* v. *Taylor*, 16 Pick., 335. But this principle cannot apply, for the trustee was summoned *before* the assignment, and, consequently, there was a debt to seize.

The question, therefore, is whether we shall vary our processes, or release attachments, or order them to be released, because, by the laws of another State, the attachment, if made there, would have been dissolved by virtue of its statutes. There cannot be two modes of procedure — one for the citizen and a different one for the "stranger within our gates." "A person suing in this country," remarks Lord TENTERDEN, in *De la Vega* v. *Vianna*, 1 B. & Adol., 284, "must take the law as he finds it. He cannot, by virtue of any regulations in his own country, enjoy greater advantages than other suitors here. And he ought not, therefore, to be deprived of any superior advantage, which the law of this country may confer. He is to have the same rights,

which all the subjects of this kingdom are entitled to." Story's Conflict of Laws, § 571.

The plaintiffs, being prior in time to the assignees, their claim has precedence by the law of this State, which alone we are called on to administer. The attachment, whether by trustee process or otherwise, is part of the remedial process of this, and cannot be affected by the statutes of any other State. *Upton* v. *Hubbard*, 28 Conn., 274.

Exceptions sustained. — Trustee charged.

DAVIS, J. — I concur in this. The trustee is to disclose whether he had goods, or was indebted, *at the time of the service.* If he had, the right of the plaintiff thereto was *perfected* by the *service.* All subsequent proceedings are simply to determine the condition of the parties *then.* The Court is to adjudicate as to how the parties stood *then.* A *subsequent* assignment is like inadmissible evidence. It passes nothing, because, *after the service*, the creditor has nothing to assign. He is divested of the debt by the *service.* The order *charging the trustee* merely gives effect to the right before secured.

COUNTY OF PISCATAQUIS.

SUMNER A. PATTEN *versus* ANDREW WIGGIN.

Physicians and surgeons who offer themselves to the public as practitioners, impliedly promise thereby, that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success.

This rule does not require the possession of the highest, or even the average skill, knowledge, or experience, but only such as will enable them to treat the case understandingly and safely.

The law also implies that, in the treatment of all cases which they undertake, they will exercise reasonable and ordinary care and diligence.

They are also bound always to use their best skill and judgment in determining the nature of the malady and the best mode of treatment, and in all respects to do their best to secure a perfect restoration of their patients to health and soundness.

But physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty, as already defined.

If the settled practice and law of the profession allows of but one course of treatment in the case, then any departure from such course might properly be regarded as the result of want of knowledge, skill, experience, or attention.

If there are different schools of practice, all that any physician or surgeon undertakes is, that he understands, and will faithfully treat the case according to the recognized law and rules of *his* particular school.

ACTION, ASSUMPSIT on account annexed. One portion of the account is for professional services as a physician, in attendance on defendant's minor son.

The defence to this portion of the claim was malpractice in the treatment of the patient, and such ignorance, want of skill and judgment on the part of the plaintiff in managing professionally the case under his care, that the patient was more injured than benefitted by his treatment, and that on the whole case he was not reasonably entitled to recover anything for his services.

Evidence was introduced on both sides as to such treatment and management by the plaintiff, during the whole time the patient was under his care.

The Court (Judge KENT) instructed the jury that, if the plaintiff had been guilty of malpractice, or neglect, or want of ordinary care and skill, within the rules hereafter stated, it would be a defence to that part of the claim which related to the treatment of plaintiff's son, — and the Court instructed the jury as follows: —

1. When a man offers himself to the public or to patients as a physician or surgeon, the law requires that he be possessed of that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession who are in good standing as to qualifications, and

which reasonably qualify him to undertake the care of patients.

This rule does not require that he should have the highest skill, or largest experience, or most thorough education, equal to the most eminent of the profession in the whole country; but it does require that he should not, when uneducated, ignorant, and unfitted, palm himself off as a professional man, well qualified, and go on blindly and recklessly to administer medicines, or perform surgical operations. The rule above stated is the true one.

But a physician qualified within this rule may be guilty of negligence or malpractice.

2. The law requires, and implies, as part of the contract, that when a physician undertakes professional charge of a patient, he will use reasonable and ordinary care and diligence in the treatment of the case.

3. The law further implies, that he agrees to use his best skill and judgment, at all times, in deciding upon the nature of the disease, and the best mode of treatment, and the management generally of the patient. The essence of the contract is, that he is to do his best—to yield to the use and service of his patient his best knowledge, skill, and judgment, with faithful attention by day and night as reasonably required. But there are some things that the law does not imply or require. He is not responsible for want of success in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. He is not a warranter of a cure, unless he makes a special contract to that effect. If he is shown to possess the qualifications stated in the first proposition, to authorize and justify him in offering his services as a physician, then, if he exercises his best skill and judgment, with care and careful observation of the case, he is not responsible for an honest mistake of the nature of the disease, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty.

If the case is such that no physician of ordinary knowl-

edge or skill would doubt or hesitate, and but one course of treatment would by such professional men be suggested, then any other course of treatment might be evidence of a want of ordinary knowledge or skill, or care and attention, or exercise of his best judgment, and a physician might be held liable, however high his former reputation. If there are distinct and differing schools of practice, as Allopathic or Old School, Homœopathic, Thompsonian, Hydropathic, or Water Cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best. Apply these rules to the evidence.

Then, as to medical and surgical treatment of the case, — was there, or was there not, a want of ordinary skill and judgment, such as to render the plaintiff liable within the above rules — such evidence as satisfies you that he either did not possess the education, judgment, and skill which authorized him to undertake the case and enabled him to treat it with ordinary skill, or that he was guilty of that neglect or carelessness in the treatment or investigation of the case which showed that he did not faithfully and honestly apply his skill, and knowledge, and best judgment.

Defendant requested the Court to give the following instruction: —

A physician who, upon request and in consideration of being paid for his services, takes charge of the case of a diseased person, warrants that he possesses and promises to exercise the knowledge, skill, and care requisite to enable him to understand the nature of his disease, and to treat it properly, but the degree of such knowledge, skill and care is not that which is possessed and exercised by physicians of the highest knowledge, skill and care, but it is that possessed by physicians of ordinary knowledge, skill and care.

The Judge declined to give this, except as given in former instructions.

The Judge, in his charge, also instructed the jury, that in cases where authorities differ, or "doctors disagree," the competent physician is only bound to exercise his best judgment in determining which course is, on the whole, best.

Verdict for plaintiff for the amount of his bill, to which rulings and refusal the defendant excepted.

The case, on the exceptions, was argued before the Law Court at the May term, 1862, and the rulings of the Judge at the trial were sustained.

C. A. Everett and *J. H. Rice*, for plaintiff.

A. Sanborn, for defendant.

The opinion of the Court was drawn up by

APPLETON, C. J. — The instructions given were correct. Indeed, the propriety of most of them is not controverted. A plaintiff, in a suit against a physician for malpractice, must prove "that the defendant assumed the character and undertook to act as a physician, without the education, knowledge and skill which entitled him to act in that capacity; that is, he must show that he had not reasonable or ordinary skill; or, he is bound to prove, in the same way, that having such knowledge and skill, he neglected to apply them with such care and diligence, as, in his judgment, properly exercised, the case must have appeared to require; in other words, that he neglected the proper treatment from inattention and carelessness. *Leighton* v. *Sargent*, 7 Foster, 460. The same facts which would authorize a recovery for malpractice would constitute a defence in a suit for professional services. Physicians do not warrant the success of their prescriptions. "The law," remarks Mr. Justice WOODWARD, in *McCandless* v. *McWha*, 22 Penn., 261, "demands *qualification* in the profession practised; not extraordinary skill, such as belongs only to few men of rare genius and endowments, but the degree which ordinarily characterizes the profession." The same views of the law were laid down in *Simonds* v. *Henry*, 39 Maine, 155.

The instructions given were in accordance with the well settled principles of law. The one requested, had been given in substance. If other instructions had been desired, they should have been requested.

Exceptions overruled.

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

INHABITANTS OF WILLIAMSBURG *versus* DANIEL LORD.

Where land is claimed by *forfeiture* for non-payment of taxes under the Act of 1844, the tenant is not precluded from contesting the legality of the assessment and the subsequent proceedings to enforce the same, although he has not paid or tendered the amount of tax, &c., as provided by c. 6, § 145 of R. S. of 1857, which relates to *sales* of land, and not to forfeitures.

By law, the board of assessors cannot consist of less than three persons, who shall be qualified by taking the oath prescribed; and where it does not appear that more than two were thus qualified and acted, the tax assessed by them is illegal.

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

WRIT OF ENTRY to recover possession of certain lots of land in Williamsburg, which demandants claim have been forfeited for non-payment of taxes.

Several questions which arose from the evidence as reported were argued. The facts bearing upon the points determined sufficiently appear from the opinion of the Court.

Everett, for the demandants.

J. A. Peters, for the tenant.

The opinion of the Court was drawn up by

CUTTING, J.—This is a real action to recover possession of certain lots of land claimed to have been forfeited for the non-payment of taxes assessed in 1854.

The demandants, in order to prevail, must show a strict compliance with the law both in the assessment and subse-

quent proceedings of their collector and treasurer, unless the tenant is precluded from offering any defence by force of R. S. of 1857, c. 6, § 145, which provides that—"no person shall be entitled to commence, maintain or defend any action or suit in law or equity, on any ground involving the validity of any *such sale*, until the amount of all taxes, charges and interest, as aforesaid, shall have been paid or tendered by the party contesting the validity of *the sale*, or by some person under whom he claims."

That portion of the section, thus quoted, refers to *the sales* of the collector under that chapter, and has no relation to the Act of 1844, under which the demandants claim title to the demanded premises by a forfeiture and not by a *sale*. The tenant, therefore, may require proof of the legality of the assessment, and of all legal proceedings in its enforcement. The demandants cannot invoke even the sixteenth section of the Act of 1844, which provides that—"in any trial at law or in equity, involving the validity of any *sale* of real estate for non-payment of taxes, it shall be sufficient for the party claiming under it to produce in evidence the *collector's deed*, duly executed and recorded," &c. In this case, no collector's deed has or could be offered, so that the heretofore controverted point, as to the least *quantum* of evidence necessary to establish a tax title under recent legislation, does not arise. The defence may therefore be sustained on principles of law, as enunciated in *Brown* v. *Veazie*, 25 Maine, 359, and *Alvord* v. *Collin*, 20 Pick., 418.

The law requires that at the annual town meetings, held in the month of March or April, the qualified voters in each town shall choose by a major vote, among other town officers, three or more assessors who shall be duly qualified by taking the oath required by law. A neglect to take the oath has been held to be a non-acceptance of the office, and at a subsequent meeting the town may fill the vacancy.

It appears that at the annual meeting in 1854, the town chose *John A. Dunning*, *Adams H. Merrill* and *John H. Clifford*, selectmen and assessors. But it does not appear

that *Merrill* was ever sworn or acted as one of the assessors. The town for that year had only two assessors, one less than the law required. The two who professed to act were not the majority of *the* three, because there never were three chosen and qualified. Two assessors are not authorized to assess a tax when they only have been qualified.

There are other fatal defects in the proceedings which it becomes unnecessary further to notice.

Demandants nonsuit.

APPLETON, C. J., DAVIS, KENT, DICKERSON and BARROWS, JJ., concurred.

ASA BITHER *versus* DAVID S. BUSWELL.

The statute requires that a mortgage of personal property exceeding a specified value shall be recorded in the records of the town in which the mortgager resides; if a case discloses nothing as to the residence of the mortgager, the validity of the mortgage, though recorded, is not established.

ON STATEMENT OF FACTS.

Sanborn, for the plaintiff.

Everett, for the defendant.

The facts sufficiently appear from the opinion of the Court, which was drawn up by

DICKERSON, J. — Replevin of a horse. Both parties claim under one Henry Priest, the plaintiff by mortgage, and the defendant by purchase subsequent to the mortgage. The horse is valued at $65 in the mortgage. The mortgage is dated at Lincoln, and recorded on the records of Medway Plantation. The statement of facts does not disclose the residence of Priest, the mortgager. The R. S., c. 91, § 1, require such mortgage to be recorded in the town where the

mortgager resides. The burden of proof is on the plaintiff to establish this fact. He has not done it.

By agreement of parties this Court is authorized to draw such inferences as a Jury might, but it can draw only *such* inferences, and a jury would not be authorized to supply this deficiency in the plaintiff's case by inference, since there is no fact in the case from which the inference can legitimately be drawn that the plaintiff has complied with the requirement of the statute. *Plaintiff nonsuit.*

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

DEAN AMES & *ux. versus* CLARK SMITH.

By the Act of 1861, c. 63, § 6, no disabilities were to be created by reason of aid furnished and received by the families of volunteers enlisted in the army of the United States.

To subject the wife of a volunteer to removal to the place of her legal settlement under the provisions of c. 22 of R. S., when she had received aid from the town in which she and her husband resided at the time of his enlistment, would constitute a disability on their part of determining their place of residence and of remaining therein.

The forcible removal of the wife and family of such volunteer to the town of their legal settlement by the overseers of the poor of such town, would be an unauthorized act, for which they would be answerable in damages.

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

This was an action of TRESPASS for an assault on the female plaintiff.

It was admitted that plaintiff enlisted as a volunteer into the service of the United States on April 30, 1861, and remained in it until his discharge on December 12th, 1862.

It was admitted that defendant was an overseer of the poor of the town of Cornville; that he was authorized, in writing, by the other overseers of the poor of that town, to go and remove plaintiff's wife and family to Cornville.

That the legal settlement of plaintiffs, if they were paupers, was in Cornville; that the overseers of the poor of Medford legally notified Cornville that plaintiff's wife and family were paupers and in distress, and in need of aid, and aid had been furnished, requesting them to remove plaintiff's wife and family, and pay the bills.

There was evidence tending to show that the town of Medford furnished aid to the female plaintiff and her children to the time of their removal to Cornville; *that* the husband sent small amounts of money several times to his wife; that the wife did not suppose she was receiving aid as a pauper; that she refused to be removed to Cornville when defendant came to remove her and her children, but was forcibly taken to that place.

The presiding Judge, that the case might be presented for the determination of the full Court, directed a nonsuit, and the plaintiff excepted.

Everett, in support of the exceptions.

Stewart & Flint, contra.

The opinion of the Court was drawn up by

APPLETON, C. J.—Dean Ames enlisted in the volunteer army of the United States, on April 30, 1861, and after the Act of that year, c. 63, had gone into effect. While in the service, his family standing in need of assistance, his wife applied to the municipal officers of Medford for relief, which they duly furnished and gave notice thereof to the overseers of the poor of the town of Cornville, where said Ames had his settlement. Upon receiving notice, the defendant, one of the overseers of the poor of Cornville, came to Medford and forcibly removed therefrom the female plaintiff, claiming the right to do so under the R. S., 1857, c. 22.

The right of removing the plaintiff or his family from a residence which they had chosen, and in which they were established, would imply a corresponding duty on their part to submit to such removal. This would constitute a

disability on their part of determining their place of residence, and of remaining therein. But, by the Act of 1861, c. 63, § 6, no disabilities were to be created by reason of aid furnished and received by volunteers enlisted under that Act. *Veazie* v. *China*, 50 Maine, 518; *Milford* v. *Orono*, 50 Maine, 529. *Exceptions sustained.*

Nonsuit set aside and the case to stand for trial.

CUTTING, WALTON and DANFORTH, JJ., concurred.

BARROWS, J., concurred in the result.

MARY J. HARVEY *versus* GEORGE CUTTS.

If a writ erroneously contain a direction to arrest the defendant, but is served by summons, it may be amended, even without terms, at the discretion of the presiding Judge.

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

ASSUMPSIT on account annexed. On the second day of the return term, the defendant filed a motion to dismiss the action, for reason appearing from inspection of the writ, *namely*, because the writ was wrongfully made to run against the body of the defendant.

The plaintiff moved for leave to amend his writ by striking out the direction to arrest the defendant and substitute a direction to summon the defendant. The presiding Judge allowed the amendment, without imposing any terms, and overruled the motion of the defendant to dismiss the action; to which rulings the defendant excepted.

A. G. Lebroke, for the defendant.

The command in the writ, to arrest the defendant, was in direct contravention of § 1, c. 113 of the Revised Statutes. The amendment should not have been allowed; certainly not without terms.

Exceptions will lie if an amendment be allowed which the law does not authorize. *Newell* v. *Hussey*, 18 Maine, 249; *Hobbs* v. *Staples*, 19 Maine, 219.

An impression prevails that our statutes permitting amendments are much more liberal than formerly. But in relation to a case like the one at bar, they certainly are not so.

Sec. 16, chap. 59, of the laws of 1821, §§ 9 and 10, of c. 115, of the Revised Statutes of 1841, and § 10 of c. 82, of the Revised Statutes of 1857, are in effect the same, except as to the terms of amendment.

The verbal changes do not vary the sense or force to enlarge the liberality of amendments. So any decision which the Courts of this State have made, of however early date, will, if applicable to like cases then, now be authority in this case.

The statute of 1821 authorizing amendments, in cases of "circumstantial errors or mistakes," employs language quite as broad and comprehensive as that contained in any of the subsequent Acts.

In fact, the later statutes are more cautiously guarded by the insertion of the words "*which by law are amendable.*" *Roach* v. *Randall*, 45 Maine, 438; *Bailey* v. *Smith*, 12 Maine, 196; *Tibbets* v. *Shaw*, 19 Maine, 204.

Our present statutes provide for amendments in cases of *want of form only* and circumstantial errors or mistakes *which by law are amendable.*

So, in order to learn *what* amendments are proper, we are still to be guided by the lights which the law furnishes. By the rules of law there are very many defects, besides those already enumerated, which are not amendable. 1 Hayw., 401; *Troxler* v. *Gibson*, Ib., 465.

A change from one form of action to another is not allowable. *Littler* v. *Morgan*, 11 Foster, (N. H.,) 499; 1 Halst., 166; *Bell* v. *Austin*, 13 Pick., 91.

Under the statutes authorizing amendments of civil process and pleadings, the Court will not permit an action of

trover to be substituted for an action of trespass. *Wilcox* v. *Sherman*, 2 R. I., 540.

A very strong case to show that the rigor of the common law has not been abated by our statutes of amendment, beyond the literal expression thereof, is *Sawyer* v. *Goodwin*, 34 Maine, 419.

These cases all concur, that while certain amendments can be made, certain others cannot be. Hence it was considered by the Legislature, in enacting our statutes of amendments, that the safe and sure criterion to determine what amendments *should* and what *should not* be made at all was the *law* as then established, the Legislature simply providing, in cases like the one now before the Court, that processes should not be quashed or overturned in consequence of those defects which were *legally* amendable.

In *Matthews* v. *Blossom*, 15 Maine, 400, it is said a writ of summons may be changed to a writ of attachment, but SHEPLEY, J., in giving the opinion of the Court, plainly intimates that this amendment is allowable only for the reason that the part of the writ of attachment relating to the arrest of the body had been abolished; and then the amendment, being a matter of substance, was allowed only on terms, which should have been required in the case now before the Court, had the amendment been allowed at all.

But no terms were imposed by the presiding Judge, which was error, as this was clearly a matter of substance. *Matthews* v. *Blossom*, 15 Maine, 400; *Carter* v. *Thompson*, Ib., 464; *Ordway* v. *Wilbur*, 16 Maine, 263.

Terms are *always* to be imposed when the amendment is in matter of substance. *State* v. *Folsom*, 26 Maine, 212.

But the amendment ordered in the present case is of a different character, and may be resisted on grounds not involved in the cases last cited.

In these the plaintiffs had an election to commence by a writ of summons or attachment.

As already stated, *this* writ was made in violation of a positive statute, and it is a statute upon a very important

subject, affecting at some time, it may be, the personal liberty of every individual in the State capable of making a contract.

Above all, it has been directly decided, by the Supreme Court of this State, that where a writ is made to run against the body of the defendant, when it is not warranted by law, it is abatable. *Cook* v. *Lothrop*, 18 Maine, 260.

Hudson, for the plaintiff.

The opinion of the Court was drawn up by

APPLETON, C. J.—The writ in this case contained an order to "take the body," &c., and was served by summons. "The person and case can be rightly understood" notwithstanding the order to arrest. In *Matthews* v. *Blossom*, 15 Maine, 400, the Court allowed a writ of original summons to be changed to a writ of attachment. The amendment allowed in that case related to the form of the writ, as established by law, and was properly granted. It is not like the case of *Houghton* v. *Stowell*, 28 Maine, 215, where it was attempted to change the form of action; nor that of *Roach* v. *Randall*, 45 Maine, 438, where the Court refused to allow the name of one of the plaintiffs to be stricken out; nor that of *Tibbetts* v. *Smith*, 19 Maine, 204, where a wrong seal was affixed. The amendments in these and similar instances cited in the able argument of the defendant's counsel, were deemed matters of substance.

The terms upon which an amendment is to be allowed are at the discretion of the presiding Judge. It must be presumed that such discretion was rightly exercised. Nothing indicates the contrary. *Exceptions overruled.*

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT.

1865.

COUNTY OF KNOX.

SIMON S. BARBOUR *versus* INHABITANTS OF CAMDEN.

Where a town voted to raise money to pay the commutation, to relieve men drafted or liable to be drafted into the military service, such vote was wholly unauthorized and illegal; and there has been no subsequent legislation which was intended to make such vote valid.

If, in the vote of the town raising money for such illegal purpose, there was embraced also provision for the payment of bounty to men drafted or their substitutes, who were mustered into service, the Act of Feb. 20, 1864, has made such provision valid; and as that part of the vote which has been made valid is, without difficulty, separable from that which is illegal, the vote is so far legally operative.

REPORTED from *Nisi Prius*, WALTON, J., presiding, to be submitted to the full Court, without entry upon the law docket, as provided by § 18 of c. 77 of Revised Statutes.

ASSUMPSIT upon a negotiable order drawn by the selectmen of Camden, directed to the treasurer of that town, to pay the plaintiff $300, "it being for furnishing substitute as per vote of town, July 1, 1863." The order is dated Feb. 27, 1864.

In the warrant for calling a town meeting, to be held on July 1, 1863, are the following articles, viz. :—

"*Article* 2. To see if the town will pay to each individual citizen of said town who shall be drafted under the late law of Congress, passed March 3, 1863, commonly called the conscription Act, the sum of three hundred dollars as bounty to serve or procure a substitute to serve in the army of the United States, or to exempt such person or persons from serving as provided for in said Act, and, if so, to see what sum of money the town will raise for that purpose.

3. To see how such money shall be raised, whether by loan or otherwise, and, if by loan, to see if the town will choose some person or persons who shall be authorized to make such loan and to pledge the faith and credit of the town for the payment of the same and interest, and, if not by loan, to see what action the town will take in regard to choosing some person or persons to procure it in such way as may be voted.

4. To authorize and instruct such person or persons, so chosen, to pay to each such citizen so drafted the sum of three hundred dollars when mustered into the service of the United States, or to his substitute when so mustered, or, if such citizen so drafted wishes to be exempt under said call, to pay the said sum of three hundred dollars to exempt him from such service."

The action of the town thereupon was as follows :—

" *Voted*, To raise the sum of three hundred dollars for each individual citizen who may be drafted into the army of the United States, under the late law of Congress, passed March 3, 1863.

" *Voted*, That the money shall be raised by a loan on from one to ten years, as the committee shall think best.

" *Voted*, That this committee shall consist of, &c., &c.

" *Voted*, That the selectmen be authorized to draw an order of three hundred dollars to be paid to such drafted person in lieu of the money, if such drafted person shall be willing to receive it.

"*Voted*, That this committee be authorized and instructed to pay, to each such citizen so drafted, the sum of three hundred dollars, when mustered into the service of the United Stated, or to his substitute when so mustered, or if such citizen so drafted, wishes to be exempt, under said law, to pay the said sum of three hundred dollars to exempt him from such service."

It was admitted, that, under a call of the President of the United States, for men for the military service of the United States, the plaintiff, on the sixth day of August, 1863, was duly dratted from said town of Camden, as one of its quota under such call, and was accepted; and thereafterwards, in due time, furnished James R. Gordon as his substitute, for three years, who was accepted, and mustered into said service.

The plaintiff paid said substitute the town bounty of three hundred dollars, and took said substitute's order on said town of Camden, for that amount. And, in pursuance thereof, the defendants, by their selectmen, gave the plaintiff the order sued on in this action, which was duly presented to the town treasurer of said Camden, on the day of its date, for payment. But said treasurer refused to accept it, and said defendants to pay it. The above named call of the President was the one next before that of August, 1863.

T. R. Simonton, for the plaintiff.

L. W. Howes, for the defendant.

The opinion of the Court was drawn up by

APPLETON, C. J.—The defendant town had no legal authority to assess taxes or raise money to pay the commutation of one, who had been drafted in pursuance of the Act of Congress of March 3, 1863, c. 75. The government of the United States were in need of soldiers, and the primary object of the Act was to obtain men rather than money.

The vote of the town, so far as it relates to raising money for the purpose of paying the commutation of those drafted,

was not valid at the time of its enactment, nor has it since been ratified by the Act approved Feb. 20, 1864, c. 226.

The vote of the town embraced the raising of money for purposes made legal by subsequent ratification, as well as for those not embraced within the provisions of the Act referred to. But an Act of the Legislature may be constitutional and valid in part and in part otherwise. That which is unconstitutional will be adjudged void and the rest sustained. *Fisher* v. *McGirr*, 1 Gray, 1. So the votes of a town, so far as they are within the Act of 1864, c. 226, will be sustained and no further; — when the void is separable from that which by subsequent legislation is made valid — as in the present case, no difficulty can arise in affirming what is in accordance with the statute, and rejecting what is against law. *Defendants defaulted.*

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

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1. If one, under duress, pays a tax wrongfully assessed on him, and the money goes into the treasury of the town, he may recover the amount, in an action against the town, without first making a special demand therefor.

Look v. *Industry*, 375.

2. Where land is claimed by *forfeiture* for non-payment of taxes under the Act of 1844, the tenant is not precluded from contesting the legality of the assessment and the subsequent proceedings to enforce the same, although he has not paid or tendered the amount of tax, &c., as provided by c. 6, § 145 of R. S. of 1857, which relates to *sales* of land, and not to forfeitures.

Williamsburg v. *Lord*, 599.

3. By law, the board of assessors cannot consist of less than three persons, who shall be qualified by taking the oath prescribed; and where it does not appear that more than two were thus qualified and acted, the tax assessed by them is illegal. *Ib.*

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TOWNS AND TOWN MEETINGS.

1. To render the doings of a town meeting legal, it should appear that attested copies of the warrant for the meeting were posted in public and conspicuous places, and that the places of posting were *within* the town.

Brown v. *Witham*, 29.

2. The inhabitants of a town cannot be legally assessed to pay a reward offered by the vote of a town for the apprehension and conviction of a person who

WAYS.